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AMERICAN PUBLIC LAW.[1]

The theme for discussion is not free from complexities. Consequently within the limits prescribed I shall attempt to consider it only in a large or most general way.

It may be well at the outset, in view of the different meanings of the term "public law," to explain the sense in which it is to be taken in this paper. The modern and conventional definition of public law is that part of the positive law of a given state which relates solely to the State and to the public order of government. *"Publicum jus est quod ad statum rei publicae"* (I. 1, 14). The division of law into public law and private law is as old as Aristotle (Rhet. 1, 13, 3). In principle this division was entirely familiar to Roman lawyers, and it has been retained in every modern system. Hale and Blackstone substantially adopted the division of law into public law and private law, and thus lent to it the sanction of their great names, although the analytical jurists of England, such as Austin and Amos, criticise it with severity as a cross-division. Scientifically there is in their criticism a basis of truth. There are numerous rules or principles which may just as well be included in private law as in public law. But nevertheless, the dichotomy of law into public law and private law is an instance when scientific accuracy may well give way to the general convenience. Nothing more comprehensive than a division of law into public law and private law has ever been suggested by jurisits of any school.

In the Roman and the modern sense, "public law" includes (1) constitutional law: (2) *Jus sacrum,* or the law relating to the state church and religion; (3) criminal law, and (4) the law which Kant, in company with many jurists less philosophical, terms the law of nations. It is in view of the fact that the surface of the earth is not unlimited, but circumscribed into a unity, that Kant includes in the public law of a State the law of nations. Had the

[1]The substance of this paper was contained in an address delivered before the Second Pan-American Scientific Congress at Washington, D. C., January 3, 1916, by the writer.

area of the earth's surface been unlimited the law of nations would have had a different content and application. In this comprehensive outline of public law it will be observed that "constitutional law" comprises all the laws which determine in whom the sovereign power of a state resides, how that power shall be exercised, and the limitations imposed on all officers and agents of government; in short, all administrative law, or, in other words, all that law which according to Domat relates to public order.

When we compare American public law with the public law of the Roman lawyers and their congeners, the civilians, we should not omit to notice a distinction: the public law of the *Corpus Juris* was something distinctively Roman and even Byzantine. It is well said that no modern state has ever adopted the public law of the Romans. It was the private law of Rome which evinced the best juristic qualities of the Italian people. The more familiar part of the *Corpus Juris* and of the Institutes of Gaius and of Justinian consisted almost exclusively of private law. The Codex was concerned to a much greater extent than the digest with public law. Indeed it was the Codex which was specially reserved for the public law of the Romans. In the United States public law is largely contained in the constitutions of government, State and Federal, and in the statutes of the several organisms within the Federal state.

When contrasted with public law, it is evident that private law is concerned with the self-interest of the individual, while public law has reference to the common interests of the public *qua* public. Obviously "private law," as Lord Bacon well said, always lies under the protection of public law: *"Ius privatum sub tutela juris publici latet"* (Works 1, p. 804). Public law is referred to at times as the paramount law of a Federal State because private law is in a greater or lesser degree dependent on public law. It is curious to observe that in modern times our political society may be said to be engaged in a ceaseless endeavor to make private law encroach on the domain of public law. The processes of this encroachment represent in fact our modern politics.

Very cursorily I have, as I hope, now indicated with tolerable precision the sense in which I shall employ the term "public law." It will be immediately apparent that, as in this country we have no State church, we can very well afford at this time to ignore that department of public law which is concerned with religion, although it is highly probable that at no distant day this recognized department of public law may present even in this country some

very interesting questions for public discussion. The subdivision, criminal law, may also be ignored at this time, although its consideration could be led to embrace crimes committed by civil persons, otherwise called corporations; a subject, I think, very far from exhausted by American legislators and American lawyers. This elimination will leave for our present consideration constitutional law and, incidentally, the law of nations. I have already indicated that in its widest sense constitutional law comprises all the sovereign powers of a State, so that we may legitimately confine the few and desultory observations which I shall present to you to two subjects of never-failing interest. I refer to American sovereignty in its inward and in its outward manifestations.

