

can politics difficult to the European, who finds in them phenomena to which his own experience supplies no parallel. There are two loyalties, two patriotisms; and the lesser patriotism, as the incident in the Episcopal Convention shows, is jealous of the greater. There are two governments, covering the same ground, commanding, with equally direct authority, the obedience of the same citizen.

The casual reader of American political intelligence in European newspapers is not struck by this phenomenon, because State politics and State affairs generally are seldom noticed in Europe. Even the traveller who visits America does not realize its importance, because the things that meet his eye are superficially similar all over the continent, and that which Europeans call the machinery of government is in America conspicuous chiefly by its absence. But a due comprehension of this double organization is the first and indispensable step to the comprehension of American institutions: as the elaborate devices whereby the two systems of government are kept from clashing are the most curious subject of study which those institutions present.

How did so complex a system arise, and what influences have moulded it into its present form? This is a question which cannot be answered without a few words of historical retrospect. I am anxious not to stray far into history, because the task of describing American institutions as they now exist is more than sufficiently heavy for one writer and one book. But a brief and plain outline of the events which gave birth to the Federal system in America, and which have nurtured national feeling without extinguishing State feeling, seems the most natural introduction to an account of the present Constitution, and may dispense with the need for subsequent explanations and digressions.

## CHAPTER III

### THE ORIGIN OF THE CONSTITUTION

WHEN in the reign of George III. troubles arose between England and her North American colonists, there existed along the eastern coast of the Atlantic thirteen little communities, the largest of which (Virginia) had not more than half a million of free people, and the total population of which did not reach three millions. All owed allegiance to the British Crown, all, except Connecticut and Rhode Island, received their governors from the Crown;<sup>1</sup> in all, causes were carried by appeal from the colonial courts to the English Privy Council. Acts of the British Parliament ran there, as they now run in the British colonies, whenever expressed to have that effect, and could over-rule such laws as the colonies might make. But practically each colony was a self-governing commonwealth, left to manage its own affairs with scarcely any interference from home. Each had its legislature, its own statutes adding to or modifying the English common law, its local corporate life and traditions, with no small local pride in its own history and institutions, superadded to the pride of forming part of the English race and the great free British realm. Between the various colonies there was no other political connection than that which arose from their all belonging to this race and realm, so that the inhabitants of each enjoyed in every one of the others the rights and privileges of British subjects.

When the oppressive measures of the home government roused the colonies, they naturally sought to organize their resistance in common.<sup>2</sup> Singly they would have been an easy

<sup>1</sup> In Maryland and Pennsylvania, however, the governor was, during the larger part of the colonial period, appointed by the "Proprietor."

<sup>2</sup> There had been a congress of delegates from seven colonies at Albany in 1754 to deliberate on measures relative to the impending war with France, but this, of course, took place with the sanction of the mother country, and was a purely temporary measure.

prey, for it was long doubtful whether even in combination they could make head against regular armies. A congress of delegates from nine colonies held at New York in 1765 was followed by another at Philadelphia in 1774, at which twelve were represented, which called itself Continental (for the name American had not yet become established),<sup>1</sup> and spoke in the name of "the good people of these colonies," the first assertion of a sort of national unity among the English of America. This congress, in which from 1775 onwards all the colonies were represented, was a merely revolutionary body, called into existence by the war with the mother country. But in 1776 it declared the independence of the colonies, and in 1777 it gave itself a new legal character by framing the "Articles of Confederation and Perpetual Union,"<sup>2</sup> whereby the thirteen States (as they then called themselves) entered into a "firm league of friendship" with each other, offensive and defensive, while declaring that "each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this Confederation expressly delegated to the United States in Congress assembled."

This Confederation, which was not ratified by all the States till 1781, was rather a league than a national government, for it possessed no central authority except an assembly in which every State, the largest and the smallest alike, had one vote, and this assembly had no jurisdiction over the individual citizens. There was no Federal executive, no Federal judiciary, no means of raising money except by the contributions of the States, contributions which they were slow to render, no power of compelling the obedience either of States or individuals to the commands of Congress. The plan corresponded to the wishes of the colonists, who did not yet deem themselves a nation, and who in their struggle against the power of the British Crown were resolved to set over themselves no other power, not even one of their own choosing. But it worked badly even while the struggle lasted, and after the immediate danger from

<sup>1</sup> Till the middle of last century the name "American" seems to have denoted the native Indians, as it does in Wesley's hymn "The dark Americans convert." So Sir Thomas Browne writes "As for sopition of reason and the diviner particle from drink, tho' American religion approve, and Pagan piety of old hath practised it, etc." The War of Independence gave the word its present meaning.

