side this new structure to extend and multiply its work and to realize the hopes of other workers yet unprovided with adequate facilities, that here may be developed a great institution for the relief of suffering and the service of humanity.

HENRY B. WARD
UNIVERSITY OF ILLINOIS

THE SIGNIFICANCE OF THE NATIONAL BIRD LAW

FOR 125 years, constitutional lawyers and laymen were agreed on at least one thing—that the national government possesses only those powers specifically granted in the constitution, and those reasonably implied from such specific grants. The states possess the residue. There had been, it is true, some argument as to the interpretation to be given to Art. I., Sec. 8, Par. 1 of the constitution as well as to the 9th and 10th amendments. But this was wholly academic, and the consensus of opinion soon crystallized to the above stated proposition.

Yet during our constitutional life of 125 years we have seen remarkable changes going on in this country. The states were isolated and self-sufficient. The stage offered no inducement to travel from state to state, nor the pack horse to trade. To-day, what a revolution in our economic and social life! Railroads, steamships, the telegraph and telephone, along with a thousand other inventions, have made us live a different life. Distance has been shortened; the United States made smaller. One state can no longer satisfy our needs, for all states are interdependent.

Yet more remarkable than all, we live under substantially the same constitution. But only because it is too difficult to amend, for we are to-day confronted with many problems which some think can only be settled satisfactorily by a constitutional amendment. Yet that is next to impossible. It will pay us to glance at a few of the problems that have arisen because of revolutionary changes in our ways of living. For almost half a century the conflict of divorce laws in the states—some lenient, others strict—has been the subject of continual agitation. The origin of the American Bar Association and the origin of the Commission on Uniform State Laws is but an indication of the stir that the diversity in divorce laws must have produced. Yet in spite of continued attention to this subject from 1878, when the American Bar Association was organized, no substantial results have been accomplished; this, though the Commissioners on Uniform State Laws have fought for it for twenty-five years, though a national conference was held at Washington, and though no end of other organizations are urging uniformity of divorce laws. After all this effort three states have uniform divorce acts, and these are not absolutely uniform. The very natural result is that public opinion is turning to the federal government and asking for a national divorce law. But that would necessitate a constitutional amendment.

While not now in the public eye, it was only a short time ago that we heard of the evils flowing from the corporation laws of some states. And no wonder there was criticism when some of the states debauched themselves to an advertising campaign in order to induce incorporation under their laws, the "most liberal," that is the most lax, in the United States. Here too uniformity has been attempted by state action, and as yet not even an act has been agreed upon. Very naturally again public opinion turns to the national branch for relief, demanding either a federal incorporation act, a federal license, or any form of relief that federal action can give. Yet the constitutionality of such a law has been questioned.

In the various states, the progressive element is urging reform on such questions as hours of labor, woman and child labor, minimum wage, protection from machinery, protection from trade diseases, in short all the problems of modern factory life. What kind of opposition is met? A kind that is very difficult to reply to—successfully. The manufacturer says: "Yes, hours of labor should be reduced; children should not be employed; we ought to take greater precautions to protect

our employees; the situation does demand relief; but, however much we should desire all this, it is impossible if we are to continue in this business. We are met with a cold economic fact. Our strongest competitor against whom we can just hold our own [and every industry has such] lives in the state of X, which state is even now more lenient in its factory laws. If you accomplish this reform, you will ruin us. We could not compete under such unfavorable conditions. If you can force the state of X to pass similar laws, we heartily favor these very necessary reforms." And in state after state, year after year, has this type of argument defeated reforms that all felt were reasonable and desirable from every other standpoint. Some of our most progressive states will not listen to such argument, but eventually they must. What again is the result? The public is looking for a national child labor law, a national law for women, hoping to accomplish these reforms by an unwarranted interpretation of the interstate commerce clause. A constitutional amendment is necessary.

