JAMES BRYCE

THE AMERICAN COMMONWEALTH

VOL. 2: THE STATE GOVERNMENTS

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CHAPTER XXXVI. NATURE OF THE AMERICAN STATE

From the study of the National Government, we may go on to examine that of the several States which made up the Union. This is the part of the American political system which has received least attention both from foreign and from native writers. Finding in the Federal president, cabinet, and Congress a government superficially resembling those of their own countries, and seeing the Federal authority alone active in international relations, Europeans have forgotten and practically ignored the State Governments to which their own experience supplies few parallels, and on whose workings the intelligence published on their side of the ocean seldom throws light. Even the European traveler who makes the six days' run across the American continent, from New York via Philadelphia and Chicago to San Francisco, though he passes in his journey of 3000 miles over the territories of eleven self-governing commonwealths, hardly notices the fact. He uses one coinage and one post-office; he is stopped by no custom-houses; he sees no officials in a State livery; he thinks no more of the difference of jurisdictions than the passenger from London to Liverpool does of the counties traversed by the line of the North-Western Railway. So, too, our best informed English writers on the science of politics, while discussing copiously the relation of the American States to the central authority, have failed to draw on the fund of instruction which lies in the study of the State Governments themselves. Mill in his Representative Government scarcely refers to them. Mr. Freeman in his learned essays. Sir H. Maine in his ingenious book on Popular Government, pass by phenomena which would have admirably illustrated some of their reasonings.

American publicists, on the other hand, have been too much absorbed in the study of the Federal system to bestow much thought on the State governments. The latter seem to them the most simple and obvious things in the world, while the former, which has been the battle-ground of their political parties for a century, excites the keenest interest, and is indeed regarded as a sort of mystery, on which all the resources of their metaphysical subtlety and legal knowledge may well be expended. Thus while the dogmas of State sovereignty and State rights, made practical by the great struggle over slavery, have been discussed with extraordinary zeal and acumen by three generations of men, the character, power, and working of the States as separate self-governing bodies have received little attention or illustration. Yet they are full of interest; and he who would understand the changes that have passed on the American democracy will find far more instruction in a study of the State governments than of the Federal Constitution. The materials for this study are unfortunately, at least to a European, either inaccessible or unmanageable. They consist of constitutions, statutes, the records of the debates and proceedings of constitutional conventions and legislatures, the reports of officials and commissioners, together with that continuous transcript and picture of current public opinion which the files of newspapers supply. Of these sources only one, the constitutions, is practically available to a person writing on this side the Atlantic. To be able to use the rest one must go to the State and devote one's self there to these original authorities, correcting them, where possible, by the recollections of living men. It might have been expected that in most of the States, or at least of the older States, persons would have been found to write political, and not merely antiquarian or genealogical, State histories, describing the political career of their respective communities, and discussing the questions on which

political contests have turned. But this has been done in comparatively few instances, so that the European inquirer finds a scanty measure of the assistance which he would naturally have expected from previous laborers in this field. I call it a field: it is rather a primeval forest, where the vegetation is rank, and through which scarcely a trail has yet been cut. The new historical school which is growing up at the leading American universities, and has already done excellent work on the earlier history of the Eastern States, will doubtless ultimately grapple with this task; in the meantime, the difficulties I have stated must be my excuse for treating this branch of my subject with a brevity out of proportion to its real interest and importance. It is better to endeavor to bring into relief a few leading features, little understood in Europe, than to attempt a detailed account which would run to inordinate length.

The American State is a peculiar organism, unlike anything in modern Europe, or in the ancient world. The only parallel is to be found in the cantons of Switzerland, the Switzerland of our own day, for until 1815, if one ought not rather to say until 1848, Switzerland was not so much a nation or a state as a league of neighbor commonwealths. But Europe so persistently ignores the history of Switzerland, that most instructive patent museum of politics, apparently only because she is a small country, and because people go there to see lakes and to climb mountains, that I should perplex instead of enlightening the reader by attempting to illustrate American from Swiss phenomena.