Before venturing on the general discussion of the sovereignty of the Federal Government of this country, it may be well to recall that the sovereign powers of all governments are distributed among three great departments—executive, legislative and judicial. This distribution is, in the instance of our Federal Government, so emphasized as to engender a discussion among political thinkers concerning the prototype of the judicial department of the Government of the United States. Had it any prototype? A correct answer to this question is not perhaps so difficult as it at first seems. The Constitution of this Government was the empirical product of the traditions, customs and aspirations of the English-speaking people who founded the United States. The Federal Constitution of 1787 was not the miracle often depicted; it was an orderly sequence from anterior facts and the logical resultant of hard experience, not of political theory. As Lord Bryce has well said, it was not an *a priori* construction.

The origins of the framework of our present government can readily be detected in the earlier institutions and customs of the seaboard colonies of North America. Providentially it was a singularly sober, thoughtful and political minded people who first came to these shores, and to them and their direct descendants, now comprising at least fifty millions, or more than one-half of our present population, the existence and even the persistence of our present political institutions are primarily due.

At the outbreak of the War of Independence practically all of the three millions of people, then inhabiting the Atlantic seaboard of North America, were, as Franklin said, the descendants of English-speaking men who had migrated to America in the course of the seventeenth century, or prior to 1700. In the eighteenth cen-

tury immigation was comparatively light. Thus it was that in the year 1776 few of the inhabitants of the thirteen colonies had ever been out of North America. They were already of the soil, and already stout upholders of a very definite political creed. For a century past there had been close and constant discussion among the colonists concerning the theory and the framework of the colonial government. In this discussion the abstract political rights of the inhabitants of the American colonies were not ignored. In consequence, when the Revolutionary War broke out, in April, 1775, there was here a trained citizenship such as the modern world, prior to that time, had never seen.

I have already mentioned that the constitutional law of a State or nation comprises all those laws which determine in whom the sovereign power of the nation or State resides. In a federal state there is not only an organized nation, but at the same time the peoples of the particular states also possess organic unity. In its particular sphere each government is absolute and supreme. The composite character of a Federal State has given rise to much discussion concerning the seat of sovereignty in the United States. It is not necessary for us to consider the controversial elements of this discussion at this time. They are familiar to all publicists as well as to some practical politicians. But it is premature to discuss the nature of sovereignty in a given state until we have assigned the state itself to its proper place in some general classification of governments. The United States is what is known as a federal state. To give with philosophical precision a real definition of a federal state would be a labor of magnitude. There are shades of differences between all the types of federated states known to history. But there is at the same time between all these types a certain agreement in particulars which determine whether a state is or is not a federal state.

A federal state is sovereign in its own sphere, be it large or narrow, just as the federated states related to it are sovereign in their individual spheres. The distinction between *"Staatenbund,"* bandless or confederated states, and *"Bundestaat,"* or a banded state, is entirely familiar. A federal government within its own prescribed range of action is carried on as freely as if there were no such thing as a separate state. (Freeman, Federal Government in Greece and Italy, 11). Let no sensible man at this late day in the United States question that whatever powers are not vested in the federal government belong to the several states or to the citizens

of those states as a body politic (George Ticknor Curtis, "Implied Powers of the Constitution," 7). The bond which unites a federal government to the governments of the banded states may, however, be expressed in a great variety of ways. Nothing can be more elastic than the terms upon which a federal state becomes an independent political entity and assumes the hegemony of its constituent states. The powers entrusted to the Federal State may be very great or they may be very limited, always provided that within its own sphere of action the federal state is left independent and to that extent distinctly sovereign. While a federal state is ordinarily paramount only within the sphere of its own action, there is some inherent evidence that the government of the United States was intended to have a supervising power of a kind not ordinarily entrusted to a federal state. The Federal Constitution of 1787 is in one notable particular of general operation within the federated states, and this particular is quite outside of the federal sphere of action. The federal Constitution prohibits the legislatures of the states from passing any bill of attainder, *ex post facto law,* or law impairing the obligation of contracts. This limitation on the legislative power of the States of the Union has only a very indirect relation to the sovereignty of the federal government. It has, however, a distinct relation to the general supremacy of the federal state.

