ity constituted by State statutes, registers his birth, appoints his guardian, pays for his schooling, gives him a share in the estate of his father deceased, licenses him when he enters a trade (if it be one needing a licence), marries him, divorces him, entertains civil actions against him, declares him a bankrupt, hangs him for murder. The police that guard his house, the local boards which look after the poor, control highways, impose water rates, manage schools — all these derive their legal powers from his State alone. Looking at this immense compass of State functions, Jefferson would seem to have been not far wrong when he said that the Federal government was nothing more than the American department of foreign affairs. But although the National government touches the direct interests of the citizen less than does the State government, it touches his sentiment more. Hence the strength of his attachment to the former and his interest in it must not be measured by the frequency of his dealings with it. In the partitionment of governmental functions between nation and State, the State gets the most but the nation the highest, so the balance between the two is preserved.

Thus every American citizen lives in a duality of which Europeans, always excepting the Swiss, and to some extent the Germans, have no experience. He lives under two governments and two sets of laws; he is animated by two patriotisms and owes two allegiances. That these should both be strong and rarely be in conflict is most fortunate. It is the result of skilful adjustment and long habit, of the fact that those whose votes control the two sets of governments are the same persons, but above all of that harmony of each set of institutions with the other set, a harmony due to the identity of the principles whereon both are founded, which makes each appear necessary to the stability of the other, the States to the nation as its basis, the National Government to the States as their protector.

CHAPTER XXXVII

STATE CONSTITUTIONS

THE government of each of the forty-four States is determined by and set forth in its Constitution, a comprehensive fundamental law, or rather group of laws included in one instrument, which has been directly enacted by the people of the State, and is capable of being repealed or altered, not by their representatives, but by themselves alone. As the Constitution of the United States stands above Congress and out of its reach, so the Constitution of each State stands above the legislature of that State, cannot be varied in any particular by the State legislature, and involves the invalidity of any statute passed by that legislature which is found to be inconsistent with it.

The State Constitutions are the oldest things in the political history of America, for they are the continuations and representatives of the royal colonial charters, whereby the earliest English settlements in America were created, and under which their several local governments were established, subject to the authority of the English Crown and ultimately of the British Parliament. But, like most of the institutions under which English-speaking peoples now live, they have a pedigree which goes back to a time anterior to the discovery of America itself. It begins with the English Trade Guild of the middle ages, itself the child of still more ancient corporations, dating back to the days of imperial Rome, and formed under her imperishable law. Charters were granted to merchant guilds in England as far back as the days of King Henry I. Edward IV. gave an elaborate one to the Merchant Adventurers trading with Flanders in 1463. In it we may already discern the arrangements which are more fully set forth in two later charters of greater historical interest, the charter of Queen Elizabeth

to the East India Company in 1599, and the charter of Charles I. to the "Governor and Company of the Massachusetts Bay in Newe-England" in 1628. Both these instruments establish and incorporate trading companies, with power to implead and be impleaded, to use a common seal, to possess and acquire lands tenements and hereditaments, with provisions for the making of ordinances for the welfare of the company. The Massachusetts Charter creates a frame of government consisting of a governor, deputy-governor, and eighteen assistants (the term still in use in many of the London city guilds), and directs them to hold four times a year a general meeting of the company, to be called the "greate and generall Court," in which general court "the Governor or deputie Governor, and such of the assistants and Freemen of the Company as shall be present, shall have full power and authority to choose other persons to be free of the Company, and to elect and constitute such officers as they shall thinke fitt for managing the affaires of the saide Governor and Company, and to make Lawes and Ordinances for the Good and Welfare of the saide Company, and for the Government and Ordering of the saide Landes and Plantasion, and the People inhabiting and to inhabite the same, soe as such Lawes and Ordinances be not contrary or repugnant to the Lawes and Statuts of this our realme of England." In 1691, the charter of 1628 having been declared forfeited in 1684, a new one was granted by King William and Queen Mary, and this instrument, while it retains much of the language and some of the character of the trade guild charter, is really a political frame of government for a colony. The assistants receive the additional title of councillors; their number is raised to twenty-eight; they are to be chosen by the general court, and the general court itself is to consist, together with the governor and assistants, of freeholders elected by towns or places within the colony, the electors being persons with a forty shilling freehold or other property worth £40. The governor is directed to appoint judges, commissioners of oyer and terminer, etc.; the general court receives power to establish judicatories and courts of record, to pass laws (being not repugnant to the laws of England), and to provide for all necessary civil offices. An appeal from the courts shall always be to the King in his privy council. This is a true political

