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A COMPARATIVE STUDY OF FEDERATION
IN THE UNITED STATES SINCE THE DECLARATION OF
INDEPENDENCE, IN SWITZERLAND SINCE THE THIRTEENTH
CENTURY AND IN GERMANY SINCE 1866, WITH REFERENCE
TO FEDERATION IN THE BRITISH EMPIRE.

THESIS FOR M. A. DEGREE IN
THE HONOUR SCHOOL OF HISTORY.

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Ample recognition has been given by historians to the dominant influence in the last century of European History of the two great forces of democracy and nationalism - forces which are not even yet exhausted.⁽¹⁾ There is a close parallel and an inherent connection, which has however been neglected, between their social and political ascendancy and the contemporary constitutional development of Federalism. It is found in alliance with each and both, and in more than one case it has been the medium of an unrestrained expression to one or the other. The year of the French Revolution was the year of the formation of the American Federal State, which was not unrelated to American democracy, or, - it may be said - to American nationalism. The racial aspirations of the German nationality which were not powerful enough to effect a dismemberment of Austria or to submerge the interests of particular States, found realisation in a Federal rather than a national Constitution. The Swiss Federation which during the century has also become a State, was speeded on its way by successive democratic impulses and pays homage to the cause of nationalism no less by the reconciliation it affords to several jarring nationalities, than by the unification of a single race. Nationalism in Canada, or democracy in Australia can with no more justice be neglected.

(1) I write in the third year of the European war and in the month of the Russian Revolution.

The five States already mentioned have all become Federations since the Declaration of Independence. Some of the South American Republics have also in recent years become Federal States, and thus within little more than a century, Federalism has developed with a startling rapidity.

In fact the time-honoured classification of States into monarchies, aristocracies and democracies has become obsolete and no longer applicable to modern conditions. An analysis which (1) ignores the constitutional differences between Russia and Germany or France and the United States is obviously deficient. The old basis must be readapted and supplemented by a new political division of States into Single and Composite, Unitary and Federal.

Composite States differ from Unitary States in the plurality of their nature and the incomplete cohesion of their component parts. A Unitary State is a single sovereign State with one supreme government; a Composite State is formed by several of such sovereign States in different degrees of alliance. If each or any one of these allied States, however, surrenders its sovereignty and independence wholly into the hands of another body, it ceases to be a member of a composite State, and becomes part of a Unitary State. Thus the union of England and Scotland formed not a Composite but a Unitary State, for neither country retained any sovereign rights of independent action outside or above the powers of the single common Parliament of the Union. The mark of a Unitary State

(1) Before the abdication of the Tsar.

is the legislative omnipotence of a single body and the consequent sub-ordination of all other Legislatures. ⁽¹⁾ Thus the British Empire is a Unitary State, for the Parliament at Westminster is legally supreme over every other Assembly in the Empire, though in practice, the Parliaments of the Self-governing Dominions are independent as to their internal affairs.

There are many kinds of Composite States from a loose personal Union, to a compact Federal State, which is, indeed, the only form of such combinations of sovereign States to which the title "State" may rightly be applied. Their classification is determined by the nature and degree of the Union existing between their members. Alliances of this composite nature are at least as old as the Greeks, but the only successful combination of local independence with a permanent and efficient Union is that reached by the modern Federal State which is "the most finished product of political ingenuity and can only be attained in a refined age." ⁽²⁾ All important modern Federations, and especially the five which are the subject of this study, are Federal States - though not all in the same degree - and may be distinguished by certain well-defined characteristics from other Composite Unions and especially from "Confederations of States", which present the nearest and most common approximation to the 'Federal ideal' short of the Federal State itself. These characteristics will be described in the

(1) See Marriott Political Institutions.

(2) Freeman. History of Federal Government. p.5

course of a later elaboration of the principles of a Federal State, but the nature of Federalism will be best understood by a consideration of the circumstances in which it is most applicable.

The chief strength of Federalism lies in the fact that it is eminently adaptable to peculiar conditions where total Union is an irksome bond to which absolute separation would be preferable, and yet where some degree of co-operative action is felt to be advantageous. A Federal State requires for its formation two conditions. "There must exist in the first place a body of countries such as the Cantons of Switzerland, the Colonies of America or the Provinces of Canada so closely connected by locality, by history, by race or the like, as to be capable of bearing in the eyes of their inhabitants, an impress of common nationality. It will also generally be found, if we appeal to experience, that lands which now form part of a Federal State were at some stage of their existence bound together by close alliance or by subjection to a common sovereign. It were going further than the facts warrant to assert that this earlier connection is essential to the formation of a Federal State. But it is certain that where Federalism flourishes it is in general the slowly-matured fruit of some earlier and looser connection." All these conditions will be found to exist to a greater or less extent in all of the five modern Federations. The Swiss and the German Federal States are most conspicuously "the slowly matured fruit of an earlier and a

(1) Dicey Law of the Constitution Pt.1. chap.111. p.134.

(2) See infra chaps. 11. 12. IV. & V.

(1)
looser connection." The Canadian Federation however was formed not by the ripening of an earlier immature connection but by the relaxation of a Union which was already too tight. In all the Federations moreover where the bonds of alliance have been tightened and strengthened in the formation of a Federal State, the requirements of military defence have played an important part. In Australia alone was this element almost entirely absent. On the acquisition by Germany of certain Pacific islands the possible need of future defence entered into the calculations of statesmen, but Australia is too far removed from the serious danger of attack for the motive to have had much compelling force in the formation of the Union. Australia's tribute to Federalism is indeed the greater as it was prompted not by urgent needs, but by a conscious and deliberate appreciation of its benefits - more especially in the commercial sphere.

Thus a sufficient amount of common interest and mutual sympathy must exist between the Confederated States such as would prompt their union and remove the constant danger of civil war. "For the Federation binds the inhabitants to fight on the same side and if they have such feelings towards one another or such diversity of feeling towards their neighbour, that they would generally prefer to fight on opposite sides, the Federation is not likely to be of long duration or to be well observed while it subsists."⁽²⁾ Even more important however than the existence of elements of Union

(2) J. S. Mill Rep. Govt chap. XVII. (1) in part.

is the necessity for elements of diversity. It is the presence of local divergencies of history, race or economic conditions which prevents complete union and justifies a Federal relation. Where there are no differences or the differences are not realised, Federalism is out of place, for its supreme object is to conciliate and give expression by local sovereign independence to the peculiar characteristics of each member. Its essential character is as much determined by the desire to preserve particular local interests which would be neglected or subordinated by uniform action from a central Legislature, as by the surrender of certain common concerns to a united regulation. Thus even the mere territorial extension of a State beyond a certain point may render the outlying districts too much out of touch with the Central Government for a uniform and single policy to be either wise or effective, besides burdening a single Government with a host of claims which it is not competent to satisfy. Had the Roman Empire become a Federation it might have endured longer.

Nevertheless the existence of differences which are too fundamental or too great may destroy even the small capacity for union necessary to a Federal State. Incompatible civilizations or even totally different economic interests would not perhaps profit by a single moral code or a uniform tariff. Territorial contiguity is obviously a favourable and may be a necessary condition. A Federation of the British Empire for example would be compelled to overcome difficulties not confronted by any other Federation. Mere geographical separation in itself creates at

once differences between the members which may prove too vital for reconciliation.

The Federal State may be equally in danger from too great a disparity in size or strength between the members. Thus if there is one State disproportionately great and powerful, it will tend both to be independent of and to dominate the rest, and if there are two or more "they will be irresistible when they agree, and when they differ, everything will be decided by a struggle for ascendancy between the rivals",. The dominance of a single powerful State is illustrated in the German Federation, but the danger is somewhat lessened in more regular Federal States by the various means by which the mediation of the State has been dispensed with and the direct relation between the Federation and the individual established. (1) In a Confederation of States where the State alone is the unit such a condition of comparative equality is essential and its absence has been a frequent cause of trouble and of disruption.

The Federal principle may be extended up to a certain point in two directions, until on the one hand the component States cease to feel that they have any common interests which would be mutually served by co-operation and in the other direction until a the disappearance of any consciousness of differences between them which would prevent their complete and absolute union. "It is not every nation or every stage of the national existence that admits of

(1) See infra pp. 11 - 17.

a Federative Government. Federation is only possible under certain conditions, when the States to be federated are so far akin that they can be united and yet so far dissimilar that they cannot be fused into a single body politic." (1) A very peculiar state of sentiment must exist among the inhabitants of the countries it is proposed to unite. "They must desire union but not unity. If there be no desire to unite, there is clearly no basis for Federalism; if, on the other hand, there be a desire for unity, the wish will naturally find its satisfaction under a Unitarian Constitution.--- The sentiment therefore which creates a Federal State is the prevalence throughout the citizens of more or less allied countries, of two feelings which are to a certain extent inconsistent - the desire for national unity and the determination to maintain the independence of each man's separate State." (2) The aim of Federalism is to express and combine in a single political institution these two sentiments, and the characteristics of a Federal State follow from a consistent and effective pursuit of this aim.

The first and essential characteristic of a Federal State is that it is only a partial union of members. The contracting states form a united Central Government only for those purposes which they recognise as having in common. For all other purposes each state retains independence and its separate administration. The Union has no right of interference in the

(1) Lord Carnarvon in his speech introducing Canadian Federation Bill February 1867.

(2) Dicey Law of the Constitution. Pt. 1. chap. 111. p. 134

sphere reserved for the independent operation of the States themselves, nor may the States, as separate entities trespass on the domains which they have placed under the direction of the common will.

The nature and number of the interests in which a united policy is deemed necessary or convenient, depends largely of course on the circumstances which have prompted the federating States to come together, on the political and geographical factors which are to be taken into account, and generally, on the relative strength of the desire for union or the love of independence.

Two broad principles of division between local and general affairs are, however, afforded by the probable purposes of Union and the necessities of the case. Internal plurality is an essential feature of a Federation, but external unity is no less indispensable. The lines of division must be all on the inside and none on the outside. The relations between any of the members of the Federation and another State, country or any exterior body must be conducted on harmonious principles. To the common Federal Government therefore are naturally assigned foreign affairs, the declaration of peace and war, the support of military and naval forces and the conclusion of treaties and alliances with foreign countries. In all existing Federations external trade and commerce is also controlled by the Union, and in Federal States of similar economic conditions this is obviously advantageous. In Switzerland there exists a slight modification in the privilege which border Cantons have retained, of making special conventions

subject to Federal approval, with a foreign state for a particular
(1)
local purpose. In a hypothetical Federation of the British Empire
great economic diversity may render a uniform commercial policy
impossible and may necessitate a local management such as already
exists in the Empire.

Conversely no part-state may engage in foreign affairs on
its own account. It may not commission its ambassadors to a
foreign court; it may not negotiate with any other State except
through the instrumentality of a Federal Government, nor may it
logically remain neutral in the face of a common foe. This
principle is now recognised in all regular Federal States, but it
has not always been observed in the more imperfect "Confederations
(2)
of States" which up to the end of the eighteenth century have been
(3)
the sole expression of Federalism.

Secondly, matters which concern more than one State of
the Federation, may most advantageously be assigned to the common
government. Thus the United States appears a single State from
the point of view of New York as well as from the point of view of
France. The interest of the whole in relation to that of the
individual member must be represented by the United Central
Organisation. Particularly must disputes between States be
removed from local settlement and submitted to the more impartial
tribunal of the Federation. Inter-state trade, commerce and all

(1) See *infra* chap. III. p. 108. and cf. chap. IV. p. 174

(2) C.f. Sidgwick *Elements of Politics*. p. 538 seq.

(3) With the possible exception of the ancient Achaean League.
c.f. Freeman *History of Federal Government* Chap. V.

other matters in which one State is likely to have dealings with another are handed into the care of the Federal Government. To these are usually added bankruptcy regulations, currency, posts and telegraphs, copyrights and other matters where uniformity throughout the Federation is desirable.

In these last objects of Federal Control, the Federation is not concerned with the part-state as a separate unit but with the individuals of which it is composed. In these respects each citizen is governed by uniform laws and a common citizenship is declared throughout the whole Federation. Indeed the immediate relation between the Federation and the individual of each component State is the essential feature of a Federal State - a "Bundesstaat" - and is the chief test according to which mere Confederations of States or Staatenbünde are excluded from this category. And an effective relation with the individual can only be obtained, in a modern State at least, by means of a well organised Central Government. The fundamental difference in fact between a Federal State and a Confederation of States lies in the composition and powers of the Federal Government, which is the expression of the degree of the union existing between the members. It must be something more stable, permanent and authoritative than a mere council of diplomats. It must be able to pass laws for the whole Federation; it must have authority to make them binding and the capacity to punish their transgression. The Federation must be a "State" in short, with an independent dignity and coercive powers, with a developed

machinery, and legislative, executive and judicial organs. As well as organised governments of the part-states there must also be an organised Federal Government. (1)

Confederations such as many of the ancient Greek and Roman Leagues or the Leagues of Lombard or German cities were mere alliances for temporary purposes with no other Federal machinery than an intermittent Assembly of delegates, who frequently had no power to commit their states to the resolutions they passed. Some Confederations such as the League of Hansa Towns, the United Provinces of the Netherlands or the ancient Achæan and Lycian Leagues possessed legislative bodies which represented the members and conducted the common affairs of the League, and in different degrees of development, elements of Federal Executives and Judiciaries. These Leagues approached more nearly to the creation of a modern State organisation, but few advanced beyond a relatively rudimentary stage.

The members of a ^{mere} Confederation do not unite; they merely agree as independent equals to act in common touching certain matters of common interest; their only constituent law is treaty, and their sovereignty remains unimpaired, for the only central body is an assembly of delegates with inadequate powers

(1) C.f. Bluntschli Geschichte der Schweiz: Bundesrechts 1. 554 quoted by Freeman History of Federal Government

(2) See Freeman op. cit. chaps. VI, IX & X.

(3) C.f. Sismondi Hist. of Ital. Reps. 11. 114 seq.

(4) C.f. A. B. Hart. Introd. to the Study of Federal Government.

(5) See Freeman chaps. V & VI.

and no coercive means of enforcing their decrees on recalcitrant
(1)
states.

In a Federal State, however, the component part-states make a permanent surrender of a portion of their sovereignty to a new political organism which possesses a corporate consciousness and legal personality of its own. It becomes not a mere Confederacy during pleasure, soluble at the desire of any one part but a new social and organic structure which, within its sphere, binds every member to an implicit obedience to its will. As regards the matters which they have in common, the States have merged their individuality into one national whole, and the national authority of this compound State is expressed in the Federal Jurisprudence, which is removed from the realm of international conventions and placed within that of public law. The law of each part state is therefore of two kinds; it consists firstly, of the Federal Constitution, Treaties and Statutes, and secondly of its own Constitution and Statutes. Thus Federal Law forms a fundamental part of the law of each State administered in the ordinary way.

(2)
The Federation is not a "compact to which the States are parties" and from which they may withdraw at will; a State may with no more legal justification secede from a Federal Union than the County of Kent may declare itself independent of the rest of England

(1) C.f. Wilson The State par. 1377.

(2) Hayne of South Carolina 1830. This theory is of course the basis of the secession of the Southern States in 1861.

The Federal Constitution is a supreme law emanating from the whole people. "It was decreed and established" as Chief Justice Marshall said of the Constitution of the United States, "not by the States in their capacity as sovereign States, but expressly and formally as the preamble declares, by the people of the United States. Without doubt it belongs to the people to confer on the Federal Government all the powers which it judges convenient and necessary to accord to it, and to extend or to restrain these powers according to its will." Or, as the same Chief Justice declared in a famous phrase, a regular Federal State is "an Indestructible Union of Indestructible States."

A Federal State in its ideal form is composed of individuals as any other State, and is based ultimately on the authority of the people. "It must rest on deeper foundations than in the mere sanction of a delegated authority; the stream of national power must flow immediately from that pure original fountain of legitimate authority"-the people themselves. This popular source of Federal power must be shown, apart from such outward and visible signs as a direct ratification of the Constitution by the people, in the composition and functions of the Federal Government itself. A direct governmental contact between the individual and the Federation must be established

(1) In *Martin V. Hunter's Lessee*. 1. Wheat. 324.

(2) In *Texas V. White* 7 Wall. 700

(3) G.f. Bryce *American Commonwealth*. Kent Commentaries. Story Commentaries.

(4) *The Federalist* p.135.

independently of the State of which the individual may be more immediately a member. A double citizenship is therefore set up; each individual is at once a citizen of his own particular State, and in common with every individual of all the other States of the Federation, a citizen of a larger and different but no less real Federal State. (1) "His State allegiance receives its crown and (2) complement in the dignity of membership of the Federation."

The principle of the Federal State has taken long to establish and one Federal Civil War has been fought to secure its acceptance. Not all modern Federations have fully adopted it in all its consequences, but all have given a sufficient recognition to its importance. Herein lies an intimate connection between a Federal State and Democracy, and even the German Empire, the most irregular of Federal States has been compelled in a somewhat hesitating acknowledgement, to introduce a partial, and in some ways a pseudo-democracy into its Constitution.

The immediate relation between the Federal Government and the individual may be expressed in four ways. Firstly the Federal Government may legislate on certain matters affecting the individual of more than one State, such as bankruptcy, copyright and so on. In a regular Federal State it will also receive executive power to carry out its legislation in respect of the individual. It must

(1) C.f. J. S. Mill Representative Government chap.XVII. Wheaton. International Law 5 ed. 1916 Pt 1. p.73 seq. Freeman History of Federal Government etc.

(2) Sir J. Cockburn Australian Federation.

be able through its courts to judge him, and punish his disobedience to its laws. It must possess its own customs officers and tax collectors.

For the second way by which the direct relation between the Federal Government and the individual is established is by means of a taxing power. The Federation must depend on the individuals for its revenue and must have the power of taxing them either directly or indirectly. In Germany and in Switzerland Federal finances are, or may be, supplemented by Constitutions assessed upon the part-states, but the Federal revenue is chiefly collected from taxes on the individuals independently of the States, and in a more regular Federal State requisitions on the part-states are entirely abolished.

Thirdly the Federal Government may demand the services of each individual member of the Federal State in the military or naval defences of the Federation. As William the Conqueror, by the oath of Salisbury, placed every one of his vassals' men under a personal obligation to him, the King and Supreme Overlord, so the Federal State demands direct service to the Federation from every citizen of each State. Instead of assigning to the State the raising and organisation of separate military contingents, the Federal Government creates a Federal army for which recruits are gathered and enrolled independently of State responsibility. Thus in case of civil war each citizen owes an allegiance to the Federation as well as to the State, and the Federation possesses a Federal army. Not all modern Federal States have however fully

(1)
accepted this principle.

Lastly the Federal Government must represent the individual in its organisation, and so necessary is this feature that every Federal State has adopted it. In every Federal State the Federal Legislature consists of two Houses. In one of these the individuals of the Federation are represented and the States are ignored. It is true that this neglect of the States is so far modified that in all existing Federations every State must receive at least one member in the national House, but apart from this stipulation, representatives are apportioned to the States only in proportion to their respective populations. This House represents the Federation as a united whole, as a single State composed of individuals.

The Second House, on the other hand, is devoted to the representation of the States as separate entities. In this House is preserved the identity and individuality of the States, and their sovereignty and independence recognised. In a symmetrical Federal State such as the United States, equal representation has been accorded to the States. Each State sends to the Senate - the Second House, - the same number of delegates as its fellow states - independently of its size, population or power. Sufficient recognition is given to these factors in the First or National House. Thus New York sends forty-three Representatives to the House of Representatives while Delaware in respect of its

(1) See *infra* chaps. III, & VI.

small population sends only one, but both States alike send two Senators to the Senate. Thus in the National House the influence of the large States is supreme, but in the States House it is no greater than that of the small States. For a certain combination of large States which in the Senate is entitled to less than one-fourth of the members, return an absolute majority to the House of Representatives.

In this concession of equal representation of the States in the Second House of the Legislature has been discovered an effective means of reconciling State jealousies and of removing the apprehensions of the smaller States. Neither Canada nor Germany of modern Federal States have adopted it, though for different reasons. In this latter Federal State not only are the component States without equal representation but the delegates vote collectively according to instructions, not according to their individual opinions.

The Senate of the United States not only expresses in its most perfect form the equal representation of the part-States of the Federation, but to it must be given the honour of having first enunciated this principle in its composition. In my opinion it has however been too fondly admired by foreign critics to the consequent neglect of that feature of the Constitution of the United States which, in reality, is far more original viz:- the House of Representatives. To those accustomed to a bicameral Legislature in a Unitary State, a National House is no novelty; and the significance of the House representing the

people in a Fédration is apt to be passed over in its general similarity to that feature in a Unitary State.

The American 'Fathers', however, who created the House of Representatives fully realised the novelty and moment of the precedent they were creating. ⁽¹⁾ A single-chambered Congress representing the States of the Federation had existed from the first movements of Union. It was a common feature of all Confederations, and its retention in the proposed Union occasioned little ~~little~~ dispute. Certainly the equal representation which after 1789 it embodied, was a new and important feature, but not so important or so new as the establishment of a national House. This was an innovation of the first order. It was a novel expression of the principle of the direct connection between the Federation and the individual, an assertion of the popular foundation of the new Union, and the substitution of a national Legislature of a real Federal State for a conference of delegates of the old Confederation of American Colonies.

The Federal Legislature of a Federal State must therefore consist of two chambers, in which legitimate ^{expression} is given to the centripetal and centrifugal forces which meet and contend in such a State. A bi-cameral Legislature of this kind is therefore based on a totally different principle from that on which a similar feature rests in a Unitary State. There is in a Federation no Upper House representing birth, wealth or office.

(1) See Journal of Convention. Vol.V. Elliott's Debates.

The Second Chamber is neither an aristocratic obstruction nor a mere revising Chamber not fundamentally different in composition from the First or Lower House. Each House embodies an essential and indispensable element of a Federal State.

The two Houses have double functions for they are, in addition, separate chambers of a single Legislature and therefore play complementary roles in the passing of laws, and in the performance of other duties assigned to it. They possess all the characteristics of ordinary Legislatures of two Houses and it is obvious that the comparative importance of the two Federal forces which they embody will be largely determined by their relative positions in the joint Assembly. Thus the influence of the part-States is considerably reduced in Canada and considerably increased in Germany and the United States by the powers of the House which represents them, in its relation to the other parts of the Governments of these Federations.

The representation of the part-States of a Federation in the Federal Government constitutes one important distinction between a Federal State and a Unitary State with well developed local Government. Although New Zealand, in common with other self-governing Dominions of the British possesses practical internal independence, it is not represented as a sovereign State in the Government of the Empire, as New York is represented in Congress.

In all these matters - defence, finance, representation and in the general execution of its decrees - a Confederation of

States acts through the States themselves in their corporate capacity; it gives orders to them and they proceed to carry them out, or if they so please, to resist them. In a Federal State - and it is this which provides the surest guarantee of permanence - the Federal Government enters into direct relations with each individual citizen. "The Staatenbund has never yet really worked well. And it must ever be so with every device which confuses the direct relation of the citizen to his State, and puts him in doubt as to what his State is and where his allegiance is due." (1) This is indeed the cause of the failure of the First American Confederation. "The great and radical vice in the Constitution of the existing Confederation," writes Hamilton about 1788, "is in the principle of legislation for States or Governments in their corporate or collective capacities and as contradistinguished from the individuals of which they consist. Except as to the rule of appointment, the United States has an indefinite discretion to make requisition for men or money but it has no authority to raise either by regulations extending to the individual citizens of America. The consequence of this is, that though in theory their resolutions concerning these objects are laws, yet in practice they are mere recommendations which the States observe or disregard at their option" (2) (3) Again, "The

(1) Commonwealth of Nations Pt.1 chap 1. p. 49. c.f. also Problem of the Commonwealth Pt.11. chap XVI. p.157

(2) Federalist XV.

(3) Federalist XVI.

Government must carry its agency to the persons of its citizens. It must stand in need of no intermediate legislatures, but must itself be empowered to employ the arm of the ordinary magistrate to execute its own resolutions. The majesty of the national authority must be manifested through the medium of the Courts of Justice".

De Tocqueville, writing of the United States at the beginning of the nineteenth century and with no other experience of a "Federal State", hails such an innovation in these words. "Here the term Federal Government is no longer clearly applicable to a state of things which must be styled an incomplete National Government; a form of Government has been discovered which is neither exactly national nor Federal; but no further progress has been made and the new word which will one day designate this novel invention does not yet exist." (1) Germany has contributed a word 'Bundesstaat', which is becoming incorporated in ^{the} political vocabularies of all countries. I have consistently translated it by 'Federal State' and I have endeavoured by constant use to establish beyond confusion the distinction between this term and a 'Confederation of States'.

One other point must be noticed in the distribution of powers between the States and Federal Governments. The looseness or tightness of the Federation depends on the location of the 'definite' powers. In a loose Federation certain

(1) De Tocqueville *Démocratie en Amérique*.

specific, enumerated powers are assigned to the Federal Government while the residuum of indefinite authority is retained by the separate States. In a tight Federation the enumerated powers are conferred on the States and the indefinite authority is reserved to the Federal Government, for it is obvious that the body to which is assigned the indefinite authority controls the larger and more extensible political sphere.

In the subjects which are assigned to the Federal Government the States surrender all right to legislation. In this sphere they resemble the divisions of a Unitary State acting at the will and direction of a single sovereign legislature. In all matters, however, in respect of which they have retained sovereign rights, they are not administrative parts of a single State, but independent members of the Union.

The retention of local powers by the States resembles in practice the internal Self-government which has been extended to the Self-governing Dominions of the British Empire. The contrast however lies chiefly in the ultimate legal dependence of all Colonial powers on the Supreme Parliament of Great Britain and Ireland. Each Self-governing Dominion exercises in practice complete autonomy with regard to its internal affairs, and no Imperial Government would think it wise to disturb this arrangement. Nevertheless, in theory, each Colonial Constitution depends for its validity on the sanction of the Imperial Parliament, and could be rescinded at the will of this Assembly.

The States of a Federation on the other hand exercise their powers in virtue of their absolute sovereignty and their

sovereign rights form an indissoluble part of the Federal

Constitution. The colony of New Zealand possesses its privileges by a grant or concession from a sovereign legislature; the State of New York or the Canton of Zurich exercises its authority not by derivation from the Federal Legislature but in its sovereign capacity as an independent State, by its own inherent and original right and entirely according to the direction of its individual will. The sovereignty of each State before Federating was not so certain a matter as its sovereignty afterwards in all subjects which have been left or assigned to it in the Federal Constitution. In other affairs it has no more sovereignty than an English County Council.

Similarly the Federal Constitution possesses plenary and ample authority on all matters which have been committed to its care, but in the sphere of State control it possesses no power of dictation. It is true that in some Federal States, certain concurrent powers have been assigned to State and Federal Governments, an arrangement by which a State may enact a law in the absence of, or in harmony with, a Federal law on the same subject. Federal legislation however takes precedence of State legislation, and if the two conflict, the State law becomes ipso facto invalid. Another power still more important is sometimes conferred on the Federal Government. In Canada the Dominion Government possesses a power of "veto" on all State legislation and in Switzerland all Cantonal Constitutions and in practice all amendments must be guaranteed by the Federal Government. This authority almost invests a Federal Legislature with the supremacy of a

Parliament of a single State, but even here it is limited by the restrictions of the Federal Constitution.

As a Federal State is a partial union, it is based on the principle of a divided or double sovereignty. Each legislature, State and Federal, has sovereign powers within and only within the sphere assigned to it. Indeed, if Professor Dicey's two-fold definition (sovereignty) be accepted, - positively, the right to make or unmake any laws whatsoever and, negatively, the absence of any person or body competent to override or lay aside those laws- ⁽¹⁾ there is no 'sovereign' legislature - in the strict sense of the word - in a Federal State. Indeed there is no authority such as the English Parliament, "supreme in all things and over all causes as well ecclesiastical as temporal throughout His Majesty's Dominions" for no law-making body in a Federal State can step outside a certain limited sphere, which is defined constitution. And if it acts beyond its powers, its enactments will be declared null and void, and will have no claim to the obedience of any citizen. Thus, as Professor Dicey further remarks, every legislature in a Federal State is a subordinate law making body, and as such resembles an English railway company, a Municipal Corporation, or a Colonial Assembly. As all these bodies are subject to the limitations prescribed by the Imperial Parliament, so both State and Federal legislatures are subject to the terms of the Federal

(1) Law of the Constitution p. 39

Constitution.

A written Constitution, containing the terms of this treaty-like form of Government, is a natural and convenient (1) though not perhaps a necessary feature of a Federal State. The critical point is the distribution of powers and success depends on a careful definition, which should as far as possible remove causes for dispute. In this Constitution each authority of the State finds its writ and sanction. It is the supreme law of the land whence, as from an act of Parliament, all bodies subject to it derive their powers.

It is also consistent that no one of the authorities which the Constitution empowers, should be competent to alter the character of its basis or to disturb its relations with the other parts of the State. A Federal Constitution is therefore rigid, that is, it is placed beyond the amendment by the ordinary legislative process and can only be altered by special bodies in a special manner.

A rigid Constitution is alien to English Institutions and is hostile to the principle of the omnipotence of the English Parliament. Nevertheless the idea of some fundamental basis of the State was first expressed in the Agreement of the People and the Instrument of Government of Cromwellian times. It was further developed in America through the Colonial Charters which played a similar part to a modern rigid Constitution, and by seventeenth and eighteenth century theories of Social Contracts. (1) The Achaean League possessed no written law and it is possible to imagine a Federal development by custom which might dispense with such a basis. See Freeman Hist. of Fed. Govt. Ch.V.P 197

On the formation of the Union, a rigid Constitution was adopted by the United States as the fundamental law of the State, and this example has since been followed by France and other countries which have occasion to establish or revise their institutions during the last century. A rigid Constitution is not therefore peculiar, although pre-eminently suitable, to a Federal State.

In all Federal States the amendment of the Constitution is entrusted to special bodies or surrounded by special conditions. Its rigidity varies in different States from Germany on the one hand which possesses the most flexible Federal Constitution, to the United States on the other whose Constitution is amended with the greatest difficulty.

Not only therefore is every legislature in a Federal State a subordinate law-making body with sovereign power restricted within the limits prescribed by the Constitution, but each and every Legislature is also a non-constituent assembly, i.e. it has not authority to amend the Constitution. To the English mind it is incomprehensible that a certain legislative sphere should be ear-marked as fundamental and constituent and therefore removed by special formalities from ordinary legislative access, or that a process which is necessary and sufficient for some laws should not be also sufficient and necessary for others. And in a Unitary State a rigid Constitution is open to many objections but in a Federal State it follows by logical conclusion from the existence of a divided sovereignty.

The Constitution in a Federal State bears therefore the

same relation to all authorities in the State as an Act of Parliament in England. It is the supreme law of the land, whence all bodies derive their legitimate power and which all must obey. Like an English Act of Parliament it is the sole and supreme test of the validity of all other laws and actions within the State.

An Act of Parliament however emanates from the Legislature of the State. In a Federal State, however the position is reversed for each legislature derives its authority from the Constitution itself. It neither issues the Constitution nor can it amend it. In fact the only authority in a Federal State which in any way approaches the sovereign eminence of the English Parliament, is the one which has the power to amend the Constitution. If some completely sovereign power is sought in every State, the amending authority is the only living body in which such a power might repose. It alone is competent to modify the relations existing between all other authorities in the State. It is, as it were, a dormant constituent Legislature - the supreme law-making body in the State, and as such resembles the English Parliament. The comparison may not be carried far however, for even the amending authority is not legally "Sovereign". No Act of Parliament commits any subsequent Parliament to its terms. English Parliaments have from time to time thrown off restrictions (1) by which they were intended to be bound. The enactment of a later

(1) C.F. A.V.Dicey - Law of the Constitution.

Act of Parliament in itself annuls any previous Act with which it may conflict. An Act is merely an expression - irresponsible and perhaps capricious - of the omnipotence of Parliament.

A rigid Constitution is not, on the other hand, an expression of the sovereignty of the amending authority for it imposes restriction upon that body and indeed delegates to it its authority in just the same manner as to the Federal and State Legislatures which are subordinate to it. For the amending authority is itself limited by the Constitution and must act according to its terms. Thus the amending body possesses co-ordinate powers with the Legislatures of the States and of the Federation and all are equally limited by and derived from the Constitution.

There is in fact no legal sovereign power in a Federal State of this kind. The Federal Legislature is not sovereign for it derives its powers from an immutable Constitution whose terms it is not able to affect. For the same reason no-one of the State Legislatures is sovereign. The amending authority alone may alter the distribution of functions between the organs of the State, but even it is limited by the conditions of the Constitution. Legally therefore it is not sovereign as the English Parliament is; only politically may it be called the sovereign authority of the Federal State of this nature.
(1)

The Constitution itself alone remains as the ultimate

(1) Cf. A. V. Dicey. p.358 et passim.

repository of legal sovereignty. But this cannot be more than an expression or an emanation of a living source. There is no existing authority which is not subordinate to it. It is in fact the instrument of an abdicated sovereign. No sovereign can limit its sovereignty but whether it be Tsar or Parliament, it can abdicate its Throne. The American people who issued the Constitution of their full sovereign power in 1789 abdicated their position. They divided their own sovereignty among a number of co-ordinate bodies deriving their authority from the Charter which the people issued as a permanent expression of their own inherent and original sovereignty. The legislatures and people of the States of 1789 committed posterity to a covenant perpetually binding, in resistance to which the seceded States in 1861 tried in vain to assert their freedom. English posterity is bound by national debt or an international treaty; legally, though not perhaps morally Parliament could denounce the treaty and repudiate the debt, but no authority on earth exists legally competent to ignore the rigid Constitution of a Federal State. It was as if an English Parliament having dissolved itself and authorised no means for its re-assembling, had left only its Acts which were to be eternally binding. No Constitution can endure through centuries however, without change, and in wise anticipation, one authority was commissioned for this purpose.

Another body- the Federal Judiciary - was commissioned to guard the Constitution and to protect it against the abuse of legislation inconsistent with its terms. To the United States

must be given the credit of having invented this feature of Federal machinery - as indeed of so many others -, and it has aroused the wonder and admiration of most critics. The principle on which it is based should not be strange to an English mind for it is merely an extension of the English legal practice to a Federal situation.

Every Act of Parliament of England will be enforced by the Law Courts; every other assembly derives its powers by and only in accordance with such an Act, and exactly to the extent to which it exceeds its authority will its measures be declared invalid and of no effect by the Courts.

The Constitution of a Federal State is, as already described, in the same authoritative relation to every assembly in the State as an English Act of Parliament. It is the 'supreme law of the land', ^{will be} and upheld by the Judiciary. Any legislation, either Federal or State, which conflicts with its terms will be declared unconstitutional and invalid, and consequently rendered null and void. Any encroachment of the States on the Federal domain, or of the Federation on that of the States is equally condemned by the Courts. The Judiciary becomes the interpreter and living voice of the Constitution, and arbiter between the States and the Federation. Its power is of immense importance especially where as in the United States, the Constitution is so brief. The Courts are "the pivot (1) on which the whole Constitutional arrangements turn, and undoubtedly the centralisation which has taken place in the United States

(1) A. V. Dicey Law of the Constitution. p. 166

Federation is largely due to, and wholly sanctioned by the
(1)
interpretation of the Federal Courts.

The principles of a Federalism are further elaborated in the more detailed studies of particular Federal States. It is in the United States and Federations such as Australia, which are consciously modelled upon it that these principles are worked out with the greatest consistency and regularity and from which indeed they are largely drawn. In less symmetrical Federations such as Germany or even Switzerland, where the general principles are not uniformly applied, I have endeavoured to show the nature and reason of their deviation from the regular type.

Within the limits of this thesis, it is not possible to indicate more than in a bare outline the chief characteristics of each Federal State. The historical development of the Federation, the nature of the central Government and its relations with the component states have been briefly analysed, but no description of the Constitutions of the part-States has been attempted, with the exception of passing references to their general character, which I hope, will be sufficient to illustrate the differences of political colour in the Federal Government due to the institutions of the part-States.

It may be well, however, to consider here some of the

(1) See *infra* Chap. 11. for further characteristics.

disadvantages and advantages which have been urged against or in favour of a Federal State.

The chief weakness of Federalism arises from the existence of a double sovereignty, and the multiplication of co-ordinate authorities. These lead inevitably to a certain weakness of internal cohesion, to a friction and dissipation of energy and to a diversity of localised legislation. The dependence of a Federal Government upon the terms of a rigid Constitution does not, it is sometimes alleged, permit a sufficient concentration of power in the hands of the joint Executive. This may lead to a want of organisation and efficiency which, for example in case of war, would stultify the opposition of a Federal State in the presence of a more "unified" enemy. Similarly the demands of an imperium in imperio, as it were, place the individual in doubt as to where his allegiance is due.

A rigid Constitution encourages a conservative attitude, and the position of the Judiciary as arbiter in the State tends to substitute the spirit of litigation for that of legislation. Further the efficiency of the whole Federation may be sacrificed to State sentiment and to the necessity of conciliating State interests, as for example, by regulations apportioning members of executive or legislative Councils according to State boundaries. (1)

The American Civil War is quoted to prove that the

(1) For this and many of the other objections see Dicey Law of the Constitution. 8th Ed. Introd. and chaps. 1 & 111.

Federal tie is weak and ineffective and easily ruptured; and even where its stability is not endangered by civil war, the Federation endures hardly more; for "Federalism tends to pass into nationalism. The United States and Switzerland are both nations under the form of a Federation." (1) (2) "A Federation is almost always in process of disintegration or closer coalescence. Its formation is the prelude to the creation of a Unitary State, or else it is the first step towards complete disintegration."

These are the chief objections, real or alleged, which are brought up against a Federal State.

The disadvantages of a rigid Constitution - the encouragement of a conservative attitude and of a spirit of legality - are not peculiar to a Federal State though in practice they appear to be necessary accompaniments of it. Both have their advantages and neither exists to the same extent in all Federal States. The spirit of legality which in the United States has developed to a high degree from that 'feeling for law' which is asserted to be the secret of English political success, exists in no other Federal State to the same extent. The rigidity of the Constitution in all Federations except that of the United States has been modified in different degrees. In Switzerland, so much has the power of the people been enlarged that

(1) Dicey *ibid.* introd. p.LXXVI.

