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.

Their settlement, which began with the first Congress, has been effected in two ways, by Congressional legislation and by usage.

Congress was empowered by the Constitution to pass statutes on certain prescribed topics. On many other topics not specially named, but within its general powers, statutes were evidently needed. For instance, the whole subject of Federal taxation, direct and indirect, the establishment of Federal courts, inferior to the Supreme court, and the assignment of particular kinds and degrees of jurisdiction to each class of courts, the organization of the civil, military, and naval services of the country, the administration of Indian affairs and of the Territories, the rules to be observed in the elections of Presidents and senators, these and many other matters of high import are regulated by statutes, statutes which Congress can of course change but which, in their main features, have been not greatly changed since their first enactment. Although such statutes cannot be called parts of the Constitution in the same sense as the interpretations judicially placed upon it, for these latter have (subject to the possibility of their reversal) become practically incorporated with its original text, still they have given to its working a character and direction which must be borne in mind in discussing it, and which have, in some instances, produced results opposed to the ideas of its framers. To take a recent instance, the passing of the Inter-State Commerce Act, which regulates all the greater railways over the whole United States, is an assertion of Federal authority over numerous and powerful corporations chartered by and serving the various States, which gives a new aspect and significance to the clause in the Constitution empowering Congress to regulate commerce. Legal interpretation held that clause to be sufficiently wide to enable Congress to legislate on inter-State railways; but when Congress actually exerted its power in enacting this statute a further step, and a long one, was taken towards bringing the organs of transportation under national control.[1] Legislation, therefore, though it cannot in strictness

[1] The recognition that the Constitution empowers Congress to deal with a given subject does not imply that every detail of the Act dealing therewith is above objection. Although *prima facie* Congress, when competent to legislate on a subject, is free to choose its means, still it remains open to any one to challenge the constitutionality of any particular provisions in a statute

enlarge the frontiers fixed by the Constitution, can give to certain provinces lying within those frontiers far greater importance than they formerly possessed, and by so doing, can substantially change the character of the government. It cannot engender a new power, but it can turn an old one in a new direction, and call a dormant one into momentous activity.

Next as to usage. Custom, which is a law-producing agency in every department, is specially busy in matters which pertain to the practical conduct of government. Understandings and conventions are in modern practice no less essential to the smooth working of the English Constitution, than are the principles enunciated in the Bill of Rights. Now understandings are merely long-established usages, sanctioned by no statute, often too vague to admit of precise statement,[1] yet in some instances deemed so binding that a breach of them would damage the character of a statesman or a ministry just as much as the transgression of a statute. In the United States there are fewer such understandings than in England, because under a Constitution drawn out in one fundamental document everybody is more apt to stand upon his strict legal rights, and the spirit of institutions departs less widely from their formal character. Nevertheless some of those features of American government to which its character is chiefly due, and which recur most frequently in its daily working, rest neither upon the Constitution nor upon any statute, but upon usage alone. Here are some instances.

The presidential electors have by usage and by usage only lost the right the Constitution gave them of exercising their discretion in the choice of a chief magistrate.

The President is not re-elected more than once, though the Constitution places no restriction whatever on re-eligibility.[2]

The President uses his veto more freely than he did at first, and for a wider range of purposes.

[1] For instance, it is impossible to state precisely the practical (as distinguished from the legal) rights of the House of Lords to reject bills passed by the House of Commons, or the duty of the Crown when a Cabinet makes some very unusual request; although it is admitted that as a rule the Lords ought to yield to the Commons and the Crown to be guided by the advice of its ministers.

[2] See *ante*, Chap. V. The *Federalist* (No. lxviii.) says that the President will be and ought to be re-elected as often as the people think him worthy of their confidence.

The Senate now never exercises its undoubted power of refusing to confirm the appointments made by the President to cabinet offices.

The President is permitted to remove, without asking the consent of the Senate, officials to whose appointment the consent of the Senate is necessary. This was for a time regulated by statute, but the statute having been repealed the old usage has revived. (See Chapter VI.)

Both the House and the Senate conduct their legislation by means of standing committees. This vital peculiarity of the American system of government has no firmer basis than the standing orders of each House, which can be repealed at any moment, but have been maintained for many years.

The Speaker of the House is by a similar practice entrusted with the profoundly important power of nominating all the House committees.

The chairmen of the chief committees of both Houses, which control the great departments of State (*e.g.* foreign affairs, navy, justice, finance), have practically become an additional set of ministers for those departments.

The custom of going into caucus, by which the parties in each of the two Houses of Congress determine their action, and the obligation on individual members to obey the decision of the caucus meeting, are mere habits or understandings, without legal sanction. So is the right claimed by the senators from a State to control the Federal patronage of that State. So is the usage that appropriation bills shall be presented to the House.

