out the meaning and application of the few and apparently simple words of the original document into a variety of unforeseen results. The same thing has more or less befallen nearly every section of the Constitution and of the fifteen amendments. The process shows no signs of stopping; nor can it, for the new conditions of economics and politics bring up new problems for solution. But the most important work was that done during the first half century, and especially by Chief-Justice Marshall during his long tenure of the presidency of the Supreme court (1801–1835). It is scarcely an exaggeration to call him, as an eminent American jurist has done, a second maker of the Constitution. I will not borrow the phrase which said of Augustus that he found Rome of brick and left it of marble, because Marshall's function was not to change but to develop. The Constitution was, except of course as regards the political scheme of national government, which was already well established, rather a ground plan than a city. It was, if I may pursue the metaphor, much what the site of Washington was at the beginning of this century, a symmetrical ground plan for a great city, but with only some tall edifices standing here and there among fields and woods. Marshall left it what Washington has now become, a splendid and commodious capital within whose ample bounds there are still some vacant spaces and some mean dwellings, but which, built up and beautified as it has been by the taste and wealth of its rapidly growing population, is worthy to be the centre of a mighty nation. Marshall was, of course, only one among seven judges, but his majestic intellect and the elevation of his character gave him such an ascendency, that he found himself only once in a minority on any constitutional question.[1] His work of building up and working out the Constitution was accomplished not so much by the decisions he gave as by the judgments in which he expounded the principles of these decisions, judgments which for their philosophical breadth, the luminous exactness of their reasoning, and the fine political sense which pervades them, have never been surpassed and

[1] In that one case (*Ogden* v. *Sanders*) there was a bare majority against him, and professional opinion now approves the view which he took. When Marshall became Chief-Justice only two decisions on constitutional law had been pronounced by the court. Between that time and his death fifty-one were given.

rarely equalled by the most famous jurists of modern Europe or of ancient Rome. Marshall did not forget the duty of a judge to decide nothing more than the suit before him requires, but he was wont to set forth the grounds of his decision in such a way as to show how they would fall to be applied in cases that had not yet arisen. He grasped with extraordinary force and clearness the cardinal idea that the creation of a national government implies the grant of all such subsidiary powers as are requisite to the effectuation of its main powers and purposes, but he developed and applied this idea with so much prudence and sobriety, never treading on purely political ground, never indulging the temptation to theorize, but content to follow out as a lawyer the consequences of legal principles, that the Constitution seemed not so much to rise under his hands to its full stature, as to be gradually unveiled by him till it stood revealed in the harmonious perfection of the form which its framers had designed. That admirable flexibility and capacity for growth which characterize it beyond all other rigid or supreme constitutions, is largely due to him, yet not more to his courage than to his caution.[1]

We now come to the third question: How is the interpreting authority restrained? If the American Constitution is capable of being so developed by this expansive interpretation, what security do its written terms offer to the people and to the States? What becomes of the special value claimed for Rigid constitutions that they preserve the frame of government unimpaired in its essential merits, that they restrain the excesses of a transient majority, and (in Federations) the aggressions of a central authority?

The answer is two-fold. In the first place, the interpreting authority is, in questions not distinctly political, different from the legislature and from the executive, amenable to neither, and composed of lawyers imbued with professional habits. There is therefore a probability that it will disagree with either of them when they attempt to transgress the Constitution, and will decline to stretch the law so as to sanction encroachments

[1] Had the Supreme court been in those days possessed by the same spirit of strictness and literality which the Judicial Committee of the British Privy Council has recently applied to the construction of the British North America Act of 1867 (the Act which creates the Constitution of the Canadian Federation), the United States Constitution would never have grown to be what it now is.

those authorities may have attempted. In point of fact, there have been few cases, and those chiefly cases of urgency during the war, in which the judiciary has been even accused of lending itself to the designs of the other organs of government. The period when extensive interpretation was most active (1800–1835) was also the period when the party opposed to a strong central government commanded Congress and the executive, and so far from approving the course the court took, the dominant party then often complained of it.