Constitution.[1] Under it the colony was governed, and in the main well and wisely governed, till 1780. Much of it, not merely its terms, such as the name General Court, but its solid framework, was transferred bodily to the Massachusetts Constitution of 1780, which is now in force, and which profoundly influenced the Convention that prepared the Federal Constitution in 1787. Yet the charter of 1691 is nothing but an extension and development of the trading charter of 1628, in which there already appears, as there had appeared in Edward IV.'s charter of 1463, and in the East India Company's charter of 1599, the provision that the power of law-giving, otherwise unlimited, should be restricted by the terms of the charter itself, which required that every law for the colony should be agreeable to the laws of England. We have therefore in the three charters which I have named, those of 1463, 1599, and 1628, as well as in that of 1691, the essential and capital characteristic of a Rigid or supreme Constitution — viz. a frame of government established by a superior authority, creating a subordinate law-making body, which can do everything except violate the terms and transcend the powers of the instrument to which it owes its own existence. So long as the colony remained under the British Crown, the superior authority, which could amend or remake the frame of government, was the British Crown or Parliament. When the connection with Britain was severed, that authority passed over, not to the State legislature, which remained limited, as it always had been, but to the people of the now independent commonwealth, whose will speaks through what is now the State Constitution, just as the will of the Crown or of Parliament had spoken through the charters of 1628 and 1691.

[1] The oldest truly political Constitution in America is the instrument called the Fundamental Orders of Connecticut, framed by the inhabitants of Windsor, Hartford, and Wethersfield in 1638, memorable year, when the ecclesiastical revolt of Scotland saved the liberties of England. Connecticut was afterwards regularized by Charles II.'s charter of 1662 to "the Governor and Company of the English colony of Connecticut." The agreement drawn up in the cabin of the Mayflower may perhaps claim to have in it the germs of a government.

I am here tracing only the formal and legal growth of State Constitutions. Their democratic spirit and contents are largely due to the ideas with which the theology of the Reformers, and especially of Calvin, had filled the minds of the Puritan emigrants; and the ecclesiastical arrangements they had set up powerfully influenced those of the nascent political communities.

I have taken the case of Massachusetts as the best example of the way in which the trading Company grows into a colony, and the colony into a State. But some of the other colonies furnish illustrations scarcely less apposite. The oldest of them all, the acorn whence the oak of English dominion in America has sprung, the colony of Virginia, was, by the second charter, of 1609, established under the title of "The Treasurer and Company of Adventurers and Planters of the City of London for the first colony in Virginia."[1]

Within the period of ten years, under the last of the Tudors and the first of the Stuarts, two trading charters were issued to two Companies of English adventurers. One of these charters is the root of English title to the East and the other to the West. One of these Companies has grown into the Empire of India; the other into the United States of North America. If England had done nothing else in history, she might trust for her fame to the work which these charters began. And the foundations of both dominions were laid in the age which was adorned by the greatest of all her creative minds, and gave birth to the men who set on a solid basis a frame of representative government which all the free nations of the modern world have copied.

When, in 1776, the thirteen colonies threw off their allegiance to King George III., and declared themselves independent States, the colonial charter naturally became the State Constitution.[2] In most cases it was remodelled, with large alterations, by the revolting colony. But in three States it was maintained unchanged, except, of course, so far as Crown

[1] The phrase First colony distinguishes what afterwards became the State of Virginia from the more northerly parts of Virginia, afterwards called New England. The Second colony was to be Plymouth, one of the two settlements which became Massachusetts.