The rule that a member of Congress must be chosen from the district, as well as from the State, in which he resides, rests on no Federal enactment; indeed, neither Congress nor any State legislature would be entitled thus to narrow the liberty of choice which the words of the Constitution imply.

Jackson introduced, and succeeding Presidents continued the practice of dismissing Federal officials belonging to the opposite party, and appointing none but adherents of their own party to the vacant places. This is the so-called Spoils System, which, having been applied also to State and municipal offices, has been made the corner-stone of "practical politics" in America. The Constitution is nowise answerable for it and legislation only partially.

Neither in English law nor in American is there anything regarding the re-eligibility of a member of the popular chamber; nor can it be said that usage has established in either country any broad general rule on the subject. But whereas the English tendency has been to re-elect a member unless there is some positive reason for getting rid of him, in many parts of America men are disposed the other way, and refuse to re-elect him just because he has had his turn already. Any one can understand what a difference this makes in the character of the chamber.

We see, then, that several salient features of the present American government, such as the popular election of the President, the influence of senators and congressmen over patronage, the immense power of the Speaker, the Spoils system, are due to usages which have sprung up round the Constitution and profoundly affected its working, but which are not parts of the Constitution, nor necessarily attributable to any specific provision which it contains. The most remarkable instance of all, the choice of presidential candidates by the great parties assembled in their national conventions, will be fully considered in a later chapter.

One of the changes which the last seventy years have brought about is so remarkable as to deserve special mention. The Constitution contains no provisions regarding the electoral franchise in congressional elections save the three following:—

That the franchise shall in every State be the same as that by which the members of the "most numerous branch of the State legislature" are chosen (Art. i. § 2).

That when any male citizens over twenty-one years of age are excluded by any State from the franchise (except for crime) the basis of representation in Congress of that State shall be proportionately reduced (Am. xiv., 1868).

That "the right of citizens of the United States to vote shall not be denied or abridged on account of race, colour, or previous condition of servitude" (Am. xv., 1870).

Subject to these conditions every State may regulate the electoral franchise as it pleases.

In the first days of the Constitution the suffrage was in nearly all States limited by various conditions (*e.g.* property qualification, length of residence, etc.) which excluded,

or might have excluded, though in some States the proportion of very poor people was small, a considerable number of the free inhabitants. At present the suffrage is in every State practically universal. It had become so in the Free States[1] even before the war. Here is an advance towards pure democracy effected without the action of the national legislature, but solely by the legislation of the several States, a legislation which, as it may be changed at any moment, is, so far as the national government is concerned, mere custom. And of this great step, modifying profoundly the colour and character of the government, there is no trace in the words of the Constitution other than the provisions of the fourteenth and fifteenth amendments introduced for the benefit of the liberated negroes.

It is natural, it is indeed inevitable, that there should be in every country such a parasitic growth of usages and conventions round the solid legal framework of government. But must not the result of such a growth be different where a rigid constitution exists from what it is in countries where the constitution is flexible? In England usages of the kind described become inwoven with the law of the country as settled by statutes and decisions, and modify that law. Cases come before a court in which a usage is recognized and thereby obtains a sort of legal sanction. Statutes are passed in which an existing usage is taken for granted, and which therefore harmonize with it. Thus the always changing Constitution becomes interpenetrated by custom. Custom is in fact the first stage through which a rule passes before it is embodied in binding law. But in America, where the fundamental law cannot readily be, and is in fact very rarely altered, may we not expect a conflict, or at least a want of harmony, between law and custom, due to the constant growth of the one and the immutability of the other?

In examining this point one must distinguish between subjects on which the Constitution is silent and subjects on which it speaks. As regards the former there is little difficulty. Usage and legislation may expand the Constitution in what way they please, subject only to the control of public opinion.

[1] Save that in many of them persons of colour were placed at a disadvantage.

The courts of law will not interfere, because no provision of the Constitution is violated; and even where it may be thought that an act of Congress or of the executive is opposed to the spirit of the Constitution, still if it falls within the range of the discretion which these authorities have received, it will not be questioned by the judges.[1]

If, on the other hand, either congressional legislation or usage begins to trench on ground which the Constitution expressly covers, the question at once arises whether such legislation is valid, or whether an act done in conformity with such usage is legal. Questions of this kind do not always come before the courts, and if they do not, the presumption is in favour of whatever act has been done by Congress or by any legally constituted authority. When, however, such a question is susceptible of judicial determination and is actually brought before a tribunal, the tribunal is disposed rather to support than to treat as null the act done. Applying that expansive interpretation which has prevailed since the war as it prevailed in the days of Chief-Justice Marshall, the Supreme court is apt to find grounds for moving in the direction which it perceives public opinion to have taken, and for putting on the words of the Constitution a sense which legalizes what Congress has enacted or custom approved. When this takes place things proceed smoothly. The change which circumstances call for is made gently, and is controlled, perhaps modified, in its operation.