In this way the reader could be taken through a host of subjects in which a national law would solve the situation. Yet in each case such a law is either clearly unconstitutional, or constitutional only through some remarkable jugglery which the public to-day expects of the court, in view of the difficulty of amendment. To-day the commissioners on uniform state laws are considering or are urging uniformity in such questions as partnership, negotiable instruments, bills of lading, warehouse receipts, sales, stock transfer, workmen's compensation, taxation, insurance, carriers, conveyancing, acknowledging of instruments, the making and proof of wills as well as many other subjects. One might speak of the evils of double taxation or of the tangling question of situs in taxation; one might recall the insurance scandal in New York some years ago, the reforms put through in some of the states, and the agitation for a national insurance act; but the instances quoted show that quite a delicate situation exists. And in every case it is very unlikely that anything like real uniformity can be accomplished and permanently so by the voluntary action of the states. So that in each case a constitutional amendment would seem to be the only remedy, providing of course that the original and long-accepted thesis is true, namely that Congress possesses only conferred powers or powers implied from them.

Suddenly and almost unnoticed we have presented to us what looks like a solution of the whole difficulty. It is the theory lying back of the national bird law recently passed by Congress, and just being put into effect by the agricultural department, the so-called McLean Bird Act, regulating the killing of migratory and insectivorous birds. On what theory can such a law be constitutional? We shall see.

Almost daily we hear of the ravages of this or that insect. Now it is the San José scale, at another time the locust, sometimes the green leaf louse, and at another the potato bug. Nature has blessed us with an almost countless horde of insects which each year are causing tremendous damage to our crops. Experts have estimated this damage at various amounts. Dr. C. L. Marlatt, basing his estimate on statistics from the Department of Agriculture, concludes that an annual damage of 800 million dollars results. Mr. Forbush in his book, "Useful Birds," reaches the same conclusion. Whatever the damage may be is unimportant here; sufficient for our purpose that it is enormous. Likewise the experts have demonstrated that each of these ruthless insects has a natural enemy in the form of this or that bird. The claim very naturally follows that much of this damage can be avoided by encouraging the existence of the type of bird that feeds on the ravaging insects. The advocates of the national law declare that some states have failed to pass laws protecting such birds. For example one state protects robins and blackbirds, while another prefers to give to its inhabitants this source of food. These birds are migratory. What is the result? Protected in one state, and slaughtered in another. Any state that protects birds does so only to the advantage of another state, depriving its own citizens of this same source of food.

It "cuts its own throat" so to speak, by its own conscientiousness. This state will accordingly wipe out the prohibition, and so everywhere the law of the state with the most elastic conscience, becomes the law of all. One lenient state drags down all the others, for the laws protecting birds are competitive. So the birds die hard, and the hordes of insects go on multiplying and enjoying themselves at our expense. Up to this point there has been unanimity of opinion. From now we tread on doubtful ground.

Senator McLean, of Connecticut, believes that there must be an inherent right to protect oneself against this scourge. But where does this power lodge, in the federal or in the state branch? Senator McLean argues that the experience of 125 years, with diverse, spasmodic and crazy-quilt state laws has demonstrated their failure, and has proven conclusively that the power does not rest in the states. Their inability to efficiently protect birds and the consequent failure to reduce the insect pest, an experiment carried on for 125 years, shows that they do not possess this power. And somewhere, he contends, there must be lodged this power of self-protection. The states do not possess it; experience has so proven. There is but one alternative, the national branch. On this theory the national bird law was passed. The theory might be stated in the following form: "Whenever a particular power can not be efficiently exercised by individual state action, then that power is lodged in the federal branch. There need be no specific grant of power in the constitution, nor any implication from granted powers. The fact that diverse state action has failed proves it to be a federal power." When Senator McLean gave to the Senate the reasoning by which to uphold the constitutionality of a national bird law, to hold for migratory and insectivorous birds, the senators had great doubts; but as the reform was very necessary they passed the bill, shifting thereby a burden and possibly public criticism on the court.