(2) Alston - quoted by B. Holland. *Imperium et Libertas*.

Constitutional rigidity is little more than a slight and laudable check on hasty legislation. Few States indded could be more flexible than Switzerland either with regard to the diversity of elements it includes or to the ease with which it is susceptible to modification.

The American Civil War, which, during more than a hundred years of Federal History, is the only civil war of any Federal State, hardly proves satisfactorily the inherent weakness of this kind of political institution. All States, whether Federal or Unitary are liable to civil war, when a new and more powerful principle stronger than all legal obligations becomes an independent test of allegiance. A Federal tie as a Unitary tie, is liable to be dissolved by a counter force whether slavery, religion, national independence or Parliamentary sovereignty. Moreover the very issue of the Civil War served only to secure beyond doubt the final indissolubility of the Union, and to establish beyond dispute that it is to the Federation that a citizen's greater allegiance is due.

The Southern States seceded from one Federation only to set up another and "this fact proves far more in favour of Federalism in the abstract than their separation proves against it."⁽²⁾

A Federation is subject to special disadvantages in the way of diverse legislation and confliction of authorities of equal sovereign powers,, both of which demerits undoubtedly exist although overlapping of the powers is not unknown to Unitary States. A certain minimum

(1) The war of the Sonderbund preceded the formation of a "Federal State"

(2) Freeman Hist. of Fed. Govt. Introd.

of uniformity however is established, and with the growth of the Federal State is in fact much extended. Diversity of legislation beyond a certain point is inconvenient and embarrassing, and yet not more dangerous than the extension of a uniform legislation to conditions which are totally different. For local legislative independence may at least afford satisfactory solutions to local problems and in addition it admits of social and educational experiments on a small scale which would be impossible or too hazardous in a larger sphere.

How far the existence of co-ordinate authorities produces inefficiency is difficult to judge. There is undoubtedly a certain friction, but yet, as Lord Bryce remarks of the United States, in practice the double system works well enough. It must also be remembered that most Federal States are at the same time democracies and in their democratic as much as in their Federal capacity, they are open to charges of inefficiency and lack of executive concentration. Germany is so much identified with Prussia that it can hardly be quoted in favour of Federal efficiency, but it is at any rate one variation of a Federal State which evinces no sign of disorganisation or military powerlessness.

The success and smooth working of a Federal State depends unquestionably on the delicacy of the adjustment of its various parts; it requires high political skill and complicated and ingenious machinery, sensitive to the diverse influences at work.

"So complete is the present integration of the State and Federal

(1)

parts," declares President Wilson, "that Government with us has

(1) The State p.468

has become
ceased to be plural and singular.-----The States and Federal systems are so adjusted under our public law that they may not only operate smoothly and effectively each in the sphere which is exclusively its own, but also fit into each other with perfect harmony of co-operation wherever their jurisdictions cross or are parallel, acting as parts of one and the same frame of Government, with an uncontested subordination of functions and an undoubted common aim."

This appears to corroborate Professor Dicey's statement that the United States is in reality a nation under the guise of a Federation. Yet however national and unified the Federation of the United States may have become, however closely its various part may have been interwoven into a single compact organisation - which goes far to repudiate the charge of inefficiency and lack of cohesion urged
/against Federalism - in the existence of State privileges and sentiment and in political construction, the United States is not a nation but a Federation. "The Government of the Union has indeed become permanent, the cherished representative, the vital organ, of our life as a nation; but the States have not been swallowed up. Their prerogatives are as essential to our system as ever.----- The nation properly comes before the States in honour and importance not because it is more important than they but because it is all important to them.---- It is the organic frame of the States; it has
(1)
enabled and still enables them to exist."

(1) Wilson - The State p. 468 Ed. 1900.

In Switzerland although that Federation is marked by similar national concentration, recent events have proved fairly conclusively that few of the Cantons are willing to surrender their Federal privileges in exchange for a national Union.

The universal testimony of Federal history bears witness however, to the gradual tightening of the bonds, and all Federations have developed in a centralising direction. Federalism represents a balance between independence and union, but the Federal Government itself operates on the side of union. To some extent Federalism is an educative process up to Nationalism, for no evidence exists in support of the statement that Federalism is the beginning of a process of disintegration. Canada which was first a Unitary and then a Federal State has shown no desire to separate further into independent provinces.

A Federal Union is usually compared with a national Union to the disadvantage of the former, but in practice they are not possible alternatives. Where a National Union is possible, few would desire to substitute a Federal Union. The only alternative to Federalism is absolute separation, for as already described, the merit of a Federal Union lies in the fact that it is supremely applicable in those circumstances where a National Union is wholly impossible. Mere geographical extension will always create such a situation. And in those cases a Federal State combines all the advantages of a National Union with those of independence - military and economic co-operation, the substitution of law for the arbitrament of war over a large area, the merits of local control of local affairs - the

advantages are obvious and for that reason are too often neglected. The diversity of modern Federations proves its flexibility and adaptability to varying conditions and guarantees its permanence. And in the rank of modern nations, Federal States have a prominent place - the importance of the United States and Germany is manifest and of Switzerland no less in other directions, and who can estimate the potential greatness of Canada and Australia?

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The British possessions in America after the Peace of Paris in 1763 may be divided into two groups. The first comprised the French territories which had been ceded at the peace, consisting of the settlements in the Eastern half of modern Canada, and Louisiana as far as the Mississippi. Distinguished from these by population and history were the thirteen English Colonies situated in the approximately level plain between the Alleghanies and the sea. Of these the peninsula of Florida had been until 1763 a Spanish possession, and the States of New York, New Jersey and Delaware (1) originally forming the Dutch colony of New Netherlands, had been under the English Crown for practically a century. The inhabitants of the remaining colonies were with the exception of some Scotch and Irish settlers entirely of English extraction. They had abandoned England at various times during the seventeenth and early eighteenth centuries in the hope of religious or political freedom, or actuated by the desire for wealth or adventure, and they had brought with them to the new America English language and traditions, and English legal and political ideas. Their governments were formed after the English type of the seventeenth century with governors and

(1). 'New Sweden' on the Delaware founded 1639, conquered by Dutch and added to New Netherlands 1655. The whole fell into English hands 1664.

representative assemblies, though they differed locally through a spontaneous adjustment to particular circumstances. They were bound also by a legal and sentimental tie to the Mother Country; appeals from colonial courts lay with the English Privy Council, and Acts of the English Parliament had supreme force in the Colonies. In practice however the Colonies were - save in commercial matters - almost entirely self-governing and each colony lived in independence both of the House Government and of its neighbours. There was no political connection between the separate colonies; the imperial authority was not exercised through a common government nor represented by a single head. Each colony possessed a governor (1) whom it paid and sometimes elected, and through whom it conducted its separate relations with England. There was no common commercial, military or even Indian policy. In the Seven Years War each state had acted independently in raising troops and money and owing to the impossibility of a united colonial policy, Indian affairs had been taken over by the English Government. It was the same lack of colonial co-operation which prompted the suggestion of an Imperial tax during the troubles which led to the Declaration of (2) Independence. Inter-colonial quarrels were frequent, especially boundary disputes. The different geographical conditions of the States which had necessitated different occupations and interests

(1). e.g. Connecticut - Rhode Island.

(2). See Lecky History of England in the eighteenth century
Vol.IV p.13.

together with original religious, political and social divergencies had contributed far more to their mutual separation than the large (1). heritage of common ideas and traditions to their Union.

The inhabitants of the northern New England Colonies were descendants of the Puritan Pilgrim Fathers, and they had retained much of the sternness and fanaticism of Orthodox Puritanism. They were mostly small freeholders, frugal and industrious and engaged in fishing or agriculture. There were few social divisions or extremes of wealth or poverty among (2) them; and slavery which had never had much hold, was rapidly dying out. The unit of their political life was the town, and its character keenly democratic. (3) These New England Puritans felt little sympathy with the Roman Catholics of Maryland, or the colonists of Virginia or the Carolinas who were mostly members of the Church of England, and some of whom were descended from Cavalier refugees.

The Southern Colonies were also divided by great social cleavages; there was a large body of coloured slaves, and numbers of 'poor whites'- indentured servants-in little better condition. Wealth, social distinction and political power were enjoyed by a privileged upper class of landed proprietors. The large slave-worked tobacco plantations which formed the economic basis opposed class were situated on the banks of tidal rivers and were opposed

(1).Ibid. pp. 14-16.

(2).See Fiske Critical Period of the Revolution p.73 seq. also Lecky op.cit. Vol IV.

(3).See Lecky also Montcalm & Wolfe Vol 1 p.27 seq.

to concentrated city life. Political development had proceeded in consequence along the lines of the English county rather than the town system.

In addition there were large Quaker settlements in Pennsylvania and bodies of Dutch settlers, French Huguenots and Swedes, in the middle colonies, while Scotch and Irish immigrants were scattered throughout the Colonies and contributed to their heterogeneous character.
(1).

Nevertheless schemes of Union had been formulated and in one instance had been partially and temporarily realised. As early as 1643 a promising Federation of the New England colonies had been formed, which anticipated not a few of the features of the later Union.
(2) There was a central body of eight Commissioners, two from each colony with a president chosen from their number at their head; this board was empowered to determine all affairs of war and peace, leagues, aids, charges, and numbers of men for war, division of spoils and whatever was gotten by conquest, reception of more confederates, and all things of like nature which were the proper concomitants or consequents of a Confederation for amity, offence and defence".
(3) It was formed during the English Civil war and was marked by a significant display of independence of the Mother Country. Its activity lasted for about twenty years, but the

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- (1). See Burnaley's Report 1759-60. Pinkerton's voyages Xlll.752.
(2). Arts of the "United Colonies of New England" Appendix vol 11. W.Wilson's History of American People. also A.E.Pollard "Boston in Modern History" 'Colonial Expansion' and Thwaite's 'The Colonies' p.156.
(3). Arts of Federation.

Federation finally went to pieces between royal pressure on the one hand and internal conflicts on the other, due partly to the predominating position of Massachusetts.

Another attempt at more general union was made in 1753 in view "of the prospect of a French war and the hostile attitude (1) already assumed by tribes of Indians on the frontiers" Twenty-five Commissioners from Seven States met at Albany and unanimously recommended that "a Union of all the Colonies is absolutely necessary (2) for the defence and security of the Colonies" They adopted a (3) scheme of union proposed by Benjamin Franklin, but it was subsequently rejected both by all the Assemblies before which it was laid in America, and by the Board of Trade in England. "In America it was considered to contain too much of prerogative, and (4) in England it was considered too democratic."

There were other plans of Union such as Penn's scheme (5) of 1697, but these did not advance so far towards realisation. Most of these schemes of Union had emanated from the Government party and for that reason were not acceptable to the people. The unsuccessful Albany scheme of 1753 was the last effort of the official class, and its failure indicated as much opposition to the

(1). See Curtis' "Constitutional History of America" vol. I p. 18.
also Sparks' "Life & Works of Benjamin Franklin" I. 176; III. 22-25.

(2). Journal of Convention of June 24th Sparks op.cit III. 22-25.

(3). Sparks III. 22-25.

(4). Sparks. I. 176.

(5). For Penn's Plan of Union. See Appendix vol. II. W. Wilson's History of American People.

Governments and their proposals as absence of any desire for union. The next movement, a little more than twenty years afterwards, came directly from the popular Assemblies. In the interval however not only had the Colonies learned to know each other somewhat in the Seven Years' War, but they had been roused to a consciousness of fellowship by a common desire for independence. In 1763 however there were only "preparations for union and signs of its coming."

A spirit of independence among the American Colonies had been early displayed. Its first overt expression was perhaps the formation of the New England Confederation, and the indifference⁽¹⁾ which England had in practice shown towards her Colonies, in contrast with the paternal attitude of France and Spain, as well as the political institutions of the colonists themselves, had not discouraged this spirit. The recent removal of the French menace from the north had also tended to destroy any consciousness in the colonists of the need of Imperial protection. It needed only a policy of active interference on the part of the Imperial Government, to create an explicit desire for complete independence.

It is not possible to enter into the details of the commercial and financial measures which preceded the Revolution, or into the question of how far the Colonies were virtually represented⁽²⁾ in Parliament by the member for East Greenwich. The American War of Independence was an incident and a result of the contemporary

(1) Cf. "Grenville lost America because he read American despatches". See also "Commonwealth of Nations" Pt.1. chap.111. p.210 seq.

(2) By a legal fiction the colonies were supposed to be detached portions of the manor of East Greenwich

colonial theory, added to an irksome and unsound commercial system. The doctrine of the absolute dependence of a Colony on the Mother Country was abandoned after the American Revolution, and after a temporary approximation towards the Greek idea of complete separation a compromise has been adopted by granting self-government to a Colony in all that concerns its internal affairs. The Imperial Government alone still directs the foreign affairs of its Colonies, though in response to the desire of the self-governing Dominions, Prime Ministers of these Colonies have been invited more and more to share in its control. In the eighteenth century, however, the English Parliament alone claimed to regulate all colonial matters, internal and external, though the practical difficulties of the situation prevented much interference in internal affairs. "American Assemblies are no more than Vestries," remarked Johnson, and Grenville urged George III not to suffer anyone to advise him to draw a line between his British and American Dominions. And the root of the English failure lay in their inability to distinguish between English municipal corporations and the American Colonies. "Two opposite and inconsistent ideas were in the field, that of Imperial Dominion as it was then understood in England and that of Colonial freedom as it was then understood in America. In view of this it was idle to talk of virtual representation or the supremacy of the English parliament. In point of origin and precedents, the British case was as strong as case can be. The English argument was sound but for one fatal defect viz. that distance and separation and unlike circumstances working upon the original difference of

disposition and way of thinking which made some Englishmen cross the Atlantic while others stayed at home, had formed the Americans into
(1)
a distinct though as yet an undeveloped nation".

Their lack of national development was more conspicuous to Englishmen than their predisposition to national Union. Nevertheless the history of the American Colonies had bequeathed a double heritage of Independence and Union. Towards these ends two political Currents had from early times been flowing. The

Declaration of Independence is as much foreshadowed by the resistance of Massachusetts in the seventeenth century, and by colonial quarrels with royal governors, as the Articles of Union by the New England Confederation and the Albany Scheme of 1753. Independence and Union are closely connected, it was the desire for the first which necessitated the realisation of the second. "We therefore, the representatives of the United States of America in general Congress assembled, appealing to the supreme Judge of the world for the rectitude of our intentions, do in the name and by the authority of the good people of these colonies, solemnly publish and declare that these United Colonies are and of right ought to be, free and independent States; that they are absolved from all allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved, and that as free and independent states they have

(1). See Holland Imperium et Libertas.

full power to levy war, conclude peace, control alliances, establish commerce and to do all Acts and things which Independent States may and of right do. And for the support of this Declaration with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes and our sacred honour⁽¹⁾.
⁽²⁾ Mr. Wiske therefore, from this point of view rightly congratulates the United States on throwing off Imperial Sovereignty, suggesting that the longer it was acknowledged, so much the longer would the American Colonies have remained separate and isolated. The experience of Australia and South Africa in recent years does not support this, but it is nevertheless true that the desire for independence was the direct occasion and inspiration of the formation of the Union.

The Declaration of Independence was issued and published by the Second Continental Congress - a central Assembly containing delegates from all the States. It had been preceded by the first Continental Congress which had met in September 1774 at the beginning of the troubles to express its sympathy with the resistance of Boston, and to deny the right of the British Parliament to tax the Colonies.

The Second Congress which met in May 1775 took up more deliberately the task of organising the opposition of the Colonies. It declared their complete severance from the Mother Country, issued articles of war and proceeded to conduct a defence. The

(1) Preamble to Declaration of Independence. Mc.Donald Statutes and Documents of United States History Vol. 11.

(2) Critical Period of American History.

Massachusetts army was adopted as the Continental army, and Washington was appointed Commander-in-Chief. The States were ordered to raise corps of riflemen and the fitting up of a small navy was authorised. Plans of military action were drawn up; New York City, the Hudson Highlands and the Northern frontier were ordered to be put in a state of defence and an attack on Canada was organised. The same Congress appointed Commissions to secure the alliance of foreign countries especially of France, raised war-loans, issued Continental bills of credit and made regulations affecting trade, Indian affairs and postal communications. In fact it took over almost all matters which had been acknowledged as belonging to the sphere of the Home Government.

It completed its work by giving itself a legal existence.. Up to this time the Congress had had no legal authority; the Declaration of Independence justified its activity and gave it a *raison d'être*, but it had no other foundation than the desire of part of the population - and until the war probably a minority - for independence. It was the mouthpiece of the national party - a revolutionary Assembly, its members chosen by revolutionary Conventions in the States. It was not intended to be a legislative body, but was rather a conference of delegates to make suggestions, which should be reported to their principals the States Legislatures. Congress however had begun to pass resolutions - strong ones, such as the Declaration of Independence and Articles of War - which were to have effect without any ratification by the State Conventions, ⁽¹⁾

to have effect without any ratification by the State Conventions,

(1) A.B.Hart Formation of the Union P. 74 seq.

and for this, some explicit authority was felt to be necessary.

In 1776 three weeks before the adoption of the Declaration of Independence, a Committee was appointed to draw up the "Articles of Confederation and Perpetual Union." In 1777 they were submitted to the States and within three and a half years were ratified by all of them. By these Articles, "The States severally enter into a firm league of friendship with each other for their common defence, the security of their liberties and their mutual and general welfare, binding themselves to assist each other against all force offered to, or attacks made upon them, on account of religion, sovereignty, trade or any other pretence whatsoever,"⁽¹⁾ The ratification of the Articles gave the United States, as the Colonies now called themselves, a legal existence and a written Constitution intended to be 'perpetually' binding. As a matter of fact the body which these Articles authorised to conduct the common affairs of the Colonies, lasted hardly eight years. It carried on the war concluded peace and then it gradually fell into decay from its own inherent weakness.

No Federal State existed at this time; the Colonies merely formed a loose Confederation; their only central body was a Single Assembly, with no executive or judicial organs. A rudimentary Executive existed in such of its Committees as began to assume a permanent character - The Board of War, the Treasury Office of Accounts, the Committee of Secret Correspondence, which

(1) Arts. of Confederation Art. 111.



developed into the Committee for Foreign Affairs until it was superseded by the Foreign Secretary. For the whole Congress was almost taken up with different Committees. Of a number of members that varied from ten dozen to five score, Committees were appointed for a host of varying purposes."⁽¹⁾

Moreover the Constitution which had defined the powers of Congress had also limited them. It was practically restricted to peace and war, foreign affairs, naval and military arrangements,⁽²⁾ postal communications and Indian affairs subject to State legislation. It had no commercial powers and no authority to raise men or money on its own account. For these it had to rely entirely upon the requisitions from the States.⁽³⁾ It had no power over the individual and the States contributed according to their ability or inclination. Not one quarter of the sum asked for was collected and recourse was had to bills of credit while the national debt grew larger. As early as 1778 a system of specific supplies was adopted by which the States were allowed to make their contributions in kind, but this merely added to the confusion and did not increase the revenue.⁽⁴⁾ The country was practically bankrupt and the soldiers were clamoring for their pay. Congress became weaker and more inefficient every day. Any important measure required the consent of three-fourths of the States and a unanimous vote was necessary for an amendment.⁽⁵⁾ The Government had neither power nor money;

(1) John Adams.

(2) Arts of Confederation. Art IX.

(3) See supra chap. I. p. 21.

(4) Cf. A.B. Hart. Formation of the Union. p. 91 seq.

(5) Arts. of Confederation. Art. XIII.

it had no executive machinery of its own, and the State governments, which should have carried out its measures, were also disorganised.

Congress itself gradually 'ran down' like an unwound clock, and the United States presented 'that awful spectacle of a nation without
(1)
a national government.'

Dissatisfaction grew with the increasing disorganisation. Commerce which had declined during the war did not revive on its termination when the States found that they were out off from all trade with England and her Colonies. The States were wrangling over inter-state tariffs and unsettled territorial claims. "What indication is there of national disorder, poverty and insignificance that could befall a community so peculiarly blessed with national advantages as we are, which does not form a part of the dark
(2)
catalogue of our public misfortunes?" The time was ripe for a military dictatorship and a scheme was proposed to make Washington
(3)
King. A rebellion which threatened anarchy broke out in Massachusetts in 1786 and the dissolution of the Confederation was at hand.

The years from the conclusion of peace in 1783 until the

(1). For inefficiency and powerlessness of Congress cf. American MSS. Hist. Cong. M.S.S. 1783-6.

(2). The Federalist XVII.

(3). Cf. also Amer. M.S.S. Hist. Cong. M.S.S. Vol. IV Letter of Captain W. Armstrong to Sir Guy Carleton 1783 April 1st. "They do not think him (General Washington) ambitious, else he might easily get himself elected King of America, as the army is entirely at his command."

establishment of the new government in 1789 were indeed the most critical period in the history of the Union. The end for which it had been formed had been attained, while its continuation seemed to bring nothing but disorder upon the States. On the other hand it was felt that the preservation of the newly won Independence could only be secured by the maintenance of the Union. Not only was England a near neighbour to the north, but Spain had recovered Florida and was in possession of Louisiana, while France was removed only a little further.⁽¹⁾ The fear of foreign countries was, strangely enough, more potent in the eighteenth century than it became later when steam and telegraphs had brought Europe so much nearer. In words of prophetic value Hamilton urges union. "Let the thirteen States, bound together in a strict and indissoluble union, concur in erecting one great American System superior to the control of all transatlantic force or influence and able to dictate the terms of connection between the Old and New World----- By a steady adherence to the Union we may hope ere long to become the arbiter of Europe in America, and to be able to incline the balance of European competition in this part of the world as our interest dictates".⁽²⁾ In addition the Union possessed a vested interest in the commonlands which had been ceded to it on the formation of the Confederation in 1781. They had been converted into national property and since 1787 part had in fact been

(1) She owned some of the West Indian Islands.

(2) The Federalist. XI.

organised into new States; each separate State had surrendered its claims, and the effect of this common territory on the Union was somewhat analogous to the influence on the English Reformation of the transference of the lands of the dissolved Monasteries to the new nobility.

It was felt too that a common commercial policy and a unified revenue might relieve the confusion into which the States had fallen. The States were by no means willing to surrender their entire independence however; what they desired was to strengthen the existing Confederation by giving efficiency and power to the Common Government and by introducing a better organisation into the whole system. To have merged their separate identities into a complete Union would have sacrificed the traditions of a century and a half, as much as absolute separation would have renounced the fruits of the Revolution itself.

In fulfilment of these desires the Convention which had met at Philadelphia to consider a new Government produced in 1787 the present Constitution. It was submitted to the States and by 1789 was ratified by the necessary thirteen.

The forces of union had conquered but not wholly. The Constitution instituted a balance between union and independence, which has gradually but decidedly inclined to the side of the former. The Colonies were not impelled by an irresistible patriotism; they were prompted by a conscious and deliberate calculation of their own needs. It was a Union "extorted from the grinding necessities of a reluctant people."

The Federation of the United States is now a permanent and cherished State, but it was greeted with little enthusiasm in 1789. Within ten years warnings of the future secession were heard and the Kentucky resolutions of 1798 contained a distinct enunciation of the compact theory. ⁽¹⁾ The Constitution was a compromise, or rather a collection of compromises, and it affords an excellent example of two kinds - of those that will work and of those that will not.

As early as 1783 the slave problem had come up for settlement. "The United States entered the shadow of the coming Civil War before they emerged from that of the Revolution." ⁽²⁾ The question was two-fold - were slaves to be represented in the National Government, and secondly were they to be taxed? Were they people and taxable and representable? or were they chattels which could neither be taxed nor represented? In 1783 the Northern non-slave-holding States had upheld their taxability, but in 1787 they ^{their} denied eligibility for representation, asserting them to be people in 1783 and chattels four years afterwards. The Constitution adopted the compromise that a slave should count as three-fifths of a freeman and that the slave-holding States should be taxed and represented in that proportion. It was a compromise without rhyme or reason, and it contained the seeds of future trouble, but it served at the time to win the adherence of

(1) See supra Chap. 1. p. 42

(2) Fiske. Critical Period p. 256

South Carolina to the Union. In 1865 the problem was settled by the sword in favour of the freedom of the slaves.

The issue of the Civil War had another result which is more directly connected with the Constitutional history of
(1)
Federalism. It destroyed for ever the compact theory of a Federal State which was a constitutionally barbarous remnant of the system of Confederations of States. The division created by the slave question was the occasion rather than the cause of the assertion of this theory and the subsequent reunion marked its abandonment.

The history of the formation of the American Federal State is short but complete with the regularity of a theory. The circumstances were peculiarly favourable - thirteen separate States with a community of speech, law and race, at liberty to work out their own form of Government, and inspired to union by a common struggle for independence. And the conflict between the theory of the Compact and the theory of the State is the essential difficulty with which ^{of Federalism} pioneers are most likely to be beset.

The nature of the Constitution is as regular as its history. It is indeed from this example of a Federal State that the principles which have been laid down in the Introduction - the equal representation of States in the Second House of the Legislature, the four-fold contact of the Federation and the individual, the rigidity of the Constitution and the position of the Judiciary - have been mostly drawn. Their more particular

(1) See supra chap. 1. p., 37.

application will be best understood by a consideration first, of the relations between the States and the Federation- the distribution of powers, the representation of the States in the Federal Government, and their relation and that of the Federal State to the Constitution - and secondly of the composition and nature of the Federal Government itself.

The first occasion for the existence of important differences in the distribution of authority between Federal and States' Governments lies in the allocation of the (1) 'definite' powers. It is to be supposed from the circumstances of the formation of the Union, that the jealousy of the States and their reluctance to forge for themselves bonds which might again become oppressive fetters would lead them to grant only the minimum of necessary powers to the Union and to retain the maximum of independence for themselves. Only definite enumerated powers are therefore assigned to the Federal Government and the residuum of indefinite authority is left to the States. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively (2) or to the people"

The definite powers are therefore apportioned to the Federal Government and they are assigned in accordance with the three necessary conditions of external unity, the uniformity of inter-state relations and the necessity of maintaining an effective

(1) See supra . Introd. chap. 1. p.22 - 23.

(2) Constitution of U.S.A. Amendment X.

Federal contact with the individual of each State. In all these demands the United States has acted in fullest harmony with the general principles of a regular Federal State. It has granted to (1) the Federal Government sole authority to declare war and conclude peace, to maintain a navy, to raise armies and to provide for the calling forth of the militia of each State, and it has in consequence exclusive and absolute control over the several arsenals, dockyards forts and lighthouses which it may establish for Federal purposes. The Federal Government controls foreign affairs, sends out ambassadors to foreign courts and defines and punishes breaches of international law. It regulates commerce with foreign nations, with the Indians or among the States of the Union and this has been extended to the guardianship of the main railways and telegraphs, and the control of all navigable waters which constitute national highways of inter-state traffic or intercourse, and of the means such as bridges, by which commerce may cross them in its land passage. Federal commercial powers grow with the increase of commerce but no Federal law may yet touch agencies of commerce which are wholly within a single State. (2) The Federal Government may borrow money, impose or collect taxes indirectly by customs duties and by a recent amendment it may (3) impose a direct income-tax on the individual. It received power to

(1) See Constitution of U.S.A. Art. 1. sec.8 .

(2) Cf. W. Wilson. The State. p.412.

(3) Amendment XVI. Feb. 3rd.1913.

(1)

establish a uniform coinage, postage and telegraph, uniform bankruptcy and naturalisation laws and to give security for patents and copyrights. It may and has set up judicial tribunals, inferior to the Supreme Court. It must guarantee to each State a republican form of government and protect each State against invasion, and on the application of the State legislature against domestic violence, but it has no power of veto or disallowance of State legislation. Finally it has absolute and exclusive power over the district of Columbia, not exceeding ten square miles, in which is established the Federal Capital of Washington. Other Federal offices such as customs houses, post offices, Court chambers are held on ordinary principles of tenure, Columbia alone is absolutely and exclusively in Federal possession.

The power of the States are therefore expressly restricted by the authority which has been conferred on the Federal Government, which is stated broadly under eighteen heads. The restrictions are emphasised by definite complementary prohibi-
(2)
tions which have been placed on the States. "No State shall enter into any treaty, alliance or confederation; grant letters of marque or reprisal; coin monies, emit bills of credit, or make anything but gold and silver coin a legal tender of payment of debts." This last clause was particularly ^{inserted} to prevent the scandals which had arisen during the War of Independence owing to the

(1) See Wilson opcit. p. 482 Constitution Art. 1 s.8

(2) Constitution Art. 1. sec. 10. 1 & 2.

excessive circulation of paper currency. Further no State may pass any law impairing the obligation of contracts; or without the consent of Congress, lay any imposts or duties on imports or exports, except such^{as} may be absolutely necessary for executing its inspection laws, or any duty of tonnage. It may not keep troops unlike the Cantons of Switzerland which are allowed to maintain three hundred permanent troops - or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war unless actually invaded or in such imminent danger as will not admit of delay.

(1)

Both the States and the Federal Government are prohibited from passing any bill of attainder or ex post facto law or from granting any title of nobility. And no holder of any office under the United States may accept any distinction from any foreign power. Both the States and the Federation are further forbidden to infringe the rights of individuals in any of the following ways; -by depriving the people of their just right to bear arms; by quartering soldiers on private persons in time of peace; by causing the arrest of any person or the seizure or search of his property without legal warrant or by requisitioning any private possessions for public use without due compensation; by denying to any accused person trial by jury or making him answerable for a capital or 'otherwise infamous crime' except on the indictment of a grand jury; or by the imposition of excessive bails, fines or

(1) Constitution Art. 1. sec.9 c. 3 & 7 and Amendments 11 - VIII & XV.

punishments. Slavery is everywhere forbidden throughout the Federal State, and no citizen of the United States shall be deprived of the franchise on account of race, colour or previous
(1)
condition of servitude.

(2)

Certain express restrictions are placed upon the Federal Government even in limitation of the definite powers assigned to it. It is forbidden to suspend the writ of habeas corpus except in time of public danger, to impose any tax or duty on articles exported from any one State, to give preference to one port over another, or to draw money from the public treasury except in consequence of a legal appropriation. It may not make any laws respecting the establishment of any religious creed or prohibiting the free exercise of religion; nor may it abridge freedom of speech and of the press, or the right to assemble peaceably, or to petition the Government for a redress of grievances.

(3)

A few powers may be exercised concurrently by either State or Federal Government i.e. they are granted to the Federation but not exclusively and in the absence of their exercise by the Federal Authority, they may be exercised by the States. Among these subjects are included certain bankruptcy laws and commercial matters such as pilot laws and harbour regulations, certain powers of direct and indirect taxation, but so that neither Congress nor a State shall tax exports from any State, and so that no state

(1) Since 1865

(2) Art 1. sec. 9 c. 2, 4 & 7 and Amendment 1.

(3) Constitution Art. 1. sec. 4 c. 1. See also Bryce. American Commonwealth 1. p.317

shall, except with the consent of Congress, tax any corporation or other agency created for Federal purposes or penalise any act done under Federal authority, nor shall the national Government tax any State or its agencies or property. In certain judicial cases where Congress might have legislated but has not, or where a party to a suit has the choice to proceed either in a Federal or a State Court the States may exercise an optional power.

The immediate authority over the individual which is one of the chief distinguishing features of a Federal State is granted to the national Government with full consistency. This power, rather than the sphere or subjects which are assigned to its legislation constitutes the chief difference between the position of the present Congress and that of the Congress of the Confederation preceding it. The Federation may legislate for the individual and tax and judge him, independently of the State of which he is a member. It may tax him directly and indirectly and in default of payment, judgment, will be visited upon him by the ordinary magistrate and by the ordinary process of distraint of property as in England. Direct taxes have not been collected more than half-a-dozen times and indirect taxation is effected chiefly through tariff bills. As already mentioned, the Federal Government may since 1913 impose an income tax on the individual citizen.

To the Federal Government and not to the States is also entrusted the guardianship of the rights of individuals, which the very immutability of the Constitution tempted the political philosophers who framed it to incorporate in its terms as a second

"Bill of Rights". In fact the "responsibilities of citizenship are both double and direct. Punishment for the violation of Federal law falls directly on the individual, as does punishment for the violation of State laws; obligation of obedience is in both cases direct; every citizen must obey both Federal law and the law of his own State. His citizenship involves direct relations with the authorities of both parts of the Government of the country, and connects him as immediately with the power of the marshals of the United States as with the power of the sheriffs of his own county (1) or the constables of his own town." The Federal and State Governments work within different spheres, within which both are equally sovereign and each equally independent of the officers of the other for the execution of its laws.

The Federal Government may only act within the sphere assigned to it by the Constitution and a large province is left to the States in which they are sovereign and absolutely independent. Any State may set up any form of political institutions so long as it is of a general "Republican" nature. It may form a uni- or bi-cameral legislature, an elected or appointed executive, or (2) extend the franchise to women, minors or aliens. In fact although the United States regulates the right of naturalisation, without which no individual may legally claim political rights in every State, many states have admitted aliens without such naturalisation to the privileges and immunities of citizenship within their own

(1) W. Wilson. The State p.433

(2) Twelve States have in fact recognised the suffrage of women.

particular limits, and may do so on what terms they please. Each state may establish any Church and legislate on marriage and divorce, and on civil and criminal law. Great variety in these subjects in practice exists throughout the Federation, though most states, but not all, have a fundamental common basis of English law. The State alone may create local institutions, may provide for education and poor relief. In fact the general regulation of internal affairs, and the maintenance of order, is in the hands of the State. "The State is the rule, the Federation is the exception" and the ordinary citizen in his daily life comes most into contact with the State authorities. Of the important subjects of English Parliamentary agitation within the last century, the whole question of Electoral Reform, such as occasioned the Acts of 1832, 1867 and 1884, and the extension of the parliamentary franchise to women, municipal Corporation Reform, Higher and Elementary Education, Church disestablishment and Catholic Emancipation, and Poor Law Reform and the revision of the Divorce Laws - all these would have been carried out in the United States by the State and not the Federal Government. In illustration of the (1) large powers of the States it has been asserted that the Federal Government of the United States is neither democratic nor aristocratic but might be either according to the institutions of the States. Except with regard to such Federal democratic

(1) Cf. Boutmy. Studies in Constitutional Law.

features as the necessity of the Consent of Congress to declarations of war, this is very true even with regard to such matters as the elections of Representatives. Nevertheless the Federal Constitution clearly implies a democratic government; it was accepted by popular Convention and is based on popular support; and in practice the Governments of the States are organised on democratic lines. The town-meetings of New England resembles the landsgemeinde of some Swiss Cantons and in many States other Swiss instruments of democracy such as Referendum and Initiative and Recall, a feature akin, have been introduced.

The State as a separate unit of the American Federation has greater power than that of the Cantons of Switzerland or the States of Australia. The Second House of the Legislature or Senate, as in all modern Federal States, is devoted to the representation of the States as such. Each and every State independently of its size or population or wealth sends two members to the Senate, and their power and influence is considerably enlarged by the (1) important functions which have been assigned to the House. Each State has thus a direct and equal share in this part of the Federal organisation. Until the seventeenth amendment of the Constitution was passed in 1913 the senators were chosen by the State Legislatures. They are now chosen directly by the people but the Amendment merely gave Constitutional sanction to a fact which had long existed, for like the Presidential election, the

(1) See supra Chap. 1. p. 20

election of senators had in practice been directly decided by the people on party lines. The Senators vote according to their individual opinion not according to instructions from the States.

In the composition of the other parts of the Federal Government the States exercise an influence which cannot be neglected. Thus in the national House which is apportioned on the basis of the population no State can be small enough to be omitted. However scantily it is populated every State must receive at least one representative. Moreover the qualifications of the electors are determined by the terms on which each State has based the composition of the "Lower House" of its own Legislature. The electoral districts are not only confined within the limits of each State but they are marked out by the State authorities and by means of "gerrymandering" adequate representation of minorities is not always provided. In any case the minority in each State is rendered of no account in spite of the fact that a large minority in a large State may quite easily outnumber a small majority in a small State. Indeed this has twice happened in Presidential elections which are conducted on a similar system. In 1876 and 1888 respectively Mr. Hayes and Mr. Harrison were elected to the Presidential office by a majority of the States though each received a minority of the popular votes.⁽¹⁾

A further illustration of the part which is played

(1) In 1876 Mr. Hayes received 252000 popular votes less than Mr. Tilden. and in 1888 Mr. Harrison received 95534 popular votes less than Mr. Cleveland.

by the State with its limited sovereignty and partial independence in the American Federal system is afforded by the formations of new states out of the wide territories of the West. One of the most prominent and peculiar features in American History has been the existence and settlement of large, rich unappropriated lands. Not only has a continuous stream of immigrants produced important social and economic results, but the political organisations of these lands has contributed not a little to the success of the Federation of the United States.

As early as the days of the Second Continental Congress the question of the disposal of the lands west of the Alleghanies had arisen, and the claims of individual States to their possession had placed great difficulties in the way of settlement. It has been already mentioned that these lands were finally placed in the hands of Congress with full powers to determine their distribution. By the Ordinance of 1787 the Western Lands north of the Ohio were
(1)
formed into five new states. The Ordinance established a precedent which has since been considerably followed. Its terms were continued in effect by an Act of 1789 and its main provisions were extended to lands south of the Ohio by the Act of May 1790. It is curious that no mention of the Federal power to prevent the expansion of individual States is made in the Federal Constitution. Each new "territory" is governed by officers appointed by Congress,

(1) See Ordinance of 1787. McDonald, Select Documents and Statutes Vol. 11. no.4

until it reaches a population of sixty-thousand. It is then granted Self-government and independent statehood on the model of the older States.⁽¹⁾ From the time when it possesses five-thousand inhabitants it is allowed one member in the House of Representatives who may take part in the debates but may not vote.

Of the existing forty-eight, all except the original thirteen and Vermont and Maine have been in this manner "born of the Union,"⁽²⁾ and the parental tie has not become irksome as it has been automatically discarded when the State came of age. It has been however an important force in^{the} strengthening of the Union and its significance was realised by Bismarck in 1870 when he formed Alsace-Lorraine into Imperial territory.

