A review of Bryce's American Commonwealth, a study in American constitutional law

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Bryce's "American Commonwealth" is a unique work. It is not only a comprehensive account, at once intelligent and intelligible, of the political institutions of one great nation by a member of another; but it is also the best of all such accounts, either in our own or other literatures. It is also worthy of remark that it proceeds from a nation whose leading citizens have not been noted for their sympathy for and appreciation of American conditions, either political or social. The book is remarkable for the mastery of details, the firm grasp of general principles, and a deep and pervasive sympathy with the institutions which are described, which is as rare as it is refreshing. It is doubtless the ability, arising from such sympathy, to put himself into the position of an American observer and to look at things for the time being from an American point of view, which carries the author so successfully through many an obscure and difficult portion of his subject.

Mr. Bryce has not only succeeded in presenting an able exposition of matters on which previous writers, both native
and foreign, had written much; but he enters with equal success fields in which the systematic material is very meagre, and treats subjects in a most satisfactory way which no previous writer has attempted to discuss in a scientific manner. No one can read the work without conceiving a great admiration for the lucidity of exposition, the accuracy in matters of detail, and the comprehensiveness of the plan, as well as the success attending its execution. This admiration is increased by a second and third reading. It is also a noteworthy feature of the work that it is adapted, not only for the scholar, but also for the general reader, and is especially valuable for the college student who may desire to secure a general view of some of the most important aspects of our national life.

It is, therefore, in no spirit of carping criticism that an attempt is made in the following paper to point out certain inaccuracies of statement, and certain misleading features in the expositions. Foreigners will for a long time to come depend chiefly upon this book for their ideas of America and American institutions; a circumstance as fortunate for them as for us. But this fact makes it all the more necessary and desirable that even the small defects and errors, if such they be, which are discussed in the following pages, should be remedied in a new edition. Some of the points mentioned are evidently mere slips of the pen; some are views advanced because the author has followed leading and standard authorities in this country in their misconceptions and errors; while others relate to matters on which there are decided differences of opinion and inference.

In a few cases the mere form of presentation is criticised where it seems likely to prove misleading to those foreigners whose knowledge of the subject matter treated is limited to this work.

The following paper deals exclusively with the first volume of the third edition. There are five general points as to which criticism will be offered in these pages: First, the

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author’s statement as to the basis of the classification of the
distribution of functions between State and nation; second,
his remarks on the subject of the responsibility of officials;
third, his exposition of the judicial power of the United
States; fourth, his formulation of the principles of constitu-
tional interpretation; fifth, his views as to the final
authority in interpreting the Constitution. There are various
other subjects of minor importance which will be mentioned
in the course of the discussion.

In treating of the distribution of functions between the
Federal Government and the States, the author declares,*
that “the administrative, legislative and judicial functions,
for which the Federal Constitution provides, are those relat-
ing to matters which must be deemed common to the whole
nation, either because all the parts of the nation are alike
interested in them, or because it is only by the nation as a
whole that they can satisfactorily be undertaken.” This
statement, taken in connection with other statements relat-
ing to the same subject, seems to imply, and would undoubt-
edly convey to a foreigner, the idea not only that those
matters which are entrusted to the Federal Government are
all of national and general interest, but also that all matters
of general and national interest are entrusted to the Federal
Government.

This is a very common form of describing the distribution
of functions between the nation and the States, but it is
erroneous. As a matter of fact, the actual distribution of
functions between the Federal Government and the States,
as the author suggests elsewhere, was the outcome of a
struggle between those who were in favor of giving the
Federal Government much more extensive powers than it now
has, and those who were in favor of giving it still fewer. It
would be highly improbable that as a result of such a struggle,
all those subjects and only those subjects which were of
national and general interest should have been actually

* P. 33.
assigned to the general government; while only those which were of special and local interest should have been assigned to the States. And it is, moreover, certain that even if an ideal distribution of this sort had been made in the first place, it would no longer be ideal after a century of development in which the relative importance of different subjects has been materially changed. As a matter of fact, however, many of the most important matters which are of national and general interest were not entrusted to the Federal Government. Surely the subject of a common commercial law, for example, or common marriage and divorce laws, is just as important as a common law of naturalization, a common bankruptcy law, and a common system of weights and measures, as to which subjects Congress has full power of legislation; although in regard to one of these it may be said never to have legislated at all, and in regard to another only temporarily and occasionally. All that can be said, therefore, in regard to the actual distribution of powers between the Federal Government and the State governments in our political system, is that certain general powers have been given to the Federal Government, being only those which commended themselves to the men who drew the Constitution as being absolutely necessary to the working of such a government as they were planning, or, possibly, in some instances those as to which one party yielded its convictions in the interest of compromise and conciliation.