A few excerpts from his speech of January 14, 1913, will state the legal reasoning by which the law is to be upheld. He said:

My contention is that congress has the implied power as a natural and necessary attribute of its sovereignty to provide for the common defense and general welfare of the nation whenever the need is general and manifest, and the subject is such that no state, acting separately, can protect and defend itself against the threatened danger or secure to itself those benefits to which it is justly entitled as a part of the nation.

If the state, by exerting its authority, can secure to its citizens the protection to which it is justly and fairly entitled, there will be no need of federal interference except as it may be complementary and at the request and with the approval of the state, but if the need for assistance is manifest, if the danger is real and general and it is not within the power of a single state to protect itself and secure the benefits and protection to which it is justly entitled, then there is, as it seems to me, no escape from the conclusion that the common defense and general welfare of the people must utterly fail unless the nation can come to the rescue.

Senator Borah declared:

I do not think that the constitution of the United States can be construed in the light of the negligence of the states. Simply because the states neglect to use their reserved powers constitutes no reason why the national government should assume to exercise unconstitutional powers.

At another point Senator McLean said:

I frankly said that I did not myself find authority for it [the national bird law] in any express clause of the constitution, but I thought it was one of the implied attitudes of sovereignty, based upon the incompetency of any state to accomplish the results desired, and that it is absolutely necessary that any nation worthy of the name shall have this power.

Senator McLean could cite no decision in point on this novel theory. Yet the same theory has been urged before and has been by some called the Wilson rule of construction. In 1785 James Wilson used language applicable to our constitution, though the argument was then made under the Articles of Confederation. He said:

Though the United States in congress assembled derive from the particular states no power, juris-

diction or right which is not expressly delegated by the confederation, it does not then follow that the United States in congress have no other powers, jurisdictions or rights, than those delegated by the particular states. The United States have general rights, general powers and general obligations, not derived from any particular states taken separately; but resulting from the union of the whole. To many purposes the United States are to be considered as one undivided, independent nation; and as possessed of all rights, powers and properties by the law of nations incident to such. Whenever an object occurs, to the direction of which no particular state is competent, the management of it must, of necessity, belong to the United States in congress assembled. There are many objects of this extended nature.

In one of his speeches, after a few complimentary words for James Wilson, Mr. Roosevelt said:

He developed even before Marshall the doctrine (absolutely essential not merely to the efficiency but to the existence of this nation) that an inherent power rested in the nation outside of the enumerated powers conferred upon it by the constitution, in all cases where the object involved was beyond the power of the several states, and was a power ordinarily exercised by sovereign nations. . . . Certain judicial decisions have done just what Wilson feared; they have, as a matter of fact, left vacancies, left blanks between the limits of actual national jurisdiction over the control of the great business corporations. Actual experience has shown that the states are wholly powerless to deal with this subject [control of corporations] and any action or decision that deprives the nation of the power to deal with it simply results in leaving the corporations free to work without any effective supervision.

One might quote no end of decisions and texts declaring that Congress has only conferred and implied powers. Until this act the proposition has been regarded as settled. Therefore only one very recent case will be cited. In the case of Kansas *v.* Colorado, 206 U. S. 46, 1907, the same argument as that underlying the bird law was presented, and the court by Justice Brewer replied:

But the proposition that there are legislative powers affecting the nation, as a whole, which belong to, although not expressed in, the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the constitution, independently of the amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things.

He then shows it to be conflicting with the 10th amendment, which declares:

The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

This means that in the ordinary way—constitutional amendment—this new power could be thrown into the federal sphere, but in no other way can it be accomplished.

Constitutional thought then would seem to be unanimous against the validity of the McLean law, although there is "a" theory on which it might be vindicated. Public opinion is quite interested in a national bird law, and naturally hopes for a favorable decision.