Lastly the paramount influence of the States is seen in the conditions which are necessary to amend the Constitution. A written Constitution placed beyond the alteration by any single Legislature has been adopted in all its rigidity by the United States.⁽³⁾ "Congress, whenever two-thirds of both Houses shall esteem it necessary, shall propose amendments to the Constitution, or on the application of two-thirds of the several states shall call a Convention for the proposing^{of} amendments, which in either case shall be valid to all intents and purposes as part of this Constitution, when ratified by the Legislature of three-fourths of the several states or by Conventions thereof as the one or the

(1) The Ordinance contained an interesting clause - unfortunately omitted from the Federal Constitution, - that no state should separate or secede from the Union.

(2) See Appendix to Chapter 11. (3) Constitution of U.S.A. Art. 5.

other mode of ratification may be proposed by the Congress. Provided that no State without its consent, shall be deprived of its equal suffrage in the Senate."

There are therefore two legitimate channels for the initiation of amendments. Firstly they may proceed by way of Congress. Unlike ordinary legislative proposals they must be passed by a two-thirds majority of both Houses. The consent of the President is entirely dispensed with as the majority required in the Houses is sufficient to pass all laws "over his veto."

Secondly on the application of the Legislatures of two-thirds of the States, Congress shall call a Convention for proposing amendments. Congress therefore exercises no discretionary powers in regard to amendments demanded by the State Legislatures. This right of Initiative which is granted to the States as well as to the Federal body, has never yet been used by the States Legislatures. ⁽¹⁾

Proposals to amend the Constitution may also be ratified in two ways and in two ways only. According to the principles of a symmetrical Federation they may not be passed by any one Legislature under the Federation. No Amendment in fact becomes law unless it is ratified by the Legislatures of three-fourths of the States or by Conventions chosen ad hoc. The latter alternative has not yet been adopted and would probably be reserved for cases of wholesale amendment. In either instance the ultimate ratifying authority for constituent as opposed to non-constituent laws resides in a

(1). Bryce American Commonwealth. vol. 1. page 365.

three-fourths majority of the States. In fact amendments could be passed independently of or even against the will of the Federal Legislature. If the States were to use their constitutional right to initiate amendments, Congress would be bound to submit them for ratification.

Moreover, the people as a whole have no voice in the matter. No popular majority can ever be large enough to pass or to reject an amendment, if one-fourth of the State Legislatures are against it, or three-fourths in its favour. Thus the eight Mountain States together with five of the New England States - thirteen States in all with a population between them of seven millions could successfully reject any amendment desired by the remaining eighty-six millions. No account is taken of the population of the State. Each State has in the amendment of the Constitution as in the Senate an equal voice, while the voice of the Federation itself may be disregarded.

The Constitution is extremely rigid and difficult to amend. The necessity of two-thirds of the State Legislatures or of a two-thirds majority in Congress for proposals, and of three-fourths of the State Legislatures for ratification, places great obstacles in the path of amendment which are difficult to overcome. The revision of one clause is still further hedged about with Constitutional safe-guards. "No State without its own consent shall be deprived of its equal suffrage in the Senate". The principle of equal representation in the Second House of the Legislature must therefore remain untouched so long as one State

affected withholds its consent. Each State, whatever its size is given an absolute veto in this respect, so that Delaware with two-hundred thousand people or Nevada with eighty-one thousand could effectively oppose the wish of the remaining ninety-three odd million inhabitants.

The rigidity of the Constitution is indicated by the number of amendments which have been passed. In the whole history of the United States of over a hundred and twenty years, only seventeen amendments in all have been made to the Constitution, of which ten were passed in 1791 immediately after its adoption to rectify omissions in the original draft of the Constitution. The eleventh and twelfth amendments were passed three years afterwards and respectively reverse a judicial interpretation of the Constitution and introduce a minor reform in the election of the President and Vice-President. No other amendments were added until the Crisis of 1860. On its termination three amendments were passed in 1865, 1869 and 1870 referring to abolition of slavery, and the enfranchisement of the coloured race. These were passed under abnormal circumstances and at the point of the sword. Two other amendments were passed in 1913 which granted to the Federation power to impose an income-tax and gave constitutional sanction to the direct popular election of Senators. Excluding the first ten, only seven amendments express the political history of the Federation. Many bitter controversies on important questions - such as the right of Congress to establish a national

(1)
bank have left no record on the Constitution. Many other amendments have been proposed but have failed to obtain the requisite majority either in Congress or of the States.

The Constitution is however very short and contains rather broad general principles than detailed enactments. Constitutional development has therefore proceeded in the unbiological manner of building round and on the skeleton. The amendments to the Constitution have been largely supplemented by usage, Congressional regulation, and by judicial interpretations. None of these can create parts of the Constitution, but they can develop and direct the Constitution in such a way as powerfully and materially to affect its meaning.

(2)
By usage has been established the direct election of the President by party vote which is opposed to the intention of the framers of the Constitution. "The power of an elector to elect is as completely abolished by Constitutional understandings in America as in the royal right of dissent from bills passed by both Houses, by the same force in England." Among other Conventions of the United States Government may be included the ineligibility of the President for more than a second term of office; the assent of the Senate to the President's Cabinet appointments, and the control by a Senator of the Federal patronage in his State; the employment of Standing Committees in both Houses and the importance

(1) Cf. Bryce. American Commonwealth 1. p. 390 seq.

(2) Dicey Law of the Constitution p. 29.

(3) Cf. Boutmy. Constitutional Law.

of the Speaker who nominates them; the employment of the Party engine known as Caucuses and the party instrument of the Spoils system; as well as the rule that a member of Congress must reside in the district and State from which he is chosen.

By Congressional legislation is regulated the whole subject of taxation, direct and indirect, with the exception of the Federal income tax, the establishment of Federal Courts inferior to the Supreme Court and the assignment of particular kinds and degrees of jurisdiction to each class of courts, ⁽¹⁾ the organisation of the civil, military and naval services of the country, the administration of Indian affairs and of the territories, - these and many other matters of high import are regulated by Statutes - Statutes "which cannot in strictness enlarge the frontiers of the Constitution but which can give to certain provinces lying within those frontiers far greater importance than they formally possessed and by so doing can substantially change the character of the ⁽²⁾ Government."

Congressional Statutes are subject to reversal and do not become incorporated in the Constitution as Judicial interpretations. These too may, and have been reversed by later decisions but they are on the whole accepted as fixed principles. According to the doctrines of 'implied powers' and legality of means 'necessary and proper' to carry out the functions assigned by

(1) Cf. The institution of the important semi-judicial, semi-executive Inter-State commerce Commission in 1887.

(2) Bryce. Am. . Com. 1. p.393.

the Constitution to the Federation, the Judicial Court has not only sanctioned wide extensions of legislative authority in the commercial, financial and military spheres but has built up a body of legal principles which form a large part of the Constitution. It is accepted that every power claimed by the Federation must be shown to be affirmatively granted in the Constitution, but on the other hand it will be construed broadly. As in England, so in the United States, the Courts do not however pass judgment on a law but on a case. That is to say they do not go out of their way to assert positively that a law which is ultra vires is unconstitutional but on the first case which comes up for trial - perhaps after a lapse of years - the claimant who bases his position on that law will lose his case. Thus important constitutional questions as in England, are decided in suits between private individuals.

The position of the Judiciary as interpreter of the rigid Constitution has already been somewhat explained. The Supreme Court has also original jurisdiction "in all cases affecting ambassadors, other public ministers and consuls and those in which a State shall be a party", and appellate jurisdiction in all other cases, "in law and equity arising under this Constitution, the laws of the United States, and the treaties made under their authority, between citizens of different States, and between citizens of the same State claiming lands under grants of different States". It is

(1) See Bryce p. 381

(3) See supra chap. 1. p.31

(5) Art. 111. s.2. c.1

(2) See Story Commentaries Vol.1.p.266

(4) Const. Art. 111. s.2. c.2.

not competent to decide cases between a citizen of one State and
(1) another State. "All the enumerated cases of Federal cognisance
are those which touch the safety, peace and sovereignty of the
nation, or which presume that State attachments, State prejudices
and State interests might sometimes obstruct or control the
(2) regular administration of justice." The jurisdiction of the Federal
Judiciary is purely statutory and there is in consequence no
Federal Common Law. This is administered purely by the States.

The existence of the Federal Courts is based on the
(3) Constitution, and the independence of the judges declared. They
shall hold office during good behaviour and their salaries may not
be reduced during their tenure. Congress however is invested with
the power of ordaining and establishing Courts inferior to the
Supreme Court and of determining the number and organisation even of
that Court. The judges are appointed by the President. Congress
has used its power to create two grades of Federal Courts - Circuit
and District Courts. The Supreme Court is, therefore, the head
of a large system of Courts and in this, as in its relation to the
Constitution, is peculiarly powerful among Federal Judiciaries.

The State Courts possess original and final jurisdiction
in all cases not relegated to the Federal Courts by the Constitution
Each State recognises the judgments of the Federal Court and of the
Courts of any other part-State, although it does not necessarily

(1) Amendment XI.
(3) Art. III. s.1.

(2) Kent Commentaries. I. p.320

follow the decisions of the latter. The two judicial systems of the State and Federal Courts are separate and independent however in characteristic American fashion, and Congress has no hand in the organisation of the former. The State Court may of course freely give its decision on the validity of a Federal law on which no opinion has been expressed by the Federal Courts, but an appeal lies from it to the Federal Courts in these cases and by plain implication from the Constitution Congress has no power to delegate to the State Courts the functions of the Federal Judiciary.

To the United States belongs the credit of having established a Judiciary which is an organic part of the Federal Government. The two other parts of the Central Government - the Executive and the Legislature - remain to be described. These two departments bear a resemblance to the English Constitution, although more to the theory than to the practice of it.

(2)

Professor Freeman observes that in countries which are sufficiently developed to have a distinct Legislature and Executive the differences between them lie not so much in the power which is given to the Executive as in the nature of the hands in which it is placed. From this point of view the Executive of the United States is one of the most interesting and peculiar of modern institutions. As in the English theoretical Executive, power is placed in the hands of a single officer. The President is in fact an enlarged copy of a State Governor, who was in most of his functions an English Monarch on a small scale. He is an

(1) Cf. Wilson. The State. p.471

(2) Historical Essays. "Presidential Government".

eighteenth century King of England in republican robes, stripped of the irresponsibility of hereditary monarchy, and shorn of the divinity that hedges royalty. His prerogatives are restricted by the participation of the Senate, and the independence of the States. He is made elective and responsible, his tenure of office is limited and his salary is too small ⁽¹⁾ "to permit him to maintain a court or corrupt a legislature nor can he seduce the virtue of the citizens by the gifts of titles of nobility for such are absolutely ⁽²⁾ ⁽³⁾ forbidden." Somewhat as a Roman Consul succeeded to most of the functions of the Roman King, but was limited in his power by election an annual tenure and the existence of a colleague, so the American ⁽⁴⁾ President retained royal executive duties but was divested of such appendages of royalty as an hereditary succession and irresponsible tenure.

The President of the United States is elected for four years, nominally by an electoral college, in reality directly by the people. No feature of the Constitution met with more approval in 1789 than the method of Presidential election and none has failed so signally to fulfil the intentions of its originators. Theoretically in each State a college of electors is chosen equal to the number of Representatives and Senators to which the State is entitled in Congress. Each elector was

(1) 50,000 / 5% = £10,000. (2) Lord Bryce. American Commonwealth. Vol.1. p.40.

(3) Cf. Bryce ibid. (4) I refer of course to the theory of the English Constitution which however in the eighteenth century was not so far from facts as at the present time.

intended to exercise his independent judgment in the selection of a President. In practice each party in the State 'runs' its complete list of electors who will vote for the party Presidential candidate, and their election by the people takes place solely on that understanding. Thus President Wilson's re-election was decided incontrovertibly in November 1916, by the choice of Democratic electors by the people of the States, although the electors did not cast their vote until January 1917. The President is also a pre-eminently a party man, he is run by a party machinery, elected on party principles and if he is successful, expected to reward along party lines. He may be re-elected for a second term of office but a custom as strong as law and more immutable apparently, forbids a second re-election. In 1921 President Wilson will be compelled to resign and unless the war is speedily terminated he will be prevented from official participation in any organisation of the League of Nations which he would see established. During his term of office however the President is irremovable except on impeachment. Only one President, Andrew Johnson, has been impeached, and he was acquitted through the failure to obtain the necessary two-thirds majority in the Senate. In case of the President's removal from any reason, he is succeeded by the Vice-President who is elected at the same time, and is ex-officio President of the Senate, and failing him, formerly by the Speaker of the House of Representatives, now by the Secretary of State.

(1)

In the President are vested all the ceremonial privileges

(1) See Constitution. Art. 11., s. 2 & 3.

and duties of the titular head of the nation, and all the executive power of the State, with the exception of that portion which is shared by the Senate. His powers may be divided into four groups, concerning foreign affairs, appointments, domestic administration and legislation respectively.

The President represents the nation in foreign affairs, receives ambassadors, issues notes to foreign courts and up to the point of declaring war or making treaties, he is solely responsible for the relations of the United States with foreign countries. Like the German Emperor, the President is Commander-in-Chief of the army and navy and of the militia of the States when it is employed in the service of the United States. The powers of the President in foreign affairs resembles indeed those of the German Emperor, but in practice his power has been much less owing to the remoteness of the United States from the centre of international agitation. In time of war, however or during critical periods such as the present the President's power rises to a high level and though he cannot actually declare war, he can do a great deal towards hastening or delaying its declaration, or towards rendering peace impossible.⁽¹⁾ Congress alone can declare war, and the consent of two-thirds of the Senate is necessary for the ratification of treaties. Moreover the House of Representatives may pass resolutions if it disapproves

(1). As e.g. President Polk 1845-6. The present situation has afforded an excellent opportunity for an exercise of presidential power.

of the direction in which affairs are tending, and since both war and treaties, especially commercial treaties require supplementary legislation and financial means, Congress to some extent holds a key to the situation. The president therefore has not a free hand, but he may ignore resolutions and though Congress can prevent him from settling anything, they cannot prevent him from unsettling (1). everything.

The President possesses large powers of appointment but he shares them with the Senate. "He shall nominate and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court and all other officers of the United States whose appointment herein are not otherwise provided for; but Congress may by law vest the appointment of such inferior officers as it thinks proper in the President alone, in the Courts of Law, or in the Heads of Departments." (2) The President alone has also the power to fill vacancies in the Senate for the duration of the session.

The President and Senate have therefore power to appoint to most of the higher offices of the United States. In practice the President is given carte blanche in his Cabinet appointments which the Senate ratifies as a matter of course. Similarly, by what is known as the 'Courtesy of the Senate' each Senator expects to control the offices of his own particular State, and thus secures a large patronage by means of which he may reward the members of his

(1). Cf. Bryce 1. p.54.

(2). Const. Art 11. S.2. C.2.

party. A good many of the lower posts of the civil service have been removed by legislation from the power of the President, and are now filled by competitive examination, but he retains a wide patronage which he is expected to exercise in the interests of his party. Indeed a good deal of his time and energy is consumed in the satisfaction of office-seekers.⁽¹⁾ Although nothing is said in the Constitution on the question, the President has successfully asserted his right to remove from office, and has often abused it in the spoils system.

In time of peace the authority of the President in domestic administration is small, as this sphere is largely under the control of the States. In time of war, however, especially civil war, it may rise almost to the power of a dictator. Abraham Lincoln, for example, not only suspended the writ of Habeas Corpus on his own authority, but in 1862 and 1864 issued a Presidential proclamation declaring the freedom of the slaves in the insurgent States. In normal times, the President is entrusted with the faithful execution of Federal Laws, and it devolves partly upon him to maintain a Republican form of Government in each State and to interfere in case of the invasion of a State or, upon request, of domestic violence. The employment of Federal troops was ordered on the insurrection in Rhode Island in 1842, but it was not found necessary to employ them. They were actually dispatched however

(1) Lord Bryce (1.65) relates the story of a friend who meeting President Lincoln during the war observed "You look anxious Mr. President, is there bad news from the front?" "No" answered the President, "It isn't the war, it's that postmastership at Brownsville Ohio."

to Louisiana in 1873. The President, like the English Crown, possesses a remnant of judicial power in his right to grant pardons and reprieves, except in cases of impeachment, for offences against the United States. As a mere point of interest, it may be observed that the President and all other officers of the Federation retain the rights of an ordinary citizen in their respective States..

The President plays an important part in legislation, He possesses a right of veto which is comparable to, although not the same as, the right of dissent of the English monarch, in whose royal image he was created. In practice the King has surrendered this right, but the President exercises his with greater vigour than when it was first conferred. He may reject all bills that come up to him from Congress and must return them within ten days with his objections. Unless they are re-passed by a two-thirds majority of both Houses, they fall to the ground. Thus if the Bill is supported by a large majority it may be passed 'over the President's veto', and this is a wiser plan than to allow the Executive to delay legislation which may be urgent, by requiring an interval to elapse between the first and second passing of a bill. The President also makes an Inaugural Speech in Congress assembled, and from time to time he sends reports on the state of the Union. In case of disagreement between the two Houses, he may adjourn them to such time as he shall think proper, and on extraordinary occasions he may specially convene both Houses.

(1) As e.g. in the French Constitution of 1791.

The President's "veto" differs from the theoretical royal "veto" of England, in that the English Crown is admittedly part of the Legislature whereas the President is not. "He is a separate authority - the Executive - whom the people, for the sake of protecting themselves against abuses of the Legislative power, have associated with the Legislature for the special purpose of arresting its action by his disapproval"⁽¹⁾ He is neither chosen by Congress, nor responsible to it; he derives its authority independently, from popular election. It is this which gives him his strength and accounts for the extensive development of the 'veto' power.

Indeed the Executive authority of the United States differs as much from the real as from the nominal Executive of England, and the American President resembles an English Prime Minister as little as an English King.

Firstly, the real executive of England - the Cabinet - is collective, the executive authority of the United States is not. It resides in the President alone. It is true that the President possesses what is known as his Cabinet, consisting of Heads of eight Departments, who have indeed, owing to the physical limitations of a mere human being, become rather his colleagues than his subordinates.⁽²⁾ It is also true that the President chooses his cabinet from his own party, that he may now dismiss the members if he so desires, and what is more, if they do not agree with his policy.

(1). Bryce American Commonwealth. vol 1. p.57.

(2). Cf. Wilson Congressional Government. chap. 1.

(1)
they usually resign. Nevertheless no collective responsibility or executive authority exists in the American Cabinet. Each Minister conducts his department with little reference to the rest, and all are responsible to no-one but the President who has appointed them. They resemble rather the group of Ministers which surround a Tsar
(2)
or Sultan. The President alone is constitutionally responsible for all executive acts, his cabinet is merely an extension and expression of his own executive authority.

(3)
The American Executive is secondly non-Parliamentary.

It is neither chosen by nor out of the Legislature. Six of Mr. Cleveland's Cabinet had never sat in Congress before their appointment and neither the President nor any officer of the United

(4)
States may be members of the Legislature after their succession to office. This prohibition destroys in consequence the

characteristic feature of an English Cabinet viz; its
(5)
responsibility to Parliament. The Cabinet continues in office until it loses its majority in the House; it then either appeals against the House to the electorate or resigns. The American

President, on the other hand, is irremovable except by impeachment during his four years of office. He is therefore not responsible to the dominant party of the Legislature, which cannot abridge his tenure of office, nor even reduce his salary, nor to the electorate except at the end of his first year of office when he is seeking re-

(1). This was not so in the early days of the United States Cf. e.g. John Adams and his Cabinet in 1799.

(2). Cf. Bryce American Commonwealth Vol. I. p. 50 seq.

(3). Cf. Dicey Law of The Const. chap 1. & Appendix

(4). Const. Art. I. s. 6. c. 2. (5). I speak of normal times.

re-election. Neither he nor his Cabinet may sit in either House of Congress, and they may, after the election of a new House of Representatives in the third year of the Presidential term of office, be opposed to the party which has a majority in the more numerous house of the Legislature. The President is a party man, but he is chosen not by the leading party in the House, but by the dominant party among the people .

It follows from the separation of the Legislature and Executive in this manner that neither the President nor his Cabinet can initiate any legislation or support any proposals of their own
(1)
in either House. The President must give Congress information from time to time and he often recommends necessary measures, but he has no power to carry them further by debate in the House. They
(2)
are merely "shots in the air and may fall wide" In fact the President has less influence on the course of positive legislation than the Speaker of the House of Representatives. He possesses a great though qualified negative power however by means of his right of veto.

It is difficult to estimate the power of the President , as it varies according to his own personal character and the times in which he lives. In quiet times it is not great and after the American Civil War and up to recent years the Presidents themselves

(1). President Lincoln made one attempt to submit a draft of a proposal but this seems to be the only instance - vide Congressional Globe July 14th 1862.

(2). Bryce American Commonwealth 1. p.50 seq.

have not been men of great calibre. In times of internal trouble or foreign disturbances however, the President possesses "an unfettered initiative by means of which he may embroil the country abroad or excite passion at home?"⁽¹⁾

The Legislature of the United States consists of two H⁽²⁾ouses representing the two necessary elements of a Federation. The first House - the House of Representatives - represents the Federation as a united and single whole, the second - the Senate - as a collection of independent states, and the proportionate strength of these two forces of union and separation bears an intimate relation to the respective parts played by the two Houses in the Single National Legislature.

(3)

The House of Representatives consists of members apportioned according to the population of the States in a proportion decided by Federal law. It consists at present of four hundred and thirty five members, forty-three from New York, thirty-six from Pennsylvania, one from Delaware and so on. Members⁽⁴⁾ are chosen by the electors for the most numerous branch of the State Legislature; "they must be twenty-five years of age, citizens of the United States of seven years standing and residents of the State from which they are elected" The House is renewed

(1) Bryce American Commonwealth. 1. (2) See supra Chap. 1. p.17 seq.
(3) For qualifications see Constⁿ of U.S.A. Art. 1. s.2.
(4) See Statesman's Year Book 1916.

integrally every two years, and in practice the old House sits and legislates for nearly four months after the new Representatives have been chosen, and may thus in the days of its expiration pass measures which the electors have virtually condemned at the election of the new House. (1) The American House of Representatives differs essentially from the English House of Commons to which superficially it bears a certain resemblance. It is not a debating body like the latter, but rules through and by means of its Committees, and this is the distinguishing feature of Congressional as opposed to Parliamentary Government. (2) All legislation except that concerning taxation and appropriation is distributed among a number of Committees, and the unity of the Chamber is totally destroyed, for the House becomes merely a "huge panel from which Committees are selected". (3) The Committee system moreover cramps debate, gives facilities for the exercise of corrupt influences and does not necessarily provide for the application of the best available talent to each law. It enables a good deal of work to be overcome however and appears at present to be the only way of coping with the ten thousand bills which are introduced on the average every year. (4) It is through the Committees that the Legislature comes into contact with the Executive, and receives from it necessary information. The Committees are appointed by the Speaker, and this power, together with his membership of the small Committee which

(1) See Bryce American Commonwealth Vol.1. chap.XIII. p.127.

(2) Cf. W Wilson.Congressional Government Ch.1.

(3) Bryce. American Commonwealth Vol.1. Ch.XIII.

(4) Bryce. ibid.

shapes the rules of the House, and with his privilege of "recognising on the floor, gives him a position of prominence and of great political influence. Unlike the Speaker of the House of Commons he is a party man; he is chosen by the dominant party of the House, and he is expected to benefit his party in the composition of the Committees.

The House of Representatives loses much of the influence and power of the House of Commons owing to its failure to represent or to affect the Government of the day. It is more exclusively a legislative, not as the House of Commons, a governing body. There are parties, in fact the whole administration is one huge party machine, but no party government, no responsibility of the Executive to the dominant party of the Legislature exists. Since the Executive is not represented in the House, nor allowed to initiate a legislative policy, there are no "Government" bills or "Government" Budgets to be passed. All propositions are, as it were, private members' bills; the nearest approach to a "Government" Bill is one brought in by a leading member of the majority in pursuance of a resolution taken in the Congressional Canons of that party. "There is no Government nor opposition; neither leaders nor whips. Since no member sits in the House, there is no official representative of the party which for the time being holds the reins of the Executive. Neither is there any unofficial Representative; as far as the majority has a chief, that chief is the Speaker."⁽¹⁾

(1) Bryce The American Commonwealth. Vol.1. chap. XIII,

(1)

The Second House of the Legislature - the Senate - represents the several States in equal proportion. It is composed at present of ninety-six members, consisting of two from each State who are, since 1913, chosen in name and in fact directly by the people of the State. Every candidate must be thirty years of age, an inhabitant of the State from which he is chosen, and a citizen of the United States of nine years standing. Senators are re-eligible for election and in the small States are usually re-elected. Each Senator is chosen for six years, but only one-third of the House is renewed at a time, so that the Senate is a permanent body and is influenced less by popular fluctuations of opinion. Like the House of Representatives, it works through and is led by its Committees.

Each House decides its own disputed elections, rules of procedure, and shall assemble at least once a year. The members of both Houses are granted freedom of speech and from arrest except on charge of felony, treason or breach of the peace, and both Representatives and Senators receive a salary from the Federal, not from the State Treasury. The House of Representatives has in addition power to choose its own Speaker and other officers. The President of the Senate is chosen by the people, for he is the Vice-President of the United States. He is therefore an exception to the principle of Senatorial Membership and has only the casting

(1) Constitution of U.S.A. Art.1. s.3
(2) Amendment XVII. 1913.

and not deliberative vote.

Both Houses together form the Legislature of the United States and are competent to legislate on all matters assigned to the Federal Union. ⁽¹⁾ All laws must receive the President's consent however, unless they are re-passed over his veto by a two-thirds ⁽²⁾ majority. The two Houses possess co-ordinate legislative powers except that all money bills must, in English fashion, originate in the House of the Representatives, although they may be amended, in contrast to Australian practice, by the Senate.

The House of the Representatives possesses the sole right of impeachment, but with this exception, its powers are purely legislative. The Senate however, derives its chief strength from its non-legislative functions.

Firstly, it alone may try impeachments. For impeachments are conducted on lines much resembling those followed in England. They are reserved chiefly for political offences, which are thus removed from the cognisance of the ordinary Courts. Most Senators moreover, have been lawyers and are therefore well acquainted with the principles of legal procedure. A two-thirds majority is necessary for condemnation, and the Senate can inflict no punishment. It can only declare the accused unfit for office, and leave him to be punished by the ordinary Courts for any indictable offence he has committed.

The Senate possesses no other judicial powers, it has no

(1) Constitution of U.S.A. Art.1. s.8

(2) See ante chap.11. p.81

appellate functions such as the House of Lords and the Bundesrat.

The Senate, as already described, shares the Executive power of the President in matters relating to treaties and appointments. In these functions it stands alone, a curious anomaly among Second Chambers. (1) Originally consisting of twenty-six members only, it was indeed intended to reproduce rather the features of a Governor's Council or English Privy Council which should restrain and advise the Executive rather than those of the House of Lords. It has been praised as the "Master-piece of Constitution Makers," as the one thoroughly successful institution which has been established since the tide of modern democracy began to flow. Partly from its Executive and judicial powers, (2) and partly from its permanent character and small size and in consequence greater corporate spirit, it possesses, compared with the House of Representatives, which is five times as large and is constantly changing, a strength and influence unknown to most Second Chambers. It derives no power moreover from an hereditary or official character; there is little difference of political or social complexion between the two Houses, and both rest upon election. The Convention which framed the Constitution had five aims in view in their creation of the Senate, and they have been all (3) more or less completely realised. It stands for the State interests and conciliates them by equal representation, it is a

(1) Cf. Marriott. Second Chambers. (2) U.S.A. Senate has ninety-six members, the House of Lords 620, and the French Senate 300 and (3) See Federalist. LXI.- LXV. (the Bundesrat. 61

Council qualified by size and experience to check and advise the President in the exercise of his executive functions, and it prevents an abuse of his power by impeachment; it restrains the popular House, and it provides an element of stability in the Government.

"The English Constitution is framed upon the principle of choosing a single sovereign and making it good, the American upon the principle of having many and hoping that their multitude may atone for their inferiority"⁽¹⁾. Lord Bryce expresses the same sentiment when he says that the Government of the "United States is based upon the philosophy of Montesquien and the theology of Calvin"⁽²⁾ - the theory of the separation of powers combined with the doctrine of original sin. In imitation of what was falsely considered the secret of English freedom, the three branches of Federal Government - the Judiciary, the Legislature and the Executive - were made as independent as possible of each other. The Judges were to hold office for life, and Congress and the President to be chosen separately by the people. Each however has received power sufficient to enable him to restrain the inherent tendencies to abuse of the other two. Federal Law determines the organisation of the Courts the President together with the Senate appoints the Judges and political cases are removed from their sphere and conferred on the Senate. Each House of the Legislature is restricted by the other and both are restrained by the President's

(1). Bagehot. The English Constitution P.296.

(2). Bryce. American Commonwealth.

power of veto. The Presidential Executive is limited by the participation of the Second House of the Legislature, and lastly the Federation and the States on a large scale exercise a mutual check upon each other. The whole system is a collection of checks and balances.

The Constitution of the United States is sometimes spoken of as if it were a "pudding made to a recipe" and independent of all American experience. Both in its Federal nature and in its more detailed provisions it is, on the contrary the issue of a real growth as much as the English Government. The men who framed the Constitution were undoubtedly influenced by English Institutions,⁽¹⁾ and English Common Law, and in such features as the position of the Courts, and the financial privileges of the "Lower House" the American Constitution closely resembles that of the Mother Country. Nevertheless it was based on Colonial rather than on English experience, and it was constructed rather on the model of the States than of England. The President is an enlarged Governor, the features of the Legislature are reproduced from the bi-cameral Legislatures of many of the States, and adapted to a Federation. The Constitution itself is an extension of a State Charter. The work of the convention was one of selection rather than of creation, and "its success is not of invention, but the success of judgment, selective wisdom and practical sagacity."

(1). Especially by Commentaries such as Blackstone.

ENTRANCE OF STATES INTO THE UNIONA. Original Thirteen States formed United States 1789

1. Virginia.....(1607)
2. Massachusetts.....(1620)
3. New Hampshire.....(1623)
4. Maryland.....(1632)
5. Connecticut.....(1633)
6. Rhode Island.....(1636)
7. North Carolina.....(1663)
8. New York.....(1664)
9. New Jersey.....(1664)
10. Delaware.....(1664)
11. South Carolina.....(1670)
12. Pennsylvania.....(1681)
13. Georgia.....(1733)

B. New States Admitted Subsequently to Union.

14. Vermont...admitted to Union 1791
15. Kentucky.....1792
16. Tennessee.....1796
17. Ohio.....1802
18. Louisiana.....1812
19. Indiana.....1816
20. Mississippi.....1817
21. Illinois.....1818
22. Alabama.....1819
23. Maine.(originally part of)..1820
(Massachusetts)
24. Missouri.....1821
25. Arkansas.....1836
26. Michigan.....1837
27. Florida.....1845
28. Texas.....1845
29. Iowa.....1845
30. Wisconsin.....1848
31. California.....1850
32. Minnesota.....1858
33. Oregon.....1859
34. Kansas.....1861
35. West Virginia.....1863
36. Nevada.....1863

B. New States Admitted to Union (continued)

37.	Nebraska...	admitted to Union.	1867
38.	Colorado.....		1876
39.	Washington.....		1889
40.	North Dakota.....		1889
42.	Montana.....		1889
43.	Idaho.....		1890
44.	Wyoming.....		1890
45.	Utah.....		1896
46.	Oklahoma.....		1907
47.	New Mexico.....		1911
48.	Arizona.....		1912

The history of the United States of America illustrates the process of the formation and development of a regular Federal State. The history of Switzerland is marked by a no less certain growth in Federation. America, by its size and population, its commercial and international importance, in its connection with England and British Colonial policy, possesses many claims to prominence in the civilized world over the little Swiss commonwealth in the heart of western Europe, but it was given the first place in a study of Federation chiefly because it presents the earliest and closest approximation to the modern Federal ideal. The American Colonies, inhabited by a people who have long boasted of their political genius, and separated by an interval of distance and time from most of the entanglements of European politics, attained rapidly to the maturity of modern Federalism. The Swiss Federation is nearly five centuries older, but it remained so much the longer in a rudimentary condition and did not become a real Federal State until fifty years after the formation of the United States. Its situation in the central watershed whence flow rivers of Germany, France, Italy and Austria necessitated an intimate connection with the history of Europe, and exposed it to a series of influences which have never directly affected America. Modern Switzerland has succeeded to a vast historical heritage which has moulded its present form, and consequently modified its practical application of the Federal

principle. In their histories must be sought the explanation of the differences between American and Swiss Federation. For not only do the States of Switzerland possess records of an intense local history resembling in some cases that of the Italian or ancient Greek City States, but they have participated also in most of the wider experiences of Europe, from the Roman domination of the first century to the French of the Napoleonic era. The birth and separation of modern nationalities which issued out of the conflict between Roman and Teutonic civilizations, had consequences for Switzerland, in view of its situation on the line of division, as vital as for any other European State. It was incorporated in the Empire of Charles the Great and in the revived and more German Empire of Otto 1. In the twelfth and thirteenth centuries some of its states took an active part in the struggles of Pope and Emperor, on the side of the latter; in the fifteenth the Confederation aided Louis XI in the destruction of the middle Burgundian Kingdom of Charles the Bold, and in the sixteenth they shared in the victories and defeat of Francis 1 in Italy. Although Luther repudiated the doctrines of Zwingli, the religious movement which the latter reformer inspired in Switzerland is only an important expression of the wider European movement of the Reformation. The influence of the Counter-Reformation was equally active in the formation of the Borromean League and in the alliance of the Roman Catholic Cantons with Spain. Switzerland

(1) Von Ranke. History of the Popes. Vol. 1. p.510

like Europe had its religious wars, ending in a settlement essentially similar to that of the Peace of Augsburg; it had its aristocracies and peasant risings.

After the defeat of the Swiss armies at Marignano in 1515 and more especially after the confirmation of Swiss independence in 1648, the Confederation began to withdraw from active participation in European conflicts and to adopt that policy of neutrality which it has since more or less pursued. In its persistence in this course it plays a rôle in modern Europe for which it is by its geographical situation eminently fitted, and, to a limited extent, may be considered, to inherit the position of that middle Kingdom of Burgundy the eastern portion of which it now includes within its territory. Nevertheless although the Confederation from this time began to prefer officially an attitude of neutral independence, its soldiers, who had won renown for their military prowess, were hired as mercenaries by foreign countries right into the nineteenth century.⁽²⁾ It was the Swiss Guards of the Tulleries who were massacred by the French mob in 1789. Moreover, even the official neutrality was strongly modified by the acceptance in the eighteenth century of what was almost a French suzerainty. A small but significant expression of this dominance is contained in

(1). See Freeman. Historical Geography Vol. 1.

(2). Prohibited by the Constitution of 1848 .

the substitution of the French word "canton" for the German word "Ort" hitherto applied to a Confederate state. This French influence may be said to culminate in the democratic risings in 1798 and in the formation of the Helvetic Republic. With the rest of Europe, Switzerland felt the will of Napoleon and shared in the reconstruction of Europe on his fall. The events of 1830 and 1848 in France found an echo in Switzerland as in other countries, but from this time Switzerland confirmed still more strictly her neutrality, which was now guaranteed by the Powers, and withdrew herself to a still greater seclusion. Thus Switzerland has the appearance in many ways of a Europe in miniature, for most of the greater European upheavals have left a deposit in Switzerland.

The Swiss Cantons have attained Federal unity by a slow and somewhat fortuitous process during prolonged historical association. There is no such thing as a Swiss nation⁽¹⁾ in any but the political sense, and in that only from the fourteenth century. The cities and rural communities of which it is composed were until the end of the thirteenth century separate bodies, connected with each other in no other way than by a common allegiance to the Emperor. For, together with Germany and the greater part of Italy, the states of Switzerland all formed part of the Holy Roman Empire, and most of them were included within the administrative district of the Lesser Duchy of Burgundy⁽²⁾

(1). The Swiss do not in any way represent the tribe of the Helvetii of Caesar's time.

(2). See Map. Appendix 11.

Cities such as Zürich and Basle won, in common with many other cities in the Empire, the privilege of "Reichsfreiheit" or direct dependency on the Empire and, especially after the extinction of the Burgundian Ducal House of Zähringen, the same favour was extended by imperial grant to rural communities such as Schwyz and, in a modified form to Uri. Many parts, however, such as Unterwalden, Lucerne, Aargau, still retained the double feudal relation of an indirect dependence on the Emperor and an immediate subordination to a local ecclesiastical or temporal lord. The significance of the connection of the Swiss Cantons with the Empire lies in the fact that the cause and object of the formation of the League was the endeavor to preserve or obtain this privilege of Reichsfreiheit or immediate dependence on the Emperor,⁽¹⁾ against the aggressions of local counts, particularly of the Count of Habsburg. Somewhat in the manner of Prussia in later times, the House of Habsburg aimed at connecting up, by the conquest or purchase of intervening territories, its original possessions at the junction of the Aar and the Reuss with those in the Tyrol, more recently acquired with the Dukedom of Austria. It was to the frustration of this purpose that the first permanent League of the Three Forest Cantons was formed in 1291. In consequence, many wars were waged with Austria

(1). This is the real object and attainment of their League, but the alliance of the Three Forest Cantons in 1291 seems to be little more than a mere League for self-protection "propter maliciam temporis" - see Text of alliance 1291.

(1)

during the fourteenth and fifteenth centuries but by the middle of the latter century the confederates, who had in the meantime been joined by other states, may be said to have attained the position of immediate dependence on the Empire, to the exclusion of all claims of Austria. The Dukes of Austria had, however, often worn the Imperial Crown and the connection had the double effect of causing rival candidates to the Empire to encourage the growth of Swiss independence, and also of weakening the prestige of the Imperial name in the eyes of the Confederates themselves. Moreover with the actual decline of the Imperial Power a position of immediate dependence meant practical exemption from all authority whatever. When therefore in 1499 the Emperor Maximilian in accordance with his legal right imposed a tax upon the Confederates in common with the rest of the Empire, the Swiss asserted claims to complete independence and successfully resisted him. The confirmation of the independence and sovereignty of the Confederation in 1648 was therefore merely the public recognition of a fact already accomplished for more than a hundred years. Like the Netherlands at the other end of Germany, though in a different manner, the Swiss Confederates had gradually broken away from an original dependence on, and connection with, the Empire.

