it most advisable to do so, have placed it in the power of a court to decide when a contingency had happened which required the federal government to interfere."

"But, fortunately for our freedom from political excitements in judicial duties, this court can never with propriety be called on officially to be the umpire in questions merely political. The adjustment of these questions belongs to the people and their political representatives, either in the state or general government. These questions relate to matters not to be settled on strict legal principles. They are adjusted rather by inclination—or prejudice or compromise, often. Some of them succeed or are defeated even by public policy alone, or mere naked power, rather than intrinsic right. There being so different tastes as well as opinions in politics, and especially in forming constitutions, some people prefer foreign models, some domestic, and some neither; while judges, on the contrary, for their guides, have fixed constitutions and laws, given to them by others, and not provided by themselves. And those others are no more Locke than an Abbe Sieyes, but the people. Judges for constitutions, must go to the people of their own country, and must merely enforce such as the people themselves, whose judicial servants they are, have been pleased to put into operation." Mr. J. Woodbury (p. 51) et seq.

"Another evil, alarming and little foreseen, involved in regarding these as questions for the final arbitrament of judges would be, that in such an event all political privileges and rights would, in a dispute among the people, depend on our decision finally. We would possess the power to decide against as well as for them, and under a prejudiced or arbitrary judiciary the public liberties and popular privileges might thus be much perverted, if not entirely prostrated. But, allowing the people to make constitutions and unmake them, allowing their representatives to make laws and unmake them, and without our interference as to their principles or policy in doing it, yet, when constitutions and laws are made and put in force by others, then the courts, as empowered by the state or the union, commence their functions and may decide on the rights which conflicting parties can legally set up under them, rather than about their formation itself. Our power begins after their's ends. Constitutions and laws precede the judiciary, and we act only under and after them, and as to disputed rights beneath them, rather than disputed points in making them."

"The disputed rights beneath constitutions already made are to be governed by precedents, by sound legal principles, by positive legislation, clear contracts, moral duties, and fixed rules; they are per se questions of law, and are well suited to the education and habits of the bench. But the other disputed points in making constitutions, depending often, as before shown, on policy, inclination, popular resolves, and popular will, and arising not in respect to private rights—not what is meum and tuum—but in relation to politics, they belong to politics, and they are settled by political tribunals, and are too dear to a people bred in the school of Sydney and Russel for them ever to intrust their final decision, when disputed, to a class of men who are so far removed from them as the judiciary; a class, also, who might decide them erroneously as well as right, and if in the former way, the consequences might not be able to be averted except by a revolution, while a wrong decision by a political forum can often be peacefully corrected by new elections or instructions in a single month. And if the people, in the distribution of powers under the constitution, should ever think of making judges supreme arbiters in political controversies, when not selected by, nor frequently amenable to them, nor at liberty to follow such various considerations in their judgments as belong to mere political questions, they will dethrone themselves and lose one of their own invaluable birthrights; building up in this way—slowly, but surely—a new sovereign power in the republic, in most respects irresponsible and unchangeable for life, and one more dangerous, in theory at least, than the worst elective oligarchy in the worst of times."

Mr. Justice Swayne, in dealing with the claim that the constitution of Georgia was adopted under coercion of congress, says:

"The action of congress upon the subject can not be inquired into. The case is clearly one in which the judicial is bound to follow the action of the political department of the government and is concluded by it."

White v. Hart, 15 Wall. 646.

This appellant seems to be the only citizen of Oregon, who is agitated by these alleged unrepublican forms.

The governor and the legislature of Oregon report no violent interruptions of their duties; the duly constituted courts of the state have peaceably dismissed the appellant's complaints; its senators and congressmen attend in the same building with this court; the attorney-general comes here presumably officially representing the people of Oregon and the state of Oregon, and no one asks to overthrow the established and constitutional forms of that state, save this corporation, a creature of the state, whose very life could be lawfully destroyed by the state of Oregon, before its complaint reached this court.

No other state complains that the guaranties of the United States constitution are violated. No report has come to congress and the president, who have the armies of the United States at their back, that the republic has ceased in Oregon and must be restored.

It seems imperative that one question should first be considered and answered by this court, viz:

How will the reversal of this judgment guarantee to the state of Oregon a republican form of government?

Despite this court's decree, the people of Oregon may continue their system, subject only to the inconveniences which attend specific refusals of this court to recognize the initiative laws as valid.

This court can guarantee only that with every opportunity it will declare initiated acts void—but this will not change the form of government of Oregon. This court's only method of guaranteeing a republican form (as it may construe such form) is by some positive act, such as sending its marshals to enforce an injunction against voting for such laws.

An injunction would hardly operate upon all the voters of a state, and could not prohibit them from voting as they please.