What will be the effect of a decision declaring valid this new type of national powers, never before exercised. It will mean that Congress can legislate on any subject in which uniformity is desirable but impossible by diverse state action. It will open the way for a federal divorce law, a federal marriage law, a federal incorporation law, a federal insurance law, federal laws regulating hours of labor and the conditions of labor, federal laws on negotiable instruments, bills of lading, warehouse receipts, partnership, in fact the whole list of subjects which is now being urged upon the states for uniform adoption. It is conceivable too that after Congress has once legislated on such a subject, conditions may change, and uniformity become undesirable. Would it not follow then that the particular power would again be shifted to the states, and could not be constitutionally exercised by the federal branch? It is apparent that this new doctrine would virtually wipe out our whole division of powers between the state and federal branches, and would erect in its place a shifting rule depending on economic conditions. It would virtually destroy our constitution as far as the division of powers is

concerned, for there might just as well be no constitutional provision on such subjects. The courts too would have a delicate task, for they must decide whether uniformity is desirable, and second whether state action has produced an efficient result—both of which would be social, economic and political rather than legal questions; and on both of these hardly two people will agree. One can see the new field of legislation that this new theory opens up. It would make our constitution as elastic as the English constitution as far as the division of powers is concerned. It would revolutionize our whole constitutional growth. An early decision by the Supreme Court of the United States is then to be looked forward to with great interest both by the public and by students of law and government.

RAYMOND THEODORE ZILLMER

AMERICAN PHILOSOPHICAL ASSOCIATION

THE thirteenth annual meeting of the American Philosophical Association will be held at New Haven, Conn., on December 29, 30 and 31, in acceptance of the invitation of the Philosophical Department of Yale University. The sessions will begin on the afternoon of the 29th. The American Psychological Association will also meet at New Haven at the same time, and there will be one joint session of the two Associations.

The subject for consideration in this joint session is "The Standpoint and Method of Psychology." At the present time it is still uncertain whether this session will be devoted wholly to discussion of this subject, or whether a varied program will be made from among the papers offered, of a few of those that promise to be of greatest interest.

By a resolution adopted at its last meeting the Philosophical Association is this year committed to the discussion of some important problem for two sessions. This will give opportunity for both the opening papers and a subsequent adequate consideration of the subject chosen. The question selected for this main discussion is the problem of the relation of existence and value, including their relation both as facts and as concepts, and also the relation of a theory of existence to a theory of value.

E. G. SPAULDING,
Secretary

PRINCETON UNIVERSITY

AMERICAN SOCIETY OF ZOOLOGISTS

THE American Society of Zoologists, in affiliation with the American Society of Naturalists, the American Society of Anatomists and the Federation of American Societies for Experimental Biology, will hold a joint meeting of its eastern and central branches at Philadelphia from December 29 to January 1.

A joint meeting of the two branches of the Society is held this year in order that the report of the "Committee on organization and policy" may be considered and voted upon. This committee, consisting of E. G. Conklin, G. A. Drew and R. G. Harrison, representing the Eastern Branch; F. R. Lillie, M. M. Metcalf and W. A. Locy, representing the Central Branch, and the president of the society, *ex officio*, was appointed at the Princeton meeting and instructed to report at the meeting held in Cleveland. At the Cleveland meeting no report was received and the society continued the committee. On August 15, 1913, a meeting of the committee, called by Professor H. B. Ward, president of the society, was held at Woods Hole, at which a constitution for the society was outlined and agreed upon. At this meeting Drs. Lefevre, Reighard and Parker were invited to meet with the committee and take part in the deliberations, thus filling temporarily the places of members of the committee not at Woods Hole. The draft of the constitution formulated at this meeting was later sent to all the members of the original committee by the chairman, Dr. G. A. Drew, and certain changes and additions agreed upon have been made.

Since this meeting falls in eastern territory, the eastern branch will act as host, and, as required by the constitution, the officers of the eastern branch will be responsible for the program and other necessary arrangements. Members of both branches should, therefore,