

CHAPTER XXXV

THE RESULTS OF CONSTITUTIONAL DEVELOPMENT

WE have seen that the American Constitution has changed, is changing, and by the law of its existence must continue to change, in its substance and practical working even when its words remain the same. "Time and habit," said Washington, "are at least as necessary to fix the true character of governments as of other human institutions:"¹ and while habit fixes some things, time remoulds others.

It remains to ask what has been the general result of the changes it has suffered, and what light an examination of its history, in this respect, throws upon the probable future of the instrument and on the worth of Rigid or Supreme constitutions in general.

The Constitution was avowedly created as an instrument of checks and balances. Each branch of the National government was to restrain the others, and maintain the equipoise of the whole. The legislature was to balance the executive, and the judiciary both. The two houses of the legislature were to balance one another. The National government, taking all its branches together, was balanced against the State governments. As this equilibrium was placed under the protection of a document, unchangeable save by the people themselves, no one of the branches of the National government has been able to absorb or override the others, as the House of Commons and the Cabinet, itself a child of the House of Commons, have in England overridden and subjected the Crown and the House of Lords. Each branch maintains its independence, and can, within certain limits, defy the others.

But there is among political bodies and offices (*i.e.* the persons who from time to time fill the same office) of necessity a

¹ Farewell Address, 17th September 1796.

constant strife, a struggle for existence similar to that which Mr. Darwin has shown to exist among plants and animals; and as in the case of plants and animals so also in the political sphere this struggle stimulates each body or office to exert its utmost force for its own preservation, and to develop its aptitudes in any direction wherein development is possible. Each branch of the American government has striven to extend its range and its powers; each has advanced in certain directions, but in others has been restrained by the equal or stronger pressure of other branches. I shall attempt to state the chief differences perceptible between the ideas which men entertained regarding the various bodies and offices of the government when they first entered life, and the aspect they now wear to the nation.

The President has developed a capacity for becoming, in moments of national peril, something like a Roman dictator. He is in quiet times no stronger than he was at first, possibly weaker. Congress has in some respects encroached on him, yet his office has shown that it may, in the hands of a trusted leader and at the call of a sudden necessity, rise to a tremendous height.

The ministers of the President have not become more important either singly or collectively as a cabinet. Cut off from the legislature on one side, and from the people on the other, they have been a mere appendage to the President.

The Senate has come to press heavily on the executive, and at the same time has developed legislative functions which, though contemplated in the Constitution, were comparatively rudimentary in the older days. It has, in the judgment of American publicists, grown relatively stronger than it then was.

The Vice-President of the United States has become even more insignificant than the Constitution seemed to make him.

On the other hand, the Speaker of the House of Representatives, whom the Constitution mentions only once, and on whom it bestows no powers, has now secured one of the leading parts in the piece, and can affect the course of legislation more than any other single person.

An oligarchy of chairmen of the leading committees has

sprung up in the House of Representatives as a consequence of the increasing demands on its time and of the working of the committee system.

The Judiciary was deemed to be making large strides during the first forty years, because it established its claim to powers which, though doubtless really granted, had been but faintly apprehended in 1789. After 1830 the development of those powers advanced more slowly. But the position which the Supreme court has taken in the scheme of government, if it be not greater than the framers of the Constitution would have wished, is yet greater than they foresaw.

Although some of these changes are considerable, they are far smaller than those which England has seen pass over her Government since 1789. So far, therefore, the rigid Constitution has maintained a sort of equilibrium between the various powers, whereas that which was then supposed to exist in England between the king, the peers, the House of Commons, and the people (*i.e.* the electors) has vanished irrecoverably.

In the other struggle that has gone on in America, that between the National government and the States, the results have been still more considerable, though the process of change has sometimes been interrupted. During the first few decades after 1789 the States, in spite of a steady and often angry resistance, sometimes backed by threats of secession, found themselves more and more entangled in the network of Federal powers which sometimes Congress, sometimes the President, sometimes the Judiciary, as the expounder of the Constitution, flung over them. Provisions of the Constitution whose bearing had been inadequately realized in the first instance were put in force against a State, and when once put in force became precedents for the future. It is instructive to observe that this was done by both of the great national parties, by those who defended State rights and preached State sovereignty as well as by the advocates of a strong central government. For the former, when they saw the opportunity of effecting by means of the central legislative or executive power an object of immediate party importance, did not hesitate to put in force that central power, forgetful or heedless of the example they were setting.