In the second place, there stands above and behind the legislature, the executive, and the judiciary, another power, that of public opinion. The President, Congress, and the courts are all, the two former directly, the latter practically, amenable to the people, and anxious to be in harmony with the general current of its sentiment. If the people approve the way in which these authorities are interpreting and using the Constitution, they go on; if the people disapprove, they pause, or at least slacken their pace. Generally the people have approved of such action by the President or Congress as has seemed justified by the needs of the time, even though it may have gone beyond the letter of the Constitution: generally they have approved the conduct of the courts whose legal interpretation has upheld such legislative or executive action. Public opinion sanctioned the purchase of Louisiana, and the still bolder action of the executive in the Secession War. It approved the Missouri compromise of 1820, which the Supreme court thirty-seven years afterwards declared to have been in excess of the powers of Congress. But it disapproved the Alien and Sedition laws of 1798, and although these statutes were never pronounced unconstitutional by the courts, this popular censure has prevented any similar legislation since that time.[1] The people have, of course, much less exact notions of the Constitution than the legal profession or the courts. But while they generally desire to see the powers of the government so far expanded as to enable it to meet the exigencies of the moment, they are sufficiently attached to its general doctrines, they sufficiently prize the protection it affords them against their own impulses, to censure any interpretation

[1] So it disapproved strongly, in the northern States, of the judgments delivered by the majority of the Supreme court in the Dred Scott case.

which palpably departs from the old lines. And their censure is, of course, still more severe if the court seems to be acting at the bidding of a party.

A singular result of the importance of constitutional interpretation in the American government may be here referred to. It is this, that the United States legislature has been very largely occupied in purely legal discussions. When it is proposed to legislate on a subject which has been heretofore little dealt with, the opponents of a measure have two lines of defence. They may, as Englishmen would in a like case, argue that the measure is inexpedient. But they may also, which Englishmen cannot, argue that it is unconstitutional, *i.e.* illegal, because transcending the powers of Congress. This is a question fit to be raised in Congress, not only as regards matters with which, as being purely political, the courts of law will refuse to interfere, but as regards all other matters also, because since a decision on the constitutionality of a statute can never be obtained from the judges by anticipation, the legislature ought to consider whether they are acting within their competence. And it is a question on which a stronger case can often be made, and made with less exertion, than on the issue whether the measure be substantially expedient. Hence it is usually put in the fore-front of the battle, and argued with great vigour and acumen by leaders who are probably more ingenious as lawyers than they are far-sighted as statesmen.

A further consequence of this habit is pointed out by one of the most thoughtful among American constitutional writers. Legal issues are apt to dwarf and obscure the more substantially important issues of principle and policy, distracting from these latter the attention of the nation as well as the skill of congressional debaters.

"The English legislature," says Judge Hare, "is free to follow any course that will promote the welfare of the State, and the inquiry is not, 'Has Parliament power to pass the Act?' but, 'Is it consistent with principle, and such as the circumstances demand?' These are the material points, and if the public mind is satisfied as to them there is no further controversy. In the United States, on the other hand, the question primarily is one of power, and in the refined and subtle dis-

cussion which ensues, right is too often lost sight of or treated as if it were synonymous with might. It is taken for granted that what the Constitution permits it also approves, and that measures which are legal cannot be contrary to morals."