What is meant by the sovereignty of a State is all the powers of that State when it is considered in its highest dignity and greatest force. The United States of America is conceded by publicists to be the most carefully elaborated specimen of a federal state known to history. Indeed it is the legal terminology of the United States which has developed most clearly the difference between a federation and a confederation of states. The public law of the United States is in some respects a distinctly modern manifestation. It has at its base a new or modern conception of the inherent rights of the individual citizen. About this there is nothing medieval or classical. I venture to think that the public law of the German federation is not nearly so well worked out in detail as is the public law of the United States of America. The fundamental rights of the individual German subject are left obscure in comparison with our clearer enunciation of the fundamental rights of the citizens of the United States. This is not to conclude that the Federation of German States is inartificial. In some few respects the legislative chambers of the great Federal State, called the German Em-

pire, are better constituted than are our own Senate and House of Representatives. Their temporary committees, for instance, are better working bodies than our permanent committees with their extended powers. Nevertheless it is certain that in the history of no other nation besides that of the United States have the limitations upon the powers of the component states and those of the federal state been specified with such philosophic precision and such exact balance. This is not strange if we consider that the germs of federation were in America, as in Greece, from the first in the air. We detect them in a rudimentary form in the substantial federation of the New England towns. Some of the original colonies were at first distinctly federations of village communities.

For a considerable period after the North American Federal Union was completed in 1787 the great political question in this country was: Where does sovereignty reside? To determine this question and negative the claim of a constituent state's right to secede from the Union a long and fratricidal war was deemed necessary by the dissident states, notwithstanding that historical data anterior to the Federal Constitution of 1787 had definitively answered the question. The federal state existed prior to the Constitution of 1787. It is, to my mind, a very grave error to conceive that constitutions ever create sovereignty. Sovereignty is an organic force. It is sovereignty which creates constitutions and not constitutions which create sovereignty. The Government of the United States was distinctly federal and sovereign before a line of the Constitution of the United States was promulgated. In this particular the constitution was declarative. Political powers are not created artificially *uno ictu*. They pre-exist, at least *in posse* or in intention, before their written declarations are formulated. Let me explain more in detail what I mean.

The original people of the thirteen states forming the Federal Union were a homogeneous people, in political subordination to a great European state. When a homogeneous people, inhabiting contiguous political dependencies of the same empire, subverted the imperial government, necessarily the powers of the old government immediately accrued, partly to the whole people of all the colonies as an indivisible body and partly to the separate peoples inhabiting a particular colony. Upon examination it will be found that the imperial powers, known as the prerogatives of the crown, as they thitherto affected all the people in all the colonies without regard to demarcations of territory, accrued to the whole people of all the

colonies as joint actors in the Revolution; while those powers of the subverted colonial governments which did not concern the whole people alone accrued to those whom they did concern, to wit, the people in a particular colony. The moment the Declaration of Independence and the overt military resistance to the rule of the mother land took place, any general governmental authority over the North Atlantic colonies necessarily became unitary and, if effective, federal. The vice of the Articles of Confederation was that they failed to partition rightly the subverted powers of the old government; they did not conform to the fact *"fait accompli."* A confederation of States did not, in this instance, truly express the precise relation of the constituent states to the general government. Within a certain sphere of action the separate states did not act conjointly after the year 1776, and consequently the general agent was within that sphere already a federal state.

But there is other evidence in favor of my statement, that the government of the United States was federal prior to the Constitution of 1787. The distinctive mark of a federal government is that the federal state, within its own sphere of action, has all the marks of an absolutely independent government. In that great territory, an empire in itself, known as the "North West Territory," the government of the United States was in respect of the three great powers of government, legislative, judicial and executive, possessed by every autonomous state, supreme and independent of all outside dictation before the adoption of the Federal Constitution of 1787. By the ordinances of 1784 and 1787 Congress established a permanent government and constitution for the North West Territory. Until the states in that territory were organized, the United States was alone the absolute sovereign within the North West Territory. The States outside of the territory had no share in its government. Consequently the federal government of the United States existed as an independent state before the ratification of the Federal Constitution of 1787. In an article printed in the year 1887 in the *American Law Review,* I elaborated the theory just stated. I am very happy to observe that since then, doubtless quite independently of my investigations, the proper authorities of Harvard University have arrived at the same conclusion, and thus the theory I first enunciated is now, in any event, taught or held in that university.

It can hardly be denied that the Federal State was an autonomous state prior to the federal constitution, if it possessed, as

already stated, the three great powers, legislative, executive and judicial, which, in Kantian philosophy, are said to pertain to every autonomous state. The Constitution of 1787, however, perfected the autonomy of the Federal State in such a masterly way that no other Federal State ever possessed the nice powers of internal government in the same degree as the great federal state, now known *ab extra* as the United States of America and *ab intra* as "the federal government." The outcome of the work of the Convention of 1787 was so logical and natural in character that had the Federal Constitution of 1787 failed of adoption, some other federal organization must have inevitably resulted in a short time. A federal government was the only possible government in North America after the definitive peace with England in 1783.

