upon them, as well as the capacity of the workman for using and their willingness to use the machinery, which makes it so difficult to predict the operation of a political contrivance, or, when it has succeeded in one country, to advise its imitation in another. The growing strength of the national government in the United States is largely due to sentimental forces that were weak a century ago, and to a development of internal communications which was then undreamt of. And the devices which we admire in the Constitution might prove unworkable among a people less patriotic and self-reliant, less law-loving and law-abiding, than are the English of America.

CHAPTER XXXI

GROWTH AND DEVELOPMENT OF THE CONSTITUTION

THERE is another point of view from which we have still to consider the Constitution. It is not only a fundamental law, but an unchangeable law, unchangeable, that is to say, by the national legislature, and changeable even by the people only through a slow and difficult process. How can a country whose very name suggests to us movement and progress be governed by a system and under an instrument which remains the same from year to year and from century to century?

By the "Constitution" of a state or a nation we mean those of its rules or laws which determine the form of its government, and the respective rights and duties of the government towards the citizens and of the citizens towards the government. These rules, or the more important among them, may be contained in one document, such as the Swiss or the Belgian Constitution, or may be scattered through a multitude of statutes and reports of judicial decisions, as is the case with regard to what men call the English Constitution. This is a distinction of practical consequence. But a still more important difference exists in the fact that in some countries the rules or laws which make up the Constitution can be made and changed by the ordinary legislature just like any other laws, while in other countries such rules are placed above and out of the reach of the legislature, having been enacted and being changeable only by some superior authority. In countries of the former class the so-called Constitution is nothing more than the aggregate of those laws — including of course customs and judicial decisions — which have a political character; and this description is too vague to be scientifically useful, for no three jurists would agree as to which laws ought to be deemed political. In such countries there is nothing either in

the form of what are commonly called constitutional laws, or in the source from which they emanate, or in the degree of their authority, to mark them off from other laws. The Constitution of England is constantly changing, for as the legislature, in the ordinary exercise of its powers, frequently passes enactments which affect the methods of government and the political rights of the citizens, there is no certainty that what is called the Constitution will stand the same at the end of a given session of Parliament as it stood at the beginning.[1] A constitution of this kind, capable at any moment of being bent or turned, expanded or contracted, may properly be called a Flexible Constitution.

In countries of the other class the laws and rules which prescribe the nature, powers, and functions of the government are contained in a document or documents emanating from an authority superior to that of the legislature. This authority may be a monarch who has *octroyé* a charter alterable by himself only. Or it may be the whole people voting at the polls; or it may be a special assembly, or combination of assemblies, appointed *ad hoc*. In any case we find in such countries a law or group of laws distinguished from other laws not merely by the character of their contents, but by the source whence they

[1] The first statesman who remarked this seems to have been James Wilson, who said in 1788, "The idea of a constitution limiting and superintending the operations of legislative authority, seems not to have been accurately understood in Britain. There are at least no traces of practice conformable to such a principle. The British Constitution is just what the British Parliament pleases. When the Parliament transferred legislative authority to Henry VIII., the act transferring could not, in the strict acceptation of the term, be called unconstitutional. To control the powers and conduct of the legislature by an overruling constitution was an improvement in the science and practice of government reserved to the American States." — Elliot's *Debates*, ii. 432. Paley had made the observation relating to England in his *Moral Philosophy*, published shortly before 1787. Read and consider Oliver Cromwell's Instrument, called "The Government of the Commonwealth of England, Scotland, and Ireland," printed in the *Parliamentary History*, vol. iii. p. 1417. It was provided by this instrument that statutes passed in Parliament should take effect, even if not assented to by the Lord Protector, but only if they were agreeable to the articles of the instrument, which would therefore appear to have been a genuine Rigid constitution within the terms of the definition given in the text. Some of the provisions of the articles are so minute that they can hardly have been intended to be placed above change by Parliament; but Cromwell seems from the remarkable speech which he delivered on 16th December 1653, in promulgating the Instrument, to have conceived that what he called the Fundamentals should be unchangeable.

spring and by the force they exert, a force which overrides and breaks all conflicting enactments passed by the ordinary legislature. Where the Constitution consists of such a law or laws, I propose to call it a Rigid Constitution, *i.e.* one which cannot be bent or twisted by the action of the legislature, but stands stiff and solid, opposing a stubborn resistance to the attacks of any majority who may desire to transgress or evade its provisions. As the English Constitution is the best modern instance of the flexible type, so is the American of the rigid type.