[2] Even in declaring herself independent, New Jersey clung to the hope that the mother country would return to wiser counsels, and avert the departure of her children. She added at the end of her Constitution of 2d July 1776 the following proviso: "Provided always, and it is the true intent and meaning of this Congress, that if a reconciliation between Great Britain and these colonies should take place, and the latter be taken again under the protection and government of the Crown of Britain, this charter shall be null and void, otherwise remain firm and inviolable." The truth is that the colonists, till alienated by the behaviour of England, had more kindly feelings towards her than she had towards them. To them she was the old home, to her they were simply customers. Some interesting illustrations of the views then entertained as to the use of colonies may be found in the famous discussion in the fourth book of Adam Smith's *Wealth of Nations*, which appeared in 1776.

authority was concerned, viz. in Massachusetts till 1780, in Connecticut till 1818, and in Rhode Island till 1842.[1] The other thirty-one States admitted to the Union in addition to the original thirteen, have all entered it as organized self-governing communities, with their Constitutions already made by their respective peoples. Each Act of Congress which admits a new State admits it as a subsisting commonwealth, sometimes empowering its people to meet and enact a constitution for themselves (subject to conditions mentioned in the act) sometimes accepting and confirming a constitution so already made by the people.[2] Congress may impose conditions which the State Constitution must fulfil; and in admitting the six newest States has affected to retain the power of maintaining these conditions in force. But the authority of the State Constitutions does not flow from Congress, but from acceptance by the citizens of the States for which they are made. Of these instruments, therefore, no less than of the Constitutions of the thirteen original States, we may say that although subsequent in date to the Federal Constitution, they are, so far as each State is concerned, *de jure* prior to it. Their authority over their own citizens is nowise derived from it.[3] Nor is this

[1] Rhode Island simply passed a statute by her legislature in May 1776, substituting allegiance to the colony for allegiance to the King. Connecticut passed the following statute: — "Be it enacted by the Governor and Council and House of Representatives, in general court assembled, that the ancient form of civil government contained in the charter from Charles II., King of England, and adopted by the people of this State, shall be and remain the civil Constitution of this State, under the sole authority of the people thereof, independent of any king or prince whatever; and that this republic is, and shall for ever be and remain, a free, sovereign, and independent State, by the name of the State of Connecticut." (Three paragraphs follow containing a short "Bill of Rights," and securing to the inhabitants of any other of the United States the same law and justice as natives of the State enjoyed.) This is all that Connecticut thought necessary. She had possessed, as did Rhode Island also, the right of appointing her own governor, and therefore did not need to substitute any new authority for a royal governor.

[2] In the Act of 1889 for the admission of North Dakota, South Dakota, Montana, and Washington, the former course, in the admission of Idaho and Wyoming in 1890, the latter course was followed.

[3] In practice Congress can influence the character of a State Constitution, because a State whose Constitution contains provisions which Congress disapproves may be refused admission. But since the extinction of slavery and completion of the process of reconstruction, occasions for the serious exercise of such a power rarely arise. It was used to compel the seceding States to modify their Constitutions so as to get rid of all taint of slavery before their senators and representatives were readmitted to Congress after the war. Of

a mere piece of technical law. The antiquity of the older States as separate commonwealths, running back into the heroic ages of the first colonization of America and the days of the Revolutionary War, is a potent source of the local patriotism of their inhabitants, and gives these States a sense of historic growth and indwelling corporate life which they could not have possessed had they been the mere creatures of the Federal Government.

The State Constitutions of America well deserve to be compared with those of the self-governing British colonies. But one remarkable difference must be noted here. The constitutions of British colonies have all proceeded from the Imperial Parliament of the United Kingdom, which retains its full legal power of legislating for every part of the British dominions. In many cases a colonial constitution provides that it may be itself altered by the colonial legislature, of course with the assent of the Crown; but inasmuch as in its origin it is a statutory constitution, not self-grown, but planted as a shoot by the Imperial Parliament at home, Parliament may always alter or abolish it. Congress, on the other hand, has no power to alter a State Constitution. And whatever power of alteration has been granted to a British colony is exercisable by the colonial legislature, not, as in America, by the citizens at large.