The genesis of political institutions is not always obscure. The political history of the thirteen original colonies, composing the United States in the year 1776, demonstrates that the major part of the framework of the Federal government was laid down long before the adoption of the Constitution of 1787. For example, the title of each colony to equal representation in the Federal councils may be traced back to the year 1643. In 1643 the New England plantations first confederated for united action. By the terms of union each colony preserved its jurisdiction and powers of internal government intact, and without regard to size or population was represented by the same number of delegates in the Federal councils (1 Palfrey's New England, 445; 1 Pitkin's U. S., appendix 1, and pp. 50, 52; 2 Hazard's State Papers Preface and p. 1). In 1754 the plan of the Colonial Convention of that year, although abortive (it being rejected by both the English and the Americans), had again a just regard to the decentralized principle of a Federal republic. In the Continental Congresses of 1774, 1775 and 1776 each colony, without regard to size or population, was given an equal voice. Thus from the dawn of our colonial history it was evident that any future general government of the American States would be based on some principle of equal representation in the Federal councils. The Constitution of 1787 was only a final restatement of an old principle of union. In that constitution each State, without regard to size or population, is allotted two senators in the upper house of the Congress. It is not irrelevant to notice at this point that the Senate of the United States is invested with some powers which are very far removed from powers purely legislative in character. It is not only in the upper legislative cham-

ber that the federated states have an equal voice, but in certain executive matters of moment in the processes of a great government.

The Constitutional Convention of 1787 was a triumphant success not only because prior to the War of the Revolution the leading men in the convention had become fairly familiar with the framework of all forms of government, ancient and modern, but because they had gleaned much of value from a hard and critical experience. For years past they had then had daily under their eyes the spectacle of a judiciary which arrogated to itself the abstract power of determining whether or not the acts of the various colonial legislatures and officers of Government conformed to what were already termed, not only in state papers, but in public discussion, the constitutions of government. As early as 1761, in the Writ of Assistance cases, the colonial lawyers went so far as to assert that even the laws of the Imperial Parliament must conform to constitutional principles in order to have effective validity. Doubtless this was only a recrudescence of Coke's doctrine in Dr. Bonham's case, practically adopted by such great Englishmen as Chief Justice Hobart (Hobart's Rep., 14), and Lord Mansfield (1 Atk., 33). It is therefore not extreme to affirm that the right of the American judiciary to determine the validity, or the constitutionality as it is termed, of an act of a legislative body long antedated the promulgation of the Federal Constitution in 1787. The famous American case of Lechmere *v.* Winthrop, in the year 1727, is alone sufficient to establish this point.

The Constitutional Convention did not fail to make use of historical precedents. When the present federal constitution was in course of preparation in the year 1787, there was one historic exemplar which did not lack consideration (Gilpin, 1334; Eliot, 429). The old kingdom of Aragon possessed a singular institution which was very fascinating to some of the more thoughtful members of the convention. I refer to the power of the justiza, the Supreme Judge of that little kingdom. Robertson, in his admirable "History of the Reign of Charles V." well describes the peculiar powers of the Justiza of Aragon, and what he said is worth quoting. He says: "Not satisfied with having erected formidable barriers against the encroachments of the royal prerogative, nor willing to commit the sole guardianship of their liberties entirely to the vigilance and authority of an assembly similar to the diets, states-general and parliaments, in which the other feudal nations have

placed so much confidence, the Aragonese had recourse to an institution peculiar to themselves and elected a *justiza,* or supreme judge. This magistrate, whose office bore some resemblance to that of the ephori in ancient Sparta, acted as the protector of the people and the controller of the prince. The person of the *justiza* was sacred, his power and jurisdiction almost unbounded. He was the supreme interpreter of the laws. Not only inferior judges, but kings themselves, were bound to consult him in every doubtful case and to receive his responses with implicit deference. An appeal lay to him from the royal judges as well as from those appointed by the barons within their respective territories. Even when no appeal to him, he could interpose by his own authority, prohibit the ordinary judge to proceed, take immediate cognizance of the cause himself and remove the party accused to the *manifestation,* or prison of the State, to which no person had access but by his permission. His power was exerted with no less vigor and effect in superintending the administration of government than in regulating the course of justice. It was the prerogative of the *justiza* to inspect the conduct of the king. He had a title to review all the royal proclamations and patents and to declare whether or not they were agreeable to law and ought to be carried into execution. He, by his sole authority, could exclude any of the king's ministers from the conduct of affairs and call them to answer for their maladministration. He himself was accountable to the Cortes only for the manner in which he discharged the duties of this high office and performed functions of the greatest importance that could be committed to a subject" (Robertson's History of Charles V, 1, 161).