The Confederation however has reached its present form and numbers only by a very gradual and slow development, or

(1). See Chronological Table. Appendix 1 B.

rather by a long series of developments stretching over five centuries.⁽¹⁾ In its earliest condition it was merely a League of the three Forest Communities of peasants on the borders of Lake Lucerne. These "Urkantone", the original cantons have formed the soul of the Confederacy and it is to them and around them that later members have adhered, and the significance of their position has been recognised in the adoption of the name and colours of one of them - Schwyz - by the whole Confederation.⁽²⁾ The three Forest Cantons remained alone for forty years however, until in 1332 Lucerne joined them. Twenty years after the important city of Zürich and within the next two years three other States were added to them. For one hundred and thirty years no new members were admitted to the League, and then their number rose rapidly to thirteen during the next twenty years. This number of full members was preserved without alteration for over two hundred and eighty years down to the Revolution of 1798, and the Confederation expanded only by means of alliances and conquests. These allied (Zugewandte Orte) and subject states were united with thirteen governing states in the Helvetic Republic and on its dissolution were formed, in 1803 into six,

(1). See Table, Appendix 1A.

(2). Not officially however until nineteenth century, in practice from middle of fifteenth century. Until this time the name "Confederates" "Eidgenossen" whence 'Huguenots' oath-bound was in common use.

and in 1814 into nine, sovereign Cantons equal in position to the original thirteen. It is these Cantons which constitute the Romance elements of the present Federal State. All the governing members of the Confederation were Germanic, and its first connection with Romance lands was in the way of conquest or protection. There were no sovereign States other than German until the Act of Mediation.

The Confederation moreover was only one of many similar leagues which were formed in Italy and in Germany during the chaotic times of the decline of the Imperial power. The success of the Confederates against Austria at Morgarten in 1315 or at Sempach in 1386 has points of resemblance to that of the Italian Republics against Frederick Barbarossa at Legnano in 1171. The Swiss Confederation or as it was called the Old League of High Germany had connections with Mülhausen, Rothweil and other towns of the Swabian League. The League of 1291 itself which is usually considered as the origin of the Confederation was only the renewal of former Leagues which had lapsed. Unlike the League of Hansa Towns, the Old High German League did not depend on trade for its existence and was not therefore affected by the opening of new trade routes. Unlike other leagues too, it consisted of rural and civic communities and it had the additional great advantages of a continuous territory and mountain defences. The Swiss Confederation however was not without civil wars, such as the one between Zürich and Schwyz in 1460 or the religious wars of the sixteenth

and seventeenth centuries, though they did not permanently destroy the Confederation.

Nevertheless the preservation of Swiss unity for so long a period is extraordinary in the light of the failures of similar Leagues, for, down to 1798, the Confederation was only a very loose assembly of sovereign States. Its very looseness seems to have been its salvation. The members were not all of one kind, there were aristocratic cities like Zürich and Berne and rural democracies like Schwyz, and though all the members were allied to the Forest Cantons, they were not, until quite late in the history of the Confederation, all allied to each other. They occupied different positions even within the League itself. There was no uniform basis of membership to which all members had to subscribe; the terms of admittance were very different for powerful cities like Zürich and small rural cantons such as Glarus. The only law of the Confederation consisted of the separate treaties which the members made with each other and the common charters and conventions which from time to time some or all of them drew up together. They did not even all participate in the common undertakings of the Confederacy, and two or three frequently carried on war in the name of the Confederation. Moreover the so-called common domains were not common to the whole Confederation but were held in subjection sometimes only by two or three members.⁽¹⁾

The only Federal machinery was a Diet which represented

(1). See Table. Appendix 1.

the members and was held once a year at Basle and on other occasions in other places. It conducted the rudimentary judicial procedure of the Confederation, by means of its power of Federal intervention or mediation in disputes between the Cantons. It received the reports of the bailiffs of the common domains and possessed a wide sphere of legislative activity. It directed foreign affairs, dispatched embassies and concluded treaties, though its power was limited by the right which some of the more powerful members retained of forming separate alliances. It appointed frontier forces and defences, and after the system of the 'Defensionale'⁽¹⁾ had been adopted it assessed the quota of troops which each canton should contribute. It regulated trade and had regard to ~~trade and~~ public health and morals. It passed resolutions against vagrants, beggars, thieves and tinkers, as well as concerning the isolation of persons suffering from infectious diseases and the stoppage of traffic during prevalent epidemics; it prohibited swearing and indecent clothing; it issued orders for the repairs of the main roads of the Confederation, and its consent was necessary for the raising of all tolls or the introduction of new ones, and it frequently made arrangements on matters of coinage. Even religious questions were sometimes dealt with by the Federal Diet.⁽²⁾

In spite of its wide power of passing resolutions it had little authority. The delegates could only act according to their instructions and failing these, they were unable to conclude any definite business, but were compelled to refer all resolutions

{1). In practice the system failed: (2) Cf. Amtliche Abscheide.

back to their respective states for acceptance. Moreover the resolutions which were passed were carried out or not by the States according to their individual inclinations. Decrees were issued such as the one in 1515 declaring that the minority should be bound by the decisions of the majority, but they remained unexecuted. For the Swiss Central Diet shared the common weakness of most rudimentary Confederations,- there was no executive machinery. It had no power whatever of enforcing its enactments, no officers, no judiciary and no federal army; there was no public treasury or national mint, merely a central intermittent assembly of powerless delegates who passed resolutions which they were unable to make binding upon the Cantons.

The Confederation continued in this form with temporary ruptures down to 1798. In that year the subject states who had revolted under the influence of French Democracy were liberated and added to the existing Confederated States. The whole was formed into One Single and Indivisible Helvetic Republic, with a two-chambered legislature and a Directory of five. The Cantons were deprived of their separate independence and formed into administrative departments of the Republic, and governed by prefects appointed by the Directory. It was the first time that the Confederation had possessed real unity and state machinery, but they were opposed to its inherent centrifugal forces and were moreover associated with the arms and plunder of a foreign conqueror. They were resisted by all but the

liberated States, until in 1803 Napoleon himself intervened and established a compromise by the 'Act of Mediation'. The subject states were formed into six new Cantons, and certain French democratic principles were proclaimed, but the old Cantonal sovereignty and the old Federal Diet in a modified form and with greater powers, were restored, and the Cantons themselves reverted to such aristocratic features of former times as guilds and patricians. In 1815 on the fall of Napoleon the Confederation by the 'Federal Pact' restored still further pre-revolutionary conditions, and the neutrality of the Confederation was guaranteed by the powers on condition of maintenance of cantonal sovereignty. Nevertheless the emancipation of the subject states was confirmed and the memory and experience of union and of effective governmental machinery remained.

For over thirty years the Federal Pact formed the sole Federal connection of the Cantons. This connection was shaken in 1830 by internal democratic risings in the Cantons and finally dissolved by the war of the Sonderbund in 1847. The success of the party of union however secured the establishment in 1848 of the first native Federal State. The movement was opportune for neighbouring countries were engaged in suppressing internal disturbances. Even in this form the Federation was far from realising a mature Federalism such as that of the United States. Nevertheless the central Federal authority constituted a real state with a legislature and executive, and

the important revision of 1874 and subsequent amendments have proceeded much further along the line of closer Federal Union. The unification and consolidation of Italy and Germany have presented more forcibly to Switzerland her disunion and weakness and have prompted her to entrust more and more power to the Federal Authority, until at the present day she affords an interesting variation of a well-developed, centralized, Federal State.

The history of Switzerland, though differing fundamentally in many respects from that of the United States of America resembles it in the fact that both countries passed through a preparatory period of Confederation. A further resemblance may be traced in the civil wars which preceded the formation of closer union in the one and the establishment of the principle of permanent unity in the other. Religion in the war of the Sonderbund played a constitutional part essentially similar to that played by slavery in the war in America between the North and South. And in her present Constitution Switzerland was consciously influenced by the example of the United States. The two Federations differ however according to their different circumstances. Switzerland, like Greece, possesses natural features which divide her territory into many valleys and cause her population to be separated into small and isolated communities, more especially before the introduction of modern means of locomotion. No

physical factor suggests unity; Schaffhausen lies north of the Rhine, Ticino is situated south of the Alps. The greater part of her inhabitants are German in race and speech, but there is a large French minority;⁽¹⁾ one Canton is wholly Italian, and within the valleys of the Grisons are to be found the last remains of the Romansch race and speech. Federal official documents are published in Italian, French, and German, and the last two⁽²⁾ languages are officially spoken in the Federal Assembly. Unity is still further hindered by religious divisions, which do not, however coincide with racial differences. All these elements of disunion make Switzerland more suited to a Federal than a Unitary Government but they create difficulties which America almost entirely escaped.

The Swiss Federal State consists of twenty two sovereign cantons. Of these three have separated into two half-cantons, thus making twenty five divisions in all. In Cantonal votes on amendments to the Constitution however, a half-canton possesses only half a vote, and it is represented by only one member in the

(1). Incidents during the present war have revealed the existence of a wide divergence of view between the two races. Both sections are however united by a common desire to preserve their neutrality and independence, though the French and German Swiss each fear its violation by Germany and France respectively.

(2). It is presumed that Italian members understand one or the other.

(1)

Council of States. The object of their union is declared to be the insurance of the independence of the country against foreign nations, the maintenance of internal tranquillity and order, the protection of the liberty and rights of the members and the promotion of their common welfare. Their purpose is reminiscent of the preamble to the Constitution of the United States. Like the States of the large American Federation the Cantons of Switzerland have retained the principle of sovereignty and independence except when it is expressly surrendered to the Federal Government. (2) "The Cantons are sovereign, so far as their sovereignty is not restricted by the Federal Constitution, and as such they may exercise all rights which are not delegated to the Federal Power". They are prohibited from forming alliances or treaties of a political character either with each other or with foreign countries. (3) An interesting survival of the old times of Confederation however, is expressed in the exception to this rule, which still permits the Cantons to make agreements with one another on subjects pertaining to legislation, justice and administration, and in exceptional cases to enter into treaties with foreign countries concerning matters of public economy, of vicinage and of police. (4) Such treaties however must not contain anything contrary to the

(1). Preamble and Art. 2. Constitution of 1874.

(2). Art. 3

(3). Art. 7

(4). Arts. 7 & 9.

Union or the rights of the Cantons and must be submitted to the Federal authority which may assist their execution or forbid it if these rights are violated. No Canton may maintain more than three hundred permanent troops without the permission of the Federal Government nor may it arm in case of a dispute with another Canton. All Cantons are required to extend the legislative and judicial rights of their own citizens to citizens of other Cantons, mutually to respect and enforce validity of each other's civil judgments and to render mutual aid in case of attack in accordance with Federal directions. No Canton may expel a Cantonal citizen from its territory or deprive him of citizenship. All internal taxes on property leaving one Canton for another and all rights of first purchase of citizens of one Canton against those of another are also abolished. Finally the Cantons must submit all disputes to the Federal authority and obtain from it a guarantee of their constitutions.

In certain matters, the rights of individuals are guaranteed by the Constitution and certain prohibitions are placed on both Cantonal and Federal authorities. A common citizenship is declared and the equality of all Swiss before the law. "In Switzerland there shall be no subjects, nor any

(1) Arts. 13 & 14.

(2) Arts. 60 & 61.

(3) Art. 44.

(4) Art. 62.

(5) Arts. 6 & 14.

(1)
privileges of place, birth, family or person." This clause is directly copied from the Act of Mediation and is a significant tribute to the influence of the French Revolution. Every Swiss citizen who enjoys all the rights and privileges of Cantonal citizenship shall be capable of voting at Federal Elections but he may not exercise these rights in more than one Canton, and each Canton may determine certain regulations as to length of settlement and property rights. (2)
Freedom of faith and conscience is declared inviolable; no citizen shall be deprived of civil rights in respect of his creed or forced to pay taxes for the support of a religious society of which he disapproved. But religious^{views}/shall not absolve him from the performance of civil duties. (3)
The free exercise of religion is permitted within the limits of morality and public order with the exception that the Society of Jesuits and any other allied society are absolutely prohibited within Swiss territory. The establishment of new or the restoration of old monasteries is likewise forbidden and no bishopric may be founded without Federal approval. (4)
Marriages between members of different churches are declared valid and legal. (5)
Freedom of the press is guaranteed, though the Cantons are permitted, with the approval of the Federal authority to provide against its abuse. (6)
Exceptional Courts and ecclesiastical

(1). Art. 4

(2). Art. 43

(3). Art. 49

(4). Arts. 50, 51, & 52

(5). Art. 54

(6). Art. 55

jurisdiction are abolished, and no citizen shall be deprived of his "Constitutional judge".⁽¹⁾ The right of citizens to petition and to form associations is recognised and free emigration to foreign states is allowed as far as it is reciprocal.⁽²⁾ Imprisonment for debt, corporal punishments and sentences of death for political offences are abolished.⁽³⁾ Finally, military capitulations or agreements to furnish soldiers to foreign countries are absolutely forbidden to both Cantonal and Federal governments, and the establishments of gaming houses is likewise prohibited throughout the Confederation.⁽⁴⁾

⁽⁵⁾
The powers of the Cantons are however further restricted and in the most important respect by the powers which they have surrendered and delegated to the common Federal Government. The union has the sole power to declare war and to conclude peace, to enter into alliances, especially customs and commercial treaties- with the exception already mentioned- and to conduct relations with foreign countries, It alone may legislate on the military defences of the Union and the disposition and organisation of the army. It is forbidden however to maintain a standing army. The army of Switzerland consists of the small permanent contingents of the Cantons and of a citizen militia, for all Swiss citizens are subject to military service. To the Federal Government is given

(1). Art. 58

(2). Arts. 57, 56 & 62

(3). Arts. 59 & 65

(4). Arts. 11 & 35

(5). See Arts. 19, 20; 8, 10, 28-32, 36, 38-40, 64.

exclusive power to coin money, issue bank notes, regulate weights and measures and control postal and telegraphic services.

Customs and duties are assigned to the Federal government subject to certain general principles of inter-Cantonal free trade, the protection of home manufactures and low taxation of imported necessities and raw material. It has supreme control of affairs involving the extradition of criminals either from the Confederation or from each Canton, copyrights, bankruptcy and patents including the whole range of commercial law, and it is given a monopoly of the manufacture and sale of war powder and spiritous liquors,⁽¹⁾

though the sale of absinthe is now forbidden throughout the Confederation.⁽²⁾ With the exception of the monopoly of the

gunpowder and spirits similar powers are possessed by the Federal governments of the United States, but the Swiss Federal authority exercises many additional powers. It may legislate on the construction and management of railways; it may pass uniform laws concerning marriage, civil capacity, "heimatlosat" or loss of domicile, and the forfeiture of political rights; concerning the employment of children in factories, hours of work for adults, the protection of employees in dangerous occupations; concerning serious epidemics and epizootics and wide-spread diseases such as tuberculosis.⁽³⁾ It may also adopt regulations as to the game laws.⁽⁴⁾

It may create a Federal University or establish or assist other educational institutions or undertake other public works at the

(1). Art. 41 and Amendment of Art. 32 Oct. 25th 1885.

(2). Amendment 1908. (3). Arts. 34, 64, 54, 26, & 69

(4). Art. 25

expense of the Confederation, and for this purpose it may exercise the right of expropriation on payment of compensation. It supervises the provision of education by the Cantons and may take measures against those Cantons which do not satisfactorily conform to its regulations and it shall provide means for the granting of certificates for the exercise of the liberal professions, which shall be valid throughout the Confederation. (1) Finally the Federal authority is given a general supreme supervision over the water and forest police measures in the mountains, over the roads and bridges in whose maintenance the Union may have an interest, and over the business of emigration agents, insurance companies and lotteries. It is empowered generally to look after the internal and external welfare, safety and prosperity of the Federation, and the preservation of the rights of its citizens. (2)

The Swiss Constitution, like that of the United States assigns to the Federal Government enumerated powers, and leaves to the Cantons the unenumerated indefinite authority. The actual division differs very much however in the two countries. The American Constitution lays down certain general principles, and assigns certain broad spheres of activity to the Federal authority, leaving much to later Federal legislation. The Swiss constitution encroaches on the domain of legislation, and contains a number of miscellaneous provisions which are rather

(1). Arts. 23 & 27.

(2). Arts. 34, 35, 24, 37, 16 & Passim.

within the legislative than the constituent realm. The Federal Government is given duties and powers on matters of special interest which would only be possible in a Federation as small as Switzerland. Federal sovereignty makes itself felt in numerous matters throughout the Confederation, such as foreign relations, the army, public works, weights and measures, means of communication and locomotion, customs, public instruction and social and factory legislation. In fulfilment of its powers or in accordance with authority subsequently conferred by amendments, the Federal Government has established a national Bank and passed a Federal Insurance Bill in 1908 which practically converts insurance against accidents into a Federal monopoly.⁽¹⁾ It has received additional powers to pass laws relating to trades and professions and the utilisation of hydraulic powers.⁽²⁾ Although no Federal University has yet been created, it controls entirely the Polytechnic School at Zürich and subsidises institutions of higher education in the Cantons, and in accordance with its powers to legislate concerning railways, it has nationalised most of the railway communications in Switzerland.⁽³⁾ Moreover the Constitution requires that all Cantons shall submit their Cantonal Constitutions and in practice each amendment to the Federal Government, which is bound to guarantee them if they contain nothing contrary to the te-the-provisions of the Federal

(1). Annual Register 1908.

(2). Amendments 1908

(3). Small mountain and local lines still remain in private hands.

Constitution, if they provide for the exercise of political rights according to Republican - either democratic or representative-forms, and if they have been accepted by the people and can be revised whenever an absolute majority of the citizens demand it.⁽¹⁾ The Union moreover guarantees to the Cantons their territory, their sovereignty within the limits defined in the Constitution, the constitutional rights of the citizens and the rights and privileges⁽²⁾ which the people may have conferred upon their public authorities. The maintenance of this guarantee has given the Federal authorities certain powers of interference which have even been exercised in⁽³⁾ favour of individuals against the Cantons themselves. It possesses greater powers by virtue of article sixteen of the Constitution. In case of internal disorder in a Canton the Federation is bound to come to its aid on appeal but if the Cantonal authority is unable to ask help, the Federal authority may interfere on its own initiative and if the safety of Switzerland be endangered it shall be its duty to do so. In this case and in case of any foreign attack Federal troops shall have free passage through Cantonal territory. In this the Federation possesses a power which may be an opportunity for great interference on the part of⁽⁴⁾ the Federal Authority and a source of annoyance to the Cantons. The activity of the Federal Council during the present war indicates

(1). Art. 6

(2). Art. 5

(3). See Lowell 11. p.186

(4). e.g. The threatened arrival of German troops to suppress strikes in French Switzerland has recently aroused considerable resentment.

both the extensiveness and the elasticity of the Federal Power. It commanded the mobilisation of the forces, prohibited dispensable commodities and established an Import Trust to regulate the supply of imports and exports from and to the belligerent countries; it regulated the deficiencies of grain and created almost a Federal wheat monopoly. In accordance with an order which came into force in July 1915, it has received power over individuals who violate Swiss official neutrality; it has established a censorship of the press, and taken measures to repress espionage. It has regulated the relation of debtors and creditors by enabling payments to be deferred in order to avert a financial crisis. To lessen unemployment it has made arrangements with workmen and employers whose trades were affected by the situation. It had specially to supplement the stock of silver coin, and to issue notes and Treasury Bonds of five, ten, twenty, twenty-five and forty francs. It has created a loan Bank and contracted two Federal loans of twenty-five and forty million francs respectively. Lastly, to meet the cost of mobilisation it has for the first time imposed a war tax on all fortunes over ten thousand francs and incomes over two thousand five hundred francs. (1) (2) Indeed during the present war the Federal Government has received an increase of powers which makes its authority felt still further throughout the Confederation.

Although the Federal Government possesses wide legislative

(1). See Annual Register 1914 p. 376 & 1915 p. 267.

(2). Annual Register 1915 p. 267.

and supervising powers, the greater part of the government of each Canton is in the hands of Cantonal authorities who possess also vast discretionary powers even in such matters as education and religion which are placed under the general control of the Federation. Primary instruction is obligatory and gratuitous and independent of religious creed, but the nature and extent of the curriculum, the salaries of teachers and the general organisation of elementary and higher education belongs to the Cantons, who receive a grant from the Confederation only in respect of institutions of higher learning. Similarly there is no Federal State Church and violation of freedom of conscience is punishable by the Confederation, but any Canton may interfere with the services of worshippers whose proceedings endanger public order, and may establish any Cantonal religion. In fact, Geneva alone, and only from 1907, has no Cantonal Established Church. Some Cantons have one, some two and Neuchâtel has even three established religions, Protestantism, Roman and what is called, Christian
(1)
Catholicism.

Moreover the Cantons possess great power from the fact that to them is entrusted the execution of Federal laws. For though the Swiss Federal Government has been entrusted with wider legislative powers than Congress, it possesses much smaller executive authority. The United States has been given executive powers to carry out its legislative decrees which it therefore

(1). The Christian Catholics resemble the old Catholics of Germany.

executes by means of its own officers. It taxes him through its own officers and judges him through its own courts and magistrates. The states and the Federation work independently in different spheres, but both have the power of coming into direct relations with the individual citizen. The Swiss Federation however is marked by greater legislative centralisation and greater administrative decentralisation. The Federal Government has few officers of its own but employs Cantonal authorities to execute its decrees. Foreign affairs, postal and telegraphic services, the administration of the Polytechnic School, Federal arsenals, and the powder and spirits monopoly are conducted by Federal officers but apart from these the Federal Government has scarcely any direct Executive functions^{but} acts by way of inspection and supervision. The Federal legislature passes the necessary measures but cantonal⁽¹⁾ authorities carry out most of them.

The army itself is not entirely under Federal Control. The American Federation is distinguished by its small standing army, the Swiss Federation has no standing army at all. The only permanent troops are the three hundred which each Canton is allowed to maintain. In time of war, of course, these troops and the citizen militia and all military resources are placed under the exclusive control of the Federal Government, and in time of peace all laws affecting military organisation, the disposal,

(1). See Lowell Governments and Parties in Europe; Vol 11. 185
Adams & Cunningham. The Swiss Confederation. Chapter 11.
See also Constitution. Art. 64

equipment and arming of the troops emanate from the Federal
(1)
legislature. This body appoints too the general staff and the
Commander in chief, but officers beneath the rank of Captain are
still appointed by Cantonal authorities subject to general
Federal regulations as to qualifications and training. The Union
regulates the composition of the army as far as possible on the
territorial system, its training and arming, but the actual
raising of the units and the maintenance of their numbers are in
the hands of the Cantons. These too provide the clothing, uniform
and subsistence of the troops for which they are subsequently
(2)
reimbursed by the Federation which also compensates families who
have lost members in Federal wars. It is said that the coat of a
soldier belongs to his Canton and his rifle to the Federation.
The Cantons also take the necessary steps to prevent the evasion
of military service and collect the fine for exemption, half of
(3)
which goes to the Federal and half to the Cantonal Exchequer.

Until very recently the Federation had no power of direct
taxation. In June 1915 this power was conferred upon it and
accepted by the people by a majority of over four hundred thousand
(4)
a majority hitherto unknown in Federal voted. Part of this tax
was paid back to the Cantons in proportion to the amount raised
(5)
within their respective areas. Until this year the only direct tax

(1). See Constitution Arts. 18-22 and Military Law of 1907.
Lowell 11. p. 185.

(2). Adams and Cunningham. Chap. XI.

(3) Ibid.

(4). Annual Register 1915. p. 267.

(5). See Gazette de Lausanne-Canton Vaudois 2 Mars 1917.

which the Confederation may be said to have levied was the fine which it substitutes for military service and even this is collected by the Cantonal authorities. (1) The Confederation levies no stamp duties. (2) Federal revenues are in fact derived from customs duties, national property, posts and telegraphs, (3) railways, half the exemption fines and powder monopolies. The entire net proceeds of the alcohol monopoly are divided among the Cantons on condition that one-tenth of their receipts is spent in combatting the causes and effects of alcoholism. This is interpreted broadly and the money is used by the Cantons for various kinds of charitable institutions. If the income of the Federal Government is not sufficient, contributions may be levied upon the Cantons in proportion to their taxable capacity. (4)

The decisions of the Federal Courts depend also upon the Cantons for their execution. The Federal Tribunal, unlike the supreme Court of the United States, does not possess its own magistrates, and system of inferior Courts, but depends upon the Federal Council which employs Cantonal machinery for the enforcement of its judgments. (5)

The Swiss Federation does not even possess a district such as the district of Columbia or a capital such as Washington over which it has exclusive and absolute control. The Federal

(1). Adams and Cunningham. Chap. 2. (Year Book
(2). For statement of Federal accounts see Switzerland. Statesman's
(3). Receipts from posts and railways are rapidly increasing every
year. (4). Art. 42 Amendment 1885.
(5). See Lowell 11. 185. A. E. C. V & X. Winchester Swiss Republic
P. 114.

Capital after many wanderings was finally fixed at Berne, and this difference between the position of the capitals of the two countries is a curious and significant indication of greater differences. The American Capital is independent of any State and under the direct administration of the Federal authorities. The Swiss Federal headquarters are established in the chief seats of prominent Cantons, for the Assembly and Council are located at Berne, while the sessions of the Tribunal are held at Lausanne in French Switzerland. With a similar purpose of conciliating powerful interests, the branches of the German Federal Government are at Berlin and Leipzig respectively but the Federal Government at Berne is not connected with the Canton in the same way as the Prussian and German Governments are at Berlin.

Since the Federation possesses no executive power over the individual it may well be asked how the Federal decrees are enforced and what coercive machinery there exists for compelling a refractory Canton. The Federal Council has power to summon offenders before a special Federal jury convened 'ad hoc'. This

is a very expensive process and is avoided if possible by
(1)
submission. The Federal Government may further proceed to withhold
the subsidies due from the Federal Chest to a Canton for local
(2)
purposes, and ultimately it sends troops into the rebellious Canton, who "do not pillage, burn or kill, but are peaceably quartered there

(1). Adams. The Swiss Confederation chap.IV.

(2). Ibid.

at the expense of the Canton, and literally eat^{it} into submission. This is certainly a novel way of enforcing obedience to the law but with the frugal Swiss it is very effective⁽¹⁾ It is interesting from its resemblance to the German method of "Federal Execution" and is the only method yet devised of enforcing authority when the judicial power is imperfectly developed. In the case of Ticino⁽²⁾ in 1884 the mere threat of adopting this process was sufficient to inspire a prompt obedience but were a Canton to remain obdurate and to take steps forcibly to oppose the ingress of Federal troops, the ultimate issue must depend on the fortune of war. Owing to the peculiar circumstances of Switzerland however, peaceful means have hitherto been sufficient, and a method which in the United States could hardly be anything but a failure, has worked well. In the first place the Cantons are very small, not only absolutely but relatively they are much smaller than the States of America. An area of not much more than fifteen thousand square miles is divided among twenty-two Cantons, while only forty-eight States share the three million square miles of America. For this reason the presence of the Swiss Federation is felt much more even by the outermost States than that of the Federal Government of the United States. Moreover, Switzerland unlike America is surrounded by larger and more powerful States, and is less inclined to place herself at the mercy of these neighbours and sacrifice her neutral

(1). Lowell 11. p.197. see A & C. Chap IV.

(2). See A & C. Chap. IV.

position by Civil War. Thirdly no Canton is allowed to keep more than three-hundred permanent troops, though since the Confederation is also forbidden to maintain a standing army this absence of military forces pulls in two directions. Nevertheless the greater organisation is on the side of the Federation. The chances of resistance to the Federation are also decreased by the wide power of supervision possessed by the Federal Government. Moreover the Courts which do not stand in a position of equal independence of both Cantons and Federation, must accept every Federal law as valid though they may declare a Cantonal law invalid; Lastly an efficient guarantee is provided not only against Cantonal insubordination but against Federal aggression by the position and influence of the people, which is the ultimate sovereign of both Cantons and Federation and the supreme political judge of the actions of both authorities. The unhampered legitimate expression of their will and opinion secures the harmonious working together of Cantonal and Federal authorities both of which are the servants of this sovereign power.

The influence and manner of working of this sovereign power as well as its task of safeguarding, and as it were, of testing continually the machinery of Federation is illustrated by the process of amending the Constitution. The great difference between the American and Swiss Federation is not only in the more extensive and more particular legislative powers which are assigned to the Federal Government but also and chiefly in the relation of the Federal and Cantonal authorities. Both these differences

have been expressed in the power which had been assigned to the Federal Assembly to amend the Constitution, to alter the charter by which its very authority is determined. The American Constitution has been placed in a position of almost unchangeable supremacy and rigidity by the difficulties and restrictions which bar the way to its alteration. (1) The Swiss Constitution containing particular articles rather than general principles is not so worthy to be placed on a judicial pedestal and has been made more amenable to the ordinary legislative process. "The Federal Constitution may be revised at any time. Each revision shall take place by the ordinary method of Federal legislation" (2) In spite of this clause the method of ordinary legislation is not by itself sufficient to pass legal amendments to the Constitution but has been modified with a view to securing a more direct expression of the sovereign will i.e. of the people. Revisions may be initiated from two sources although the procedure is slightly different for total or partial revision. A total revision may be demanded by one House of the Legislature or by fifty thousand qualified voters. In either case a popular vote must be taken as to whether the Constitution shall be revised and if the result is in the affirmative both Houses shall be re-elected (3) to consider the revision of the Constitution. Since 1874 however no total revision of the Constitution has taken place and this power is much less likely to be used than that of procuring

(1). See Supra chap.11, p.89 (2). Arts 118 & 119. (3) Art.120

partial amendments. Until 1891 a partial revision could be proposed only by both Houses of the Legislature, but in that year an amendment to the Constitution extended the right to fifty thousand qualified voters. ⁽¹⁾ This is known as the popular initiative. The demand may be expressed in general terms or the amendment may be presented in the particular form in which it is desired to be incorporated in the Constitution. In the former case the Federal Chambers, if they approve the suggestion shall draw up a proposal in the sense indicated, which they shall submit to the people and the Cantons. If however they disapprove they shall refer the question of revision along the lines of the suggestion to the people, and on an affirmative vote shall proceed to a revision in accordance with the popular will. In the latter case, the Chambers must submit the particular proposal to the popular vote whether they approve or not; in case of their disapproval however they may also submit a contrary proposal to the people at the same time.

No revision however, whether partial or total, becomes legal without the approval of a majority of the voters of the whole Confederation, and of the majority of the Cantons, the vote of each Canton being determined by the popular vote. ⁽²⁾

This process of revision differs in many ways from that of the United States. It is more elaborate but much easier to put into practice and provides for a much more direct expression

(1). Art. 121 as amended July 5th 1891.

(2). Ibid.

of the popular will. As in the United States so in Switzerland the ultimate ratifying authority is one which is always dispensed with in the Legislation of Congress and may be in that of the Federal Assembly. As in the United States proposals may proceed from a source other than the Federal legislature. The difference of the second source illustrates a fundamental divergence in the whole question between the two Federations. In the United States it consists of the legislatures of two-thirds of the several States, in Switzerland it is fifty thousand voters. The same difference is expressed in the nature of the ratifying body which in America is the legislatures or Conventions of the States; in Switzerland the people independently of and as well as the Cantons give their vote, and the vote of the Canton itself is determined by the vote of its electors.

The Swiss process is also distinguished by much greater flexibility. In America a two-thirds vote of both Houses or two-thirds of the legislatures of the States, are required for proposals and three-fourths of the legislatures of the States are necessary for their ratification. In Switzerland one House alone by a simple majority, or not much more than one-eightieth of the population, may propose amendments and a simple majority of the population and the Cantons are sufficient to ratify them. The greater looseness and flexibility of the Swiss Constitution is illustrated by the more frequent use which has been made of the power of amendment. Since 1874 an amendment has been added to the Constitution on the average every other year. They have all been

in a centralising direction and with the exeption of laws of an absolute prohibitive character such as that forbidding the sale of absinthe, have all conferred extra powers on the Federal authority. Both the United States of America and Switzerland have been advancing towards the unification; Switzerland has proceeded by way of amending, America by stretching, the Constitution.

The process of amendment differs from the process of ordinary legislation in three ways, firstly in the power of one House alone to formulate a proposal which must be submitted to the people, secondly in the obligatory referendum to the people and ~~the~~ the Cantons and thirdly in the popular initiative. This last right of the people may be exercised in Federal matters only in Constitutional questions, partly no doubt to render the Constitution more sensitive to popular influence and partly also to some extent to limit this very influence by restricting it within the sphere of the Constitution. The result has been however to add to the Constitution clauses which are not constituent in character but are pure legislative proposals. In 1893 for example an amendment forbidding the slaughter of animals by bleeding was passed by means of the initiative and added to the Constitution; in reality it was a measure of persecution aimed at Jews. The initiative has been used recently with greater frequency than at first. ⁽¹⁾ Three times for example a demand for the adoption of proportional representation in the Federation has been

(1). 1909, 1910, 1924,, (and in 1917 but the issue is yet undecided)

unsuccessfully formulated by popular Initiative. In 1914 an Initiative proposing the prohibition of games of chance in the Casinos at tourist centres attained greater success. (1) In the preceding year the excitement aroused by the St. Gotthard Convention caused the formulation by popular Initiative of a proposal that in future all questions concerning the ratification of international treaties extending over a period of more than fifteen years should be subjected to the optional Referendum. (2)

(3) The Right of Initiative is closely allied to the Right of Petition; the only difference is that the first requires the compulsory submission of the proposal to a vote, the second depends for its decision on the will of the Chambers. The Right of Initiative supplements in a positive direction the power which is possessed by the people in the Referendum. This, as already stated, is in Constitutional questions obligatory and means that every amendment must be submitted to the people for their rejection or acceptance before it becomes law. It exists also however in ordinary Legislation in the optional or 'facultative' form. (4) On the demand of thirty thousand voters or of eight Cantons Federal laws and Federal decrees - if they are of a general nature and are not urgent - shall be submitted to the people for their approval or rejection. (5) On the whole laws thus submitted are more often rejected than approved, for the Referendum is not demanded unless strong opposition is expressed. The decision as to

(1). See Annual Register 1914 p.374. (2). Annual Register 1913 p.361
(3) or The growth of the right of the Eng. Parli to draft Bills from its right to petition. (4) Not yet employed. (5) Art.89 Const.

the urgency of decrees lies with the Federal Assembly and has sometimes been expressed arbitrarily. It is usually accepted that foreign affairs, the annual budget, questions of the conflict of authorities, or the approval of a Cantonal Constitution are removed from the exercise of the Referendum. It has also been extended to subventions voted for the construction of roads and (1) the dyking of streams, and in 1914 on the outbreak of war, legislation increasing the rates of telephonic communications to meet the deficit caused by the crisis, was formally declared urgent. In order to allow a demand for the Referendum to be made, laws and decrees which are not urgent do not go into effect until ninety days after they are passed by the Assembly.

Thus the Referendum is as it were the nation's 'veto' on the laws of the Federal Legislature. The people possess the same powers of arresting legislation as an English monarch at present in theory, and, in the time of Elizabeth in practice, actually exercised. It differs however from the 'right of veto' such as was established in St. Gall in 1831 in the fact that whereas by the latter a law can only be affected in a negative sense and that only when an absolute majority of all voters have voted against it, by the former a law may be either approved or rejected according to the simple majority of the votes actually cast. The nation assumes the position of another House of the

(1). See Lowell II. 253 Depoige-Referendum pp 95-98

(2). Annual Register 1914 p. 373.

Legislature and the two representative Chambers are reduced to that of deliberative council. In so far as their actions are referable to the popular will the Federal Assembly loses its power as a sovereign Legislature. And though a law proposed and passed by the Legislatures may be rejected by the Referendum, a law formulated by the popular Initiative requires no corresponding sanction of the assembly. The situation becomes that described in the Constitution of Zürich, "The people exercises the lawmaking with the assistance of the State Legislatures." It alters also the whole relation of the Legislature to the Executive which become the definite agents of the people. At the same time it increases a statesman's freedom since he is not expected to resign on the rejection of a measure, and thus discourages the growth of party government.

The popular power of the Initiative and Referendum is consequently declared to lessen the responsibility of the Legislature; it is denounced for its spasmodic activity. It is abused by liberals for its conservative effects. There is a tendency to reject on Referendum laws in any way radical, even including labour laws, or of a comprehensive nature as well as laws involving expense such as the one for an establishment of a Secretary to the Legation at Washington with a salary of £2000 a
(1)
year. It operates moreover in favour of the German majority

(1). Lowell chap. x11.

in the Swiss population to the possible sacrifice of the French
(1)
minority.

On the other hand it undoubtedly makes for the unity of the Confederation, emphasising the national as opposed to the Cantonal element of the Federal State. Thus the marriage law of December 1874 and the Bankruptcy law^{of} November 1889 were passed by a majority of the people though opposed by the majority of the Cantons as Cantons. (2) It is extolled as the instrument and expression of a pure democracy of the ancient Athenian type. The Referendum represents indeed in curious combination both ancient and modern democracy. In the small valleys of Switzerland, was preserved, as for example in the lands of the Forest Cantons a primitive Teutonic democracy such as Tacitus describes. In the cities a dominant aristocracy was introduced during the middle ages, and nowhere in Switzerland was any native representative system developed. The delegates from the States to the Central Diet were only commissioned 'ad audiendum et referendum' and possessed no power to bind their States in the measures of which they approved. Representative institutions were introduced in Switzerland with French democracy in the time of the Revolution. At the same time however the absolute sovereignty of the people and the bondage of representative institutions was preached and an effort was made to give to the people a direct share in

(1). Thus the law prohibiting absinthe which is drunk only in French Switzerland was nevertheless passed chiefly by the German majority.

(2). Lloyd. The Swiss Democracy p.80.

government in imitation of the ancient Greek democracy. In accordance therefore, not so much with historical tradition, as with a belief in the direct sovereignty of the people, by the end of the first half of the nineteenth century, the Referendum had been introduced for Constitutional questions both into the Federation and into the Cantons. By the same date it had also been adopted for ordinary laws in most of the Cantons and in the Federation it was included in the optional form in the terms of the Constitution of 1874.