<sup>2</sup> See these Articles in the Appendix at the end of this volume.

England had been removed by the peace of 1783, it worked still worse, and was in fact, as Washington said, no better than anarchy. The States were indifferent to Congress and their common concerns, so indifferent that it was found difficult to procure a quorum of States for weeks or even months after the day fixed for meeting. Congress was impotent, and commanded respect as little as obedience. Much distress prevailed in the trading States, and the crude attempts which some legislatures made to remedy the depression by emitting inconvertible paper, by constituting other articles than the precious metals legal tender, and by impeding the recovery of debts, aggravated the evil, and in several instances led to seditious outbreaks.<sup>1</sup> The fortunes of the country seemed at a lower ebb than even during the war with England.

Sad experience of their internal difficulties, and of the contempt with which foreign governments treated them, at last produced a feeling that some firmer and closer union was needed. A convention of delegates from five States met at Annapolis in Maryland in 1786 to discuss methods of enabling Congress to regulate commerce, which suffered grievously from the varying and often burdensome regulations imposed by the several States. It drew up a report which condemned the existing state of things, declared that reforms were necessary, and suggested a further general convention in the following year to consider the condition of the Union and the needed amendments in its Constitution. Congress, to which the report had been presented, approved it, and recommended the States to send delegates to a convention, which should "revise the Articles of Confederation, and report to Congress and the several legislatures such alterations and provisions therein as shall, when agreed to in Congress and confirmed by the States, render the Federal Constitution adequate to the exigencies of government and the preservation of the Union."

The Convention thus summoned met at Philadelphia on the

<sup>1</sup> Rhode Island was the most conspicuous offender. This singular little commonwealth, whose area is 1085 square miles (less than that of Ayrshire or Antrim), is of all the American States that which has furnished the most abundant analogies to the republics of antiquity, and which best deserves to have its annals treated of by a philosophic historian. The example of her disorders did much to bring the other States to adopt that Federal Constitution which she was herself the last to accept.

14th May 1787, became competent to proceed to business on May 25th, when seven States were represented, and chose George Washington to preside. Delegates attended from every State but Rhode Island, and among these delegates was to be found nearly all the best intellect and the ripest political experience the United States then contained. The instructions they had received limited their authority to the revision of the Articles of Confederation and the proposing to Congress and the State legislatures such improvements as were required therein.<sup>1</sup> But with admirable boldness, boldness doubly admirable in Englishmen and lawyers, the majority ultimately resolved to disregard these restrictions, and to prepare a wholly new Constitution, to be considered and ratified neither by Congress nor by the State legislatures, but by the peoples of the several States.

This famous assembly, which consisted of fifty-five delegates, thirty-nine of whom signed the Constitution which it drafted, sat nearly five months, and expended upon its work an amount of labour and thought commensurate with the magnitude of the task and the splendour of the result. The debates were secret, a proof of the confidence reposed in the members; and it was well that they were secret, for criticism from without might have imperilled a work which seemed repeatedly on the point of breaking down, so great were the difficulties encountered from the divergent sentiments and interests of different parts of the country, as well as of the larger and smaller States.<sup>2</sup>

<sup>1</sup> It was strongly urged when the draft Constitution came up for ratification in the State Conventions that the Philadelphia Convention had no power to do more than amend the Articles of Confederation. To these objections Mr. Wilson, speaking in the Pennsylvania Convention, made answer as follows:—"The business, we are told, which was intrusted to the late Convention was merely to amend the present Articles of Confederation. This observation has been frequently made, and has often brought to my mind a story that is related of Mr. Pope, who it is well known was not a little deformed. It was customary for him to use this phrase, 'God mend me,' when any little accident happened. One evening a link boy was lighting him along, and coming to a gutter the boy jumped nimbly over it. Mr. Pope called to him to turn, adding 'God mend me!' The arch rogue, turning to light him, looked at him and repeated 'God mend you! He would sooner make half a dozen new ones.' This would apply to the present Confederation, for it would be easier to make another than to amend this."—Elliot's *Debates*, vol. ii. p. 472.