But there were other and less remote precedents than that of Aragon more familiar to the members of the Constitutional Convention of 1787. The subordination of the Colonial Legislatures to the judiciary of the colonies, because of the expressed limitations upon the powers of the Colonial Legislatures, was a marked feature of all the American Colonial governments subject to the English crown. The history of this judicial supremacy, which was strenuously insisted on long before the American Revolution by such Colonial lawyers as Otis and John Adams of Massachusetts, is very ably given by Professor Charles B. Elliott in the Political Science Quarterly (5 Polit. Science Quar., 224), and by Professor James Bradley Thayer of Harvard in a paper read before the Congress of Jurisprudence in August, 1893 (Little, Brown & Co., Bos-

ton, 1893). In 1895, ignorant of these contributions, I ventured to publish my own conceptions of the development of the judicial power in the Federal Constitution (29 Am. Law Review, 711), a fact I mention merely because the paper contained some references to authorities of very distinct value. The paper itself was too late in order of time to possess any valid claim to originality. But it is unnecessary here to pursue further the history and development of the judicial power in the Federal Constitution. It is only necessary to notice that since 1893 it is generally conceded that the Federal judicial establishment of the United States had a prototype.

The express authority of the Federal judiciary, in the proper forum, to declare void a legislative act of a state of the Union when such act conflicts with the organic law, is sometimes thought to be clearer than its authority to declare void an act of the Federal Legislature when that legislation conflicts with the constitution of the Federal state. But both powers *ex necessitate rei* proceed on the same general principle and are founded on the same precedents. The exercise of the one power is as essential to the protection of the nation as the exercise of the other is to the protection of the federated states. The fact that the judicial power of the Federal establishment is called into play only in the course of litigations sometimes tends to obscure the extraordinary powers vested in the Supreme Court of the United States by the Federal Constitution.

Doubtless the power of greatest dignity and importance conferred on the Federal judiciary by the Federal Constitution relates not to their jurisdiction of ordinary litigations, but to their jurisdiction over contentions and controversies between states. It was intended that the Supreme Court of the United States should be the permanent arbitrator of all serious differences between the constituent states of the United States, and also the arbitrator of all the graver controversies between the Federal state and the states of the Union, if the Federal state so elected. In any plan of Federal government some mode of arbitrating differences between the combined governments is essential to permanence. The paramountcy of the terms of union must be safeguarded against all infractions or invasion, and the only effective protection is afforded by the principle of compulsory arbitration. Among the Grecian Commonwealths, the history of which was imperfectly familiar to the members of the Constitutional Convention of 1787, examples of

arbitration are very frequent. In ancient Greece the Amphiktyonic Councils, whatever they were originally, became in course of time to some extent councils of arbitration for the contending political units contained in the federations of Greece. These councils finally passed on a variety of issues arising between the different Grecian communities. The decisions of these councils ought in fact to have furnished a sort of international law of Greece. In America of the present the most important decrees of the federal judiciary of this country constitute a kind of international or interstate law for the States of the Union. The best exercise of this peculiar function of the federal judiciary of this country calls for very statesmanlike qualities in the judges, and it is perhaps not too much to say that the most distinguished personages in the history of the Supreme Court of the United States are those who have exhibited these statesmanlike qualities in the most eminent degree. The Supreme Court is the one court of America where the narrow learning of lawyers is of secondary importance to yet higher qualifications. It is quite unnecessary for present purposes to review the technical and familiar side of the jurisdiction of the federal courts of this country. Many principles of profound political and constitutional importance are laid down almost daily in private litigations or in suits and controversies between private persons. But here we may confine our survey to the jurisdiction of the federal tribunals in controversies between the states of the Union or, at the election of the federal government, in controversies between the great federal state and the states of the Union. That branch of the jurisdiction of the federal courts was intended as a formal substitute for a voluntary system of arbitration. For the purpose intended it is highly probable that no better machinery could have been devised.