To the Swiss belongs the credit of having first applied this principle to ordinary legislation. It had already been accepted for Constitutional questions in the French Constitutions (1) from 1793 to 1815 and in America even earlier. In 1778 the general Court of Massachusetts submitted a Constitution to the people who rejected it and two years later the present Constitution of that State was passed by a two-thirds majority of the people. Similar procedure took place in New Hampshire in 1779 and 1784. Mississippi and Missouri had also submitted their Constitution to popular approval on their entrance into the Union in 1817 and 1820. The same practice was followed by New York and since that time it has become almost universal in Constitutional questions. (2) In Wisconsin it has also been extended to the creation of banks by state law and the Constitution of Minnesota, after the manner of

(1). viz. 1793, 1795, 1802, 1804, & 1815.

(2). Lowell op. cit:11. p.244.

Swiss rather than of American precedent, makes certain railways and all appropriations from an Internal Improvement Land Fund depend
(1)
dependent on the popular vote.

Direct popular control has moreover been extended to ordinary legislation in many of the States. The Swiss instruments of Referendum and Initiative have been adopted and, particularly in the cities of the Western States, the right of Recall introduced. By this process an official may be deposed or 'recalled' from office on the vote of a requisite number of
(2)
citizens.

In France also popular opinion has from time to time been taken on political measures, the most famous instance being perhaps en-the coup d'etat of 1851.

In Switzerland however natural and economic conditions and the character of its people have combined to favour a natural and simple democracy, and it is in this small country that self-government may be seen in its most perfect expression,

In the actual composition of the Federal Government the Swiss have incorporated some of the more essential features of the American Federal State. More especially they have adopted the principle first formulated by the United States of the representation of the two distinct elements of a Federation-national Unity and state

(1). See Oberhalzer - Referendum in America chap.111 also Lowell 11. chap.X11.

(2). D. Wilcox. Initiative and Recall. 1912.

independence in two chambers of the Legislature. The national Council represents the people of Switzerland in proportion to their population, the Council of States represents the Cantons, their sovereign identity, and equal independence. These two Chambers form the Federal Assembly.

One representative to the National Council is apportioned to each twenty-thousand of the population, with the condition that each Canton must have at least one representative as well as fractions over ten thousand. The Representatives are chosen in Federal districts which thus precludes such practices as gerry-mandering but no electoral district may cross the borders of a Canton. Every male Swiss voter, who is a layman, is eligible

(1)
for election, and every adult male, who by the law of this Canton exercises political rights, is eligible to vote. The Federal

Government is competent to pass uniform laws as to the

(2)
qualifications of voters. The voting is in the hands of the Canton and presents much variation; two Cantons, St. Gall and Zürich, have

(3)
adopted the principle of proportional representation. The Council is renewed integrally every three years, thus sitting for one year longer than the House of Representatives in the United States.

Members receive a salary from the Federal Chest at the rate of

(4)
twenty francs for every day of their actual presence in the House.

(1). He need not as in U.S.A. reside in the State by which he is
(2). Constitution Arts. Div. 11 Arts. 72-79. (chosen.
(3). In 1910 & 1914 respectively. See Annual Register for these years
(4). See Admans & Cunningham op. cit. chap. 111.

(1)

The present House consists of one hundred and eighty nine members, containing thirty two from Bern, twenty five from Zurich and only one Representative from small Cantons such as Uri and Zug. (2)

Switzerland has adopted the important principle of equal representation of the Cantons in the States Council. Each Canton sends two delegates - the six half-Cantons sending only one each - who like the National Councillors vote not according to instructions but according to their individual opinion. Their qualifications, length of tenure, method of election, as well as their salaries are determined, not by the Constitution, as in the United States, but by the individual Cantons themselves. There is a tendency to introduce a certain uniformity in these conditions and to bring them more in accordance with those in force for the National Council. Thus most representatives are now elected for three years and they receive on an average a salary of twenty franc per diem, though this varies from thirty francs in Geneva to fifteen in Uri and Unterwalden. (3)

Each chamber chooses its own President and Vice-president. In the Council of States an endeavour is made to preserve the rotation of Cantons in the choice of these officers, and in the National Council four are elected during the triennial Session with the same object. In neither House can the President be elected to (4)

(1). Elected 1914

(2). Statesman's Year Book 1916.

(3). See Constitution Arts. 80, 81, 83.

(4). Statesman's Year Book 1916.

either office for the ensuing year, though the Vice-President may be and usually is elected to the Presidency. Both Chambers meet at least once a year, and debate as a rule in public, both French and German being the official languages. A majority of each House constitutes a quorum for business and a simple majority is sufficient for a legal vote. Each Council and every member as well as the Cantons by correspondence have the right of initiating (1) legislation. The Swiss Legislature is the one bicameral Legislature of European Constitutions in which both Houses possess absolutely co-ordinate powers. Neither House exercises any functions, legislative, executive or judicial, which the other may not share. Each Council gives as it were a second consideration to the proposals of the other House. The two Chambers differ therefore not in any respect of powers or duties but solely in the difference of the elements of the Federation which they represent. The National Council represents the Federation as a united nation, the Council of States as a number of independent and sovereign Cantons. The former expresses the will of the larger States, the latter the will of the smaller in comparison. In its representation of the Federal principle the Council of States has the same basis of existence as the American Senate. The latter however by its organisation and the special powers which it has received has become the more powerful of the two Houses of Congress. The Council of States however has sunk into a position of

(1). Constitution Arts. 73 & 82.

(2). Arts. 86-94.

comparative unimportance; its smaller size, its lack of special functions, its rather anomalous composition, as well as the fact that in a joint Assembly the President of the National Council presides, have all combined to reduce its influence. With few exceptions the chief men sit in the National Council and tend to regard membership of the other House merely as a stepping stone to this Chamber.⁽¹⁾

The two Houses together form the Federal Assembly which, subject to the rights of the people and the Cantons, shall exercise the supreme authority of the Union and shall have jurisdiction of all subjects within the competence of the Union which are not assigned to other authorities.⁽²⁾ They do not exercise the executive functions entrusted to the Executive Council though every decision of this authority may be revised by them, nor the judicial duties assigned to the Federal Tribunal, but there is no sharp distinction between the branches of the administration, and the authority of the Federal Assembly is wide and extensive. They legislate on all the numerous matters entrusted to the Union, including war and peace, foreign affairs, military and financial subjects, and exercise a general supervision over the whole of the administration; they possess also judicial functions; they act as a court of appeal from the decisions of the Federal Council in administrative disputes, they decide questions as to the competence of Federal

(1). See Wilson. The State p.323 Marriott Second Chambers p.127 seq.
(2). Constitution Art. 71 & 84.

authorities and they may exercise the right of amnesty and pardon. To them have been entrusted also important powers of appointment and in the exercise of these and their judicial functions the two Chambers sit together. (1) They elect the members of the Federal Council and the Federal Tribunal, and in time of war or on the mobilisation of the army they elect the Commander-in-Chief (2) and the chief of the general Staff.

The Federal Assembly may also determine the organisation, mode of election, and the remuneration of the Federal authorities, and lastly they may revise the Constitution itself subject of course to the obligatory Referendum.

The chief difference between the American and Swiss Federal Machinery lies in the relation of the other branches of the Government to the Legislature. The Swiss have not adopted any doctrine of the separation of powers, as it is understood in America, for the composition of both the Executive and the Judiciary are determined by the Legislature. They do not stand apart with the authority of the Constitution as their warrant.

The Executive power of the Swiss Federation is vested (3) in a Federal Council, elected by the two Houses of the Legislature in joint session. It consists of seven members who are elected from all Swiss citizens eligible for the National Council, in practice usually from the members of the Legislature, who must then

(1). Constitution Art.

(2). E.g. as in 1914.

(3). Constitution Arts. 95 - 104.

resign from the Assembly, for no member of the Federal Council may be also a member of either Legislative House. Not more than one member may be chosen from each Canton. The German Cantons have had on the whole the greater representation, though recently other (1) elements of the Federation have received more frequent inclusion. The Council is elected nominally for three years but if the Federal Assembly is dissolved in the meantime the new Assembly proceeds to another election of the Federal Council. At the same time the Assembly elects the President and a Vice-President of the Council who are respectively the President and Vice-President of the whole Confederation. They may hold office for one year and are not eligible for the same position in the ensuing year. The Vice-President usually succeeds to the Presidency, although the President may not be elected Vice-President.

The work of the Council is heavy and includes besides (2) purely administrative duties, the preparation of legislation and some judicial functions. It is for simplicity divided into the seven departments of Foreign Affairs, Interior, Justice and Police, Military organisation, Finance and Customs, Industry and Agriculture and Posts and Railways. It watches over the due observance of the provisions of the Constitution and of Federal decrees and authorises their execution, and that of the judgments

(1) H. Calonder from Grisons 1913. President Motta who entered Council 1911 came from Ticino.

(2) These have now been lightened by increasing the functions of the permanent officials. Reorganisation of the Federal Council Law 1914 which came into force January 1915.

of the Federal Tribunal. It examines whether the articles of Cantonal Constitutions are in harmony or not with the Federal Constitution and Federal laws, and reports upon them to the Federal Assembly. It maintains the external independence and neutrality and the internal tranquillity and order of the Confederation and in times of danger it may of its own authority call out troops for the preservation of either, provided that they do not exceed two thousand in number and are ^{not} required to serve for more than three weeks. It regulates also the finances and national investments and the organisation of the Posts and Railways and prepares the budget and statement of accounts, ⁽¹⁾

It has also been entrusted with a wide domain of administrative law, which in Continental fashion has thus been separated from other branches of jurisprudence. It thus has jurisdiction over such matters as disputes respecting the primary education of the Cantons, freedom of commerce and trade, validity of Cantonal elections, the rights of established Swiss and some religious ⁽²⁾ questions. In fact the Federal Council is as it were the balance wheel of the whole Swiss Federal organisation and is in relation with all its parts. In this it more nearly resembles the German Bundesrath or Second House of the Legislature, and in the nature of some of its powers it may be compared with the American Senate. For the Swiss Executive differs very much from the

(1) See A & C chap. IV p. 198 Lowell Vol. II. cp. supra. p. 20

(2) See Adams & Cunningham chap. V. Lowell Vol. II. chap. XI. Until 1891 religious questions concerning the prohibition of Jesuits and similar matters were decided by the Federal Assembly, not seldom on party lines.

American. The former is elected by the Legislature, is dependent upon it and its members are usually chosen out of it. The American Executive on the other hand is elected in practice directly by the people, and is entirely independent of the Legislature and of co-ordinate rank. Apart from the difference⁽¹⁾ based on the parliamentary source of the Swiss Executive authority, another distinction separates still further the two Executives. The Swiss Executive is collective, the American single, for the American "cabinet"⁽²⁾ is but an emanation from the power of the President. It is this important function of the President of the United States which distinguishes him from the President of the Swiss Confederation. The two Presidents are both elected,⁽³⁾ the Swiss President by the Legislature, the American by the people. They both hold office for a limited number of years, the former for one year only, the latter for four or a possible eight. Both are the titular heads of their respective nations, and perform all⁽⁴⁾ the ceremonial duties incidental to their office. The comparison may be continued no farther however; the President of the United States is strong in the possession of large executive powers; the President of the Swiss Confederation is so weak that if for some reason his office becomes vacant during the year it is not even filled up. He is not Commander-in-chief of the army, he has no

(1) For Parliamentary and Non-Parliamentary Executives see Dicey- Law of the Constitution.

(2) See supra chap. 11. p. 84 (3) Nominally by a college of electors.

(4) E.g. on the occasion of the visit of the German Emperor to Switzerland in 1912 it was of course the President of the Confederation who received him.

power of appointment or right of veto. He is in fact, merely "the chairman of the Executive Committee of the nation" and as such he tries to keep himself informed of what his colleagues are (1) doing, but he has no greater power or responsibilities than any other member. For some time he took charge of the Foreign Affairs department of the Federal Council, but as this involved a constant change in a sphere which pre-eminently required continuity, he does (2) not even possess this distinction over his colleagues. He now retains whatever department he held before his election to the Presidency.

The Swiss Executive differs from the American in both its collective nature and parliamentary authority and in both of these qualities it resembles a parliamentary Cabinet of the English type. The resemblance disappears however with regard to one important characteristic, in which the Swiss Executive approaches the American rather than the English practice. (3) The essence of the position of the English Cabinet is its responsibility to Parliament. In bold defiance of the doctrine of the separation of powers, English practice establishes the closest connection between the Legislature and the Executive. Switzerland however has accepted this doctrine though in a much more modified form than America. As in the United States no member of the Executive may also be a member of (4) the Legislature during his tenure of office. This at once destroys

(1) Lowell II. p. 195.

(2) See Federal Council Re-organisation Law 1914. See Annual Register 1915 p. 266.

(3) I speak of course of normal, not of war cabinets.

(4) See Lowell II. p. 195.

a connection such as that of an English Cabinet with its Legislature. The separation is not complete however. The Executive is elected by the Legislature and its members may sit and debate though not vote in either House. They too, like an English Cabinet, prepare legislation which they lay before the Houses, and at times the Assembly requests them by a "postulat" to draw up a bill on special subjects and in fact most measures not introduced by the Council are referred to it before they are discussed in the Assembly. It has no power however to dissolve the Assembly, nor may it be dissolved by the Assembly. In cases of disagreement between the two authorities, neither branch has any power of appealing to the nation over the head of the other. Real collisions therefore practically never occur for the Federal Council always gives way, as it has no independent authority of its own. If the measures of the Federal Council or of an individual Councillor are rejected by the Assembly, neither the Council or the particular member would think of resigning any more than an English Cabinet Minister would think of remaining in office in similar circumstances. If the Assembly puts forward proposals which are opposed to the sympathies of the Council, this latter body nevertheless does its best to carry out its wishes loyally. Indeed a Federal Councillor is rather in the position of a lawyer or architect who gives advice but is not obliged ^{to retire} if his advice is not accepted. ⁽¹⁾ Thus the Council resembles a Board of Directors chosen by a large joint stock

(1) I borrow the excellent simile of Prof. Dicey quoted by Lowell
11. p. 199.

(1)
company, and in practice the Councillors are almost without exception re-elected by each Federal Assembly. The Council is therefore practically a permanent body and its members are chosen more for their administrative capacity than for their prominence in any political party. It follows too that the members are not necessarily all of one party, nor even of that party which possesses a majority in the Legislature. The Council has habitually
(2)
contained men from two, sometimes from three parties and at times the dominant party in the Federal Council has been opposed to the
(3)
dominant party in the Legislature. There is in fact no desire to conceal differences, the aim being rather to give open representation to divergent views than to create a false appearance of harmony as in Coalition Cabinets. Measures or decrees of the Council emanate authoritatively from the Council as a whole and receive the votes of the members, but Councillors are lenient towards the pet schemes of their colleagues and are not compelled to act afterwards in the Chamber in accordance with the vote of the Council. In practice they may even speak against proposals of the Council, though this is avoided as much as possible. There is however no organised policy or legislative campaign which is conducted by the Council and by the reception of which it stands or falls. The Council moreover no more resigns if its measures are

(1) Lowell 11. p. 199

(2) E.g. 1891.

(3) From 1876 - 1893 four of seven members of Council were Liberals.
during a decided Liberal minority in the Legislature.
the

rejected by the people on Referendum, than if they are disapproved by the House. When in 1882 the people rejected a law on Education the responsible minister did not resign. On the contrary the papers of the opposite party congratulated the country on the absence of the party system in accordance with which the nation would have lost the services of a capable and honest administrator.⁽¹⁾

It is obvious that Parliamentary Government which in England means government by party majorities no more exists in Switzerland than in America, in fact much less so. The responsibility of the American Executive to the dominant party of the Legislature does not exist because there is no connection between the two, and because the tenure and qualifications of each branch of the administration is defined in Constitutional or statutory terms. But the dependence of the Government on the dominant party in the nation is secured within these limits, and with the system of spoils, , and other party machinery, the influence of parties in the national administration is notoriously active. It is interesting too to notice that the American President like the English Prime Minister chooses his cabinet of his own political colour.

In Switzerland though parties exist, party government in either the English or the American sense is entirely absent. "The Executive does not resign when it is out-voted by parliament; Parliament is not dissolved when its measures are negatived by the

(1) See Adams and Cunningham chap. IV.

people, and the electorate whilst constantly rejecting laws made by their representatives usually sends back those same representatives to serve for another term of years.⁽¹⁾ Many factors contribute to this state of affairs of which perhaps the chief are the presence of three nationalities and languages which split up the nation into sections, and the small size of the whole Confederation and of the electoral districts which facilitates a personal acquaintance with the Representatives and emphasises their choice on personal rather than on party grounds.

The third branch of the Federal Government differs also from the corresponding section of the Federal machinery of the United States. The American Judiciary owes its importance to three great causes.⁽²⁾ Firstly it is the guardian and interpreter of the Constitution. Raised to the position of an arbiter between the States and the Federation it decides whether both State and Federal laws are in harmony with the supreme law of the land. Secondly, the Supreme Court of the United States stands at the head of a large hierarchy of inferior Courts. It possesses its own officers, carries out its own judgments and comes into direct contact with the individual. Thirdly its authority is independent of the Legislature and is derived from the Constitution

(1) E.g. in 1914 when even after the excitement roused by the St. Gotthard Convention elections were only contested in a few districts. See introd. to Deploige-Referendum in Switzerland.

(2) See supra. chap. 11. p.

itself. The Legislature may determine its organisation and the Executive may appoint its chief officers, but by the Constitution the judges hold office during good behaviour, and their salaries may not be altered during their tenure of office.

The Federal Tribunal possesses none of these qualifications. It does not interpret or guard the sanctity of the Constitution. Cantonal Constitutions are examined not by it but by the Federal Council. It has no power to declare Federal legislation unconstitutional, for every law passed by the Legislature, subject to the Referendum of course must be accepted by it as valid. It may however declare Cantonal laws to be unconstitutional and
(1)
therefore invalid.

The Federal Tribunal stands alone. There is no organised system of inferior courts though for criminal law it is divided into a series of special courts. It may not carry out its own judgments, for it has no officers, but must depend on the Federal Council for their enforcement. It must be added that recent legislation has tended to develop and extend the organisation
(2)
of the Judiciary.

Lastly not only are the members of the Federal Tribunal chosen by the Legislature but their length of term of office, as well as the composition and organisation of the courts are determined by the same authority. Criminal trials must proceed by way of a jury, and the Federal Tribunal is allowed by the

(1) See Constitution Art. 113. Dicey Law of Constitution. Note viii Brinton Coxe Judicial Power and Unconstitutional Legislation p.86.

(2) See Legislation of 1881, 1889, 1898, 1907, 1912 and 1914.

(1)
Constitution to organise its own Secretariat. The Federal Tribunal consists at present of twenty-four members and nine substitutes. (2) They are elected for six years by the Federal Assembly in joint session and are re-eligible. Any member who is eligible for the National Council may be elected to the Tribunal but care must be taken to represent the three nationalities. No member of the Federal Tribunal may hold any office under the Union or in any Canton or pursue any other calling or business during his term of office. He may not judge where his personal or Cantonal interest is involved or that of his betrothed or of a near relative. The judges are in practice noted for their common sense rather than for their legal knowledge. (3)

The influence of the court is further diminished by the assignment of certain judicial functions to other bodies. with questions of public law, civil justice and since the establishment of a uniform civil code in 1912 its power in this department is now very extensive - criminal justice in certain cases and in some instances it acts as a Court of Appeal. (4)

In the domain of public law it has cognisance of questions concerning conflicts of authority between Federal and Cantonal authorities, and such disputes between Cantons as are within the domain of public law. It may decide complaints of the violation of the Constitutional rights of citizens, and appeals of private

(1) See Constitution Arts. 106-109. (2) Federal Organisation Law 1912. (3) See Adams and Cunningham chap. 9. (4) See Constitution Arts. 110 - 114 A & C chap V.

citizens on account of violation of concordats between Cantons or violation of international treaties. It is in its functions in public law, that the Federal Tribunal most nearly resembles the Supreme Court of the United States.

In civil law its authority extends to cases between the Union and any Canton, between the Union and corporations or private persons when such corporations or private persons are the plaintiffs and the amount in dispute exceeds three thousand francs. It is competent to decide civil questions between different Cantons, between Cantons and corporations or private persons upon the demand of either when the amount in question exceeds three thousand francs. It may also pass upon questions with regard to loss of domicile (Heimat-losat) and upon civil disputes between communes of different Cantons. It must also decide other cases by which the Constitution or Legislation of a Canton are extended to its competency or where both parties to the suit demand it and the amount in dispute exceeds three thousand francs.

In criminal justice with the aid of juries its jurisdiction extends to all cases of high treason against the Confederation, or revolt or violence against the Federal authorities, of crimes and misdemeanours against international law, political crimes or misdemeanours that are the cause or consequence of such disturbances as call for armed intervention on the part of the Union, and lastly it shall decide charges against officials appointed by a Federal authority, upon the application of the latter.

In cases where Federal laws have to be applied by Cantonal tribunals either party has by virtue of the Federal organisation law right to have recourse to the Federal Tribunal against the judgment of the highest Cantonal authority, or the appeal may be made direct to the Federal Tribunal without passing first through the highest Cantonal Court of Appeal. To this category belong Federal laws respecting contracts, copyright, protection of trademarks, divorce and nullity of marriage.⁽¹⁾

Federal law does not regulate or interfere with the organisation of Cantonal Courts as in Germany, but on the other hand they are not entirely separate and independent bodies within their sphere as in the United States. Justice is administered by the Cantons with recourse in selected cases to the Federal Tribunal and in some cases the Cantonal Courts are subordinated to the Federal Tribunal.⁽²⁾ Until the Federal Civil Code of 1912 each Canton had extensive civil rights and perhaps in no other matter were the anomalies of the Canton and the influence of such forces as feudalism so clearly betrayed. The Swiss Constitution, in imitation of that of the United States, requires that full force and credit be given throughout the Confederation to the judgments of the Courts of each Canton.⁽³⁾

The Swiss Federation is not only a union of democratic Cantons, but in a fuller sense than the United States of America

(1). Adams and Cunningham Law chap.V. Federal Civil Code 1912.

(2). See Wilson. The State. chapters VII & XI.

(3). Constitution. Art.61.

it is a democratic Federation. Not only are democratic principles expressed in the election of the national Council and in the eligibility of all citizens for the Executive Council and Judicial Tribunal, but more particularly by means of the Referendum and Initiative. Through these instruments is asserted, as in no other Federation save Australia, an intimate and immediate relation between the Federal Government and the citizens of the respective Cantons. In both the United States and Switzerland the political sovereign is the people, but in the former Federation the monarch (1) slumbers and is slow to express his will, in the latter he is ever wakeful and demands constant attention.

Cantonal democracy is likewise guaranteed by the Federal Constitution and in most of the Cantons it has been preserved or developed to its utmost limits. In the old Forest Cantons the pure democracy of ancient Teutonic tribes has been preserved in the lands gemeinde and mass meetings of all the inhabitants. (2) In other Cantons legislative bodies and in some even the Executive councils are chosen directly by the citizens, and the Referendum exists for Constitutional questions in all Cantons and for ordinary laws in all except Fribourg. Swiss democracy however has its roots deep down in the Commune which is the smallest unit of the Swiss Federal State. It is as a member of a Commune that a Swiss

(1).C.f. Dicey Law of the Constitution. Chap.111.

(2). See Freeman's classic description in 'Growth of the English Constitution.'

citizen ultimately exercises the privileges of citizenship and though Federal law regulates naturalisation, full rights can only be conferred by Cantonal or Communal law.⁽¹⁾

Swiss democracy is, it is claimed, the most successful in Europe and it is the only one which is of that pure non-representative type which is more akin to ancient forms. It is natural to compare Swiss and Athenian democracy.⁽²⁾ In the ancient city state every citizen shared^{the} in control of peace and war, of finances, and military and naval defences, and foreign affairs, and in the trial of judicial cases. He either exercised this powers directly or through Committees appointed for a short time. The laws however were considered normally permanent and unchangeable. Special formalities were attached to their alteration, and they were on the whole made by and placed under the guardianship of the aristocratic Court of the Areopagus. In Switzerland exactly the reverse is the case. The laws are under the absolute and immediate control - as far as this is possible - of the citizens themselves, but administrative affairs are managed by a Council which is the most aristocratic feature of so democratic a Federation. But the subordination of the Executive to the popular control is in practice sufficiently secured. Switzerland indeed seems to possess the merits of ancient democracy without the evils of its slavery, and the advantages of modern institutions without their limitations of direct popular action.

NOTE Since this was typed there are indications that the French inhabitants of the Jura district intend to separate from the German Canton of Berne and form a new Canton of Jura.

(1) See Wilson. The State.

(2) cf. Lowell 11. p.333 seq.

GROWTH OF THE CONFEDERATION**A** ADMITTANCE OF STATES

THIRTEEN FULL MEMBERS down to 1798	(August 1st 1291	THREE)	1.Uri)	EIGHT OLD STATES
	(renewed	FOREST)	2.Schwyz)	
	(December 9th 1315	STATES)	3.Unterwalden)	
	(November 7th 1332		4.Lucerne)	
	(May 1st 1351		5.Zürich)	
	(March 6th 1353		6.Berne)	
	(Temporarily 1352)		7.Zug)	
	(Finally 1368)	8.Glarus)	
	(Temporarily 1352))	
	(Finally 1368))	
	()	
	(December 22nd 1401		9.Fribourg)	
	(10.Soleure)	
ALLIED STATES	(June 9th 1501		11.Basle)	
	(August 10th 1501		12.Schaffhausen)	
	(December 17th 1513		13.Appenzell)	
	(1417	Valais)	
	(1451	Abbey))	
	(1454	Town) of St. Gall)	
	(1495	Neuchatel)	
	(1497	Grisons)	
	(1526	Geneva)	
	(1579	Bishopric of Basle)	

COMMON DOMAINSa.) Subject to two or three states

Uznach and Gaster 1483---subject to Schaffhausen and
Glarus

Morat, Orbe Grandson, Eschallens and Ulens 1476
---subject to Berne and Fribourg.

Bellinzona 1503 ---subject to Uri, Schwyz and
Unterwalden

b) Subject to more than three States

Free Bailiwicks and Baden 1415 - The former under six or seven states at first; divided 1712:- lower ones (Vilmergen, Wohlen, Mellingen and Bremgarten) remaining only under the reformed States Zurich, Berne and Glarus; upper ones (Hitzkirch, Muri, Merischiwand) under the Eight Old States. BADEN at first under seven then under eight states; after 1712 subject only to Zurich, Berne and Glarus.

Thurgau 1460 - subject first to seven, later (1712) to eight States.

Sargans 1483 - subject first to seven, later (1712) to eight States.

Rheintal 1490 - subject first to seven, later (1712) to nine States.

Bailiwicks of Ticino (Lugano, Locarno, Mendrisio and Magliata) - subject to twelve States.

Allied States and Common domaine became sovereign Cantons in 1803 after having been united with the Governing States in the Helvetic Republic of 1798.

1803 { 14 St. Gall
{ 15 Grisons
{ 16 Aargau
{ 17 Thurgau
{ 18 Ticino
{ 19 Vaud

1814 { 20 Valais
{ 21 Neuchatel
{ 22 Geneva

1832 Basle)
Untersvalden) separated into two
Appenzell) half-Cantons

B.

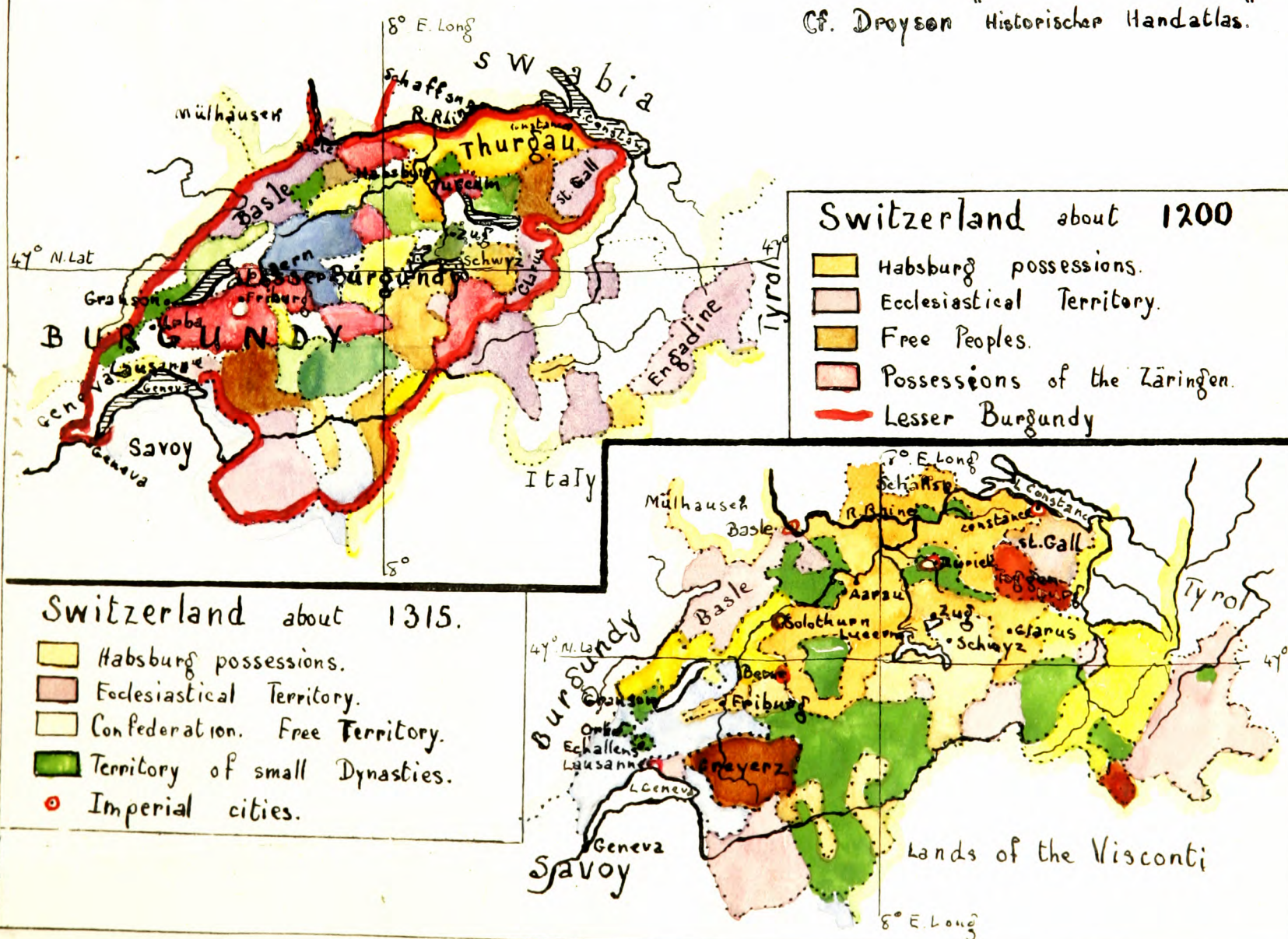
CONSTITUTIONAL AND POLITICAL EVENTS

1315. Nov. 15th. Three Forest States win Victory at Morgarten against Austria.
- Up to 1352 Separate resistance of Zürich, Glarus, Zug and Berne to Austria.
- 1370 Oct. 7th. Monk's or Priest's Charter - Common League of Eight Old States except Berne and Glarus.
- 1386 July 9th. Victory of Seven Old States at Sempach against Austria.
- 1388 Victory of Seven Old States at Näfels against Austria. Glarus rejoins Confederates.
- 1393 July 10th. Convention of Sempach - Eight Old States and Soleure
- 1394 Twenty Years' Peace with Austria.
- 1415 Confederates conquer Aargau from Austria.
- 1436 - 50 Civil war between Zürich in alliance with Austria and on the one side Schwyz and the Confederates on the other.
- 1474 - 1477 In alliance with France Swiss defeat Charles the Bold of Burgundy. Defeat of Charles by Swiss alone at Grandson and Morat.
- 1481 Covenant of Stans - Eight Old States.
- 1499 Swabian War - Emancipation of Confederates from German Imperial regulations.
Italian Wars of Swiss Confederates in alliance with France.
- 1512 Victory of Confederates at Novara.
- 1515 Defeat of Confederates at Marignano.

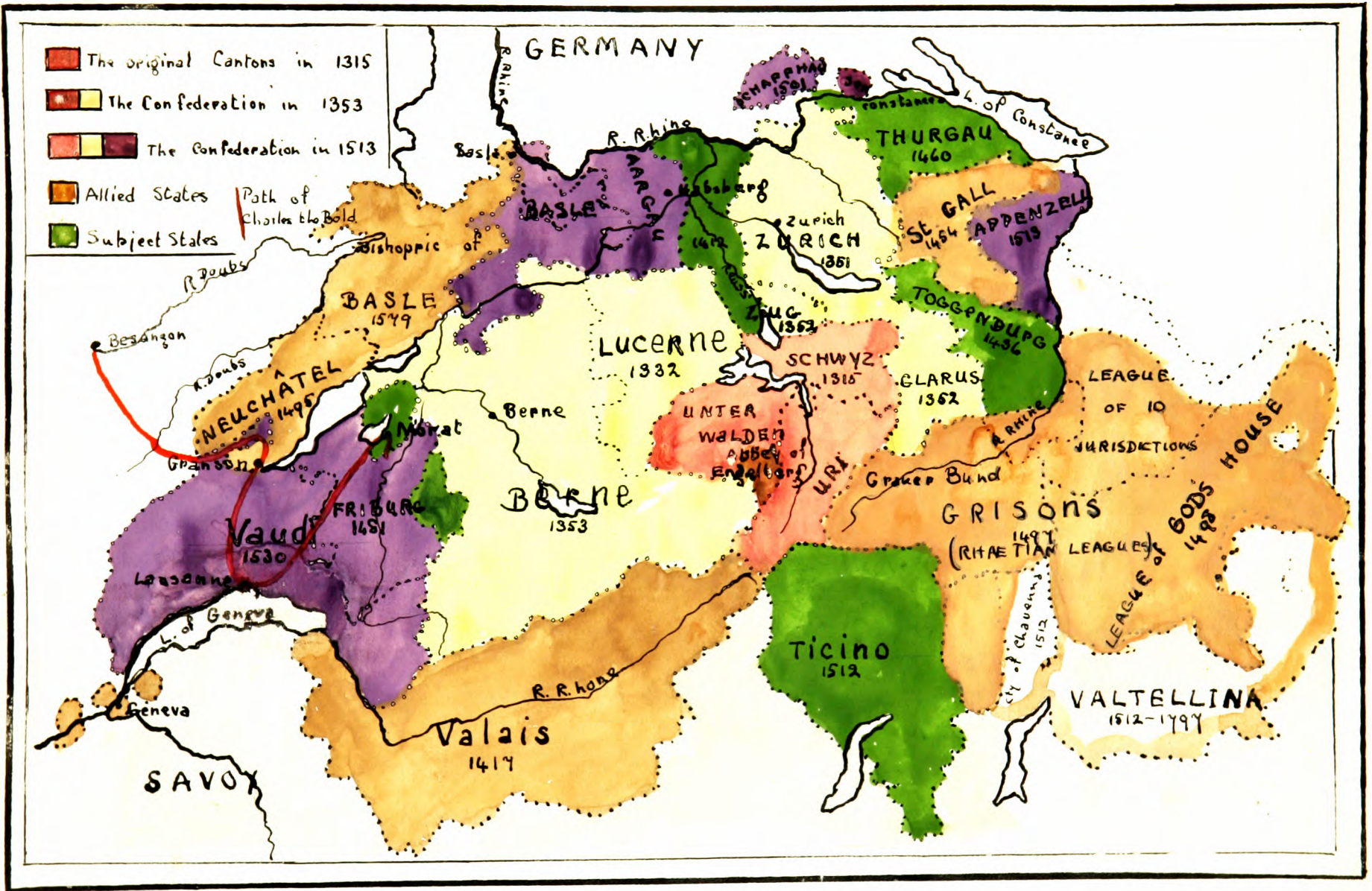
REFORMATION

- 1519 Zwingli in Zürich.
- 1528 Reformation accepted in Berne.
- 1529 First war of religion - First war of Kappel.
June 26th. Peace of Kappel - liberty of each State religion declared.
League of five Roman Catholic States with Austria.
- 1531 Second War of Kappel. Second Peace of Kappel - separate
Leagues dissolved - liberty of religion of each State
confirmed.
- 1536 Conquest of Vaud by Berne.
Calvin in Geneva.
- 1586 Borromean League of Counter Reformation.
Alliance of six Roman Catholic States with Spain.
- 1648 Independence of Confederates acknowledged at Peace of
Westphalia.
- 1653 Peasants' war in Switzerland.
- 1656 Failure of attempt to tighten Confederation.
War of Villmergen - Protestants and Roman Catholics
form separate leagues. Roman Catholics win supremacy-
reversed in
- 1712 Second war of Villmergen or war of Toggenburg.
11th Aug. Peace of Aarau.

- 1789 April 12th. First United Helvetic Republic.
1801 May 29th. "Scheme of Malmaison" - compromise.
1801 Oct. 24th New scheme of Helvetic Diet with a view to
a United State.
1802 Feb. 27th The (Federalist) Scheme of Reading.
1802 May 20th Second Helvetic Constitution.
- 1803 Feb. 19th Napoleon's "Act of Mediation" and the "Consulta".
Constitutions of the Federation and the nineteen
Cantons.
- 1815 Aug. 7th "Federal Pact" of the twenty-two Cantons.
1832 and 1833. Unsuccessful attempts at revision of Federal
Pact.
- 1847 War of Sonderbund.
- 1848 New Federal Constitution - Federal State.
1866 First revision of Constitution (not very successful)
1872 Scheme for new Constitution rejected.
- 1874 Revision of Constitution - Present Constitution accepted.
-



Growth of the SWISS CONFEDERATION up to 1798



On Christmas Day in the year eight hundred, as Pope Leo III. placed the Imperial Crown on the head of the King of the Franks, there echoed through St. Peter's the shout of the multitude, "Karolo Augusto, a Deo coronato, magnè et pacificè imperatori, vita et victoria." Nearly eleven centuries later a cheer which rang through the halls of Versailles proclaimed another coronation, - "Seine Mâjstat der Kaiser Wilhelm lebe hoch". The two scenes were very different. The King of Prussia stood in the place of the King of the Franks, and no Pope anointed him Protector of the Holy See, and disputed with Frankish followers and Roman people the honour of his elevation. The election of William I. to the new dignity depended obviously on the might of his Prussian soldiers and the wish of the German Princes. The title itself conveyed two fundamentally different meanings on the two occasions. In 800 the imperial name represented a European supremacy and the unity of the Christian World. ⁽¹⁾ In 1871 it meant the primacy among a number of small German states, the headship of a united Germany which as a nation hardly existed in the time of Charles the Great.

