CHAPTER IV

NATURE OF THE FEDERAL GOVERNMENT

THE acceptance of the Constitution of 1789 made the American people a nation. It turned what had been a League of States into a Federal State, by giving it a National Government with a direct authority over all citizens. But as this national government was not to supersede the governments of the States, the problem which the Constitution-makers had to solve was two-fold. They had to create a central government. They had also to determine the relations of this central government to the States as well as to the individual citizen. An exposition of the Constitution and criticism of its working must therefore deal with it in these two aspects, as a system of national government built up of executive powers and legislative bodies, like the monarchy of England or the republic of France, and as a Federal system linking together and regulating the relations of a number of commonwealths which are for certain purposes, but for certain purposes only, subordinated to it. It will conduce to clearness if these two aspects are kept distinct; and the most convenient course will be to begin with the former, and first to describe the American system as a National system, leaving its Federal character for the moment on one side.

It must, however, be remembered that the Constitution does not profess to be a complete scheme of government, creating organs for the discharge of all the functions and duties which a civilized community undertakes. It presupposes the State governments. It assumes their existence, their wide and constant activity. It is a scheme designed to provide for the discharge of such and so many functions of government as the States did not, and indeed could not, or at any rate could not adequately, possess and discharge. It is therefore, so to speak,

the complement and crown of the State Constitutions, which must be read along with it and into it in order to make it cover the whole field of civil government, as do the Constitutions of such countries as France, Belgium, Italy.

The administrative, legislative, and judicial functions for which the Federal Constitution provides are those relating 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 be satisfactorily undertaken. The chief of these common or national matters are[1]—

War and peace: treaties and foreign relations generally.
Army and navy.
Federal courts of justice.
Commerce, foreign and domestic.
Currency.
Copyright and patents.
The post-office and post roads.
Taxation for the foregoing purposes, and for the general support of the Government.
The protection of citizens against unjust or discriminating legislation by any State.[2]

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, the national judiciary to adjudicate. All other legislation and administration is left to the several States, without power of interference by the Federal legislature or Federal executive.

Such then being the sphere of the National government, let us see in what manner it is constituted, of what departments it consists.

[1] The full list will be found in the Constitution, Art. i. § 8 (printed in the Appendix), with which may be compared the British North America Act 1867 (30 and 31 Vict. cap. 8), and the Federal Council of Australasia Act 1885 (48 and 49 Vict. cap. 60), the Swiss Constitution of 1874 (Arts. 8, 22, 30, 42, 54, 64, 67–70), and the interesting draft Constitution of the Commonwealth of Australia, prepared by the Sydney Convention of 1891.

[2] Amendments xiv. and xv.

The framers of this government set before themselves four objects as essential to its excellence, viz. —

Its vigour and efficiency.
The independence of each of its departments (as being essential to the permanency of its form).
Its dependence on the people.
The security under it of the freedom of the individual.

The first of these objects they sought by creating a strong executive, the second by separating the legislative, executive, and judicial powers from one another, and by the contrivance of various checks and balances, the third by making all authorities elective and elections frequent, the fourth both by the checks and balances aforesaid, so arranged as to restrain any one department from tyranny, and by placing certain rights of the citizen under the protection of the written Constitution.

They had neither the rashness nor the capacity necessary for constructing a Constitution *a priori*. There is wonderfully little genuine inventiveness in the world, and perhaps least of all has been shown in the sphere of political institutions. These men, practical politicians who knew how infinitely difficult a business government is, desired no bold experiments. They preferred, so far as circumstances permitted, to walk in the old paths, to follow methods which experience had tested.[1] Accordingly they started from the system on which their own colonial governments, and afterwards their State governments, had been conducted. This system bore a general resemblance to the British Constitution; and in so far it may with truth be said that the British Constitution became a model for the new national government. They held England to be the freest and best-governed country in the world, but were resolved to avoid the weak points which had enabled King George III. to play the tyrant, and which rendered English liberty, as they thought,

[1] Mr. Lowell has said with equal point and truth of the men of the Convention: "They had a profound disbelief in theory and knew better than to commit the folly of breaking with the past. They were not seduced by the French fallacy that a new system of Government could be ordered like a new suit of clothes. They would as soon have thought of ordering a suit of flesh and skin. It is only on the roaring loom of time that the stuff is woven for such a vesture of their thought and experience as they were meditating." — Address on Democracy, delivered Oct. 6, 1884.