<sup>2</sup> Benjamin Franklin, who was one of the delegates from Pennsylvania (being then eighty-one years of age), was so much distressed at the difficulties

The records of the Convention were left in the hands of Washington, who in 1796 deposited them in the State Department. In 1819 they were published along with the notes of the discussions kept by James Madison (afterwards twice President), who had proved himself one of the most useful members of the body. From these official records and notes<sup>1</sup> the history of the Convention has been written.

It is hard to-day, even for Americans, to realize how enormous those difficulties were. The Convention had not only to create *de novo*, on the most slender basis of pre-existing national institutions, a national government for a widely scattered people, but they had in doing so to respect the fears and jealousies and apparently irreconcilable interests of thirteen separate commonwealths, to all of whose governments it was necessary to leave a sphere of action wide enough to satisfy a deep-rooted local sentiment, yet not so wide as to imperil national unity.<sup>2</sup> Well might Hamilton say: "The establishment of a Constitution, in time of profound peace, by the voluntary consent of a

which arose and the prospect of failure that he proposed that the Convention, as all human means of obtaining agreement seemed to be useless, should open its meetings with prayer. The suggestion, remarkable as coming from one so well known for his sceptical opinions, would have been adopted but for the fear that the outside public might thus learn how grave the position of affairs was. The original of Franklin's proposition, written in his own still clear and firm hand, with his note stating that only three or four agreed with him, is preserved in the State Department at Washington, where may be also seen the draft of the Constitution with the signatures of the thirty-nine delegates.

<sup>1</sup> They are printed in the work called Elliot's *Debates*, which also contains the extremely interesting debates in some of the State Conventions which ratified the Constitution.

For some remarks on Constitutional Conventions in general, see the note to this chapter at the end of this volume.

<sup>2</sup> The nearest parallels to such a Federal Union as that formed in 1789 were then to be found in the Achæan and Lycian Leagues, which, however, were not mere leagues, but federated nations. Both are referred to by the authors of the *Federalist* (see *post*), but their knowledge was evidently scanty. The acuteness of James Wilson had perceived that the two famous confederations of modern Europe did not supply a model for America. He observed in the Pennsylvania Convention of 1788: "The Swiss cantons are connected only by alliances. The United Netherlands are indeed an assemblage of societies; but this assemblage constitutes no new one, and therefore it does not correspond with the full definition of a Confederate Republic."—Elliot's *Debates*, vol. ii. p. 422. The Swiss Confederation has now become a Republic at once Federal and national, resembling in most respects its American model.

whole people, is a prodigy to the completion of which I look forward with trembling anxiety."<sup>1</sup> And well might he quote the words of David Hume (*Essays*; "The Rise of Arts and Sciences"): "To balance a large State or society, whether monarchical or republican, on general laws, is a work of so great difficulty that no human genius, however comprehensive, is able by the mere dint of reason and reflection to effect it. The judgments of many must unite in the work: experience must guide their labour; time must bring it to perfection; and the feeling of inconveniences must correct the mistakes which they inevitably fall into in their first trials and experiments."

It was even a disputable point whether the colonists were already a nation or only the raw material out of which a nation might be formed.<sup>2</sup> There were elements of unity, there were also elements of diversity. All spoke the same language. All, except a few descendents of Dutchmen and Swedes in New York and Delaware, some Germans in Pennsylvania, some children of French Huguenots in New England and the middle States, belonged to the same race.<sup>3</sup> All, except some Roman Catholics in Maryland, professed the Protestant religion. All were governed by the same English Common Law, and prized it not only as the bulwark which had sheltered their forefathers from the oppression of the Stuart kings, but as the basis of their more recent claims of right against the encroachments of George III. and his colonial officers. In ideas and habits of life there was less similarity, but all were republicans, managing their affairs by elective legislatures, attached to local self-government, and animated by a common pride in their successful resistance to England, which they then hated with a true family hatred, a hatred to which her contemptuous treatment of them added a sting.

<sup>1</sup> *Federalist*, No. lxxxv.

<sup>2</sup> Mr. Wilson said in the Pennsylvania Convention of 1787: "By adopting this Constitution we shall become a nation; we are not now one. We shall form a national character: we are now too dependent on others." He proceeds with a remarkable prediction of the influence which American freedom would exert upon the Old World. — Elliot's *Debates*, vol. ii. p. 526.