But sometimes the courts feel bound to declare some statute,

[1] "It is an axiom in our jurisprudence that an Act of Congress is not to be pronounced unconstitutional unless the defect of power to pass it is so clear as to admit of no doubt. Every doubt is to be resolved in favour of the validity of the law." — Swayne, J., in *United States* v. *Rhodes*, 1 Abb. U. S. 49.

An interesting illustration is supplied by a very recent case which arose in the efforts made to check the evils arising from the lotteries established in Louisiana. Congress, being unable to strike at the lottery in Louisiana itself, passed a statute forbidding the post-office to carry newspapers containing lottery advertisements (since it was by these that mischief was done over the rest of the Union), and imposing a penalty on any one posting lottery advertisements in breach of the statute. A newspaper proprietor arrested for such breach carried his case to the Supreme court, alleging the statute to be unconstitutional because inconsistent with the first amendment to the Constitution. The court however unanimously held (1892) that that amendment did not apply, and supported the right of Congress to use the control of the post-office as a means of dealing with the harm done by lotteries; and public opinion heartily welcomed this decision.

or executive act done in pursuance of usage, contrary to the Constitution. What happens? In theory the judicial determination is conclusive, and ought to check any further progress in the path which has been pronounced unconstitutional. But whether this result follows will in practice depend on the circumstances of the moment. If the case is not urgent, if there is no strong popular impulse behind Congress or the President, no paramount need for the usage which had sprung up and is now disapproved, the decision of the courts will be acquiesced in; and whatever tendency towards change exists will seek some other channel where no constitutional obstacle bars its course. But if the needs of the time be pressing, courts and Constitution may have to give way. *Salus reipublicae lex suprema.* Above that supreme written law stands the safety of the commonwealth, which will be secured, if possible in conformity with the Constitution; but if that be not possible, then by evading, or even by overriding the Constitution.[1] This is what happened in the Civil War, when men said that they would break the Constitution in order to preserve it.

Attempts to disobey the Constitution have been rare, because the fear of clashing with it has arrested many mischievous proposals in their earlier stages, while the influence of public opinion has averted possible collisions by leading the courts to lend their ultimate sanction to measures or usages which, had they come under review at their first appearance, might have been pronounced unconstitutional.[2] That collisions have been rare is good evidence of the political wisdom of American statesmen and lawyers. But politicians in other countries will

[1] In a remarkable letter written to Mr. Hodges (4th April 1864), President Lincoln said: "My oath to preserve the Constitution imposed on me the duty of preserving by every indispensable means that government, that nation, of which the Constitution was the organic law. Was it possible to lose the nation and yet preserve the Constitution? By general law life and limb must be protected, yet often a limb must be amputated to save a life, but a life is never wisely given to save a limb. I felt that measures, otherwise unconstitutional, might become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the nation. Right or wrong I assumed this ground, and now avow it. I could not feel that to the best of my ability I had even tried to preserve the Constitution, if, to save slavery, or any minor matter, I should permit the wreck of government, country, and Constitution altogether."

[2] Such as the expenditure of vast sums on "internal improvements" and the assumption of wide powers over internal communications.

err if they suppose that the existence of a rigid or supreme constitution is enough to avert collisions, or to secure the victory of the fundamental instrument. A rigid constitution resembles, not some cliff of Norwegian gneiss which bears for centuries unchanged the lash of Atlantic billows, but rather a sea-wall, such as guards the seaside promenade of an English town, whose smooth surface resists the ordinary waves and currents of the Channel but may be breached or washed away by some tremendous tempest. The American Constitution has stood unbroken, because America has never seen, as some European countries have seen, angry multitudes or military tyrants bent on destroying the institutions which barred the course of their passions or ambition. And it has also stood because it has submitted to a process of constant, though sometimes scarcely perceptible, change which has adapted it to the conditions of a new age.

The solemn determination of a people enacting a fundamental law by which they and their descendants shall be governed cannot prevent that law, however great the reverence they continue to profess for it, from being worn away in one part, enlarged in another, modified in a third, by the ceaseless action of influences playing upon the individuals who compose the people. Thus the American Constitution has necessarily changed as the nation has changed, has changed in the spirit with which men regard it, and therefore in its own spirit. To use the words of the eminent constitutional lawyer whom I have more than once quoted: "We may think," says Judge Cooley, "that we have the Constitution all before us; but for practical purposes the Constitution is that which the government, in its several departments, and the people in the performance of their duties as citizens, recognize and respect as such; and nothing else is. . . . Cervantes says: Every one is the son of his own works. This is more emphatically true of an instrument of government than it can possibly be of a natural person. What it takes to itself, though at first unwarrantable, helps to make it over into a new instrument of government, and it represents at last the acts done under it."