Let me attempt to sketch the American States as separate political entities, forgetting for the moment that they are also parts of a Federation.

There are forty-four States in the American Union, varying in size from Texas, with an area of 265,780 square miles, to Rhode Island, with an area of 1250 square miles; and in population from New York, with 5,997,853

inhabitants, to Nevada, with 45,761. That is to say, the largest State is much larger than either France or the Germanic Empire; the most populous much more populous than Sweden, or Portugal, or Denmark, while the smallest is smaller than Warwickshire or Corsica, and the least populous less populous than the parish of Wandsworth in the suburbs of London (46,717), or the town of Warrington in Lancashire (52,742). Considering not only these differences of size, but the differences in the density of population (which in Nevada is .4 and in Wyoming .6 to the square mile, while in Rhode Island it is 276 and in Massachusetts 268 to the square mile); in its character (in South Carolina the blacks are 692,503 against 458,454 whites, in Mississippi 747,720 against 539,703 whites); in its birthplace (in North Carolina the foreign-born persons are less than 1/350 of the population, in California more than 1/3); in the occupations of the people, in the amount of accumulated wealth, in the proportion of educated persons to the rest of the community, — it is plain that immense differences might be looked for between the aspects of politics and conduct of government in one State and in another.

Be it also remembered that the older colonies had different historical origins. Virginia and North Carolina were unlike Massachusetts and Connecticut; New York, Pennsylvania, and Maryland different from both; while in recent times the stream of European immigration has filled some States with Irishmen, others with Germans, others with Scandinavians, and has left most of the Southern States wholly untouched.

Nevertheless, the form of government is in its main outlines, and to a large extent even in its actual working, the same in all these forty-four republics, and the differences, instructive as they are, relate to points of secondary consequence.

The States fall naturally into five groups: —

The New England States — Massachusetts, Connecticut, Rhode Island, New Hampshire, Vermont, Maine.

The Middle States — New York, New Jersey, Pennsylvania, Delaware, Maryland, Ohio, Indiana.

The Southern, or old Slave States — Virginia, West Virginia (separated from Virginia during the war). North Carolina, South Carolina, Georgia, Alabama, Florida, Kentucky, Tennessee, Mississippi, Louisiana, Arkansas, Missouri, Texas.

The Northwestern States — Michigan, Illinois, Wisconsin, Minnesota, Iowa, Nebraska, Kansas, Colorado, N. Dakota, S. Dakota, Wyoming, Montana, Idaho.

The Pacific States — California, Nevada, Oregon, Washington.

Each of these groups has something distinctive in the character of its inhabitants, which is reflected, though more faintly now than formerly, in the character of its government and politics.

New England is the old home of Puritanism, the traces whereof, though waning under the influence of Irish and French Canadian immigration, are by no means yet extinct. The Southern States will long retain the imprint of slavery, not merely in the presence of a host of negroes, but in the degradation of the poor white population, and in certain attributes, laudable as well as regrettable, of the ruling class. The Northwest is the land of hopefulness, and consequently of bold experiments in legislation: its rural inhabitants have the honesty and narrow-mindedness of agriculturists. The Pacific West, or rather California and Nevada, for Oregon and Washington belong in character to the Upper Mississippi or Northwestern group, tinges the energy and sanguine good nature of the Westerns with a speculative recklessness natural to mining communities, where great fortunes have rapidly grown and vanished, and into which elements have been suddenly swept together from every part of the world, as a Rocky Mountain

rainstorm fills the bottom of a valley with sand and pebbles from all the surrounding heights.