These considerations lead naturally to the conclusions that a principle of arbitration, the autonomy of the separate political units composing the federal state, and the perfect political equality of these entities in the federal councils are leading characteristics of the public law of the United States. That each and all of these characteristics is susceptible of a more extended development and a larger application than at present there can be little doubt. By reason of the limited fertile and inhabitable areas of the *globus terraqueous* which we call the world, men, as Kant said in substance, are placed in such close and thoroughgoing relations of each to all the rest that intimate intercourse is indispensable to the development of the common heritage of mankind. Now, this

intercourse requires general regulation. Such general regulation can proceed on no better principles than those at least adumbrated in the leading characteristics of the public law of the United States of America. The public law of the United States is in part a development of the law of nations.

It remains to notice that a federal constitution of government has the force and the quality of durability as well as other great merits. This the whole history of our government and nation exemplifies. The federal government of the United States has already outlived almost all the national governments of Europe. It has survived numerous forms of government in France and in almost all the other countries of Europe. England is not even an exception, for the government of the British Isles has undergone momentous changes of a far-reaching kind since our federal government was formally erected. The English Constitution of to-day is not that of 1787. During the period of its already long existence the Government of the United States of America has, as the philosophic historian Freeman in his most valuable but fragmentary History of Federal Government[2] states, "actually secured a greater amount of combined peace and freedom than was ever before enjoyed by so large a portion of the earth's surface."

That a federal government is that form best adapted to national development, without interference with the rights of the members adhering to the federation, is illustrated by the rapid expansion of the possessions of the United States. The cession of the Northwest Territory to the federal government in 1784 was but the beginning of the acquisition by the United States of a new empire, to become even more distinctly federal possessions than the Northwest Territory had ever been. By the Treaty of Paris, known as the Treaty of September 3, 1783, the eastern bank of the Mississippi, as far south as the thirty-first parallel, ceded to Great Britain in 1763, passed under the control of the United States. On April 30, 1803, France ceded the whole of the Province of Louisiana, together with all adjacent islands, to the United States. But by the third article of the Treaty of 1803 the inhabitants of the ceded territory were to be incorporated in the Union and admitted as soon as possible thereafter to the enjoyment of all the rights, advantages and immunities of citizens of the United States. This was a very farsighted provision on the part of France, one designed

[2]Only the first volume ever appeared. This is practically a history of Greek federations.

for the efficient protection of the inhabitants of the ceded territory. On February 22, 1819, Spain ceded to the United States all the Spanish territories east of the Mississippi, known as East and West Florida, together with the adjacent islands dependent on said province. In 1845 Texas was added to the United States. In 1846 Great Britain at last yielded to the United States that part of Oregon lying between the forty-second and forty-ninth parallels of north latitude. By the treaty of Guadalupe Hidalgo, signed February 2, 1848, Mexico ceded to the United States all that territory north of the Rio Grande and the Gila Rivers, comprising New Mexico, a part of New Navarre in old Mexico and the great country known as Upper California. The Gadsden purchase of 1853 rectified the Mexican frontier and added 45,535 square miles to New Mexico. Since then have occurred in 1867 the cessions of all Russian America, together with the Russian islands, stretching across the Pacific; in 1897 the cession of the Hawaiian or Sandwich Islands, in 1898 the cession of the Spanish islands in the Pacific, and the cessions of Puerto Rico, the Isle of Pines in the Atlantic, and in 1903 a portion of the Isthmus of Panama, known as the "Canal Zone." For all these cessions the United States has given value. Minor cessions such as the District of Columbia, it is unnecessary now to particularize.

To much of this great territory so ceded by the various powers the American system of government has been extended, while over much of the residue territorial governments have been established. There is no solid reason why at no distant day all the possessions annexed or ceded to the United States should not be provisionally incorporated as States, territories or self-governing communities in the great federal state, the citizens of each of such possessions obtaining substantially the same legal rights and enjoying the same political guaranties as the people of the original states. This is a consummation devoutly to be desired. It is the only solution consistent with the past history of the United States. That the domain thus acquired will never be voluntarily surrendered I believe. No great statesman has ever yet dared to advocate the surrender of a substantial portion of the national domain. If anyone in authority has so dared he has been execrated by posterity. When the material resources of a great power begin to diminish the night of that nation is at hand. Statesmanship is a practical science and not a political theory. Statesmen do not surrender what they take and hold in trust for the nation in perpetuity. Statesmen

look forward to the needs of future generations. They have regard to things latent in the womb of time. It is the politicians who govern only for the day. The population of America, in one or more centuries, will be five hundred millions. This will be the great power of the Pacific Ocean. What will our posterity then think, if the islands of the Pacific, now in our hands, have been abandoned to rival powers, or then rest in unfriendly commercial hands?