It will at once be asked, How can any constitution be truly rigid? Growth and decay are the necessary conditions of the life of institutions as well as of individual organisms. One constitution may be altered less frequently or easily than another, but an absolutely unchangeable constitution is an impossibility.[1]

The question is pertinent; the suggestion is true. No constitution can be made to stand unsusceptible of change, because if it were, it would cease to be suitable to the conditions amid which it has to work, that is, to the actual forces which sway politics. And being unsuitable, it would be weak, not rooted in the nature of the State and in the respect of the citizens for whom it exists; and being weak, it would presently be overthrown. If therefore we find a rigid constitution tenacious of life, if we find it enjoying, as Virgil says of the gods, a fresh and green old age, we may be sure that it has not stood wholly changeless, but has been so modified as to have adapted

[1] The constitutions of the ancient world were all or nearly all flexible, because the ancient republics were governed by primary assemblies, all whose laws were of equal validity. By far the most interesting and instructive example is the Constitution of Rome. It presents some striking resemblances to the Constitution of England — both left many points undetermined, both relied largely upon semi-legal usages and understandings — and any constitutional lawyer who should compare the practical workings of the two in a philosophical way would render a service to political science.

However, one finds here and there in Greek constitutions provisions intended to secure certain laws from change. At Athens, for instance, there was a distinction between Laws (*νόμοι*) which required the approval of a committee called the Nomothetae, and Decrees (*ψηφίσματα*), passed by the Assembly alone, and any person proposing a decree inconsistent with a law was liable to an action (*γραφὴ παρανόμων*) for having, so to speak, led the people into illegality. His conviction in this action carried with it a declaration of the invalidity of the decree.

itself to the always altering circumstances that have grown up round it. Most of all must this be true of a new country where men and circumstances change faster than in Europe, and where, owing to the equality of conditions, the leaven of new ideas works more thoroughly upon the whole lump.

We must therefore be prepared to expect that the American Constitution will, when its present condition is compared with its fire-new condition in 1789, prove to have felt the hand of time and change.

Historical inquiry verifies this expectation. The Constitution of the United States, rigid though it be, has changed, has developed. It has developed in three ways to which I devote the three following chapters.

It has been changed by Amendment. Certain provisions have been struck out of the original document of 1787–88; certain other, and more numerous, provisions have been added. This method needs little explanation, because it is open and direct. It resembles the method in which laws are changed in England, the difference being that whereas in England statutes are changed by the legislature alone, here in the United States the fundamental law is changed in a more complex fashion by the joint action of Congress and the States.

It has been developed by Interpretation, that is, by the unfolding of the meaning implicitly contained in its necessarily brief terms; or by the extension of its provisions to cases which they do not directly contemplate, but which their general spirit must be deemed to cover.

It has been developed by Usage, that is, by the establishment of rules not inconsistent with its express provisions, but giving them a character, effect, and direction which they would not have if they stood alone, and by which their working is materially modified. These rules are sometimes embodied in statutes passed by Congress and repealable by Congress. Sometimes they remain in the stage of a mere convention or understanding which has no legal authority, but which everybody knows and accepts. Whatever their form, they must not conflict with the letter of the Constitution, for if they do conflict with it, they will be deemed invalid whenever a question involving them comes before a court of law.

It may be observed that of these three modes of change, the first is the most obvious, direct, and effective, but also the most difficult to apply, because it needs an agreement of many independent bodies which is rarely attainable. The second mode is less potent in its working, because an interpretation put on a provision may be recalled or modified by the same authority, viz. the courts of law (and especially the Supreme Federal Court), which has delivered it. But while a particular interpretation stands, it is as strong as the Constitution itself, being indeed incorporated therewith, and therefore stronger than anything which does not issue from the same ultimate source of power, the will of the people. The weakest, though the easiest and most frequent method, is the third. For legislation and custom are altogether subordinate to the Constitution, and can take effect only where the letter of the Constitution is silent, and where no authorized interpretation has extended the letter to an unspecified case. But they work readily, quickly, freely; and the developments to be ascribed to them are therefore as much larger in quantity than those due to the two other methods as they are inferior in weight and permanence.

We shall perceive after examining these three sources of change not only that the Constitution as it now stands owes much to them, but that they are likely to modify it still further as time goes on. We shall find that, rigid as it is, it suffers constant qualification and deflection, and that while its words continue in the main the same, it has come to mean something different to the men of 1890 from what it meant to those of 1810 when it had been at work for more than twenty years, or even to those of 1860, when the fires of protracted controversy might be thought to have thrown a glare of light into every corner of its darkest chamber.