<sup>3</sup> The Irish, a noticeable element in North Carolina and parts of Pennsylvania, Virginia, and New Hampshire, were not Catholic Celts but Scoto-Irish Presbyterians from Ulster, who, animated by resentment at the wrongs and religious persecution they had suffered at home, had been among the foremost combatants in the Revolutionary War.

On the other hand their geographical position made communication very difficult. The sea was stormy in winter; the roads were bad; it took as long to travel by land from Charleston to Boston as to cross the ocean to Europe, nor was the journey less dangerous. The wealth of some States consisted in slaves, of others in shipping; while in others there was a population of small farmers, characteristically attached to old habits. Manufactures had hardly begun to exist. The sentiment of local independence showed itself in intense suspicion of any external authority; and most parts of the country were so thinly peopled that the inhabitants had lived practically without any government, and thought that in creating one they would be forging fetters for themselves. But while these diversities and jealousies made union difficult, two dangers were absent which have beset the framers of constitutions for other nations. There were no reactionary conspirators to be feared, for every one prized liberty and equality. There were no questions between classes, no animosities against rank and wealth, for rank and wealth did not exist.

It was inevitable under such circumstances that the Constitution, while aiming at the establishment of a durable central power, should pay great regard to the existing centrifugal forces. It was and remains what its authors styled it, eminently an instrument of compromises; it is perhaps the most successful instance in history of what a judicious spirit of compromise may effect.<sup>1</sup> Yet out of the points which it was for this reason obliged to leave unsettled there arose fierce controversies, which after two generations, when accumulated irritation and incurable misunderstanding had been added to the force of material interests, burst into flame in the War of Secession.

The draft Constitution was submitted, as its last article provided, to conventions of the several States (*i.e.* bodies specially chosen by the people for the purpose) for ratification. It

<sup>1</sup> Hamilton observed of it in 1788: "The result of the deliberations of all collective bodies must necessarily be a compound as well of the errors and prejudices as of the good sense and wisdom of the individuals of whom they are composed. The compacts which are to embrace thirteen distinct States in a common bond of amity and union must as necessarily be a compromise of as many dissimilar interests and inclinations. How can perfection spring from such materials?" — *Federalist*, No. lxxxv.

was to come into effect as soon as nine States had ratified, the effect of which would have been, in case the remaining States, or any of them, had rejected it, to leave such States standing alone in the world, since the old Confederation was of course superseded and annihilated. Fortunately all the States did eventually ratify the new Constitution, but two of the most important, Virginia and New York,<sup>1</sup> did not do so till the middle of 1788, after nine others had already accepted it; and two, North Carolina and Rhode Island, at first refused, and only consented to enter the new Union more than a year later, when the government it had created had already come into operation.

There was a struggle everywhere over the adoption of the Constitution, a struggle presaging the birth of the two great parties that for many years divided the American people. The chief source of hostility was the belief that a strong central government endangered both the rights of the States and the liberties of the individual citizen. Freedom, it was declared, would perish, freedom rescued from George III. would perish at the hands of her own children.<sup>2</sup> Consolidation (for the word centralization had not yet been invented) would extinguish the State governments and the local institutions they protected. The feeling was very bitter, and in some States, notably in Massachusetts and New York, the majorities were dangerously narrow. Had the decision been left to what is now called "the voice of the people," that is, to the mass of the citizens all over the country, voting at the polls, the voice of the people would probably have pronounced against the Constitution, and this would have been still more likely if the question had been voted on everywhere upon the same day, seeing that several doubtful States were influenced by the

<sup>1</sup> Virginia was then much the largest State (population in 1790, 747,610). New York was reckoned among the smaller States (population 340,120) but her central geographical position made her adhesion extremely important.