But outward differences - however many and great they may be and are - cannot destroy, not only the essential similarity in the significance and nature of the two events, but the prolonged and intimate historical connection between them. In both cases, a new ^{Sovereign} King and nation were entrusted with the

(1) Cf. Bryce Holy Roman Empire p. 63.

guardianship and representation of an idea which they alone seemed able to defend. The creation of the Frankish Empire ^{visibly} expressed the union 'so long in preparation and so mighty in its consequence' of Roman and Teuton and announced the entrance of the Barbarians into that fruitful heritage of the past, which they had once helped to destroy and were now to aid in conserving. The institution of the German Empire heralded a union of Prussia and Germany, which on a small scale was as long prepared and as momentous in its results. And the second Empire was the historical consequence of the first.

The Roman Empire, as a name and a tradition has shown an obstinate if somewhat spasmodic vitality. Charles the Great was styled the sixty seventh successor of Augustus. Otto I, when in 962 he was crowned Emperor of the "Holy Roman Empire of the German nation," merely claimed to be reviving the Empire of Charles the Great, and the institution he established - or renewed - survived nominally until the resignation of Francis II. in 1806. Even Napoleon posed as a new Charlemagne, a second Caesar. The German Empire of 1871 never claimed to be a restoration of the legal position of the Holy Roman Empire, which had published its extinction in 1806, but it recalled the Imperial traditions of the past ⁽¹⁾ with a conscious recognition of its share in them. The

(1) Cf. Bryce Holy Roman Empire. chap. XXIV; and Sorel. Histoire de la guerre Franco-Allemande Vol. II. p. 137. "Le Moniteur prussien de Versailles disait le 26 Nov. 1870. ---- 'Le Saint-Empire paraît enfin vouloir revivre sous une forme plus pratique, et pourtant plus heureuse' "etc.

creation of the German Empire is the last of a long chain of events connected by an historical sequence with the Frankish Empire. Of no other State may it more truly be said that the roots of the present lie deep in the past and that the understanding of what is, entails a knowledge of what has been.

Through all its vicissitudes, in its strength and in its weakness the history of "The Empire" has been indissolubly connected with the history of Germany, especially from the
(1)
"revival " of Otto I.

In the time of its greatness it gave to Germany of the tenth, eleventh and twelfth centuries, a splendour and renown far surpassing that of any contemporary European Kingdom. For not only was the Emperor, as Temporal Head of Europe, entitled to a precedence and, according to mediaeval theories, a certain supremacy over all monarchs, but his dominions stretched from the Tiber to the Baltic and included the Carolingian capital of Aachen as well as the more ancient Roman seat. But beneath the weight of the Roman Empire the German Kingdom itself was crushed. When the Empire had become only "a gorgeous anachronism," the lure of its fame still tempted German Kings to neglect their native lands and waste their native energies on Italian battlefields in pursuit of it. While France and England were being consolidated under strong hereditary monarchs, the elected King-Emperors of Germany were

(1) See further Bryce "Holy Roman Empire", esp.chaps.VIII-XIII.

fighting their way to their Imperial capital, which, although the theoretical centre of their power was ^{in fact} only a geographical outpost of their dominions. Between the civic freedom of the Italian Republics, the hostility of the Popes, and the rebellion of German nobles, by the middle of the thirteenth century the Empire had lost most of its power and a large part of its prestige. "It might indeed, and so far as its practical utility was concerned, ought now to have been suffered to expire; nor could it have ended more worthily than with the last of the Hohenstaufen. . . That it did not so expire was owing partly indeed to the belief, still unshaken, that it was a necessary part of the world's order, yet chiefly to its connection with the German Kingdom." (1) It lingered on as a German institution into which occasional Emperors infused some of their own vitality, deprived like the Papacy, of half its allegiance by the Reformation, until after 1648 it became nothing more than a name, a 'piece of antiquarianism hardly more venerable than ridiculous.' By the eighteenth century it was, as Voltaire said, neither Holy, nor Roman nor an Empire but merely an honorary appendage to the hereditary dominions of the Austrian Habsburgs. On August 6th 1806 the last of the Roman Emperors - Francis II. of Austria - resigned the imperial dignity in the face of the new Napoleonic Imperialism - new and yet invoking Carolingian traditions more ancient than those of the Austrian itself.

(1) Bryce. Holy Roman Empire. p.212.

The decline of the Empire meant also the weakness of the Royal power in Germany and the corresponding growth of the power of the nobles. The elective character of the Empire had led each Emperor to barter away the rights of the Crown to secure his own succession or that of his son. In practice the competition had been confined to a few powerful families and since^{before} the middle of the fifteenth century, the Imperial office had been held, with a brief exception, continuously by the Habsburgs.⁽¹⁾ Their policy had been dynastic, rather than Imperial, and the hereditary succession had not therefore strengthened German Unity, while their situation on the outskirts of Germany had prompted them to acquire large non-German territories.

Corresponding to the temporal aristocracy, there existed until the time of Napoleon a spiritual aristocracy no less powerful, and the rise of "Imperial free cities" in the Middle Ages contributed a further element to the heterogeneity of the Empire. The excessive development of Feudalism in addition had caused the frequent division of hereditary lands and the consequent multiplication of fiefs. At the outbreak of the French Revolution there were in the "Empire", which was approximately what was known by the merely geographical expression of 'Germany', three hundred and sixty⁽²⁾ states which were practically autonomous. At their head was Austria which possessed the Imperial dignity and the nominal

(2) Cf. W.A.L. Fisher. Napoleonic Statesmanship. Germany p.7
Himly Formation Territoriale de l'Europe. p. 290 seq.

(1) It had already been held by Rudolf of Habsburg as early as 1273.

suzerainty over the rest, and constituted a shadowy bond of unity. Next to Austria and a close second was Prussia.

In 1415 the Emperor Sigismund conferred the mark of Brandenburg as an Imperial Fief, together with the Electoral dignity on Frederick of Hohenzollern, Burgrave of Nürnberg. This investiture established the connection of the Hohenzollerns with Brandenburg. This was a barren and ill-favoured land, and gave no promise of the future to which the Hohenzollerns were to guide it. In fact during the next two hundred years it is only a significant exception to the division and feudalisation of lands which prevailed among the German States. The Electors preserved their lands intact and even expended their territories, but during these two centuries the Hohenzollerns of Brandenburg had nothing to do with Prussia. It was not until 1618 that the Duchy of Prussia became united for the first time with the Electorate of Brandenburg. On the conversion to Protestantism in 1525 of Albert, a member of another branch of the Hohenzollerns, the part of Prussia which he ruled as Grand Master of the Teutonic Order of Knights, was made an hereditary Duchy under the suzerainty of Poland. The secularisation of ecclesiastical or semi-ecclesiastical benefices was no uncommon feature of the time. Owing to the failure of heirs in the Prussian line, the Duchy fell to the Brandenburg Hohenzollerns in 1618, but until that year the Electorate of Brandenburg and the Duchy of Prussia were separate States ruled, as it happened by different branches of the same family. Until 1657 when the Great Elector secured the independence of Prussia, the Electors of Brandenburg in their capacity as Dukes of Prussia, still received

investiture from the Kings of Poland. The accession of the Great Elector in 1640 marks the beginning of the growth in other ways of the power of Brandenburg - Prussia. He rescued it from the difficulties into which it had fallen during the Thirty Years War, and stamped on it an implicit character which was made explicit by (1) the measures of his successors down to Frederick II. The success of his work is measured by the assumption of the royal title by his son in 1701. The royal title was taken from Prussia which lay outside the Empire, and the monarch with his own hands placed his royal crown upon his head as a symbol of his independence and political irresponsibility. Administrative consolidation, a liberal religious policy which encouraged the immigration of Protestant refugees especially from France, the establishment of an efficient standing army, and territorial acquisitions were all measures and fruits of a century of "enlightened despotism", which made Prussia at the death of Frederick the Great the ^{rival of the} Austrian power in Germany. From the middle of the eighteenth century begins the dualism between the Protestant Hohenzollerns of the North and the Roman Catholic Habsburgs of the South of Germany, and the policy of opposition to Austria which Frederick the Great pursued was resumed by Bismarck, his successor in many respects, and led to Königgrätz and Sedan. Not that Prussia in the ^{eighteenth} century may be credited with the consciousness of any 'German Mission'. The aims of ^{the} Hohenzollerns

(1) Cf. Marriott and Robertson. Evolution of Prussia. p.96.

were dynastic and Prussian. They had made themselves the brain of the state; the military and civil machines had been organised into an efficient subordination to the common head, the monarch who was the impersonation of its unity; and the state which they had ruled autocratically but with illumination according to the interest of Prussia, they had converted into a power in Germany, and under Frederick II, in Europe. But it was a part of the Germany of the day, an order of Princes and dynastic States, with particularistic interests and selfish aims.

The tide of Prussia's greatness which had risen to a flood under Frederick the Great, ebbed rapidly under his successors. "Prussia fell asleep on the laurels of Frederick," the army stagnated in a self-satisfied complacency, and the second essential of the Prussian state - an efficient head - was equally wanting, for the first of the two successors of Frederick the Great was a "mixture of debauchery and mysticism", the second though virtuous was stupid. It is true that the second and third partitions of Poland during the reign of Frederick William II. added large territories on the East to Prussia, of which nearly a half has remained a permanent possession. But a period of decay and decadence set in which led within twenty years after the death of Frederick, to Jena and Tilsit.

A new Prussia however arose, phoenix-like, from the
(1)
ashes of defeat and humiliation. The work of Stein and Hardenberg, Scharnhorst and Gneisenau, increased the revenue,

(1) See further Seeley. Life and times of Stein. Vol. II. 220 seq.

reconstructed the administrative system, re-organised the army, emancipated the serfs, abolished the old feudal economic basis of quit-rents and dues, and established a new social system. The reformed State became the instrument of that national uprising against the conqueror who was absorbing the life-blood of the people, and the leader in the War of Liberation. (Befreiungskrieg).

Although much of the work of Napoleon was undone by the Congress of Vienna, a large permanent contribution towards the unity of Germany was made during the twenty years from 1795 to 1815. The spirit of liberalism had been awakened by the doctrines of the French Revolution, and the spirit of nationalism by the domination of Napoleon. Germany which had begun from the last quarter of the eighteenth century to have a literature of its own, received a great artistic and literary impulse from the patriotic wars. Bards of the War of Liberation - S^{änger} des Befreiungskrieges - Körner, Schenkendorf, Rückert, Uhland, sang of the struggles of Germany. Arndt's "Was ist des deutschen Vaterland?", became almost a national cry. Students' societies - Burschenschaften - were formed with the aim of a national, liberal Germany. Fichte in 1807 delivered his Addresses to the German People. A "Prussian school" of historians arose - Dahlmann, Böhmer, Häusser, Droysen, Giesebrecht and later Sybel and Treitschke - recruited from all parts of Germany, who preached the doctrine of nationality, stimulated it by the study of the history of the Empire and called

(1) Cf. Sybel 1. p.57. (2) See Gooch Hist of Hist^{ns}. of the 19th century

upon Germany to rally round Prussia whose 'German Mission' they proclaimed in their histories.

The political situation had developed in the direction of simplification. Of the three hundred and sixty States only thirty-nine were left in 1815, after the absorption of the smaller principalities and the ecclesiastical States.

Prussia, in recognition of her services, was given the
(1)
Rhenish Provinces, in exchange for the part of the Polish lands of which she was still deprived. Not only were the Rhenish lands German thus increasing her German at the expense of her non-German territories, but their geographical position marked her out as the guardian of Germany on the west, as well as on the east, and therefore the future antagonist of France. It caused the Prussian Kingdom to be divided but this proved rather an advantage than a disadvantage, for it gave an additional justification for the annexation in 1866 of Hanover, Nassau and the lands which lay between the separated pieces.

The non-German character of Austria was increased by her acquisitions in 1815, for although she had lost the Flemings, she had gained Italians. The Holy Roman Empire had also disappeared and its place was taken by a Confederation of States in which Austria was given the Presidency in virtue of her traditions, and Prussia the Vice-Presidency as a tribute to her services. The States
(2)
agreed not to make war on each other, and to submit their disputes to the impartial judgment of the Diet. This assembly was a body

(1) As well as part of Saxony and Pomerania.

(2) See Hertslet. Map of Europe by Treaty. Vol. 1. p.202.

of ambassadors representing the States, and constituted the only central machinery of the Confederation. It had the power to declare peace and war, to organise the Federal army and to make laws for the application of the Constitution of the Confederation. It had no executive powers, however, or administrative officers. The States had surrendered no portion of their sovereign powers and the Diet became merely an international conference. The States had formed no 'Federal State' but only a 'Confederation of States'. They were not represented equally in the Diet and the delegates voted according to instructions, features which have both been retained in the present Bundesrat. The procedure of the Diet was double. For constitutional questions and those relating to peace and war, an 'in plenum' arrangement was adopted, by which six of the largest States had four votes, five had three, and three had two, while the remaining twentyfive had one each. For other matters, the Diet proceeded by sections called 'curiae', in which the eleven largest States had one vote each, and the ^{remaining} twenty-eight were divided into six groups with one vote to each group. A unanimous vote was necessary for all amendments to the Constitution. In accordance with the newly-aroused democracy it was declared by the Article thirteen that Assemblies of States should be established in all the States.

Both the nationalist and liberal hopes which were based

(1) See infra p.183

the
on/Confederation were doomed to disappointment. The Diet became the instrument of the re-actionary policy of Metternich, the Austrian Statesman, it settled down into a slothful impotence, and resigned itself to the investigation of the claims of individuals against the old Empire. Prussia followed in the wake of Austria.

In 1848, however, the revolution in Paris once more roused the latent democracy in Germany to action. Rebellions broke out in the States, particularly in Berlin and Vienna. A Parliament elected by universal suffrage met at Frankfort in an attempt to realise the national unity of Germany. It turned in despair from the Diet, whose futility was universally recognised, (1) to the only other power which seemed to offer any promise of a fulfilment of its aims - Prussia. The members wasted precious months in discussion and it was not until March 1849 that they took the step of offering the Imperial Crown of Germany to Frederick William IV King of Prussia. By this time the risings had been put down in Vienna and Berlin - and it is of interest that Bismarck's first entry into political life is associated with their suppression - and the re-action was triumphing. The Imperial Crown was declined, "because of the revolutionary, or at any rate, the parliamentary source of the offer, and because of the Frankfort Parliament's lack of a legitimate mandate owing to the want of acquiescence on the part of the ruling houses." (2) With the refusal of Frederick William IV.

(1) Cf. The official document issued in 1847 by the Prussian Govt. "To the question what has the Confederation accomplished since its birth 32 years ago during an almost unprecedented era of peace, for the strengthening and advancement of Germany, no answer can be given". A.W.Ward. Germany. vol. 1. pp. 47 & 347. (2) Bismarck. Gedanken und Erinnerungen. 1. chap. III also chap. XIII.

to "merge Prussia in Germany", ended the last attempt to unite Germany on the basis of a liberal democratic nationalism. The Germans were unaccustomed to popular institutions and they had used them unwisely. They paid the penalty of their failure; the anti-democratic reaction increased more strongly than ever. The new Austrian Minister Schwarzenburg only followed in the steps of Metternich.

In 1861, William, who had been Regent since October 1858, became King of Prussia, and the next year, Bismarck, - the man whom fourteen years before William, then Prince of Prussia, is said to have dubbed 'a red reactionary smelling of blood' - was made Minister-President. Bismarck's appointment marked the establishment of a new regime in Prussia which was to lead in ten years to the institution of the German Empire. Bismarck's programme however, was not based on the "Gross Deutschland" of the professors and men of letters, nor on the plan of Frederick William IV. for a dual leadership of Germany by Austria and Prussia, with Austria as Imperial Head and Prussia as Imperial Commander-in-Chief,⁽¹⁾ nor on the scheme of the Frankfort Diet of Princes in 1863 by which Austria "would have been the single apex and Prussia probably reduced to the rank of a middle State,"⁽²⁾ but on nothing less than the exclusion of Austria from a united Germany based on the supremacy of Prussia. Bismarck had represented Prussia for some years in the Diet at Frankfort and had acquired a hearty contempt for it and for the lack of independence and energy which had characterised the policy of Prussia, up to, in, and since the humiliation of Olmütz - a policy which, as he declared,

(1) Cf. Ward op.cit. p.347.

(2) Cf. Bismarck Gedanken und Erinnerungen. chap. XVII.

"had been made in Vienna". He had no more respect for democracy whether "in the press, in Parliament or on the barricades." "The German problem cannot be solved by speeches, associations and majority votes but by blood and iron,"⁽¹⁾ by the forcible exclusion of Austria - the head of the German political system for over three centuries - from the new united Germany under the leadership of Prussia.⁽²⁾

The political hegemony of Prussia was preceded and prepared by her commercial hegemony. A customs union originating in 1819 in a treaty between Prussia and Schwarzburg - Sondershausen, had developed especially during the thirties until by 1860 it included the whole of Germany except Austria. It was purely German and Austria was excluded on the ground of the difficulty of either including or excluding her non-German dominions. The several States had entered the Zollverein for short periods at a time, but the advantages which they derived from it, secured its permanence. Even after 1866 when the Southern States were excluded from the North German Federation, they continued to maintain the economic connection. Thus by 1860 Prussia was at the head of a commercial union of all Germany from which Austria was excluded.

The political supremacy of Prussia in a united Germany was brought about in three ways. The military power of Prussia was strengthened; Austria was isolated by the diplomacy of Bismarck, and then, in a war of a few weeks she was thrust out of Germany,

(1). Speech to the Committee on the Budget, Sept. 30th 1862. cf. also Gedanken und Erinnerungen chap XII and XIII.

(2). Cf. Bismarck Gedanken und Erinnerungen chap III & XVII et passim

King William had from his accession determined on a reorganisation of the army and it was to support him in the struggle with the Lower House of the Prussian Landtag which this involved, that Bismarck was called to his Council.⁽¹⁾ For four 'years of conflict' the Lower House consistently withheld supplies, while Bismarck and the King carried on the Government in the face of their opposition⁽²⁾ in accordance with the monarchical theory. They increased and reorganised the army and after its success in 1866, Bismarck gracefully asked the Chamber for an indemnity for the action of the Government during the four preceding years. It was granted with enthusiasm.

An occasion for a dispute with Austria soon arose. The Two rivals had in alliance occupied the Danish Duchies in 1863 and in 1866 they quarrelled over their disposal. Austria however when she was confronted with war, found herself unprepared and without allies. By a skilful diplomacy Bismarck had isolated her in Europe. Italy's adherence to Prussia was won by the promise of Venetia. After the ingratitude with which, in 1856, Austria had rewarded the help of Russia in 1848, she could look for no help from that quarter. Russia, in fact, preserved a friendly neutrality towards Prussia, in return for the sympathetic attitude which the latter had consistently adopted both in 1870 she so far profited by Prussia's success in the Franco-German War

(1) Cf. Bismarck *ibid.* chap.XI.

(2) It was during this time that Bismarck made his famous statement about "Blood and iron". Cf. *Memoirs.* chap.XIII.

as to repudiate the Black Sea clauses of the Treaty of Paris of 1856. To Napoleon the chief cause of fear lay in the consolidation of Germany, either by the union of Prussia and Austria or in the supremacy of Austria alone - for he seriously contemplated no other possibility. He was not unwilling therefore to see Germany divided by civil war and Austria weakened by a struggle with Prussia. If, as was the most he expected, the combatants proved well-matched, he could play the arbiter or incline the balance according to his wishes. Moreover his respect for nationalities which required the surrender of Venetia to Italy, and a hint - at least - of 'une petite rectification des frontieres' thrown out by Bismarck, helped to secure the neutrality of France until it was too late to remedy the evils of Napoleon's miscalculations.

The military superiority of Prussia in the war with Austria was quickly proved to an astonished world. The desire of Bismarck not to irritate Austria unnecessarily or to prevent the possibility of future reconciliation, together with the fear of French intervention, brought Prussia to a halt^{soon} after the battle of Königgrätz, and a truce was made on which the later peace was based. Austria surrendered Venetia to Italy but she made no territorial cession to Prussia. Prussia annexed Frankfurt and the Danish Duchies and Hanover, Nassau, and Hesse-Cassel which divided her dominions. The old Confederation was dissolved; a new Federation was formed - from which Austria was of course excluded - of all the States north of the Main. Bavaria, Wurtemberg and Baden remained outside and independent although they

were expressly left free to make treaties with the North German Federation. They renewed their membership of the Zollverein and their delegates attended the Federal Parliament for the discussion of commercial questions. This commercial union whose organs were the Bundesrat and Reichstag of the North German Federation together with the members of the Southern States paved the way to the later political union.

"That a war with France would succeed that with Austria
(1)
lay in the logic of history." The dismay of France at the partial unification of Germany and her claim for 'compensations' aroused the fear and strengthened the national feeling of the Southern States, while the removal of the dual system no longer prompted them to look for support outside Germany. They made secret military treaties with the North German Federation and the war of 1870 saw the troops of Bavaria and the Southern States fighting against France on the side of Germany. The defeat of France completed the unity of Germany. On January 18th 1871, one hundred and seventy years after the assumption of the royal title by the first King of Prussia, William I. by the choice of his peers was crowned German Emperor in the Hall of Mirrors of Versailles.

From the new Germany are excluded the Germans of Austria and those of Switzerland also remained outside. With these exceptions it is based on the principle of nationality. It is not a Unitary but a Federal State, a partial union of separate States

(1) Bismarck's Memoirs. II. p.40. (Trans). Cf. also II. 56.

with a central organised machinery. As a Federal State it is anomalous in many ways, in its composition and in the construction of the Federal Government. Its chief peculiarities lie in the dominance of the monarchical principle which characterises it throughout, and in the primacy of Prussia.

From the members to the head, the German Empire, with the exception of the three Free cities, is a Federation of monarchies (1) The Preamble to the Constitution declares that "His Majesty the King of Prussia, His Majesty the King of Bavaria, His Royal Highness the Grand Duke of Baden etc. conclude an eternal alliance." The people, both of the Federal State and of the part-States are not mentioned. The States are not democracies either in the American or the Swiss sense. In 1848 Frederick William IV. refused to act without the Princes. In the new Union which has been attained not only have the Princes been given a predominant influence, but the incorporation of the dynasties in the Federal Constitution has also strengthened their position. Alone of all Federations, the German Federal State is both a monarchy and a collection of monarchies (2)

It is true that the Constitution was accepted and ratified by the Legislatures of the States, and that in Bavaria a certain popular resistance was shown to the Union. But the measures had already been agreed upon by the Governments before they were

(1) Not all are 'Kingdoms'. I use the word 'monarch' in the germane sense 'one-ruler'.

(2) Annexations such as that of Hanover 1866 or of Alsace-Lorraine 1871 were not carried out according to popular votes.

(1)
submitted to the people. For both the Federal and State Constitutions
of Germany differ from those of other Federations in the fact that
(2)
they were granted from above rather than formulated from below.
And although in all the States except Mecklenburg, the people are
represented ^{in the Government} and through their representatives exercise a certain
influence on the administration, it is in the Prince that the
guiding and governing power exists; the Governments are, in the
(3)
strict sense, 'limited monarchies', that is to say, the monarchs
rule subject to a certain control by the Chambers. The
monarchical principle in fact prevails throughout the Federation.
The popular House does not govern, it only restricts the bureaucratic
(4)
administration of Emperor, or Prince.

Prussia, the presiding and controlling State of the
Federation, possesses a Constitution which was issued by the King in
1850 as a result of the risings of 1848. It is not so liberal
as was desired, but it contains such a democratic ^{feature} as a two-chambered
Legislature (Landtag) with a popular House. The Lower House
(Abgeordnetenhaus) is however elected on the three-class system so
that the franchise is apportioned ^{according} to property qualifications, and the
Upper House (Herrenhaus) whose composition is controlled by the

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- (1) Cf. Lowell l. p.240 Note 4. Malletson. Refounding of Germ. Emp. p.315
(2) Cf. Borgeand Etablissement et Revision des Constitutions.chap 1
(3) Cf. Seignobos. Contemp Europe.
(4) The relation of a German monarch to the Parliament resembles the
position of an English king before the Revolution.

King, consists of Princes of the Blood, Heads of Royal Families whose territories have been annexed by Prussia, and representatives of landowning and official classes. The consent of the Landtag⁽¹⁾ is required for all laws, taxes, loans as well as the annual budget, but in practice its power is limited to a certain restricting⁽²⁾ influence on the Government of a negative character. "A Prussian Minister is, besides, so likely to have the nation on his side when he makes an appeal to it in the name of the King and feels so confident that even if he defies the Chamber without dissolving, the nation will not be greatly stirred, that he sometimes refuses to obey the Legislature"⁽³⁾. As in 1862 the theory still prevails that in case of conflict between the Crown and the Legislature, the King has the right to carry on Government in accordance with the permanent laws and to make the necessary expenditures. "Thus the Legislature is prevented from gaining ground on the Executive not so much by the Constitution as by the occasional refusal of the Executive to obey the Constitution - a refusal made in reliance on the ascendancy of the King"⁽⁴⁾.

The ministers are moreover not responsible to the Legislature and they do not resign on an adverse vote. They are responsible to the King alone, and the King has taken his crown⁽⁵⁾ from God. The position of the whole Government is expressed in the

(1) Prussian Constitution. Arts 62, 63, 99, 100, 103 .

(2) Cf. Lowell l. p.298 seq.

(3) Bryce. American Constitution l. 220.

(4) Bryce. *ibid.*

(5) Cf. Coronation Ceremony of William I. Seignobos *op. cit.*

(1)
decree of the late King. "The monarchy in Prussia is, after the Constitution, what it was before the Constitution, a monarchy of dead----. The right of the King to conduct the Government and policy of Prussia according to his judgment is restricted not abolished by the Constitution. The 'Government documents of the King' require the counter-signature of a minister and must be, as was the case before the Constitution was issued, represented by the King's ministers, but they remain "Government documents of the King" from whose decision they proceed and who constitutionally expresses his will through them. It is therefore not admissible and tends to obscure the constitutional rights of the King when the exercise of these rights is represented as though it proceeded from the ministers for the time being and not from the King himself. The Constitution of Prussia is the expression of the monarchical tradition of this country, whose development is based on the living relationship of its King to the people. These relations cannot be transferred from the King to an appointed minister since they are attached to the person of the King. It is my will that no doubt shall be allowed to exist as to the constitutional right of myself and my successors to conduct the policy of my Government personally, and that the idea shall always be contradicted that----- the necessity of responsible counter-signatures has taken away the character of my Government documents as independent royal decisions." This is indeed the present situation of Prussia, but reforms in a

(1) January 4th 1882 decree of William I. See Dawson. Evolution of Germany. p.440.

democratic direction have been promised.

The distribution of powers between the Federation and the states is irregular and its irregularity emphasises still further the influence of the Government or Princes as compared with the other organs, particularly the Legislature, of the States of the Empire. For the German Federal State, like the Swiss, is marked by great legislative centralisation, and great administrative decentralisation. The Federation does not work in a separate sphere, independently of the States, it has few executive officers of its own and employs almost entirely those of the States.

No express mention is made in the Federal Constitution of the assignment of the definite or indefinite powers. Presumably it is to the Federal Government that the definite powers are given but the limitation which this imposes is inconsiderable in view of the extensive sphere which is entrusted to Federal control, and of the ability to amend the Federal Constitution, with which, subject to certain restrictions, the Federal Government is invested. The States however may, it must be supposed, exercise any power which is neither expressly forbidden to them nor conferred on the Federation. They have, in fact retained certain peculiar privileges of negotiating with foreign countries on special matters and subject to the rights of the Empire and even of maintaining
(1)
ambassadors at foreign courts. This right is comparable to that possessed by the Swiss Cantons, although in the case of Germany, it

(1) Cf. Lowell l. p.247. Wilson The State. p.271

is exercised largely with reference to the personal relations and private affairs of the dynasties of the State. Many States have in the same way made treaties among themselves, such as the military conventions with Prussia.

In general however, the control of foreign affairs, peace and war, consular and diplomatic services, inter-state and foreign commerce, posts and telegraphs, ⁽¹⁾ patents and copyrights, weights and measures and coinage is assigned to the Federal Government. Wide additional powers have been entrusted to its ⁽²⁾ care, railways as in Switzerland, roads and canals, citizenship, the change of residence, trades, insurance and poor relief, ⁽³⁾ medical and veterinary police, ⁽⁴⁾ criminal and since 1873 the whole domain ⁽⁵⁾ of civil law.

Even power to amend the Constitution has been conferred on the Federal Government. The German Federal Constitution is the most flexible, the most easily amended, that is theoretically, of all the Constitutions of Federal States. "Amendments of the Constitution shall be made by legislative enactment. They shall be considered as rejected when fourteen votes are cast against them in the Bundesrat. The provisions of the Constitution of the Empire by which certain rights are secured to particular States of the Union

(1) Except in Bavaria and Wurtemberg..

(2) Except in Bavaria.

(3) Except in Bavaria.

(4) Reichsverfassung 11.

(5) Amendment 1873 December 20th.

in their relation to the whole, shall only be modified with the consent
(1)
of the States affected. The Constitution is not, therefore
entirely flexible, for each State possesses an absolute veto on
a question affecting its own privileges, while fourteen votes of
the Bundesrat - the Federal Chamber - are sufficient to negative
an amendment, which is not required to be submitted either to the
people or to the Legislatures of the States. It must be passed
like an ordinary law by the popular representatives in the Reichstag,
but no additional power of affecting the alterations of the
Constitution is given to that House as to the Bundesrat. From
(2)
1871 to 1906 nine amendments were passed, which though considerably
fewer than those of Switzerland, are proportionately more numerous
than the amendments to the Constitution of the United States.
Both in Germany and in Switzerland however, the extensive powers of
the Federal Government have facilitated centralisation and
development by legislation.

The States have therefore been deprived of wide
legislative authority which has been conferred on the Federal
Government. The power of the Executive of the State, i.e. the
dynastic Governments, has been little curtailed, for to them is
entrusted the carrying out of Federal laws. Except for foreign
affairs and the Navy, and to some extent the army and postal
service, the function of the Federal Government in Germany as in
Switzerland is limited to regulation and supervision. The customs

(1) Reichsverfassung Art. 78.

(2) See Dareste. Constitutions Moderns.

duties are collected by State officials who are inspected by Federal inspectors and must act in accordance with Federal laws. Even the coining of Imperial money is entrusted to State mints, which are provided with the necessary amount of metal.

The States also partly bear the cost of the administration of the Federal laws, and their expenses are included in the contributions to the Imperial revenue (Matricular-beiträge) which the States make. (1) A similar provision exists in the Swiss Constitution, but it has hitherto never been acted upon. In Germany however regular contributions have been paid by the States to the Federal finances. (2) In addition, the Federal Government replenishes its Exchequer from the tariff dues, posts and railways, (3) And in these matters the Federal Government possesses indirectly the taxing power over the individual which is essential in a Federal State. (4) The immediate relation between the Federation and the State is also secured in the composition of the Federal Legislature but in the two other channels of direct contact between the individual and the Federation - defence and judgment - the Imperial Federation is irregular.

The military organisation of the Empire is peculiar, it is neither wholly Federal nor left entirely to the States. It is in harmony however with the general principle of the German Federation, - legislative centralisation and administrative

(1) Wilson. The State. chap.VII.
(3) See Statesman's Year Book.

(2) Art. 70.
(4) See introd. pp.17-22.

decentralisation. Very elaborate arrangements are made in the Constitution concerning the army, for it was characteristic of Bismarck to devote himself to practical details of this nature rather than to theoretical generalisations. Universal obligation (1) to military service is declared throughout the Empire and every recruit upon enlistment takes a joint oath to his territorial sovereign and to the Emperor. (2) But there is no Imperial army in time of peace. (3) There are four armies belonging to Prussia, Saxony, Bavaria and Wurtemberg respectively. A certain uniformity of organisation on the Prussian model is demanded, and the armies are inspected by the Emperor and are under his command, their composition (4) disposal and regulation is determined by Imperial laws, and the expense of maintaining the army is borne by the Federation. The Emperor also appoints all officers commanding troops of more than one contingent (5) and the appointment of generals is subject to his approval, but the subordinate officers are left to the choice of each State. In all other respects the management of the troops is left entirely to the control of each State. (6) In time of war, however, the armies are placed under the direct authority of the Emperor.

The navy however is on quite a different footing. Prussia alone possessed a navy of any importance in 1871, which she had

(1) Reichsverfassung XI. Art. 57. (2) In Bavaria only in time of peace.
(3) See infra p.183
(4) Except in Bavaria and to a certain extent in Wurtemberg in time of peace.
(5) Except in Bavaria. (6) See Const. XI. Arts. 57-68. Treaty with Bavaria November 23rd 1870 and Convention with Wurtemberg November 21-25, 1870.

bought by auction in 1852, from the Confederation, and this she transferred to the Empire. The merchant vessels of all other States were likewise federalised. The navy is therefore under (1) the supreme command of the Emperor, who is charged with its constitution and organisation and the appointment of its officers, and in whose name the seamen are sworn in. The harbours of Kiel and Jade are Imperial harbours. The conditions of the commercial marine are in the same way Imperial and Federal affairs. The navy (2) belongs therefore to the Federal Empire and not to the States, but the army is not directly an Imperial force, but is chiefly controlled and managed by the four States, although subject to (3) Imperial laws and in time of war at the disposal of the Federation.

In the same way justice and Federal law are administered in the first instance by the State courts, as in Switzerland. There is only one Imperial Court - Reichsgericht - with a hundred judges located not at Berlin but at Leipzig. Thus as in Switzerland, the Imperial tribunal does not stand at the head of a large Federal Judiciary such as the Supreme Court of the United States. In this latter regular Federal State, the Federal State Judiciaries work in separate, and independent and complete spheres of their own. The Courts of the separate States of the United States are in no sense organs of Federal justice; they have an independent standing,

(1) Constitution IX. Arts. 53-55. (2) Like that of the U.S.A.
(3) Except in Bavaria.

organisation and jurisdiction, and are not in any way except that of limitation affected by Federal law. The Swiss Federation employs the State Courts to execute its decrees, but it does not rule its procedure. The German State Courts although in the same way Federal agents, are also regulated in their organisation and rules of practice by Federal statutes, and moreover the whole field of civil, criminal and commercial law is codified by Imperial law. There are therefore in each State "a similar series of courts organised on an Imperial or Federal plan and expounding Imperial laws in accordance with Imperial forms of procedure, but whose members are appointed by the local sovereign and render their decisions in his name."

Thus in Germany as in Switzerland, the ultimate enforcement of Federal laws depends not on the subjection of the individual to the ordinary Federal law courts, but on the coercion of the State which is largely the agent of the Federation. The two processes of Switzerland and Germany are not dissimilar. The German method of 'Federal Execution,' ordered by the Bundesrat and carried out by the Emperor, is an armed attack on the delinquent State. It has not yet been necessary to employ this means of co-ercion, for the Imperial or Federal power is^{so} closely united with the Prussian, that Federal execution would also mean Prussian coercion and no State possesses any reasonable hope of a successful issue to

(1) Cf. Gerichtsverfassungsgesetz of January 27th 1877, and Civil Prozessordnung of January 30th 1877, and Strafprozessordnung of February 1st 1877, the administrative courts however are left largely to the discretion of the several States.

(2) Lowell l. p.281.

(3) See supra chap. III. p.108.

a resistance to Prussia.

The Imperial Federal State of Germany therefore possessed unusually wide legislative powers, but the execution of the Federal laws is entrusted almost entirely to the State Governments, that is in reality to the Princes and Monarchs of the States. In the Constitutions of the Separate States and in the administration of Federal laws it is therefore the monarchs and dynasties who exercise the supreme governmental authority. In the composition of the Federal Legislature their influence is also equally great.

As in all Federal States, one house of the Legislature represents the States in their corporate and independent capacity. In Germany as in no other Federation, the delegates to this house (1) are appointed by the governments of the separate States. In addition, the members do not vote according to their individual opinion, but collectively according to the instructions of their respective governments. Thus one delegate may cast the whole number of votes for his State, in fact several of the smaller States were in the habit of commissioning an agent to represent them in the Federal Chamber. Since 1860 however the procedure of the Bundesrat has been divided into two parts, in the first of which important measures are passed, and in which every State must be represented by its own members. In the second half the members may depart, and any agent may be authorised to deliver the vote of the State. The delegates are recalled and paid at will by the

(1) By the Senates of the Free cities.

Governments of the States and the ambassadors are guaranteed safe-
conducts by the Federal Constitution. (1) (2) "The true conception of the
Bundesrat is an Assembly of the Sovereigns of the States, not
actually present but acting through their Representatives." This
fact together with the great powers which as an organ of the Federal
Government the Bundesrat possesses justifies a German jurist's
statement that "The body of German Sovereigns together with the
Senates of the three Free Cities, considered as a unit - tanquam
(3)
unum corpus - is the repository of Imperial Sovereignty."

The composition of the Bundesrat illustrates the second
guiding principle of the German Federation, - the inequality of
the States. The German Empire differs from all other Federal States
in the fact that it is a Federation of Monarchies; it differs no
less vitally in its being, not a union of States with equal rights,
but an association of privileged members. The United States is
based on an equality of parts, and the decided preponderance of any
one State would wholly destroy the character of the Union. The
German Federation is organised on a plan that can only work
successfully, in case one member is strong enough to take the lead
and to keep the main guidance in its hands.

The expression of the inequality of members is contained in
the representation of the States in the Bundesrat, the Federal

(1) Reichsverfassung 111. Art. 10

(2) Lowell 1. p.267.

(3) Laband Deutsches Staatsrecht p.40 Cf. Wilson. The State p.258

Chamber, and in this feature Germany may be compared with Canada⁽¹⁾ which has also apportioned unequally the members of the provinces in the second House of the Legislature.