far inferior to that which the constitutions of their own States secured. With this venerable mother, and these children, better in their judgment than the mother, before their eyes, they created an executive magistrate, the President, on the model of the State Governor, and of the British Crown. They created a legislature of two Houses, Congress, on the model of the two Houses of their State legislatures, and of the British Parliament. And following the precedent of the British judges, irremovable except by the Crown and Parliament combined, they created a judiciary appointed for life, and irremovable save by impeachment.[1]

In these great matters, however, as well as in many lesser matters, they copied not so much the Constitution of England as the Constitutions of their several States, in which, as was natural, many features of the English Constitution had been embodied. It has been truly said that nearly every provision of the Federal Constitution that has worked well is one borrowed from or suggested by some State constitution; nearly every provision that has worked badly is one which the Convention, for want of a precedent, was obliged to devise for itself. To insist on this is not to detract from the glory of that illustrious body, for if we are to credit them with less inventiveness than has sometimes been claimed for them, we must also credit them with a double portion of the wisdom which prefers experience to *a priori* theory, and the sagacity which selects the best materials from a mass placed before it, aptly combining them to form a new structure.[2]

Of minor divergences between their work and the British Constitution I shall speak subsequently. But one profound difference must be noted here. The British Parliament had always been, was then, and remains now, a sovereign and constituent assembly. It can make and unmake any and every law, change the form of government or the succession to the crown, interfere with the course of justice, extinguish the most

[1] Minor differences between the English and American systems are that the American Federal judge is appointed by the President, "with the advice and consent of the Senate," an English judge by the Crown alone: an American judge is impeachable by the House of Representatives, and tried by the Senate, an English judge is removable by the Crown on an address by both Houses.

[2] See note to this chapter in the Appendix for further remarks on the influence of the State Constitutions.

sacred private rights of the citizen. Between it and the people at large there is no legal distinction, because the whole plenitude of the people's rights and powers resides in it, just as if the whole nation were present within the chamber where it sits. In point of legal theory it is the nation, being the historical successor of the Folk Moot of our Teutonic forefathers. Both practically and legally, it is to-day the only and the sufficient depository of the authority of the nation; and is therefore, within the sphere of law, irresponsible and omnipotent.

In the American system there exists no such body. Not merely Congress alone, but also Congress and the President conjoined, are subject to the Constitution, and cannot move a step outside the circle which the Constitution has drawn around them. If they do, they transgress the law and exceed their powers. Such acts as they may do in excess of their powers are void, and may be, indeed ought to be, treated as void by the meanest citizen. The only power which is ultimately sovereign, as the British Parliament is always and directly sovereign, is the people of the States, acting in the manner prescribed by the Constitution, and capable in that manner of passing any law whatever in the form of a constitutional amendment.

This fundamental divergence from the British system is commonly said to have been forced upon the men of 1787 by the necessity, in order to safeguard the rights of the several States, of limiting the competence of the national government.[1] But even supposing there had been no States to be protected, the jealousy which the American people felt of those whom they chose to govern them, their fear lest one power in the government should absorb the rest, their anxiety to secure the primordial rights of the citizens from attack, either by magistrate or by legislature, would doubtless have led, as happened with the earlier constitutions of revolutionary France, to the creation of a supreme constitution or fundamental instrument of government, placed above and controlling the national legislature itself. They had already such fundamental instrument in the charters of the colonies, which had passed into the constitutions of the several States; and they would certainly have followed, in creating their national constitution, a precedent which they deemed so precious.

[1] It is often assumed by writers on constitutional subjects that a Federal Government presupposes a written or Rigid constitution. This is not necessarily so. There may be, and have been, federations with no fundamental law unalterable by the usual legislative authority. The Achæan League had apparently none.

The subjection of all the ordinary authorities and organs of government to a supreme instrument expressing the will of the sovereign people, and capable of being altered by them only, has been usually deemed the most remarkable novelty of the American system. But it is merely an application to the wider sphere of the nation, of a plan approved by the experience of the several States. And the plan had, in these States, been the outcome rather of a slow course of historical development than of conscious determination taken at any one point of their progress from petty settlements to powerful republics. Nevertheless, it may well be that the minds of the leaders who guided this development were to some extent influenced and inspired by recollections of the English Commonwealth of the seventeenth century, which had seen the establishment, though for a brief space only, of a genuine supreme or rigid constitution, in the form of the famous Instrument of Government of A.D. 1653, and some of whose sages had listened to the discourses in which James Harrington, one of the most prescient minds of that great age, showed the necessity for such a constitution, and laid down its principles, suggesting that, in order to give it the higher authority, it should be subscribed by the people themselves.

We may now proceed to consider the several departments of the National Government. It will be simplest to treat of each separately, and then to examine the relations of each to the others, reserving for subsequent chapters an account of the relations of the National Government as a whole to the several States.