It is for this reason that the process by which the National

government has grown may be called a natural one. A political force has, like a heated gas, a natural tendency to expansion, a tendency which works even apart from the knowledge and intentions of those through whom it works. In the process of expansion such a force may meet, and may be checked or driven back by a stronger force. The expansive force of the National government proved ultimately stronger than the force of the States, so the centralizing tendency prevailed. And it prevailed not so much by the conscious purpose of the party disposed to favour it, as through the inherent elements of strength which it possessed, and the favouring conditions amid which it acted, elements and conditions largely irrespective of either political party, and operative under the supremacy of the one as well as of the other. Now and then the centralizing process was checked. Georgia defied the Supreme court in 1830-32, and was not made to bend because the executive sided with her. South Carolina defied Congress and the President in 1832, and the issue was settled by a compromise. Acute foreign observers then and often during the period that followed predicted the dissolution of the Union. For some years before the outbreak of the Civil War the tie of obedience to the National government was palpably loosened over a large part of the country. But during and after the war the former tendency resumed its action, swifter and more potent than before.

A critic may object to the view here presented by remarking that the struggle between the National government and the States has not, as in the case of the struggles between different branches of the National government, proceeded merely by the natural development of the Constitution, but has been accelerated by specific changes in the Constitution, *viz.* those made by the three latest amendments.

This is true. But the dominance of the centralizing tendencies is not wholly or even mainly due to those amendments. It had begun before them. It would have come about, though less completely, without them. It has been due not only to these amendments but also —

To the extensive interpretation by the judiciary of the powers which the Constitution vests in the National government.

To the passing by Congress of statutes on topics not exclusively reserved to the States, statutes which have sensibly narrowed the field of State action.

To exertions of executive power which, having been approved by the people, and not condemned by the courts, have passed into precedents.

These have been the modes in which the centralizing tendency has shown itself and prevailed. What have been the underlying causes?

They belong to history. They are partly economical, partly moral. Steam and electricity have knit the various parts of the country closely together, have made each State and group of States more dependent on its neighbours, have added to the matters in which the whole country benefits by joint action and uniform legislation. The power of the National government to stimulate or depress commerce and industries by tariff legislation has given it a wide control over the material prosperity of part of the Union, till "the people, and especially the trading and manufacturing classes, came to look more and more to the national capital for what enlists their interests, and less and less to the capital of their own State. . . . It is the nation and not the State that is present to the imagination of the citizens as sovereign, even in the States of Jefferson and Calhoun. . . . The Constitution as it is, and the Union as it was, can no longer be the party watchword. There is a new Union, with new grand features, but with new engrafted evils."¹ There has grown up a pride in the national flag, and in the national government as representing national unity. In the North there is gratitude to that government as the power that saved the Union in the Civil War; in the South a sense of the strength which Congress and the President then exerted; in both a recollection of the immense scope which the war powers took and might take again. All over the country there is a great army of Federal office-holders who look to Washington as the centre of their hopes and fears. As the modes in and by which these and other similar causes can work are evidently not exhausted, it is clear that the development of the Constitution as between the nation and the States has not yet stopped, and present appearances suggest that the centralizing tendency will continue to prevail.

¹ Cooley, *History of Michigan*.

How does the inquiry we have been conducting effect the judgment to be passed upon the worth of rigid constitutions, *i.e.* of written instruments of government emanating from an authority superior to that of the ordinary legislature? The question is a grave one for European countries, which seem to be passing from the older or Flexible to the newer or Rigid type of constitutions.