How very different a modern distribution of functions between the Federal and State governments would be, if we had the subject before us anew, can be seen by comparing, in this respect, recent federal constitutions (i.e., those made since 1870), with our own. The federal constitution of Germany, for example, or that of Switzerland, both reflect in their distribution of functions between State, and nation the economic and social conditions of the latter half of the nineteenth century, instead of those of the close of the eighteenth.
Bryce’s "American Commonwealth." 5

In discussing the subject of the responsibility of the President, his cabinet and other officials in the United States, the author expresses himself as follows: "In America, the President is responsible, because the minister is nothing more than his servant, bound to obey him and independent of Congress." * Further, † "the President is personally responsible for his acts, not indeed to Congress, but to the people by whom he is chosen. No means exist of enforcing this responsibility except by impeachment." In another place, ‡ "if the resolution [of Congress] be one censuring the act of a minister, the President does not escape responsibility by throwing over the minister, because the law makes him, and not his servant or adviser, responsible." In another connection it is declared, § that "every power in the state draws its authority, whether directly like the House of Representatives, or in the second degree like the President and Senate, or in the third degree like the federal judiciary, from the people, and is legally responsible to the people and not to any one of the other powers." Finally, speaking of State officials the author says, || that "they are in no sense a ministry or cabinet to the governor, holding independently of him, and responsible neither to him nor to the legislature, but to the people. They do not generally take his orders and need not regard his advice."

It is difficult to see how this exposition, in spite of various modifying and explanatory statements to be found elsewhere in the work, should not be confusing to a foreign student of our politics. The term "responsible" in political science and in constitutional discussions, has come to have a definite technical meaning which makes it improper to use it in describing the relations of the officials in the United States to the people.

* P. 91.
† P. 93.
‡ P. 210.
§ P. 305.
|| P. 497.
Looking for a moment at the President alone, there is no sense in which the term "responsible" is used in the discussions of political science in which the President can be fairly said to be responsible to the people at all. He is elected for a period of four years and during that period is as completely and absolutely out of the reach of law and legal process in his official capacity as President, as even the crowned heads of Europe. It is true that if the President desires to be re-elected, he may shape his policy with reference to the impression it will produce upon the voters of the country, or, at least, upon the politicians; but, so the German Emperor, if he desires to secure the passage of a bill through the German legislature, will act in such a way as, in his opinion, will contribute to that end, but he is not for that reason responsible, in any political sense, to the people. Even if the President might be said, in a certain sense, to be responsible in his first term, that is, so far as he may be affected by the desire to influence public sentiment in favor of securing a second term, certainly this cannot be said of his conduct during his second term with reference to a third. He knows full well that no conduct of his would be likely to secure a third term in the present temper and with the present political traditions of the people of the United States.

No power is given to individual citizens, or to the citizens taken collectively, or to the States individually, or to the States taken together, to control or supervise in any way the acts of the President. He is, so far as any of these elements in our political system are concerned, absolutely irresponsible. Nor can he be reached by any process of the court, and he is, therefore, in this sense, as truly above the courts and free from responsibility to them as any king in Europe. Indeed, one may say that in a certain sense the crowned heads of Europe are more immediately responsible to some power outside of themselves than is the President. If the German Emperor, for example, were to act in such a way as
to justify the opinion that he had become insane, a method is provided in the law by which he can be practically suspended from the exercise of his office and his power placed in the hands of a regent; but no such power is given under our Constitution to any political authority whatever. This question acquired a practical significance during the long illness of President Garfield. The President was in this instance certainly unable to discharge the powers and duties of his office, and in such cases the Constitution declares that they shall devolve upon the Vice-President. But the Constitution provides no way of determining when such a condition actually intervenes, nor does it give either to Congress or the Vice-President the right of initiative in the matter, and leaves the President, therefore, in control of the situation.

On the other hand, the President is undoubtedly responsible in a sense to Congress for his acts. Mr. Bryce states definitely that he is not responsible to Congress. Congress is authorized by the Constitution to impeach, convict and remove from office, a President, who, in their opinion, shall be guilty of treason, bribery, or other high crimes and misdemeanors. And, since, under our Constitution, Congress is made the absolute and final judge of what constitutes those particular crimes for which a President may be impeached (with the single exception of treason which is defined in the Constitution itself), it is evident that Congress may remove a President from office without the possibility of his appeal to any other authority, either the courts of justice or the people themselves.