The marshals who alone can enforce this court's decree, are the officers of the political department, appointed by the president. The president might remove them for making such an effort: congress having recognized this system as republican, might take away the appellate power of this court to prevent its interference in such cases. Thus the proposition is emphasized, that the guaranty is for enforcement by the political power, which alone possesses the instruments to enforce its orders. This court is plainly not equipped to enforce this guaranty.

H. EFFECT OF JUDICIAL DECREES.

1. The Nullification of Initiated Laws.

The only operation which a decree of the court could have would be to outlaw the state of Oregon, at least so far as its constitution, laws and institutions are based upon "initiative" proceedings.

The court could upon any appeal from the courts of Oregon, refuse the enforcement of judgments based upon such enactments. In the eyes of this court such constitutions and laws would be void ab initio. If they were not void ab initio this appellant has no standing.

The following constitutional amendments and acts were enacted last year at the polls in Oregon on initiative petitions:

Constitutional amendments.

For the regulation of taxation by counties.

Giving cities and towns power to license or prohibit the sale of liquors.

Providing jury verdicts of three-fourths, separate summonses for grand and petty juries, regulating retrails, fixing terms, increasing jurisdiction of supreme court, and fixing tenure of judges.

Extending debt limit for counties for road making purposes.

Acts for

A tax to support a normal school.

Amendments of direct primary law and corrupt-practices' act.

Fixing employers' liability.

Prohibiting taking of fish.

Are these laws organic and functional void ab initio? The appellant can only stand upon that ground with respect to the tax imposed upon him.

As a judgment in its favor must be on the ground of the unconstitutionality of the method of making the law, it would require no further judgment of this court to nullify all laws, institutions, taxes, territorial divisions, judicial proceedings, etc., which in ten different states may have been established by this same method.

If the people have no right to propose laws without the intervention of a legislature, it would seem to follow that they can not alter their constitutions by the same method: the two propositions are inseparable.

2. Conflict with Congress

Congress and the president have already after full discussion admitted to the union the state of Oklahoma and agreed to admit the state of Arizona, under constitutions containing provisions for the initiative on constitutional amendments and statutes, which follow almost in exact words the Oregon amendment.

For more than a century this court has recognized the power of congress to determine whether the constitutions of states applying for admission to the union are republican in form. It can not be that a different department of the government is to decide upon the republican forms of states already in the union. The very proposition involves an irrepressible conflict.

Certainly Oklahoma and Arizona have no greater rights in the union than has the state of Oregon. And if this court should now declare the constitution of Oregon to be unrepublican, it can not avoid a like decree against Oklahoma and Arizona. That congress would assert its rights and defend with its political power the legality of the constitutions, which it has expressly approved, is unquestionable. It would likewise extend its protection to Oregon, Maine, Missouri, South Dakota, Nevada, Utah, Montana, Arkansas and California.

If congress thus recognizes these constitutions, it is clear that the other states must give full faith and credit to the public acts, records and judicial proceedings of these states, and this court would be the only tribunal to ignore or deny their constitutional regularity.

Such a conflict is inconceivable; yet it would be opened if this appellant should prevail.

This court might impede by its decrees the operations of statehood, but it is plain that only congress could enforce the guaranty to which the United States has pledged itself.

(As to the proceedings for the admission of Oklahoma and Arizona, see infra III B, 2, a. and b.)

Chief Justice Taney in Luther v. Borden gave the logical forecast of such a conflict between the judicial and political departments in these words:

"After the president has acted and called out the militia, is a circuit court of the United States authorized to inquire whether his decision was right? Could the court, while the parties were actually contending in arms for the possession of the government, call witnesses before it and inquire which party represented a majority of the people? If it could, then it would become the duty of the court (provided it came to the conclusion that the president had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States or the government, which the president was endeavoring to maintain. If the judicial power extends so far, the guarantee contained in the constitution of the United States is a guarantee of anarchy, and not of order."

[The third installment of Mr. Williams' brief will be printed in the next issue of The Commoner.]

FACT VS. FICTION

For three years the people of Oregon have possessed the right to recall a judge. This power has never been used. Some weeks ago a judge named Coke charged the jury in a murder trial in a way that commanded acquittal. A movement for his recall failed absolutely, the recallers failing to get a third of the required 25 per cent. This case has been made much of by the conservative press, the "martyrdom of Judge Coke" providing many stirring columns of editorial comment. These same papers, however, have failed to mention the little fact that the petition "died a-bornin'," and this instance is the only attempt made to use the recall in the case of judges.—Denver News.

THE HEART'S THE PART

It's no in titles nor in rank;
It's no in wealth like London bank,
To purchase peace and rest.
It's no in making muckle mair;
It's no in books; it's no in lear
To make us truly blest.
If happiness has not her seat
And center in the breast,
We may be wise, or rich, or great,
But never can be blest.
Nae treasures, nor pleasures,
Could make us happy lang,
The heart aye's the part aye
That makes us right or wrang.

—Robert Burns.