A European reader who has followed the facts stated in the last foregoing chapters may be inclined to dismiss the question summarily. "Rigid Constitutions," he will say, "are on your own showing a delusion and a sham. The American Constitution has been changed, is being changed, will continue to be changed, by interpretation and usage. It is not what it was even thirty years ago; who can tell what it will be thirty years hence? If its transformations are less swift than those of the English Constitution, this is only because England has not even yet so completely democratized herself as America had done half a century ago, and therefore there has been more room for change in England. If the existence of the fundamental Constitution did not prevent violent stretches of executive power during the war, and of legislative power after as well as during the war, will not its paper guarantees be trodden under foot more recklessly the next time a crisis arrives? It was intended to protect not only the States against the central government, not only each branch of the government against the other branches, but the people against themselves, that is to say, the people as a whole against the impulses of a transient majority. What becomes of this protection when you admit that even the Supreme court is influenced by public opinion, which is only another name for the reigning sentiment of the moment? If every one of the checks and safeguards contained in the document may be overset, if all taken together may be overset, where are the boasted guarantees of the fundamental laws? Evidently it stands only because it is not at present assailed. It is like the walls of Jericho, tall and stately, but ready to fall at the blast of the trumpet. It is worse than a delusion: it is a snare; for it lulls the nation into a fancied security, seeming to promise a stability for the institutions of government, and a respect for the rights of the individual, which are in fact baseless. A flexible constitution like

that of England is really safer, because it practises no similar deceit, but by warning good citizens that the welfare of the commonwealth depends always on themselves and themselves only, stimulates them to constant efforts for the maintenance of their own rights and the deepest interests of society."

This statement of the case errs as much in one direction by undervaluing, as common opinion errs by overvaluing, the stability of rigid constitutions. They do not perform all that the solemnity of their wording promises. But they are not therefore useless.

To expect any form of words, however weightily conceived, with whatever sanctions enacted, permanently to restrain the passions and interests of men is to expect the impossible. Beyond a certain point, you cannot protect the people against themselves any more than you can, to use a familiar American expression, lift yourself from the ground by your own bootstraps. Laws sanctioned by the overwhelming physical power of a despot, laws sanctioned by supernatural terrors whose reality no one doubted, have failed to restrain those passions in ages of slavery and superstition. The world is not so much advanced that in this age laws, even the best and most venerable laws, will of themselves command obedience. Constitutions which in quiet times change gradually, peacefully, almost imperceptibly, must in times of revolution be changed more boldly, some provisions being sacrificed for the sake of the rest, as mariners throw overboard part of the cargo in a storm in order to save the other part with the ship herself. To cling to the letter of a Constitution when the welfare of the country for whose sake the Constitution exists is at stake, would be to seek to preserve life at the cost of all that makes life worth having — *propter vitam vivendi perdere causas*.

Nevertheless the rigid Constitution of the United States has rendered, and renders now, inestimable services. It opposes obstacles to rash and hasty change. It secures time for deliberation. It forces the people to think seriously before they alter it or pardon a transgression of it. It makes legislatures and statesmen slow to overpass their legal powers, slow even to propose measures which the Constitution seems to disapprove. It tends to render the inevitable process of modification gradual and tentative, the result of admitted and growing necessities

rather than of restless impatience. It altogether prevents some changes which a temporary majority may clamour for, but which will have ceased to be demanded before the barriers interposed by the Constitution have been overcome.

It does still more than this. It forms the mind and temper of the people. It trains them to habits of legality. It strengthens their conservative instincts, their sense of the value of stability and permanence in political arrangements.¹ It makes them feel that to comprehend their supreme instrument of government is a personal duty, incumbent on each one of them. It familiarizes them with, it attaches them by ties of pride and reverence to, those fundamental truths on which the Constitution is based.

These are enormous services to render to any free country, but above all to one which, more than any other, is governed not by the men of rank or wealth or special wisdom, but by public opinion, that is to say, by the ideas and feelings of the people at large. In no country were swift political changes so much to be apprehended, because nowhere has material growth been so rapid and immigration so enormous. In none might the political character of the people have seemed more likely to be bold and prone to innovation, because their national existence began with a revolution, which even now lies only a century behind. That none has ripened into a more prudently conservative temper may be largely ascribed to the influence of the famous instrument of 1789, which, enacted by and for a new republic, summed up so much of what was best in the laws and customs of an ancient monarchy.

¹ An illustration of what I mean is afforded by the influence upon Roman legal history of the enactment at a comparatively early period of the Laws of the Twelve Tables, which, summing up the customary law of the community in a concise and impressive form, fostered a conservative temper in the nation, and caused legislative changes, when after some generations these became necessarily frequent, to be made in a cautious and tentative way.