In the Bundesrat, the 'in plenum' arrangement of the Diet of the old Confederation has been preserved, except that Bavaria was given six votes, as in the Bundesrat of the Zollverein from 1815 to 1866 - 1871, and Prussia acquired^{the} votes of the States she annexed in 1866.⁽²⁾ Of the sixty-one members, Prussia has seventeen votes, Bavaria six, Saxony and Wurtemberg four each, Baden, Hesse and Alsace-Lorraine three each,⁽³⁾ Brunswick and Mecklenburg-Schwerin two each, and the remaining fourteen States and three Free Cities one each.

Besides this expression which is allowed in the Federal Legislature to the inequalities of the States, more direct privileges have been granted to them by exceptions to the uniform application of Imperial laws which have been made in their favour.

Hamburg and Bremen were declared free ports and excluded from the operation of the Imperial Customs tariff. Both cities⁽⁴⁾ have since however surrendered this privilege.

More extensive privileges were granted to the Southern States to secure their adhesion to the North German Confederation in 1871.

Bavaria has the entire control of her army in time of

(1) See infra Chap. V. p.224 (2) 13 in number :- Hanover 4, Hesse-Cassel 3, Holstein-Lauenburg 3, Nassau 2 and Frankfurt 1.
(3) Since 1911. See infra p. 190.
(4) Hamburg 1888 Bremen 1885

peace, except for the stipulation that it must conform to the general organisation of the Federal army . The exemption from Imperial control does not in addition extend to the universal obligation to military service. In every other way, however, the Bavarian army is independently controlled by the State itself, and is subject only to the right of inspection which is retained by the Emperor.⁽¹⁾ In time of war it is of course placed under the exclusive command of the Emperor. Bavaria is also exempt from the Imperial excise on beer and may impose its own duties on this commodity.⁽²⁾ It is excluded from Imperial railway legislation, except with reference to those railways which are of a strategic importance. Imperial laws on matters relating to marriage and domicile and settlement do not extend to that State, and it organises its own postal and telegraphic services, subject to certain Imperial regulations.⁽³⁾ Bavaria is also entitled to a seat on the Committee of the Bundesrat on the army and fortifications and to the Presidency of the Committee on foreign affairs, in which Saxony and Wurtemberg must also be represented.⁽⁴⁾ Saxony in addition possesses the privilege of having the seat of the Federal Judiciary located in its territory.

Wurtemberg possesses, besides, the seat in the Committee on foreign affairs, equal privileges with Bavaria with regard to posts and telegraphs, and to the Imperial excise on beer, from which

(1) See supra p.178.

(2) Until 1877 on Brandy also.

(3) Reichsverfassung XI. Treaty of November 23rd 1870. Arts. 46 & 4 s.l. Art. 52.

(4) III. Art. 8.

Baden is also exempt. Wurttemberg has also been granted special military privileges, although not so great as those of Bavaria.

It is however in the relation of Prussia to the Federation that the most important and conspicuous example is afforded of the privileged character of its composition. In size and population Prussia alone is greater than all the other States of the Empire put together, possessing two-thirds of the territory of the whole Federation and containing three-fifths of its entire population. It is therefore natural that in a compact of such a nature, Prussia should play the lion's part.

Besides its Imperial position, the power of Prussia has been also increased as a separate member by an exercise of the rights of concluding treaties on local matters which the Federal Constitution permits to the States of the Empire.

Thus the Prince of Waldeck, desiring to retire, from the financial burdens of government, sold his rights, with the exception of a few prerogatives which he retained, to the King of Prussia, who "has bought the goodwill of his trade, and carries on the government as his successor."⁽¹⁾ With the government of Waldeck, Prussia acquired also the vote of that Principality in Bundesrat, and in 1886 she secured the appointment of a Prussian Prince as Regent of Brunswick, and thus gained virtual control over the two votes of this State. These three votes, together with the three votes

(1) Cf: Lowell 1. pp.249 & 353.

(1)
of Alsace-Lorraine, have given her command therefore over twenty-three votes in the Bundesrat out of the sixty-one.

Several States have in a similar manner transferred their postal administrative rights to Prussia, and the Jurisdiction of the their Courts, while Baden and all the members of the old North German Confederation except Saxony i.e. all the States of the Empire except Saxony, Bavaria and Wurtemberg have transferred their military organisations to the control of Prussia. As has been

(2)
already described, the Empire exercises a supervisory and legislative regulation of military affairs, but has left the organisation of the armies to the States themselves. As most of the smaller States found it too expensive to maintain universal military service and the requisite amount of efficiency, they transferred their armies to Prussia, on a condition that they should not be removed from their respective States, except in case of actual necessity. But for all practical purposes they are recruited, drilled, commanded and organised by Prussia, and in fact form an integral part of the seventeen corps which she contributes to the twenty-five active corps which constitute the Federal army.

These are however 'private' or State privileges of Prussia. She possesses many more by virtue of the Federal or Imperial Constitution.

In military affairs her organisation, military code, even to the cut of the soldiers' uniform, is established as a model

(1) See however *infra* p. 190

(2) See *supra* p. 178.

(1)
for that of the other States. With her twenty votes in the Bundesrat she possesses an absolute veto on all changes in the Constitution. She is, in addition, given the Presidency of that chamber which gives her a casting vote in case of ties and the final decisions on all laws affecting the army, navy or the customs, or upon the rules and regulations for the execution of the laws of the Empire, whenever it shall be pronounced in favour of retaining
(2)
existing arrangements. The power though negative is important. She is also chairman of all the standing committees of the Bundesrat
(3)
except that in foreign affairs.

(4) Finally the Prussian Capital is the seat of the Federal Government, and Berlin has become the first capital of Germany for "neither Aachen nor Dresden, neither Mainz nor Heidleberg, Frankfort nor Munich, Cologne nor Augsburg were capitals as London or Paris were capitals" - expression of the unity of the nation. The entry of Napoleon into Vienna did not mean what the entry of the Germans into Paris in 1871 meant, but the occupation of Berlin by
(5)
a foreign foe would now involve the whole Empire in its downfall. The Prussian King, the Arch-Monarch of the Federation of Monarchs is also declared perpetual President of the Federation. He is given the Imperial title, and the chief executive power of the Federation; and the Imperial Presidency is regulated solely

(1) Reichsverfassung XI. Art. 61. Her education laws have also been largely adopted throughout the Empire. Statesman's Year Book 1916.

(2) Arts. 5, 35, 37.

(3) Cf. supra p.184

(4) Except the Reichsgericht.

(5) Cf. Marriott and Robertson 'Evolution of Prussia' p. 14.

according to the laws of succession of the Prussian Royal House, and is in fact a hereditary and ex officio appendage to the Prussia Monarchy.

It is of interest to notice that Prussia as a member of the Imperial Federation has not demanded exemption from the operation of Federal laws in the same way as Bavaria or Wurtemberg. Such an immunity would indeed be of little use, for the Government of the Empire is to a great extent conducted in accordance with the will of Prussia. Not that her wish may not be and in conspicuous instances has been defeated but the organisation of the Federal Government gives to her the supreme controlling power in the Empire. It is in recognition of this fact that the exemptions from Imperial laws already described, have been granted to the Southern States. For the German Federal State is a triple complication of privileges and inequalities.

Firstly certain States in the Federation are distinguished by their possession of comparatively large areas, or numerous populations, and in this respect alone Prussia rules more than half the Federation; secondly the prominence of these States is expressed and confirmed by the parts they have been assigned in the Government of the Federation itself. Their rank in the Federal hierarchy which has thus been constructed, is not apportioned, however, in any exact ratio to their individual worth for Prussia, although she is given all the Executive power of the Federation (except that which

(1) e.g. The Imperial Railroad Bill of 1875 and in the fixing of the Judiciary at Leipzig rather than at Berlin 1877.

vested
is in the Bundesrat) and this as already stated is small compared with the Federal Legislative authority, is only entitled constitutionally to ^{less than} one-third, and actually possesses a little more than one-third of the votes of the Legislative Chamber which represents the States. Thirdly, in addition to particular power as individual States, and to relatively privileged positions in the Federation in respect of their individual greatness, and both of these factors have given Prussia a pre-eminent position in the German Empire - certain of the other States viz:- Bavaria, (1) Wurtemberg and so on have been specially favoured as it were against the Federation, or in reality against the privilege in the Federation which has been accorded to Prussia as the largest State. This third concession of privilege is therefore of the nature of an exception to, or even contradiction of, the result of the operation of the first and second causes. Bavaria, itself privileged in respect of smaller States such as Schaumburg-Lippe is, in addition, specially protected against the extension of the same privilege in the case of Prussia, the largest State of the Federation. Of course in practice all the powers possessed by all the States excluding Prussia act or may act, as checks upon the ascendancy of Prussia, and it is therefore perhaps of little point to discriminate between the concessions which have been granted to Bavaria for example, in respect of its size or historical position, and those which have been given to it as a protection against the greater

(1) I.e. distinguishing between Prussia on the one hand and all the other States of the Federation on the other.

powers which were accorded to Prussia in respect of its size and historical position. It is nevertheless an interesting Federal example of a complicated inequality of privilege within privilege.

The irregularity of the Federation is still further increased by the position of Alsace-Lorraine. The province which was part of the price which France paid for her defeat in 1870 was not formed into an autonomous State on the model of the other members of the Federation, nor on the other hand was it annexed to any one State of the Empire. Indeed Prussia alone could have incorporated it without danger to its internal tranquility and it has therefore been made an Imperial Province, (1) 'Reichsland'. The Government is vested in the Emperor who carries out the administration of the laws which he enacts with the consent of the native 'Landesausschuss', a legislative assembly consisting of two Houses of which the first is of a popular, the second of an official and nominated character. The Emperor exercises his power through the Statthalter or Governor whom he appoints and may remove. Alsace-Lorraine possesses some share in the Government of the Federation. It sends fifteen members to the Reichstag, and three members to the Bundesrat, who, since the Constitution of (2) 1911 have been allowed to vote, except on questions effecting an alteration in the Constitution or when, added to the votes of Prussia they would create a majority in the House. For the Emperor who

(1) The Constitution of Alsace-Lorraine is based on the Imperial laws of 1871, 1872, 1873, 1879 & 1911.

(2) See Annual Register 1911 p.328 seq.

appoints the Statthalter, who nominates the delegates, virtually controls the votes of Alsace-Lorraine in the Bundesrat.

The position of Alsace-Lorraine is therefore anomalous. It is not an independent State for the Emperor possesses the executive power, but on the other hand it exercises a reasonable influence in the Federal Government. Before 1911 in its organisation and its relation to the Empire it resembled a "Territory" of the United States, but, since 1911 it has taken a step towards 'Statehood', although it still does not possess the full autonomy which is accorded to the new members of the American Federation. It differs still more vitally in its history from the new States of the United States, for Alsace-Lorraine was acquired by conquest and although the larger part of its inhabitants are of German race, they have acquired, during their association of three centuries with France, a deep sympathy with French institutions and ideas, which the forty years of German rule have apparently not been able to undo.

The composition of the German Federal State is therefore distinguished by two characteristics; firstly by the power of the Princes, who exercise the governing functions in all the States, and whose position is strengthened by the nature of the distribution of authority between the Federation and the part-States, and secondly by the irregularity and inequality of the members of the Federation. The expression of both these features in the Bundesrat has already been described and the connection of Prussia - the most important example of both principles - with the Federation

briefly indicated. A description of the construction of the Federal Government and the relation of its parts, enable the importance of the two characteristics to be more accurately measured.

The chief Executive power of the Federation is vested in the Emperor, who however as a separate Federal Officer does not exist, for the Imperial functions are exercised by the reigning King of Prussia, who, in the capacity of President of the Federation, bears the title of German Emperor. His title is therefore official and not territorial; he is 'deutscher Kaiser' and not 'Kaiser von Deutschland'. The duties of the Federal Executive consist in the publication of Federal laws and the supervision of their execution. For the administrative authority of the Federation or Empire is small, and the Emperor as Federal Executive Officer possesses powers considerably less than those of the President of the United States in virtue of a similar position. Whereas the American President executes the Federal laws, the German President supervises their execution by the States. Like (1) the President of the United States, the Emperor is Commander-in-chief of the army and navy; he controls foreign affairs; declares war, subject to the consent of the Bundesrat, except in the case when German territory or coasts are invaded, makes treaties for which so far as they refer to matters of Imperial legislation, the consent of the Bundesrat and the approval of the Reichstag are

(1) See Reichsverfassung IV. Art. 11-19.

necessary; he accredits and receives ambassadors, and represents the Federation in all its relations with foreign countries. As the President of the United States may send troops into a State in case of invasion, or, upon request, of domestic disturbance, so the Emperor is charged with the carrying out of the "Federal Execution" against a State when it is ordered by the Bundesrat. Like the Republican President, the Emperor possesses a power of appointment; he may appoint all Imperial officials, subject to a certain right of confirmation which has been given to the Bundesrat. He may summon and adjourn the Houses of the Legislature and, with the consent of the Bundesrat, may dissolve the Reichstag.

The authority of the Emperor as Executive officer of the Federation is therefore small except in foreign affairs. As Emperor he possesses no right of pardon, or of veto on legislation, such as is exercised by the President of the United States; and his consent is not legally necessary to the passage of a law; he has no initiative in legislation, nor is he represented in the Reichstag at all, for the Chancellor strictly speaking is only there as a member of the Bundesrat. (1) As Emperor he may not confer titles, nor does he enjoy an Imperial civil list, or possess an Imperial household.

The powers of the Emperor are however largely supplemented by his powers as King of Prussia, and it is in his Prussian and not in his Imperial capacity, that the influence of

(1) Cf. Lowell. Governments and Parties Vol.1. p.275

the Emperor is dominant in the Federation. Thus, although as Emperor he has no veto on Federal Legislation, as King of Prussia⁽¹⁾ and director of the Prussian votes in the Bundesrat he has a very extensive veto. His functions as King and Emperor are indeed so closely interwoven that it is difficult to distinguish them. As Emperor his Majesty William II. carries on the administration, through the Statthalter, of Alsace-Lorraine; as King of Prussia he governs in addition^{three-}fifths of the whole population of the Empire and is sovereign of two-thirds of the territory. As Emperor, he supervises the execution of the Imperial military laws throughout all the States of the Federation except Bavaria and Wurtemberg,⁽²⁾ appoints the highest officers of the several armies, and inspects them from time to time. As King of Prussia, he has absolute command throughout, of the troops of all the States except Bavaria⁽³⁾ Wurtemberg and Saxony, regulates their organisation and appoints the lower officers. "As Emperor he instructs the Imperial Chancellor to prepare a bill; as King he instructs him to introduce it into the Bundesrat and directs how approximately one-third of the votes of that body shall be cast. Then the Bill is laid before the Reichstag in his name as Emperor and as King he directs the Chancellor what amendments to accept on behalf of the Bundesrat, or rather of the Prussian delegation there. After the bill has been passed and become law, he promulgates it as Emperor and in

(1) See supra p. 183 & 186.

(2) Except in Bavaria and Wurtemberg.

(3) See supra p. 178 & 184

most cases administers it in Prussia as King, while finally as
(1)
Emperor he supervises his own administration as King?

The Emperor's position is however not so confusing as it appears. The situation is not so much that of a double position or dual personality; William II. does not as King act in one way and then, having divested himself of his Kingship assume the Emperor and act in another way. But as King Of Prussia he is German Emperor, and as head of the Hohenzollerns i.e. of the Royal Family of Prussia, he is the Executive Officer of the Federation. For the German Federation is based on the inequality of the States and on the monarchical principle of government, and William II. as Monarch of the greatest State is ex-officio President of the Federation and German Emperor.

There is one other Executive Officer of the Federation viz:- the Imperial Chancellor whose counter-signature is in fact required for the validity of Imperial decrees, and "who thereby
(2)
assumes responsibility for them." In fact he represents the Emperor in the Federal Government and performs most of his Imperial duties. His functions as Chancellor are, however, small, and like his Royal Master he derives his powers chiefly from his Prussian connection, for as Chancellor he represents neither the King of Prussia nor any of the other Monarchs of the Federation. In
(3)
practice, - and only once has the practice been departed from - the Imperial Chancellor is at the same time Minister-President of

(1) Lowell op. cit. I. p.276.

(2) Reichsverfassung Art.17.

(3) In the case of Von Caprivi in 1892.

Prussia and chief of the Prussian delegation to the Bundesrat. Indeed owing to the peculiar connection between Prussia and the Empire such an identification seems necessary. Although the Chancellor is President - as representing the Emperor - of the Bundesrat it is in the fact that he controls the votes of Prussia that his importance lies. In the Reichstag on the other hand, where he appears nominally as commissioner for the Bundesrat or one of its Prussian members, his importance is really due to his position as chief of the Federal Government⁽¹⁾. There he is subject to interpellations, but he does not resign on an adverse vote. For the Constitution provides no means of securing his political responsibility to the Reichstag. If such a responsibility were established, it would sever the connection of the Imperial Chancellor with Prussia, for no minister could be responsible to two chambers one of which might on one day call upon him to resign, while the other ordered him to remain in office. Even were ministerial responsibility introduced in one - either the Empire or Prussia - and not in the other, the same difficulty would arise. The Chancellor is in fact responsible to the Emperor alone, by whom he is appointed. The Chancellor - as the Federal Executive - is not represented in the Lower House, he is non-parliamentary and irresponsible. The Emperor may however, with the consent of the Bundesrat, dissolve the Reichstag and appeal to the nation over its head. This method has so far been successful in case of

(1) Lowell I. p.270

(1)
opposition, and the new Chamber has been more sympathetic. The fall of a minister may of course be brought about by popular opposition, but there exists no political compulsion. In no one of the three Federal States therefore, - the United States, Switzerland and Germany - has the principle of the political responsibility of the executive to the Legislature been adopted in the Government of the Federation.

The first Imperial Chancellorship was held for nearly twenty years by Bismarck, who moulded the office largely according to his personal wishes. He had wished indeed to make the
(2)
Imperial Chancellor a Prussian officer, but although he was overruled in the theory of the office, he practically succeeded in carrying out his intention. It was also owing to his dislike of colleagues, that no Imperial Cabinet has been developed. There are "substitutes" who were created temporarily to relieve an overworked Chancellor of some of his duties, and who have since become a permanent body of officials, but they are subordinates not colleagues they are subject to his orders, and the Chancellor alone remains the sole head of the Government and morally responsible for its whole policy.

The Federal Legislature consists of two Houses, based, in the usual manner of a Federal State, on the two Federal elements.

(3)
The Reichstag, or National House represents the States

(1) Cf. In the case of the army bill on 1892 - 1893.

(2) Cf. Lowell P.277

(3) See Reichsverfassung V. Arts. 20-32.

in proportion to their population. The number of three hundred and ninety-seven members of which it consists, was fixed in 1871 and since that date no redistribution of seats has taken place. The towns therefore which have grown rapidly in the interval are far from adequately represented; Berlin, for example, only sends six members instead of about thirty. Every man who is twenty five years old, and not on active service or otherwise disqualified, may vote, and any voter who is a German citizen of one year's standing is eligible for election in any constituency in the Empire. The electoral districts are fixed by Imperial law, as in Switzerland, (1) and members are chosen by the system of ballotage, since 1888 for five years. Prussia by virtue of her population possesses two hundred and thirty-five seats, Bavaria comes next with forty-eight, and so on. If a member of the Reichstag accepts a higher office (2) he must offer himself for re-election, in English fashion.

In 1871 universal suffrage was a novel experiment and (3) Bismarck insisted on the non-payment of members. This was even extended to prevent the payment of Socialist members by their own (4) Unions or organisations. The article of the Constitution prohibiting remuneration was however repealed in 1906 and members (5) now receive three thousand marks, per session with a deduction of twenty marks for every day's absence.

(1) I.e. an absolute majority is required for election at the first ballot, and failing this another vote is taken between the first and second candidates.

(2) Wilson. The State.

(3) Art. 32.

(4) Cf. Lowell l. p.253.

(5) = £150.

The members possess the ordinary privileges of freedom of speech and from arrest, although some little opposition has been offered to their exercise, and the House may elect its own officers, draw up its own rules and decide its own disputed elections. The power of the Reichstag appear also in theory very great. All laws, loans, the budget, and all treaties involving legislation require its consent. It may initiate legislation, interpellate the Chancellor, and on the demand of fifty members may force a debate. Over taxation however, it has no such hold as the House of Commons, it possesses no exclusive initiative in financial affairs, and the revenue laws are permanent or passed for long periods at a time, and cannot be changed without the consent of the Bundesrat. The military appropriation law is in practice determined by the law fixing the number of troops and this is passed some years ahead. (1) Some laws, and notably that extending the competence of the Federation to civil law, have been passed on its initiation, but it does not direct the legislative policy of the State, and its chief function lies rather in the consideration of bills which are submitted to it by the Chancellor and the Bundesrat. It exercises its power of amendment freely, but it is a negative rather than a positive activity. It checks and restrains, but it does not govern. No minister is responsible to it, the 'government' of the day is neither chosen from it nor may be dismissed from office by it. The Executive however, possesses a power to dissolve the

(1) Lowell 1. p.256.

House, with the consent of the Bundesrat, a means which is used to break down opposition and is not the complement of ministerial responsibility as in countries of Parliamentary Government. The minister is not however responsible to the nation. For he would not be bound to resign were the new House hostile to his plans. In practice, however, this has never happened, and the question has therefore not yet been forced to its ultimate issue. It is a curious provision, and in no other State may the Lower and larger House be dissolved by the Upper and smaller. The Reichstag may not be prorogued for more than thirty days^{and} in case of dissolution a new House must be elected and meet within ninety days.

The Second House - the Bundesrat - is perhaps the most interesting institution of the Empire. It represents the States but unequally and the members are appointed by the Governments of the several States and vote according to instructions⁽¹⁾. Therefore, although it expresses the supremacy of Prussia, it on the other hand represents the centrifugal element of the Federation and is the champion of State independence against the unification or Prussianisation of Germany. It is the 'central and characteristic organ of the Empire', the most thoroughly native feature of the Constitution. It possesses wide and heterogeneous powers and a peculiar vitality. In its functions it is as much an executive council as a legislative chamber, and in this it somewhat resembles the Senate of the United States. The Legislature of the German

(1) See supra pp. 177 & 178

(1)
Empire has in fact been called unicameral. It is however based on the ordinary Federal principle of the representation of the two elements of a Federation, and in this respect may legitimately be compared with the bi-cameral Legislatures of other Federal States. It is not however a deliberative Assembly, because the delegates vote according to instructions from home. On the other hand it is not an international conference because it is part of a Constitutional system and has power to enact laws, but it is unlike any other legislative Chamber in as much as the members do not enjoy a fixed tenure of office, and are not free to vote (2) according to their personal convictions!

Like the Senate of the United States it is organised on the Committee System. The Constitution in 1871 provided for eight standing Committees, but these have now been increased to twelve; - on the army and fortresses, maritime affairs, foreign affairs, taxes and customs, trade, railroads, posts and telegraphs, accounts, the Constitution, Alsace-Lorraine, civil and criminal law and on standing orders, respectively. The members of the first two are appointed by the Emperor, and Bavaria constitutionally, and Saxony and Wurtemberg by a special convention, are always represented in the Committee on the army and fortresses. The other Committees are elected annually by the Bundesrat itself, and must represent five States, of which one must be Prussia except in

(1) DeMombaynes. Cf. Marriott. Second Chambers p.116 seq. for discussion of question.

(2) Lowell op. cit. p.264.

foreign affairs - who is ex-officio chairman. A further illustration of the ambassadorial character of the Bundesrat is afforded by the fact that the Emperor or Bundesrat merely designates the States to be represented, and the State Government appoints its own delegate.

(1)

In the committee on foreign affairs, Prussia has no seat. Bavaria is the constitutional President and Saxony and Württemberg must be represented as well as two other States. Prussia's absence is however of not much importance, for the committee can only listen and take action according to the reports of the Chancellor who is in practice a Prussian minister for foreign affairs. The Committee does not report as other committees do, and is really a means of securing that the larger States of the Empire shall be legally and permanently consulted on foreign affairs.

The consent of the Bundesrat as part of the Legislature is required to every law. It possesses an initiative in Legislation, as well as every State, and it has succeeded in making its power far more effective than the Reichstag. In matters not common to the whole Empire only the States interested can vote. This provision also extended to the Reichstag, but was repealed for that House in 1873,^{as} it was inconsistent with the Imperial and National Unity which the Reichstag represents.

Although the legislative powers of the two Houses are

(1) Reichverfassung 111. Art. 8

co-ordinate, the Bundesrat is the main source of Federal legislation. This is partly due to the fact that the Chancellor is its President⁽¹⁾ and chiefly to its large additional functions.

It may order 'Federal Execution' against a State and with the consent of the Emperor, may dissolve the Reichstag. It has power to make regulations for the conduct of the administration, and to issue ordinances necessary for the execution of the laws of the Empire so far as no other provision is made by law. Its consent is necessary to declarations of war except on invasion and to the conclusion of treaties (with the Reichstag). It confirms the appointment of the Judges of the Imperial Court, the Consuls and the tax-collectors, and elects the members of the Court of Accounts. In some ways it acts like a ministry, for it appoints one or more of its members to represent it in the Reichstag and to support its measures. Any member may attend the Lower House and speak even against the proposals of the Bundesrat.

The Bundesrat possesses also large judicial powers. To it is committed the decision of disputes between the Imperial and States' Governments concerning the interpretation of Statutes. In this power it resembles the Federal Council of Switzerland, as in some of its other functions. It also acts as a Court of Appeal in cases where there is a denial of justice by the State Court, and it decides controversies between the States in the domain of public law, or it may appoint some other body to decide them. Constitutional questions in the States may also be

(1) Reichsverfassung 111. 7 & 9; IV. 11 & 19; V. 24.

settled by the mediation of the Bundesrat upon the request of one
(1)
of the parties.

The Bundesrat is therefore a combination of Legislative Chamber, Executive Council and Court of Appeal. "It is a nullity if regarded as an independent part of the Constitution for its impulse is from without. Yet it is the most important organ in the Empire, as is the instrument whereby the larger States
(2)
(especially Prussia) rule the Empire." And in its relative position in the Federal Government and in its composition it demonstrates the truth of Bismarck's statement that "the dynasties are the true guardians of German unity, not the Reichstag and its parties!"

The organisation of the Federal Judiciary has already
(3)
been described; and it is obvious that the judicial powers of the Bundesrat have deprived it of a large province of jurisdiction. Like the Federal Tribunal of Switzerland it does not possess the power which accrues to the Supreme Court of the United States from its position as interpreter of the Constitution. As in Switzerland there is no pervading and fundamental distinction in Germany between Constituent and legislative enactments. The decision of the validity of Statutes lies not with the Reichsgericht, but with the Bundesrat as with the Federal Council in Switzerland. Though the Federal Council does not represent the Bundesrat, yet in both cases the States of the Federation are given a more direct share in decisions respecting Federal laws than in the United

(1) Cf. Arts. 76 & 77
(3) See supra p. 178-80.

(2) Lowell l. 272.

States where such decisions emanate from a Federal Court whose judges are appointed by the Federal Executive. Every law of the German Federation as of the Swiss, must probably be accepted by the Courts as valid, although State legislation can apparently be treated as unconstitutional.⁽¹⁾ Both of these last two points remain still a matter of dispute.⁽²⁾

The Imperial Court exercises original jurisdiction in case of treason against the Empire, e.g. espionage, and appellate jurisdiction from the Federal Consular Courts, and from the State Courts on questions of Imperial law. It is, in addition, a general Court of Error for all cases arising under the ordinary Imperial civil and criminal law.

(1) See Dicey Law of the Constitution. Appendix Note 2.

(2) See Lowell l. p.282

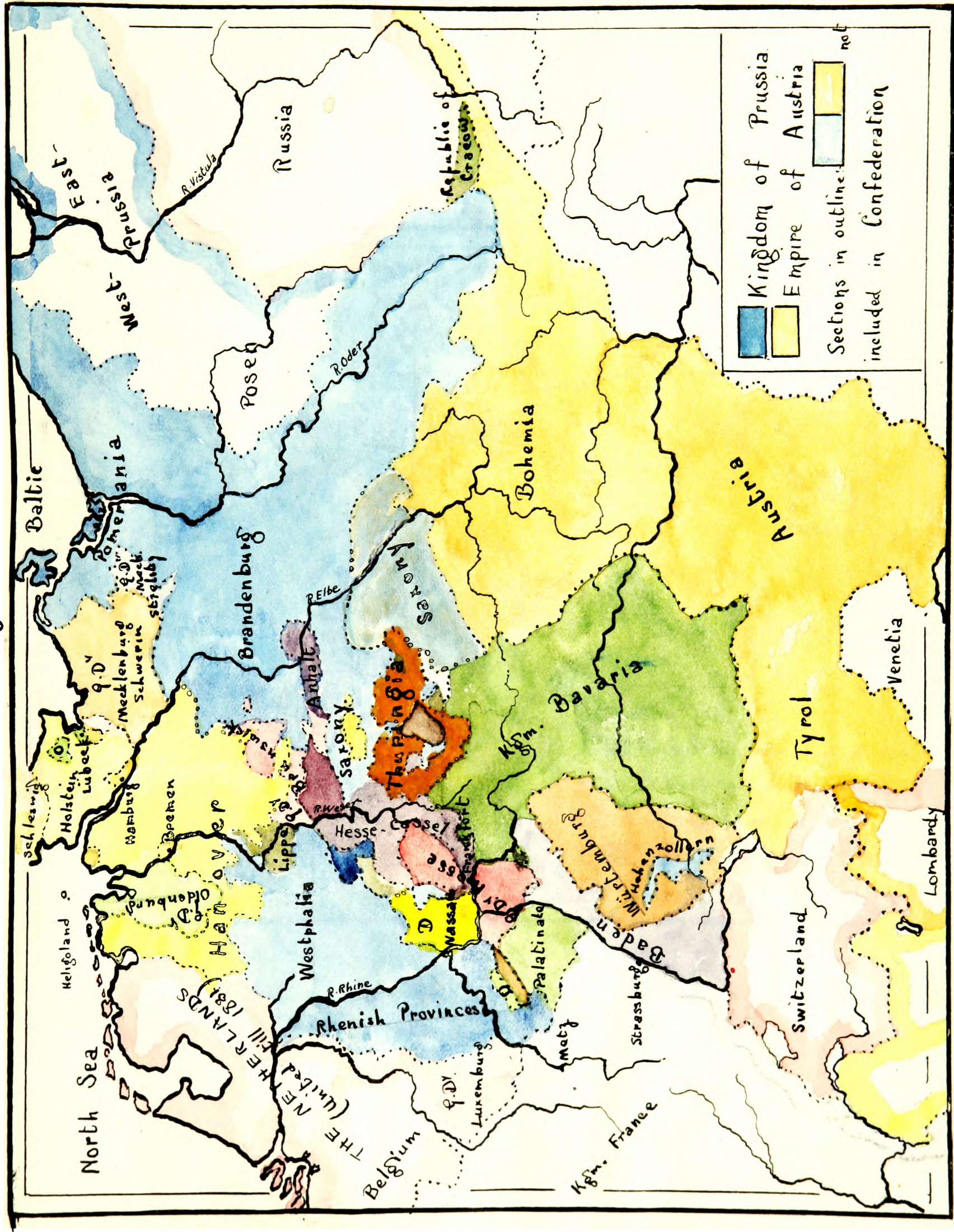
Appendix I

Germany 1815-1866

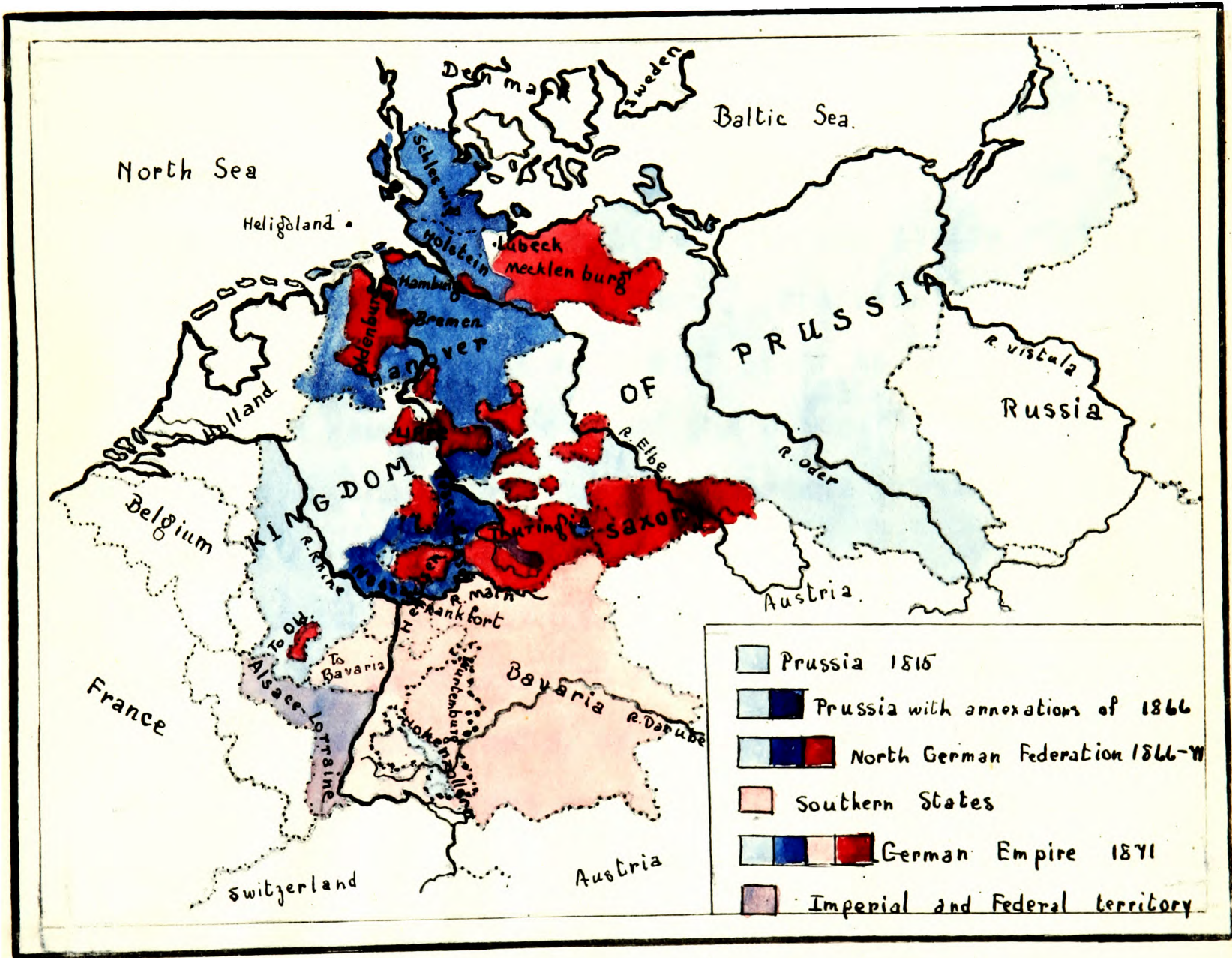
Chapter IV

Appendix I

Germany 1815-1866



GROWTH OF GERMAN UNITY



The British Empire, with its rich constitutional history, must be given a prominent place in the development of Federalism. Two of the 'Self-governing' Dominions - Canada and Australia - are Federal States. The Union of South Africa, formed in 1909, is a legislative and not a Federal Union. For the Parliament of the Union is supreme over every legislative Assembly of the (1) Provinces. "The Government and the Parliament of the Union shall have full power and authority within the limits of the colonies," (Cape of Good Hope, Natal, Transvaal and the Orange River Colony)--- "and shall have full power to make laws for the (2) peace, order and good government of the Union." "In addition, the Supreme Courts of the Provinces shall become provincial divisions (3) of the Supreme Court of South Africa"

It is of interest to notice however that certain temporary features pertaining to the Union and of a Federal nature. The composition of the Senate, or Second House of the Parliament, for example, which is fixed until 1919, closely resembles the construction of the Second Chambers of Federal Legislatures on the basis of the equal representation of the part-States. For each (4) Province has received eight Representatives in the Senate. The Parliament of the Union is besides limited for at least ten years

(1). See Supra p.23.

(2). South Africa Act 9. Edw.7. Preamble and Arts 4 & 89. cf. also Lucas. The British Empire. p.172. Brand. The Union of South Africa.

(3). Ibid. Art 90.

(4). Art.24.

from the date of the formation of the Union in respect of this
(1)
and other temporary arrangements, while the special enumeration of
(2)
subjects within the competency of the Provincial Legislatures,
although it does not thereby restrict the legislative sovereignty of
the Parliament of the Union, bears a certain resemblance to the
division of powers of a Federal State. The concentration of
Legislative authority, however, in a Single Parliament places the
Union of South Africa in the class of Unitary rather than of
Federal States.

The States of Canada and Australia afford further
examples of the application of the Federal principle, and in many
of their characteristics they have added to the rich diversity of
Federal history and practice.

The history of Canada is of double import in the growth
of the British Empire. For not only was it the first of English
Colonies to adopt a Federal form of Government, but it was a
pioneer in the evolution of Colonial self-government without
which Federation seems hardly possible. The Provinces of the
present dominion of Canada, combined for the first time the Imperial
tie with self-government and with Federation.

Canada is the only instance of a Federation which was
formed by the loosening of a previous connection. This statement
must be somewhat qualified however. Of the present nine

(1) Arts. 24, 33, 152.

(2) Art. 85.

provinces, two only - Quebec and Ontario- and those only for a little more than a quarter of a century - had previously been bound together in a single legislative Union. Of the four provinces which federated in 1867, neither Nova Scotia nor New Brunswick were connected with Ontario or Quebec in any other way than in their common allegiance to the British Empire. Nova Scotia - originally the French 'Acadie' - had been an English possession since the beginning of the eighteenth century, and since the expulsion of the French Acadians in 1755 had become completely anglicised. In 1769, St. John's Isle, later known as Prince Edward Isle, became a separate State and similarly New Brunswick, originally also a part of Nova Scotia and largely comprised within the County of Sunbury, received an independent government on the immigration of the Loyalists from the United States. in 1783. These separations due to the growth or increase of population, cannot be cited, with any reference to Federalism, as steps in a process of political disintegration.