<sup>2</sup> In the Massachusetts Convention of 1788 Mr. Nason delivered himself of the following pathetic appeal: "And here, sir, I beg the indulgence of this honourable body to permit me to make a short apostrophe to Liberty. O Liberty, thou greatest good! thou fairest property! with thee I wish to live—with thee I wish to die! Pardon me if I drop a tear on the peril to which she is exposed. I cannot, sir, see this highest of jewels tarnished—a jewel worth ten thousand worlds; and shall we part with it so soon? Oh no."—Elliot's *Debates*, ii. 133.

approval which other States had already given. But the modern "plebiscital" method of taking the popular judgment had not been invented. The question was referred to conventions in the several States. The conventions were composed of able men, who listened to thoughtful arguments, and were themselves influenced by the authority of their leaders. The counsels of the wise prevailed over the prepossessions of the multitude. Yet these counsels would hardly have prevailed but for a cause which is apt to be now overlooked. This was the dread of foreign powers.<sup>1</sup> The United States had at that time two European monarchies, Spain and England, as its neighbours on the American continent. France had lately held territories to the north of them in Canada, and to the south and west of them in Louisiana.<sup>2</sup> She had been their ally against England, she became in a few years again the owner of territories west of the Mississippi. The fear of foreign interference, the sense of weakness, both at sea and on land, against the military monarchies of Europe, was constantly before the mind of American statesmen, and made them anxious to secure at all hazards a national government capable of raising an army and navy, and of speaking with authority on behalf of the new republic. It is remarkable that the danger of European aggression or complications was far more felt in the United States from 1783 down till about 1820, than it has been during the last half century when steam has brought Europe five times nearer than it then was.

Several of the conventions which ratified the Constitution accompanied their acceptance with an earnest recommendation of various amendments to it, amendments designed to meet the fears of those who thought that it encroached too far upon the liberties of the people. Some of these were adopted, im-

<sup>1</sup> The other chief cause was the economic distress and injury to trade consequent on the disorganized condition of several States. See the observations of Mr. Wilson in the Pennsylvania Convention (Elliot's *Debates*, ii. 524). He shows that the case was one of necessity, and winds up with the remark, "The argument of necessity is the patriot's defence as well as the tyrant's plea."

<sup>2</sup> The vast territory then called Louisiana was transferred by France to Spain in 1762, but Spanish government was not established there till 1789. It was ceded by Spain to France in 1800, and purchased by the United States from Napoleon in 1803. Spain had originally held Florida, ceded it to Britain in 1763, received it back in 1783, and in 1819 sold it to the United States.

mediately after the original instrument had come into force, by the method it prescribes, viz. a two-thirds majority in Congress and a majority in three-fourths of the States. They are the amendments of 1791, ten in number, and they constitute what the Americans, following a venerable English precedent, call a Bill or Declaration of Rights.

The Constitution of 1789<sup>1</sup> deserves the veneration with which the Americans have been accustomed to regard it. It is true that many criticisms have been passed upon its arrangement, upon its omissions, upon the artificial character of some of the institutions it creates. Recognizing slavery as an institution existing in some States, and not expressly negating the right of a State to withdraw from the Union, it has been charged with having contained the germ of civil war, though that germ took seventy years to come to maturity. And whatever success it has attained must be in large measure ascribed to the political genius, ripened by long experience, of the Anglo-American race, by whom it has been worked, and who might have managed to work even a worse drawn instrument. Yet, after all deductions, it ranks above every other written constitution for the intrinsic excellence of its scheme, its adaptation to the circumstances of the people, the simplicity, brevity, and precision of its language, its judicious mixture of definiteness in principle with elasticity in details.<sup>2</sup> One is therefore induced to ask, before proceeding to examine it, to what causes, over and above the capacity of its authors, and the patient toil they bestowed upon it, these merits are due, or in other words, what were the materials at the command of the Philadelphia Convention for the achievement of so great an enterprise as the

<sup>1</sup> One may call the Constitution after either the year 1787, when it was drafted, or the year 1788, when it was accepted by the requisite number of States, or the year 1789, when it took full effect, the Congress of the Confederation having fixed the first Wednesday in March in that year as the day when it should come into force. The year 1789 has the advantage of being easily remembered, because it coincides with the beginning of the great revolutionary movements of modern Europe. The Confederation may be taken to have expired with the expiry of its Congress, and its Congress died for want of a quorum.

<sup>2</sup> The literary Bostonians laid hold at once of its style as proper for admiration. Mr. Ames said in the Massachusetts Convention of 1788, "Considered merely as a literary performance, the Constitution is an honour to our country. Legislators have at length condescended to speak the language of philosophy." — *Elliot's Debates*, ii. 55.

creation of a nation by means of an instrument of government. The American Constitution is no exception to the rule that everything which has power to win the obedience and respect of men must have its roots deep in the past, and that the more slowly every institution has grown, so much the more enduring is it likely to prove. There is little in this Constitution that is absolutely new. There is much that is as old as Magna Charta.