But to return to the thread of our discourse. It must, I think, be obvious that the distinctive and leading characteristics of the public law of the United States are three: (1) the autonomy of the separate States composing the United States; (2) the comprehensive and perfect sovereignty of the great Federal State in its own sphere of action; and (3) the permanent judicial mode for the arbitration of all disputes and controversies arising between the States of the Union or any of them, or between the great Federal State and any of such States, if the Federal State so elect. If there is anything whatever, then, in the public law of the United States which can be differentiated from the public law of other continents—and this is the theme prescribed for me at this time—it is disclosed in the three characteristics to which I have just referred.

It would seem not irrelevant to this discussion to inquire what the public law of the United States is theoretically worth, if anything, to the world at large. Would it not seem to be this—that in any union or aggrandizement of states the local autonomy of the combined states must be scrupulously respected, in so far as is consistent with any union at all? This is the leading principle which the Federal Government of this country is always obligated to apply when any voluntary augmentation of territory is contemplated or effected. But perhaps, after all, the supreme lesson taught by the Constitution of the Federal Government of the United States is the importance it attached to arbitration. Differences between allies or among the States of a Federal Union, or between the Federal Government and the governments of the states are inevitable, and such differences can be peacefully solved only by a permanent court of arbitration.

The abolition of warfare has long been the dream of humanitarians and of some philosophers. One of the finest minds in all the ages (I refer to the philosopher Kant) has in substance affirmed that if ever war shall be banished from the earth it

will be due to some closer union of the great nations of the world. It is due to Kant to state that in his Philosophy of Law he seems to apprehend that such a union is impracticable. While conceding that the art of government and the law of nations are two things which never subject themselves to idealism, it would perhaps be going too far to conclude that Kant's conception—that war can be banished from the earth only by some closer union of states—was an error. Doubtless if such a union of states ever shall come to a realization, the federative plan presented in the Union of American States will be sure to have received the profound consideration of the nations concerned. Certainly should there ever be one Federal state in all North America, another in South America, like unions would follow throughout the world. Then the *pax humana* will be nearer at hand than it is at present. Without some such unions international arbitration must continue to be the solution of only minor issues between nations rather than the substitute for war.

It is very notable that some steps in the direction of the world federation indicated have already been taken in America. In the year 1890 the International American Conference held at Washington adopted a very significant resolution. In view of its importance I will give it. It is as follows:

> "Whereas there is in America no territory which can be deemed *res nullius*; and
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> Whereas in view of this, a war of conquest of one American nation against another would constitute a clearly unjustifiable act of violence and spoliation; and
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> Whereas the possibility of aggressions upon national territory would inevitably involve a recourse to the ruinous system of war armaments in time of peace; and
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> Whereas the Conference feels that it would fall short of the most exalted conception of its mission were it to abstain from embodying its pacific and fraternal sentiments in declarations tending to promote national stability and guaranty just international relations among the nations of the continent; be it therefore
>
> Resolved, by the International American Conference, that it earnestly recommends to the Governments therein represented the adoption of the following declarations:
>
> First. That the principle of conquest shall not, during the continuance of the treaty of arbitration, be recognized as admissible under American public law.
>
> Second. That all cessions of territory made during the continuance of the treaty of arbitration shall be void if

made under threats of war or in the presence of an armed force.

Third. Any nation from which such cessions shall be exacted may demand that the validity of the cessions so made shall be submitted to arbitration.

Fourth. Any renunciation of the right to arbitration, made under the conditions named in the second section, shall be null and void."

It is evident that this remarkable resolution only paraphrases a principle of the international law of the United States, a principle which has had the careful consideration of this government for now a century, and which in part is emphasized in what is known as the "Monroe Doctrine." By the larger definition of public law, before announced, the law of nations is a part of the public law of the United States. Had it not been for the principle stated in the Monroe Doctrine as a part of American public law, the guardianship of the soil of a large part of the Americas would long since have passed from its present custodians. The future of the new world would have been altogether different and the liberty and the safety of all the inhabitants of the Americas would have been in jeopardy every hour. That all America has been left to work out its own destiny is due primarily to the hegemony of the great federated state of the United States and to its public law. The notable resolution of the International American Conference in 1890, already recited at length, suggests that a Federal tie or union may be arrived at through mutual affection of states as well as by a solidarity of interests. Those states which have friends and enemies in common are in a sure way to an early federation of some kind. This federation may be of the narrowest sort; the individual autonomy of the various federated powers may be almost absolute, but nevertheless any union is a federation in kind if the general agent be definitely constituted within its own independent sphere of action.