Ontario and Quebec must be treated in greater detail. The issue of that age of Colonial rivalry between England and France from the end of the seventeenth through nearly three-quarters of the eighteenth century, was decided in America as in India in favour of England. By the Peace of Paris in 1763, France, whose claims in North America were based on exploration and

(1) Cf. Farkman. Montcalm and Wolf. 1. chap.VIII. Bourinot. History of Canada. etc.

(2) Cf. Seeley. Expansion of England. chap.11.

settlement surrendered to England Louisiana and the disputed territory between the Alleghanies and the Mississippi, as well as modern Canada, except Nova Scotia and Ruperts Land round Hudson's Bay. At the cession, the population of French Canada consisted of about seventy thousand, of whom sixty thousand were concentrated on the Lower St. Lawrence in the three towns of Quebec, Three Rivers and Montreal.

Until 1774 the Colony thus acquired by conquest and inhabited by an alien race with its own language, traditions, law and separate religion was ruled by martial law. In 1774 however, on the outbreak of the war with the American colonies, attempts to anglicise the colony which had previously been made were abandoned and martial law was withdrawn although the inhabitants still continued under a military government. The guarantee of the Roman Catholic Religion was confirmed and French civil law was restored, but English Criminal law was retained. This conciliatory policy secured the loyalty of the French Canadians in the war of American Independence. It was not in fact until this war and especially on the conclusion of peace in 1783, than any considerable English settlement was made in this part of Canada. On the severance of the Imperial bond between Great Britain and the United States, over thirty thousand "United Empire Loyalists" as they were called, formed new homes in the lands of Canada which the Imperial Government offered them. Over twenty thousand went to the maritime Provinces; ten thousand settled on the Upper St. Lawrence and founded "Upper Canada."

In 1791 the French and English settlements were separated into Upper and Lower Canada, and in rather an apathetic spirit, after the loss of the American Colonies, were given representative institutions. This grant is also of interest, as for the first time, a Colonial Charter rested not on royal concession but on an Act of Parliament. Each Province received a separate Governor and a separate Legislature of two Houses. The Lower House was chosen by the people of each Province, the Upper House and the Executive Council were nominated by the Governor. The Executive was not therefore responsible to the popular House of the Legislature.

With the increase of expenditure due to the American war of 1812, conflicts broke out in both Provinces, culminating in small but open insurrections in 1837. The situation was not unlike English constitutional quarrels of the seventeenth century. After the "Canadian Rebellion", Lord Durham was sent as High Commissioner for the determining of certain important questions depending in the provinces of Upper and Lower Canada respecting the form and future government of the said Provinces." The trouble, (1) he declared, came from two sources. In both Provinces the principles of the British Constitution must be consistently extended, and responsible as well as representative Government granted. In Upper Canada political power had been restricted to a 'Family Compact', but in Lower Canada, the political difficulty due to the

(1) See Lord Durham's Report. Eng. Parl. Papers. February 1839 now published separately, edited by Sir Ch. Lucas.

absence of executive responsibility, was aggravated by racial antagonism. "I expected to find a contest between a Government and a people; I found two nations warring in the bosom of a single State".⁽¹⁾ The Lower House or Assembly was overwhelmingly French, the Upper House and Executive Council exclusively English.

The two remedies therefore which Lord Durham suggested were responsible Government and Union. In the first, which was granted in 1840 and established securely in the governorship of Lord Elgin,⁽²⁾ Lord Durham was right beyond dispute. The second, by which he hoped to assimilate the French in the English population of Canada, was unsuccessful. In the legislative Union which was formed, each Province was represented by forty-two members in the Lower House. At first the English tongue was adopted as the sole official language, but in 1848 the demand for the use of French was satisfied. The racial hostility which this incident illustrates increased. Upper Canada, whose population and wealth had rapidly increased, claimed greater representation in the Legislature, and complained that while it contributed the larger part of the revenue, Lower Canada provided most by the expenditure. Lower Canada protested rightly enough that in 1840 it had received no more members in the Lower House, although its population was at the time larger than that of Upper Canada, and it accused the English Province of attempting to reduce the French nationality to a position of inferiority. The Union had wholly failed to amalgamate the two

(1) Lord Durham's Report. Lower Canada.

(2) 1847 - 54.

racess. Not only were the two peoples different in national character, but they spoke different tongues, professed different creeds and enjoyed different rights relating to marriage, property and inheritance based on different laws. To this day the French of Quebec have remained a distinctly non-English element in Canada, but although they have not been racially absorbed, they have become incorporated in the political system of Canada and the Empire, and as recently as Sir Wilfred Laurier this they have given loyal statesmen to the Dominion.

The solution of the difficulty was found in Federation. The Legislative Union was dissolved, but the desire for separation co-incided with the realisation of the need of some union not only of the two Canadas but of all the British Provinces in North America, which had also been granted responsible government. The United States was a near neighbour and had already been an enemy and in 1864 its united strength had been shown in the suppression of a civil war. A conference of delegates from the Canadas and the maritime provinces met at Quebec in 1864 and passed a series of resolutions expressing their opinion that "The system of Government best adapted under existing circumstances to protect the diversified interests of the several Provinces and to secure efficiency, harmony and permanency in the working of the Union would be a General Government charged with matters of common interest to the whole country and Local Governments for each of the Provinces charged with the control of local matters in their respective sections." They

(1) New Brunswick, Nova Scotia 1848. Prince Edward Island 1851.
(2) Quebec Resolutions No.2 .

further added that "In framing a Constitution for the General Government, the Conference, with a view to the perpetuation of our connection with the Mother Country, and the promotion of the best interests of the people of these provinces, desire to follow the model of the British Constitution as far as circumstances will permit. The combination of English Parliamentary Government with the Federation are the two leading political characteristics of the Dominion of Canada.

The Resolutions were submitted to the Imperial Government and passed without much alteration or without much interest. They were accepted at the time only by the four Provinces of Upper and Lower Canada, afterwards termed Ontario and Quebec, Nova Scotia and New Brunswick, but the Federation now included in addition Manitoba, British Columbia, Prince Edward Isle, Saskatchewan and Alberta. Newfoundland has hitherto remained outside.

The first Parliament of the new Federation was opened in 1867. It was the first Federal experiment in the British Empire, and its originators were influenced in the direction of a reaction by the recent civil war in the United States. They endeavoured - hitherto successfully - to obviate such catastrophes by strengthening the Federal bond and reducing the sphere of State rights. The (1) undefined margin of power they entrusted to the central and not to the Provincial Governments. The very substitution of the name "Province" for "State" illustrates the difference between the

(1) Quebec Resolutions No. 3

(2) See supra p.22.

Federations of Canada and the United States. The 'Dominion of Canada' is the sole example of a 'tight' Federal State. "It shall be lawful for the Parliament of the Dominion to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces⁽¹⁾ The residuary power rests therefore with the general and not with the local Governments⁽²⁾. The subjects which have been assigned exclusively to the Provincial Legislatures include direct taxation for Provincial purposes, licencing for local revenue, the borrowing of money on the credit of the Province, the regulation of public lands within the Province, the establishment of Provincial offices and the maintenance of charitable and other municipal institutions other than marine hospitals. It may undertake works of a provincial nature but not such as are declared of 'general advantage', it may incorporate companies with provincial objects, solemnise marriage, protect property and civil rights, administer justice and inflict punishments within the Province. It is in fact generally charged with "all matters of a merely local or private matter in the Province"⁽³⁾. With regard to education each Province may exclusively make laws subject to certain conditions protecting denominational schools, the rights of religious minorities in each Province. Each Province is, in addition, given power to

(1) British North America Act. 30 & 31. Vict. c. 3. Art. 91.

(2) Ibid. Art. 92.

(3) Art. 93.

amend its own Constitution except with respect to the Lieutenant-Governor. (1)

(2)
Certain concurrent powers of legislation respecting agriculture and immigration are conferred on the Provinces, but such laws shall only have effect so far as they are not repugnant to any Act of the Parliament of Canada. The Parliament of the

Dominion may also make uniform laws relative to property and civil rights in the Provinces of Ontario, Nova Scotia and New Brunswick. (3)

Quebec retains exclusive control over her own civil law

To the Dominion Parliament belong all the powers which are not entrusted exclusively to the Provinces or retained by the Imperial Government. They are specially enumerated not in

(4) limitation but merely as examples. (5) The authority of the Dominion extends to the public debt and property; the regulation of trade and commerce; taxation direct or indirect; military and naval defence, and matters relating to the conduct of the two services; posts; census and statistics; navigation and shipping; sea-coasts and inland fisheries; currency and coinage; banks and paper money; weights and measures; bankruptcy, patents and copyrights; Indians and Indian lands; naturalisation and aliens; marriage and divorce; criminal law and procedure, but not the constitution of Courts of criminal jurisdiction; and the establishment of penitentiaries. The Parliament of Canada may also alter the boundaries of any

(1) Art. 91.

(2) Art. 95.

(3) B.N.A. Act. Art. 94.

(4) See Todd. Parl. Govt. in Colonies.
p. 424 & 561.

This right has not yet
been exercised.

Province with the consent of the Province concerned, establish any new Province and provide for its constitution as well as for the (1) administration of territories not included in any Province.

The Dominion possesses two other powers which give it a unique place in the history of Federation. The Governor-General in Council appoints the lieutenant-Governor of the Provinces or a deputy in case of absence, and the Dominion Parliament fixes his salary. No Lieutenant-Governor however shall be removable within five years of his appointment except 'for cause assigned, which shall be communicated by message to the (2) Senate and House of Commons' at the earliest possible date. Thus the Governors of the Provinces are neither elected by the Province nor appointed by the Imperial Crown like the Governor of the whole Dominion. They receive their commissions from the Governor-General and under the Privy Seal of Canada, although in the name of the Crown, and must be considered as 'part of the Colonial (3) administrative staff' responsible to the Governor-General. They do not therefore exercise the royal prerogatives of mercy and honour although on the other hand they represent the Crown to some extent in provincial legislation, where they concede and may even withhold the 'assent of the Crown'. (4) They therefore play a double part, Federal and Imperial. In their Federal capacity they are

(1) B.N.A. 1871. 34 Vic. c.28.

(2) B.N.A. Act. Arts. 59, 60 & 67.

(3) Dispatch of Col. Sec. (Earl Carnarvon) to Gov.-Gen. of Canada. (Earl Dufferin) January 7th 1875.

(4) B.N.A. Act. Arts. 55-57, & 90. Cf. Todd op.cit. pp.581,583,586.

comparable to the Statthalter of Alsace-Lorraine, which is a Federal Province with a Governor appointed by the Federal Executive.

The second characteristic which distinguishes the Canadian Federation is the power of disallowance exercised by the Dominion Government over Provincial Legislation. In the Swiss Federation Cantonal Constitutions with their amendments must be guaranteed by the Federal Government. The Dominion Government exercises no control over the Constitutions of the Provinces except with relation to the office of Lieutenant-Governor, for with this exception the Provinces are given exclusive power to amend their Constitutions. ⁽¹⁾ But it possesses a power of disallowance ⁽²⁾ of Provincial Legislation. A Lieutenant-Governor of a Province may "according to his discretion" reserve any bill "for the signification of the pleasure of the Governor-General," and no reserved bill can go into operation within one year of its being reserved until it has received the consent of the Governor-General in Council. In addition any Provincial bill which has received the assent of the Lieutenant-Governor in the King's name, may be disallowed within one year by the Governor-General in Council. In the exercise of this power the Governor-General acts with the ⁽³⁾ advice of his ministers, not on his own responsibility as an Imperial representative. The Imperial Government has therefore with regard to the Provinces surrendered to the Dominion the royal power of disallowance which it exercises with regard to Colonial

(1) Art. 92. s.1.

(2) Arts. 55, 56, 57 & 90.

(3) Todd. p.451 seq.

legislation, including that of the Dominion itself. For the authority for determining upon the expediency of disallowing Provincial Statutes, or withholding royal assent from reserved bills to the Governor-General in Council and not the Imperial Government.

In no other Federal State does the Federal Government possess a similar control over the legislation of the part-States. It resembles the subordination of local law-making bodies to the Parliament of a Unitary State, and illustrated the Unitary bias of the Canadian Federation, but the power must only be exercised in conformity with the letter and spirit of the British North America Act. 'This 'Great Charter of the Canadian Constitution' recognises and guarantees to every Province in the Federation the right of local self-government in all cases within the competency of the Provincial authorities. And it does not contemplate or justify any interference with the exclusive powers which it entrusts to the Legislatures of the several Provinces; except with regard to acts which transcend the lawful bounds of provincial jurisdiction or which assert a principle, or prefer a claim, that might injuriously affect the interests of any other portion of the Dominion, or in the case of acts which diminish rights of minorities in the particular Province in relation to education that had been conferred by law in any Province prior to Confederation⁽¹⁾ Few Acts have been in practice actually disallowed, although many have been objected to by the Dominion Government and in consequence

(1) Todd. op. cit. 2nd. Ed. p.456 Cf. Report of Sir John MacDonald Minister of Justice 1868. ibid. p.515-6.

repealed by the Provincial Legislatures.

The Dominion Government exercises a double power over the Provinces. It controls the Executive through the appointment of the Lieutenant-Governor, and the Legislature by means of its capacity to disallow Provincial laws.

Not only in the Legislature and Executive, but even in the Judiciary of the Provinces the influence of the Federation is felt. The Provinces are given the exclusive power of constituting, maintaining and organising the Provincial Courts both of criminal and civil jurisdiction, and each Province has as yet retained its own law relating to civil property rights. ⁽¹⁾ The Criminal law is Federal and uniform however, as well as the laws relating to bankruptcy and insolvency. More important is the power of appointment which is vested in the Governor-General. The salaries of the Superior District and County Courts in each Province are fixed by the Dominion Parliament, the judges themselves are appointed by the Governor-in-Council from the bar of the Province of Quebec, and at present, of Ontario, Nova Scotia and New Brunswick, and they hold office during good behaviour, but are removable by ⁽²⁾ the Governor-General on the address of both Houses of Parliament. The Dominion Parliament was also empowered "to provide for the Constitution, maintenance and organisation of a General Court of Appeal for Canada and for the establishment of any additional courts

(1) C.N.A. Act. Art. 92 & 94.

(2) Arts. 96 - 100.

(1)

for the better administration of Canada." A Supreme Court was established in 1875 and an Exchequer Court (which is also a Court of Admiralty) possessing original jurisdiction in revenue cases and other cases in which the Crown is interested. The Supreme Court whose organisation is based not on the Constitution but on Statute, has appellate jurisdiction from all the Courts of the Provinces. It may decide controversies between the Dominion and the Province or between two Provinces if the respective Legislatures agree, and it may examine the constitutionality of a Statute. It is interesting to notice that no provision is made in the Constitution for conflicts ^{for} or its own interpretation. Owing to the English legal practice which Canada has inherited, of deciding not on a law but on a case under a law, the Court has developed an interesting advisory power. The Governor-General in Council may refer to it 'for hearing and consideration' any important questions of law and fact affecting the interpretation of the British North America Acts, the constitutionality of any Dominion or Provincial Act, appellate jurisdiction relating to educational matters, the powers of the Provincial and Dominion Parliaments or any other matters which the Governor-General sees fit to submit. The decision is merely advisory, but

(3)

it is treated as a final judgment. From the Supreme Court of the Dominion as well as direct from the Highest Courts of the Provinces appeals, except in criminal matters, lie by special leave and as of

(1) Art. 101.

(2) Supreme Court Act. (c.139 Revised Statutes 1906)

(3) See Todd. Parl. Govt. in Colonies. 2nd Ed. p.538 seq. also Cf. Keith Responsible Government in the Dominions. 'The Judiciary'

right to the Judicial Committee of the English Privy Council which⁽¹⁾ is the final Court of Appeal of the Empire for Colonial questions.

The Supreme Court of Canada and the Court of Exchequer are the only two Federal Courts; the Federal functions are exercised by the State Courts as in the Continental Federations. The judges however, are not left to the Province as in the other four Federal States, but are appointed from above by the Dominion Executive.

Two powers are withheld from the Dominion Parliament and are not conferred on any other body within the Federation. These are the regulation of foreign affairs and the amendment of the Federal Constitution, both of which are retained by the Imperial⁽²⁾ Parliament.

The Imperial Parliament has conferred on the separate Provinces power to amend the Provincial Constitutions, except with regard to the office of Lieutenant-Governor, but has invested the Federal Legislature with no such right. It possesses a limited discretion with regard to certain provisions of the British North America Act, such as the salary of Governor-General, the constitution of a quorum of the Senate, and certain matters relating to the⁽³⁾ electoral franchise of the House of Commons. By later Acts the Parliament of Canada may make provision for the government and

(1) See infra p.

(2) See infra p. 49 & 50 Vic. c.35. 1886. cl. 1. & 38 & 39. Vic. c. 38. 1875. cl.1.

(3) B.N.A. Act. 105, 35, 41 & 47.

representation of territories in the Dominion, and may define -
with certain restrictions - the privileges, immunities and powers
to be enjoyed by the members and Houses of the Legislature. (1)

No other articles of the Imperial Statute which
constitutes the Canadian Federation may be amended by the Federal
Legislature. They can be altered only by the Imperial Parliament
which will, however, act in response to addresses of the Provincial
and Federal Governments, in accordance with the wishes of the
people as a whole and neither at Federal nor Provincial bidding. (2)
The Constitution is not therefore rigid in the extreme sense of that
of the United States. The amendment of the Constitution, as in
all other Federations, is not entrusted to the ordinary legislative
process of the Federal Parliament, but Canada is peculiar since
there is no other body within the Empire with the required
competence. The rigidity of the Canadian Constitution is in fact
based on a different principle from that on which it rests in the
United States and Switzerland. It is not the expression of a
Federal limitation but of Imperial sovereignty - not Federal but
Colonial. The Parliament of the United Kingdom therefore,
embraces the original, creative sovereignty of the people of the
United States as well as the dormant, amending authority of three-
fourths of the Legislatures of the States. (3) In the case of

(1). B.N.A. Act. 105, 35, 41, 47.

(2). Cf. Keith. Responsible Government in the Dominions p.771.

(3). See supra p.69. seq.

the Australian and South Africa, the Imperial Parliament has surrendered its power of allowing the Constitution to the Colony itself. In Australia, which is a Federal State, the rigidity of the Constitution has been secured by other means, but in the practically unitary State of South Africa, the Parliament of the Union has been given constitutional power and the flexibility of the Constitution retained.⁽²⁾

Subordination of the Federation to the Imperial Government,⁽³⁾ is expressed not only in judicial affairs by the appeal to the Privy Council and in the rigidity of the Constitution but in ordinary Legislation and in the composition of the Federal Government. The Federal Legislature consists of two Houses and the Governor-General who is appointed by, and represents, the Crown and every law requires the consent of all three. Any bill passed by the Dominion Legislature however, and to which the Governor-General has assented in the King's name, may be disallowed by the King-in-Council within two years. The right of disallowance is not exercised unless the law is in direct conflict with an Imperial Statute or with Imperial Treaties. A bill may also be reserved by the Governor-General for the assent of the King-in-Council, in which case it has no force unless and until royal assent has been signified within two years. The relation between the Empire and the Dominion is therefore reproduced in the relation

(1) See infra p. 229

(2) South Africa. Act of Ed.VII. chap.9 Art. 152

(3) See infra p. 231.

of the Dominion and the Provinces.

The construction of the Central Government is similar in principle, as the preamble of the British North America Act (1) declares, to that of the United Kingdom. The Provincial Governments are likewise based on the same principle, except that in all the Provinces except Quebec and Nova Scotia unicameral Legislatures have been introduced. Its chief features are the Governmental authority of the Lower House and the responsibility of a Parliamentary and collective Executive to it. In the adoption of Parliamentary Government Canada differs from the three Federal States already described, and consequently the relation of the Federal and National elements which are necessarily represented in the central Government, is modified. For Parliamentary Government means the dominance of the popular i.e. the National House and the comparative insignificance of the Upper House, i.e. the Federal House. The composition of the Canadian Senate is in fact curious. As part of a Federation it represents the Provinces, although in unequal proportion. Ontario and Quebec have each twenty-four members, Nova Scotia has ten, the remaining six States have four or three each. As part of a Legislature modelled on that of the United Kingdom, it is of an unpopular character. It does not however, possess the ancient prestige of a House of Lords. Its members are in fact nominated by the Governor-General, on the advice of his Council. Its

(2)

(1) Cf. B.N.A. Act. Arts. 17-54.

(2) Art. 24.

character is rendered of little effect, however, owing to its dominant position of the other House. The weakness of the Federal element is however of less importance in a tight Federation such as Canada, than in a loose Federal State such as Australia, which has also accepted the principles of English Parliamentary Government. Australia affords a contrast to Canada in most of its Federal characteristics and resembles far more the Federation of the United States.

It differs from it also in its history. The one point of resemblance is the common complaint which both Canadian and Australian Colonies made of the sacrifice of Colonial and Imperial interests. The binding force of Australian Federation was the deliberate recognition of the commercial benefits of co-operation. There were no 'grinding necessities' of war, independence or
(1) defence, no compelling force of nationality urging Union, nor on the other hand racial antagonism to prevent its completion. Australia is the sole instance of a whole Continent inhabited (excluding aborigenes) by a single race and owing a single allegiance, although united by no other political tie. The chief factor and also the chief difficulty of Australian Federation was inter-colonial trade, but it was also stimulated by the Oceanic policy of foreign countries- especially of France and Germany. Thus in 1870 an inter-colonial conference discussed the subject of defence and the Pacific question. Common action was also

(1) Cf. Motion of Sir Samuel Griffith (Queensland) in Convention of 1883.

desired for marine defence, the prevention of the influx of
(1)
criminals and quarantine regulations.

Federation was slow of accomplishment however. It was introduced by the Imperial Government as early as 1847, when Earl Grey, then Secretary of State for the Colonies suggested the Union of the scattered settlements under a central authority for the consideration of "questions which, though local as it respects the British possessions in Australia collectively, are not merely local as it respects any one of those possessions." The idea was not accepted with much enthusiasm by the Colonies themselves and it was not until the second half of the century, after the
(2)
Colonies had been granted self-government, that Federation entered into Australian practical politics at all. The tariff question created immense local difficulties, and State feelings ran high. Nevertheless the first step towards union was taken by the formation of the "Federal Council of Australia" in 1885, due in fact to the course of external affairs. As may be expected the Council had no executive or financial powers. It had legislative control over the relations of Australia with the islands of the Pacific, the prevention of the influx of criminals, fisheries in Australian waters outside territorial limits, extradition of criminals and certain other matters. No

(1) Cf. Motion of Sir Samuel Griffith (Queensland) in Convention of 1883.

(2) New South Wales and Victoria 1885; Tasmania and South Australia 1856; Queensland 1859; Western Australia was not made self-governing until 1890.

efficient Union was formed however for three States at last refused to participate , including New South Wales which was the 'pivotal State' of the Australian Group and whose accession to the later Union was gained by a special privilege with regard to the Federal capital.

The idea of Union grew, however, with the increasing consciousness of the futility of the existing machinery. In a series of Conferences a new Constitution was drawn up and accepted by the people of the States on Referendum - a new experiment in British Dominions. It was proclaimed with one slight alteration by the Queen in 1900 and came into force on January 1st. 1901. The Federation of Australia was a popular act and an expression of the free will of the people of every part of it, or as the Constitution declares, the people of the Colonies agreed to unite.

Many features of the United States Federation have been reproduced, but in no slavish spirit of imitation, in the Australian Commonwealth, - the assignment of the definite powers to the Federation, ⁽¹⁾ and not to the States as in Canada, the position of the Judiciary, the rigidity of the Constitution and the equal representation of the States in the Federal House. In the number and character of the matters assigned to the Federal Government Australia follows the example of Canada rather than of the United States. They include marriage and divorce, invalid and old age

(1) Commonwealth of Australia Constitution Act 63 & 64 Vic.c.12
Art. 106.

pensions, the service and execution of the civil and criminal process, railways with respect to naval and military transport, conciliation and arbitration for the prevention of industrial
(1) disputes. Comparatively few powers are 'exclusively vested' in the Federal Legislature; certain powers may be exercised, with the consent of the State concerned, such as the acquisition of State railways, railway contraction and extension in any State, and the formation of a new State by the alteration of existing State boundaries (2) and on reference by a State or States, but so that the law shall only extend to the States concerned, and lastly at the request (3) or with the concurrence of all the States directly concerned, it may exercise any power "which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia. The sphere entrusted to the Australian Federation is therefore larger and more extensible than that of the United States.

The wide powers of the Legislature qualify the rigidity of the Commonwealth Constitution which is also in several other respects more flexible than that of the United States. Australian Statesmen have combined the ideas borrowed from the Federal and Republican constitutionalism of the United States with ideas derived from the unitarian and monarchical constitutionalism of England. The Constitution is in fact flexible in certain of its

(1). Ibid Art 51.
(3). Art 51. (XXXVII).

(2). Arts. 51 (XXIII & XVI) & 124.

(1)
articles. With regard to the others no amendment shall become law unless it has been passed by an absolute majority of both Houses and has been ratified not only by a majority of the people in each of the States but also by a majority of the whole people. (2) The

Federal Parliament possesses the sole initiative for amendments, and neither the State Legislatures as in U.S.A, nor the electors as in Switzerland have any direct means of setting the machinery to work. Provision is made against dead-lock between the two Houses, (3) which differs from that allowed for ordinary legislative conflicts in its greater simplicity and in the greater privilege which is accorded to the Senate. The rigidity of the United States

Constitution is modified by the substitution of an absolute majority for a two-thirds in the Houses and a simple majority of electors for the three-fourths of the State Legislatures. As in Switzerland there must be a majority of the whole electors as well as of the States. In imitation of the United States a clause is incorporated, which is omitted in Switzerland, protecting the rights of particular States, unless the State affected consents to their alteration.

The Federal Parliament of Australia has like Congress constitutional power to establish a High Court and inferior Courts, but it may also invest State Courts with Federal jurisdiction, and an appeal lies from them to the High Court. The two systems of

(1). Cf. Art 51 (XXXVI); 1.7; 9.10.14.22. 29. 30. 31. 46. 47 etc.

(2). Commonwealth Act. Art 138.

(3). See Art 57.

Courts are not therefore kept separate and independent like those of the United States.

In addition Australia differs from the United States in the composition of the Federal Government and its relation to the British Empire. Australia like Canada has accepted the principle of English Parliamentary Government with the supremacy of the Lower House and the insignificance of the Upper. In Australia the convention of English Parliamentary Government is incorporated in the Constitution which declares that the Senate may neither initiate nor amend a money Bill. The position of the Australian Senate differs from that of the Canadian, not only in the greater looseness of the Federal Bond but also in its composition. The

Senate of the Commonwealth like that of the United States, is based on the principle of equal representation of the part-States and contains six members from each of the six States. It possesses co-ordinate powers, except in financial matters, with the House of

Representatives - even in the names of the Houses the influence of the United States is marked - but lest the 'conventional' weakness of the Upper House in a Parliamentary Government should not sufficiently safeguard the interests of the States it is strengthened
(1)
by its elective - and permanent - character, and is the one Upper House of such Legislatures which is more democratic than the Lower.

Canada and Australia differ from all other Federal States in their membership of the British Empire. A double division of

(1). Except in case of dead-lock.

authority is therefore made. Certain powers are exclusively exercised by the Imperial Government, others by the Federal Government, and still others by the Government of the States. But for the ultimate legal subordination of the colonies and their lack of representation in the Imperial Government and of course the absence of any purely Federal Government, the Empire itself would be a Federal system.⁽¹⁾ Since the grant of internal self-Government to the Colonies, the Imperial Government has only retained exclusive control of foreign affairs. The Imperial relation is expressed in other ways but by no means identically in Canada and Australia. The difference between them is partly caused by the difference in the nature of the two Federations.

The Imperial Government has surrendered to the Federal Government of Canada its relations with the separate Provinces, thus decreasing its own power and increasing that of the Dominion Government. A direct relation is however preserved between ^{the} Imperial Government and the separate States of the looser Australian Federation. The Governors of the State for example, are, like the Governor-General himself, appointed by the Crown, although in practice the opinion of the State as well as of the Federation, is usually obtained before the appointment. Through their Governors the States correspond directly with the Secretary of State for the Colonies, on all matters within their sphere, and sometimes on matters outside, although in that case copies of the correspondence must be sent to the Governor-General and, if the matter is public,

(1) See supra p.23.

to the Federal Ministry. On Federal matters the Colonial Secretary replies through the Governor-General but on subjects within the jurisdiction of the States he replies directly to the Governor of the State. Not only is the Lieutenant-Governor of a Canadian Province appointed by the Governor-General himself but all communications between the House Government and the Province pass through the hands of the Governor-General, who may use his (1) discretion in transmitting them. The quasi-independent position of the Governors of the Australian States sometimes causes friction (2) between them and the Governor-General, especially since Melbourne is both the seat of the Victorian Government, and until the completion of the Federal Capital at Canberra, also the seat of the Federal Government.

The Imperial Government has also retained its power of disallowance of State laws which it exercises through the Governors (3) of the States and has not vested it in the Governor-General, while appeals as in Canada may also lie in certain cases to the Judicial (4) Committee of the Privy Council.

In the relations between the Australia as a whole and the Empire, the Commonwealth possesses greater independence than the Dominion. In both Colonies the Imperial Government appoints the Governor-General and exercises a similar power of disallowance of Federal Legislation. It is in judicial matters that the greater

(1) Cf. Keith, Imperial Unity of the Dominions. pp.428-31.

(2) Cf. The dispute about the position of Government House in New South Wales. (3) See Instructions to Governor of State.

(4) Cf. Moore. Commonwealth of Australia. p.255 seq.

independence of the Australian Federation is displayed. In Canada an appeal lies to the Privy Council on practically all matters but by Article 74 of the Commonwealth Constitution it is decreed that "no appeal shall be permitted to the King in Council from a decision of the High Court upon any question howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States unless the High Court shall certify that the question is one which ought to be determined by His Majesty in Council." The High Court of Australia therefore, unless it decides otherwise, may be the final Court in Constitutional questions, and its position as interpreter of the Constitution closely resembles^{that of} the Supreme Court of the United States. Moreover the principles it has adopted in imitation of the United States, have created a divergence in the interpretation of the Australian and Canadian Constitutions, the latter of which depends in the final case on the decisions of the Judicial Committee of the Privy Council. The British North America Acts have been regarded by the Privy Council as ordinary Acts of the Imperial Legislature and no more inaccessible than any other act to the ordinary method of legislation and judicial approach; they have therefore been interpreted, like any other Imperial Acts on the principle that literal and full effect should be given to each clause according to the normal rules of English Judicial procedure, while it is understood that any inconvenience arising from conflicting decisions

could be removed by simple legislation.

The High Court of Australia on the other hand, has based its judgments on a different principle. It has preserved the American distinction between the constituent and other legislation and has regarded the ^{Constitution} rather as a fixed and permanent "supreme law", which must be interpreted with a view to its maintenance rather than its alteration and whose harmonious working depends on judicial decision rather than on legislative amendment.

An interesting illustration of the application of these two principles is afforded by the case of the taxation of Federal officials by local governments. The Privy Council arguing from the clause in the Constitution of the Commonwealth ⁽¹⁾ which states that the powers remain inherent in them unless they were exclusively vested in the Commonwealth decided that local governments had ⁽²⁾ power to tax the salaries of Federal officials. The High Court of Australia however, basing its decision on United States precedent, and on the principle of the immunity of instrumentalities formulated by the Judiciary of that country, gave judgment in the opposite sense. According to this principle by which instruments necessary to the Federal Government for the execution of its functions were immune from the control by the authorities of the States. The Australian Court declared that a State could neither make a Federal ⁽³⁾ officer give a stamped receipt for his income, nor pay an income ⁽⁴⁾ tax.

(1) Art. 106

(2) Webb v. Outtrim 1907. Ap.Cas. 81.

(3) D'Emden. v. Pedder. 1.C.L.R. 91.

(4) Deakin v. Webb. 1. C.L.R. 585.

The Supreme Court of Canada which had, under the influence of the United States given the same judgment as the High Court of the Commonwealth in a similar case, reversed its decision in the next case in accordance with the judgment of the Judicial Committee of the (1) Privy Council.

A comparison of the relation between the Empire and Canada and Australia respectively shows a development in the direction of Colonial Independence. The Empire is however, on the eve of still further development. Problems of Imperial Federation which have long engaged the interest and attention of political writers and thinkers are becoming increasingly matters of immediate or not far distant settlement. In 1900 Sir Wilfred Laurier demanded a voice in the Government of the Empire for Canada. "If you desire our help. call us to your Councils." The process has been reversed. The Colonies have made loyal and generous contributions in the present struggle of the Empire, and in recognition of their help their Statesmen have been called to the Councils of the Empire. These Imperial Councils are as yet only 'Conferences', and although it may be asserted without much fear of contradiction that the resolutions and views which are there expressed will at least influence the terms of peace, at present the Conference possesses no legal authority with regard to the government of the Empire; it has not yet superseded the

(1) Abbott v. City of St. John. 40. S.C.R. 597. The whole question is discussed by Keith in "Imperial Unity and the Dominions." Part II. chap. I. p. 446-8.

Parliament of the United Kingdom. It is not possible to describe the schemes of Imperial Federation which are now being formulated. (1) One feature is now gaining increasing recognition, and a study of present Federations emphasises its importance - the necessity of the construction of a separate Imperial Government, detached from that of the United Kingdom, now called the 'Imperial' Government, but with organs as advanced, specialised and authoritative. The relation between England and the Empire would resemble in certain ways, that between Prussia and the German Empire, but the acceptance of Responsible Government as a political principle would prevent such an identification of Governments as exists in the German and Prussian systems.

(1) Cf. eg. L. Curtis. The Problem of the Commonwealth.

The five Federations which are the subject of this study are distinguished by well-defined characteristics from Unitary States on the one hand and Confederations of States on the other. They are based on the principle of the partial union of semi-independent States; they possess central organised bodies with executive, judicial as well as legislative power, and they have established channels of direct communication between the Federal Government and the individual of the part-State. Within these limits however there exists an immense variety in the application of the Federal principle.

Germany and Australia are inhabited by a single race; Canada is occupied by two and Switzerland by three or even four different peoples while the original comparative homogeneity of the United States has been largely modified by subsequent immigration. The Federal principle has been extended to countries as large as the United States and Canada and as small as Switzerland, as densely populated as Germany or as sparsely as Australia. The histories of the five States are no less different. Germany has a history of not much less than a thousand years from the accession of Henry the Fowler to the formation of the new Empire, the growth of the Swiss Federation is prolonged through ^{more than} ~~nearly~~ five centuries. The unity of the American Colonies was accomplished in less than two centuries from the landing of the Pilgrim Fathers or in two and a half to the end of the Civil War; it might even be said to have been practically achieved during the twenty years from 1770 to

to 1790. Equally different is the nature of their histories - in the wealth of dramatic incident and the abundance of varied influences from Germany and Switzerland on the one hand to Australia on the other - as in their length.

A still greater point of difference between Germany and Switzerland on the one hand and Canada, Australia and the United States on the other, lies in the Continental origin of the former and its feudal heritage contrasted with the English origin of the latter. Canada however has incorporated an important Continental offshoot in the province of Quebec, while the United States was influenced in the construction of its central Government by Continental ideas. The Federations are however alike in one respect. In all five cases the part-States were connected with each other before the formation of each Federation, by a common allegiance to a single head.

The causes of Federation are no less varied - the grinding necessity of union in the face of a common foe, the promptings of a spontaneous nationality, the pursuit of a means to reconcile racial antagonisms, the advantage of harmony in the relations towards powerful neighbours, or the deliberate appreciation of commercial co-operation. In the formation of all the Federal States some or all of these elements were present, but in each State one particular factor works with a compelling irresistible force.

In the constitutional frame of the Federal State and in the composition of the central Government the differences of

condition and causes have exerted a powerful influence. The tightness of the Canadian Federation distinguishes it from all other Federal States, and in the unequal representation of its Provinces it resembles Germany. On most other points however the Continental and English Federations are far apart. In two respects the two Continental Federations - the powerful monarchical Germany and the small democratic Switzerland - are in agreement; both are marked by legislative centralisation and executive decentralisation and neither have adopted Responsible Government. In this latter point the United States reveals Continental influence and, as it were, denies its English birth. Canada and Australia, although they resemble each other and differ from the remaining Federal States in their possession of Responsible Government and in their connection with the British Empire, are as little alike in the relations of their parts, the rigidity of their Constitutions, the composition of the Federal House of their Legislatures, as Canada and the United States.

It is not necessary, nor do the limits of a Thesis permit it, to emphasise still further the rich variety in expression of the Federal principle. Still more, statesmen are turning towards it in their search for solutions of modern political problems. To Ireland, India and the Balkan States has its application been suggested, while Imperial tariffs^{proposals} and Imperial Conferences have brought incomparably nearer to realisation a Federation of the British Empire.

Binder's error. General Statistics. see end of Bibliography.

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GENERAL STATISTICS OF THE FIVE FEDERATIONS

	U. S. A.	SWITZ ²	GERMANY	CANADA	AUSTRALIA
Date of Formation	1789	1848(revised 1874)	1866 enlarged 1871	1867	1900
No. of States	48	22	26	9	6
Area of whole Federation	3,574,658 sq.m.	15,976 sq.m.	208,780 sq.m.	3,729,665 sq.m.	2,974,581 sq.m.
Population of whole Federation about 1910	91,972,266	(1) 3,877,210	67,812,000	8,075,000	4,951,000
Legislature National House	435	189	397	(2) 234	75
Federal House	96 (each State two members)	44 each of 19 Cantons two members; 6 half-cantons one each	61 Prussia 17 Bavaria 6 Saxony & Württemberg 4 Baden, Hesse Alsace-Lorraine 3 each. Mecklenburg-Schwering & Brunswick 2 each. Remaining 17 States one each.	87 Ontario 24 Quebec 24 Nova Scotia 10 New Brunswick 10 Prince Ed. Isle 4 Manitoba 4 Saskatchewan 4 Alberta 4 British Columbia 3	36

(1) 2,594,298 speak German; 793,264 speak French; 302,578 speak Italian; 40,122 speak Romansch.

(2) Since Representation Act 1914.

Yukon Territory possesses a member in House of Commons but none in the Senate.