The men of the Convention had the experience of the English Constitution. That Constitution, very different then from what it is now, was even then not quite what they thought it. Their view was tinged not only by recollections of the influence exercised by King George the Third, an influence due to transitory causes, but which made them overrate its monarchical element,<sup>1</sup> but also by the presentation of it which they found in the work of Mr. Justice Blackstone. He, as was natural in a lawyer and a man of letters, described rather its theory than its practice, and its theory was many years behind its practice. The powers and functions of the cabinet, the overmastering force of the House of Commons, the intimate connection between legislation and administration, these which are to us now the main characteristics of the English Constitution were still far from fully developed. But in other points of fundamental importance they appreciated and turned to excellent account its spirit and methods.

They had for their oracle of political philosophy the treatise of Montesquieu on the Spirit of Laws, which, published anonymously at Geneva forty years before, had won its way to an immense authority on both sides of the ocean. Montesquieu, contrasting the private as well as public liberties of Englishmen with the despotism of Continental Europe, had taken the Constitution of England as his model system, and had ascribed its merits to the division of legislative, executive, and judicial functions which he discovered in it, and to the system of checks and balances whereby its equilibrium seemed to be preserved. No general principle of politics laid such hold on

<sup>1</sup> There is a tendency in colonists to over-estimate the importance of the Crown, whose conspicuous position as the authority common to the whole empire makes it an object of special interest and respect to persons living at a distance. It touches their imagination, whereas assemblies excite their criticism.

the constitution-makers and statesmen of America as the dogma that the separation of these three functions is essential to freedom. It had already been made the groundwork of several State constitutions. It is always reappearing in their writings: it was never absent from their thoughts. Of the supposed influence of other Continental authors such as Rousseau, or even of English thinkers such as Burke, there are few direct traces in the Federal Constitution or in the classical contemporaneous commentary on and defence of it<sup>1</sup> which we owe to the genius of Hamilton and his less famous coadjutors, Madison and Jay. But we need only turn to the Declaration of Independence and the original constitutions of the States, particularly the Massachusetts Constitution of 1780, to perceive that abstract theories regarding human rights had laid firm hold on the national mind. Such theories naturally expanded with the practice of republican government, and have at various times been extremely potent factors in American history. But the influence of France and her philosophers belongs chiefly to the years succeeding 1789, when Jefferson, who was fortunately absent in Paris during the Constitutional Convention, headed the democratic propaganda.

Further, they had the experience of their colonial and State governments, and especially, for this was freshest and most in point, the experience of the working of the State Constitutions, framed at or since the date when the colonies threw off their English allegiance. Many of the Philadelphia delegates had joined in preparing these instruments: all had been able to watch and test their operation. They compared notes as to the merits, tested by practice, of the devices which their States had respectively adopted. They had the inestimable advantage of knowing written or rigid constitutions in the concrete; that is to say, of comprehending how a system of government actually moves and plays under the control of a mass of statutory provisions defining and limiting the powers of its several organs. The so-called Constitution of England consists largely of customs, precedents, traditions, understandings, often vague and always flexible. It was quite a different thing, and for the

<sup>1</sup> *The Federalist*, a series of papers published in the New York newspapers in advocacy of the Federal Constitution when the question of accepting it was coming before the New York State Convention.

purpose of making a constitution for the American nation an even more important thing, to have lived under and learnt to work systems determined by the hard and fast lines of a single document having the full force of law, for this experience taught them how much might safely be included in such a document, and how far room must be left under it for unpredictable emergencies and unavoidable development.

Lastly, they had in the principle of the English common law that an act done by any official person or law-making body beyond his or its legal competence is simply void, a key to the difficulties involved in the establishment of a variety of authorities not subordinate to one another, but each supreme in its own defined sphere. The application of this principle made it possible not only to create a National government which should leave free scope for the working of the State governments, but also so to divide the powers of the National government among various persons and bodies as that none should absorb or overbear the others. By what machinery these objects were attained will appear when we come to consider the effect of a written or rigid constitution embodying a fundamental law, and the functions of the judiciary in expounding and applying such a law.<sup>1</sup>

<sup>1</sup> See *post*, Chapters XXIII. and XXXIII.