The original Constitutions of the States, whether of the old thirteen or of the newer thirty-one, have been in nearly every case (except those of the eight newest States) subsequently recast, in some instances five, six, or even seven times, as well as amended in particular points. Thus Constitutions of all dates are now in force in different States, from that of Massachusetts, enacted in 1780, but largely amended since, to that of Kentucky, enacted in 1891.

The Constitutions of the revolutionary period were in a few instances enacted by the State legislature, acting as a body

course Congress is not bound to admit a community desiring to be recognized as a State. Utah was kept knocking at the door of the Union for many years, because the majority of her inhabitants lay under grave suspicion, and the nation wished to retain for the purpose of preventing polygamy that full control which can be exercised over a Territory but not over a State. Sometimes a dominant party postpones the admission of a State likely to strengthen by its vote the opposite party; and sometimes, as happened in the recent cases of Wyoming, Montana, and Idaho, communities whose fitness for Statehood might well be doubted have been admitted for partisan reasons. An act has now (1894) been passed for the admission of Utah in 1896.

with plenary powers, but more usually by the people acting through a Convention, *i.e.* a body especially chosen by the voters at large for the purpose, and invested with full powers, not only of drafting, but of adopting the instrument of government.[1] Since 1835, when Michigan framed her Constitution, the invariable practice in the Northern States has been for the Convention, elected by the voters, to submit, in accordance with the precedents set by Massachusetts in 1780, and by Maine in 1820, the draft Constitution framed by it to the citizens of the State at large, who voted upon it Yes or No. They usually vote on it as a whole, and adopt or reject it *en bloc*, but sometimes provision is made for voting separately on some particular point or points. In the Southern States the practice has varied, but the growing tendency has been to submit the draft to the people. In 1890, however, Mississippi enacted a new Constitution by a Convention alone; and in Kentucky (in 1891), after the draft Constitution which the Convention had prepared had been submitted to and accepted by a popular vote (as provided by the statute which summoned the convention), the Convention met again and made some alterations on which, strange to say, the people have not been since consulted.[2]

The people of a State retain for ever in their hands, altogether independent of the National government, the power of altering their Constitution. When a new Constitution is to be prepared, or the existing one amended, the initiative usually comes from the legislature, which (either by a simple majority, or by a two-thirds majority, or by a majority in two successive

[1] In Rhode Island and Connecticut the legislature continued the colonial Constitution. In South Carolina a body calling itself the "Provincial Congress" claimed to be the "General Assembly," or legislature of the colony, and as such enacted the Constitution. In the other revolting colonies, except Massachusetts, Conventions or Congresses enacted the Constitution, not submitting it to the voters for ratification. In Massachusetts the Convention submitted its draft to the voters in 1780, and the voters adopted it, a previous draft tendered by the legislature in 1778 having been rejected.

[2] Proceedings were taken before the Court of Appeals of Kentucky to determine the validity of these alterations, and the court by a majority upheld them, on the ground, it would seem, that the legislature and executive had treated them as operative. *Sed quære.* It has also been suggested that the court, being itself the creature of the new Constitution, was not entitled to question title of its creator. The matter is further complicated by the fact that something similar had happened in 1850, when the last previous Constitution was adopted, and that that Constitution did not, like the statute which created the Convention of 1890, prescribe a popular vote.