There is no doubt that the process required for the enforcement of this control over the President is so difficult in its workings that it can hardly be resorted to as a means of affecting the ordinary political action of the President. The explanation of this fact, however, is to be sought in political and not in constitutional difficulties.

Nor is the statement in regard to other officials any more
nearly correct. There is, generally speaking, no legal responsibility of administrative officials in this country to the people, in any sense in which that term can be properly used. On the contrary, one may much better describe the system of government in the United States as one composed of many irresponsible officials, with power to check and hinder one another, a limit to whose irresponsibility is set simply by the fact that they have comparatively short terms of office, at the end of which they must be re-elected by the people in order to be continued in such office. But when one considers that, generally speaking, owing to the rapid change in tenure of political parties and the notion that rotation in office is an eminently democratic and desirable institution, good conduct in office does not lead to re-election, nor bad conduct necessarily to rejection, it is surely not proper to speak of political or legal responsibility to the people in any sense in which that term is ordinarily employed in political parlance. This description would apply fully to the systems of State government, and even in the case of the Federal Government, where owing to the power of the President to dismiss any official at will, complete administrative responsibility is assured, the officials are even further removed from any direct responsibility to the people than in the States. It is also a misstatement to speak of the federal judiciary as being legally responsible to the people. The only body to which they are in any sense responsible, except the courts themselves, is Congress, which may, by process of impeachment, remove them from office.

Such an exposition of this subject is not only open to objection, as not stating the actual facts of the case and as likely to be misleading to foreign students of our politics; but still more so because the habit which is widespread in this country of speaking of our officials as being responsible to the people, is one which leads the public to believe that they really are so, and it makes it difficult to secure public interest in proposed schemes for more efficient administration.
We imagine that, under our present organization, we have an effective control over public officials, whereas the whole history of our politics and law bears out the statement that no such control really exists as is implied by the expression that officials are responsible to the people. A most startling illustration of the ineffectiveness of popular control is given in a recent number of the ANNALS. Mr. S. E. Moffett there describes the efforts of the people of California to secure action of a certain kind by a railroad commission. Although the members of this commission are elected by the people, and although the people seemed to be determined to secure action in accordance with their wishes—if there is any standard by which we may judge such determination—yet in spite of repeated elections, in spite of rejecting time and again every member of the commission who sought re-election after failing to comply with the popular demand, the people of California after more than a decade of effort are no further along than they were at the beginning.†

The exposition which the author gives of the judicial system of the United States, especially as relating to the federal judiciary, is not satisfactory. It is a complicated and difficult question about which few Americans, outside of the legal profession, concern themselves at all, and it has never ceased to be a pons asinorum for European jurists. Professor Bryce evidently understands the situation himself, but he does not make his exposition as clear as could be desired.

He gives in one place‡ a summary of the chief common or national matters which fall within the jurisdiction of the

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† "The idea that officers are directly 'responsible' to the people and to no one else has, among our own citizens, diverted attention from a grave defect in our State government, viz: that most of the officials, such as sheriffs, state attorneys, attorneys-general, auditors, etc., are responsible to nobody. It is a sheriff's duty to suppress riots. Suppose that he sympathizes with the rioters or desires their votes and so does not suppress their disorder; to whom is he responsible for this misfeasance? To nobody."—Meritt Starr.
‡ P. 33.
national government, and declares at the end that this "list includes the subjects upon which the national legislature has the right to legislate, the national executive to enforce the federal laws and generally to act in defence of national interests, and the national judiciary to adjudicate." This seems to imply, in the very form of the statement, that the function of the federal judiciary is not only primarily, but exclusively, to pass upon cases in which the Federal Constitution or federal laws are involved.

In another place he declares* that "sometimes a plaintiff who has brought action into a State court finds, when the case has gone a certain length, that a point of federal law turns up which entitles either himself or the defendant to transfer it to a federal court, or to appeal to such a court should the decision have gone against the applicability of the federal law. . . . Within its proper sphere of pure State law, and, of course, the great bulk of the cases turn on pure State law, there is no appeal from a State court to a federal court."

When discussing the State judiciary,† the author declares that "the jurisdiction of the State courts, both civil and criminal, is absolutely unlimited, that is, there is no appeal from them to the federal courts, except in certain cases specified by the Federal Constitution, being cases in which some point of federal law arises." (The italics are the writer's.)

In mentioning the points in which the legal independence and right of self-government of the several States appears, the author says‡ that "each of the forty-four States has its own court from which no appeal lies (except in cases touching federal legislation or the Federal Constitution) to any federal court." (The italics again are the writer's.)

There is in all this, and other similar statements may be found in the work, no indication whatever that one of the

* P. 332.
† P. 502.
‡ P. 419.