But to bring about general international arbitration is the labor of practical statesmen, not a task for the ingenuity of political theorists. The principle of international arbitration can never be enforced by weak states. Even to protect its neutrality a state must be powerful. In order that a state may have its proper influence in the world of the present it needs to be a strong and a great power. It must be capable not only of expressing its will, but of enforcing that will should occasion arise. A

state advocating international arbitration as a substitute for force, if its counsels are to be listened to and heeded by other nations, must not be in a position where it will derive more material benefit from arbitration than from force. An unarmed nation, standing only for arbitration, will receive but slight attention from the great military powers of the modern world. In short, the principle of international arbitration will be successfully applied on this globe only when the states advocating it are altruistic and have relatively nothing to gain by arbitration, for then it will be evident to the world that such states are animated only by high moral principle and not by self-interest. A rich, lethargic, commercial nation, necessarily regardful of self-interest, is, when wholly unarmed for conflict, in no position whatever to pose as the successful advocate of arbitration. It is in a like situation to that of the stout and plethoric burgher of the middle ages when confronted with the man in armor. While advocating the desirability of peace, we should never forget that all the laws and all the nations of the world are the result of war and of force.

It has been said by one of the greatest and most philosophical jurists of the modern world that "law is the formal expression of the means whereby a people organizes itself in the struggle for existence." Then this legist proceeds to say, and what he says in his epitome of the History of Roman Institutions is accurate: "War is the father of all things. Under the stress of the perils of war a people consolidates into an army, into a state. So far from being the power that destroys societies, war is the power that builds them up. Legal order has its ultimate origin in military order, and in this sense the soldier is *'pater patriae.'*" If we remember that every government but one in this hemisphere is the result of war we shall see the application. But because all this has been so in the past is not conclusive that wars must go on forever. It is not idle to speculate on a long reign of peace for the world. It is not fatuous to hope for it. But speculation on any great theme in order to be valuable must always be tempered by practical considerations. Some of these practical considerations I have endeavored to indicate, and only to indicate in this paper on the theme chosen.

Let me say a word before closing on the advantage of the principle of local autonomy in American public law. Local autonomy, or what is called in American political terminology

"states' rights," is, as many of us in this country believe, at all times a necessary condition of freedom and wholesome self-government. A great unitary state is inconsistent with liberty. Vast empires, however strong, are incapable of the nicest adjustments of human needs. There is in government a geographical limit to internal efficiency, just as there is none to outward efficiency. It may be retorted that the local units of government in the United States, and indeed in all America, are not now in many respects exemplary models of governmental efficiency. This to some extent may be accurate. All educated Americans are aware of defects in the application of the principles of their government. But to admit such conclusions as final at this time is highly premature. This country and all the countries of its American allies are yet in the making. Perhaps several hundred years will elapse before the citizenship of this or of any other American state will be so thoroughly developed, so highly educated and organized in a civic sense as to make our governmental forces work without friction and with the ultimate perfection designed.

That a federal system of government is not only ideally the best, but the best in practical operation for great populations, scattered over wide and contiguous areas, the development of the United States thus far, I think, conclusively shows. But whether this be so or not, our national government is generally admitted to be the most interesting experiment in government which the world has ever seen. Yet our national government is no longer in the experimental stage. To be sure the history of government is a very long one. But the history of the great federal state in America, though short in comparison, is not, in fact, brief. It is only so when we come to compare it with the history of the world. Of course, what Divine Providence has yet in store for America no mortal can know. All we can now say is that in so far as our history has developed, it has certainly disclosed the abstract wisdom of the federal system of government now in force in the United States of America.

In conclusion, let me add that Americans, those whose traditions are purely American, who have no familiarity with political institutions other than their own, and who have inherited from past generations of Americans the political creed that no other governmental institutions are founded on better principles of right and justice—those Americans, I say, firmly believe that the seeds of freedom and equality before the law, planted so long ago with

such care and foresight in this hemisphere, will in the fullness of time produce here not only a perfect governmental administration, but also its natural fruits, the triumph of justice and the very perfection of human liberty. When America has accomplished this, which we term her mission, then her counsel and example will, let us hope, be able to assure the peace of the world. The fact that the public law of America contains elements, or norms, which look to the pacification of the world, perhaps differentiates it at the present time from the public law of other continents.

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