legislatures, as the Constitution may in each instance provide) submits the matter to the voters in one of two ways. It may either propose to the people certain specific amendments,[1] or it may ask the people to decide by a direct popular vote on the propriety of calling a constitutional Convention to revise the whole existing Constitution. In the former case the amendments suggested by the legislature are directly voted on by the citizens; in the latter the legislature, so soon as the citizens have voted for the holding of a convention, provides for the election by the people of this convention. When elected, the Convention meets, sets to work, goes through the old Constitution, and prepares a new one, which is then usually presented to the people for ratification or rejection at the polls. Only in the little State of Delaware is the function of amending the Constitution still left to the legislature without the subsequent ratification of a popular vote, subject, however, to the provision that changes must be passed by two successive legislatures, and must have been put before the people at the election of members for the second. Some States provide for the submission to the people at fixed intervals, of seven, ten, sixteen, or twenty years, of the propriety of calling a convention to revise the Constitution, so as to secure that the attention of the people shall be drawn to the question whether their scheme of government ought or ought not to be changed. Be it observed, however, that whereas the Federal Constitution can be amended only by a vote of three-fourths of the States, a Constitution can in nearly every State be changed by a bare majority of the citizens voting at the polls.[2] Hence we may expect, and shall find, that these instruments are altered more

[1] In New Hampshire the legislature has no power to propose amendments: so the local authorities take the sense of the people every seven years as to the need for a revising Convention. In some States the legislature can do so only after stated intervals, *e.g.* of five years.

[2] Sometimes, however, an absolute majority of all the qualified voters is required. In Rhode Island (where the voting is in town and ward meetings) a three-fifths majority is needed, and in South Carolina the ratification of the next elected legislature by a two-thirds majority in each House is necessary. In Delaware the proposal to call a convention must be approved by a majority of all the voters, in Kentucky by at least one-fourth of the total number who voted at the last preceding general election. Delaware having during several years failed in the attempt to amend her Constitution (of 1831) by the legislature, fell back, in 1887, on the proposal to hold a constitutional convention, but has not yet been able to secure a sufficiently large vote.

frequently and materially than the Federal Constitution has been.

The tendency of late years has been to make the process of alteration quicker; for recent Constitutions generally provide that one legislature, not two successive legislatures, may propose an amendment, which shall at once take effect if accepted.[1]

A State Constitution is not only independent of the central national government (save in certain points already specified), it is also the fundamental organic law of the State itself. The State exists as a commonwealth by virtue of its Constitution, and all State authorities, legislative, executive, and judicial, are the creatures of, and subject to, the State Constitution.[2] Just as the President and Congress are placed beneath the Federal Constitution, so the Governor and Houses of a State are subject to its Constitution, and any act of theirs done either in contravention of its provisions, or in excess of the powers it confers on them, is absolutely void. All that has been said in preceding chapters regarding the functions of the courts of law where an Act of Congress is alleged to be inconsistent with the Federal Constitution, applies equally where a statute passed by a State legislature is alleged to transgress the Constitution of the State, and of course such validity may be contested in any court, whether a State court or a Federal court, because the question is an ordinary question

[1] The following provisions are found in the eight most recent Constitutions. In South Dakota, Montana, Idaho, Wyoming, Washington, two-thirds of all the members elected must in each House of the Legislature agree to propose an amendment. In Mississippi two-thirds of the members are required. In Kentucky three-fifths of all the members elected are required. In North Dakota a bare majority of each House of one Legislature, and a majority of all the members in each House of the next Legislature are required, the amendment being in every case ultimately submitted to the people.

[2] Some details as to the provisions of State Constitutions may be found in Stimson's *American Statute Law*, and in the article "States" in the *American Cyclopædia of Political Science*. Of course the great authority is the collection of the State Constitutions, embracing (together with the colonial charters) all that have been duly enacted since 1776, in the two thick quarto volumes entitled *Federal and State Constitutions*, published under the authority of Congress by Ben. Perley Poore, Washington, 1878. It is much to be wished that a biennial or even quinquennial supplement to this collection should be officially published, containing all the new constitutions and constitutional amendments. At present it is very difficult, especially for a resident in Europe, to ascertain exactly how the constitution of each State stands; and I ask indulgence for any errors into which I may, owing to this difficulty, have fallen.