The interpretation of the Constitution has at times become so momentous as to furnish a basis for the formation of political parties; and the existence of parties divided upon such questions has of course stimulated the interest with which points of legal interpretation have been watched and canvassed. Soon after the formation of the National government in 1789 two parties grew up, one advocating a strong central authority, the other championing the rights of the States. Of these parties the former naturally came to insist on a liberal, an expansive, perhaps a lax construction of the words of the Constitution, because the more wide is the meaning placed upon its grant of powers, so much the wider are those powers themselves. The latter party, on the other hand, was acting in protection both of the States and of the individual citizen against the central government, when it limited by a strict and narrow interpretation of the fundamental instrument the powers which that instrument conveyed. The distinction which began in those early days has never since vanished. There has always been a party professing itself disposed to favour the central government, and therefore a party of broad construction. There has always been a party claiming that it aimed at protecting the rights of the States, and therefore a party of strict construction. Some writers have gone so far as to deem these different views of interpretation to be the foundation of all the political parties that have divided America. This view, however, inverts the facts. It is not because men have differed in their reading of the Constitution that they have advocated or opposed an extension of Federal powers; it is their attitude on this substantial issue that has determined their attitude on the verbal one. Moreover, the two great parties have several times changed sides on the very question of interpretation. The purchase of Louisiana and the Embargo acts were the work of the Strict Constructionists, while it was the Loose Constructionist party which protested against the latter measure, and which, at the Hartford Convention of 1814, advanced doctrines of State rights almost amounting to those subsequently asserted by South Carolina in 1832 and by the Secessionists of 1861. Parties in America, as in most countries, have followed their temporary interest; and if that interest happened to differ from some traditional party doctrine, they have explained the latter away. Whenever there has been a serious party conflict, it has been in reality a conflict over some living and practical issue, and only in form a debate upon canons of legal interpretation. What is remarkable, though natural enough in a country governed by a written instrument, is that every controversy has got involved with questions of constitutional construction. When it was proposed to exert some power of Congress, as for instance to charter a national bank, to grant money for internal improvements, to enact a protective tariff, the opponents of these schemes could plausibly argue, and therefore of course did argue, that they were unconstitutional. So any suggested interference with slavery in States or Territories was immediately declared to violate the State rights which the Constitution guaranteed. Thus every serious question came to be fought as a constitutional question. But as regards most questions, and certainly as regards the great majority of the party combatants, men did not attack or defend a proposal because they held it legally unsound or sound on the true construction of the Constitution, but alleged it to be constitutionally wrong or right because they thought the welfare of the country, or at least their party interests, to be involved. Constitutional interpretation was a pretext rather than a cause, a matter of form rather than of substance.

The results were both good and evil. They were good in so far as they made both parties profess themselves defenders of the Constitution, zealous only that it should be interpreted aright; as they familiarized the people with its provisions, and made them vigilant critics of every legislative or executive act which could affect its working. They were evil in distracting public attention from real problems to the legal aspect of those problems, and in cultivating a habit of casuistry which threatened the integrity of the Constitution itself.

Since the Civil War there has been much less of this casuistry because there have been fewer occasions for it, the Broad Construction view of the Constitution having practically pre-

vailed—prevailed so far that the Supreme court now holds that the power of Congress to make paper money legal tender is incident to the sovereignty of the National government, and that a Democratic House of Representatives passes a bill giving a Federal commission vast powers over all the railways which pass through more than one State. There is still a party inclined to strict construction, but the strictness which it upholds would have been deemed lax by the Broad Constructionists of thirty years ago. The interpretation which has thus stretched the Constitution to cover powers once undreamt of, may be deemed a dangerous resource. But it must be remembered that even the constitutions we call Rigid must make their choice between being bent or being broken. The Americans have more than once bent their Constitution in order that they might not be forced to break it.

CHAPTER XXXIV

THE DEVELOPMENT OF THE CONSTITUTION BY USAGE

There is yet another way in which the Constitution has been developed. This is by laying down rules on matters which are within its general scope, but have not been dealt with by its words, by the creation of machinery which it has not provided for the attainment of objects it contemplates, or, to vary the metaphor, by ploughing and planting ground which, though included within the boundaries of the Constitution, was left waste by those who drew up the original instrument.

Although the Constitution is curiously minute upon some comparatively small points, such as the qualifications of members of Congress and the official record of their votes, it passes over in silence many branches of political action, many details essential to every government. Some may have been forgotten, but some were purposely omitted, because the Convention could not agree upon them, or because they would have provoked opposition in the ratifying conventions, or because they were thought unsuited to a document which it was desirable to draft concisely and to preserve as far as possible unaltered. This was wise and indeed necessary, but it threw a great responsibility upon those who had to work the government which the Constitution created. They found nothing within the four corners of the instrument to guide them on points whose gravity was perceived as soon as they had to be settled in practice. Many of such points could not be dealt with by interpretation or construction, however liberally extensive it might be, because there was nothing in the words of the Constitution from which such construction could start, and because they were in some instances matters which, though important, could not be based upon principle, but must be settled by an arbitrary determination.