As the dissimilarity of population and of external conditions seems to make for a diversity of constitutional and political arrangements between the States, so also does the large measure of legal independence which each of them enjoys under the Federal Constitution. No State can, as a commonwealth, politically deal with or act upon any other State. No diplomatic relations can exist nor treaties be made between States, no coercion can be exercised by one upon another. And although the government of the Union can act on a State, it rarely does act, and then only in certain strictly limited directions, which do not touch the inner political life of the commonwealth.

Let us pass on to consider the circumstances which work for uniformity among the States, and work more powerfully as time goes on.

He who looks at a map of the Union will be struck by the fact that so many of the boundary lines of the States are straight lines. Those lines tell the same tale as the geometrical plans of cities like St. Petersburg or Washington, where every street runs at the same angle to every other. The States are not natural growths. Their boundaries are for the most part not natural boundaries fixed by mountain ranges, nor even historical boundaries due to a series of events, but purely artificial boundaries, determined by an authority which carved the national territory into strips of convenient size, as a building company lays out its suburban lots. Of the States subsequent to the original thirteen, California is the only one with a genuine natural boundary, finding it in the chain of the Sierra Nevada on the east and the Pacific ocean on the west. No one of these later States can be regarded as a naturally developed political organism. They are trees planted by the forester, not self-sown with the help of the

seed-scattering wind. This absence of physical lines of demarcation has tended and must tend to prevent the growth of local distinctions. Nature herself seems to have designed the Mississippi basin, as she has designed the unbroken levels of Russia, to be the dwelling-place of one people.

Each State makes its own Constitution; that is, the people agree on their form of government for themselves, with no interference from the other States or from the Union. This form is subject to one condition only: it must be republican. But in each State the people who make the constitution have lately come from other States, where they have lived under and worked constitutions which are to their eyes the natural and almost necessary model for their new State to follow; and in the absence of an inventive spirit among the citizens, it was the obvious course for the newer States to copy the organizations of the older States, especially as these agreed with certain familiar features of the Federal Constitution. Hence the outlines, and even the phrases of the elder constitutions reappear in those of the more recently formed States. The precedents set by Virginia, for instance, had much influence on Tennessee, Alabama, Mississippi, and Florida, when they were engaged in making or amending their constitutions during the early part of this century.

Nowhere is population in such constant movement as in America. In some of the newer States only one-fourth or one-fifth of the inhabitants are natives of the United States. Many of the townsfolk, not a few even of the farmers, have been till lately citizens of some other State, and will, perhaps, soon move on farther west. These Western States are like a chain of lakes through which there flows a stream which mingles the waters of the higher with those of the lower. In such a constant flux of population local peculiarities are not readily developed, or if they have grown up when the district was still isolated, they

disappear as the country becomes filled. Each State takes from its neighbors and gives to its neighbors, so that the process of assimilation is always going on over the whole wide area.

Still more important is the influence of railway communication, of newspapers, of the telegraph. A Greek city like Samos or Mitylene, holding her own island, preserved a distinctive character in spite of commercial intercourse and the sway of Athens. A Swiss canton like Uri or Appenzell, entrenched behind its mountain ramparts, remains, even now under the strengthened central government of the Swiss nation, unlike its neighbors of the lower country. But an American State traversed by great trunk lines of railway, and depending on the markets of the Atlantic cities and of Europe for the sale of its grain, cattle, bacon, and minerals, is attached by a hundred always tightening ties to other States, and touched by their weal or woe as nearly as by what befalls within its own limits. The leading newspapers are read over a vast area. The inhabitants of each State know every morning the events of yesterday over the whole Union.

Finally the political parties are the same in all the States. The tenets (if any) of each party are (with some slight exceptions) the same everywhere, their methods the same, their leaders the same, although of course a prominent man enjoys especial influence in his own State. Hence, State politics are largely swayed by forces and motives external to the particular State, and common to the whole country, or two great sections of it; and the growth of local parties, the emergence of local issues and development of local political schemes, are correspondingly restrained.

These considerations explain why the States, notwithstanding the original diversities between some of them, and the wide scope for political divergence which they all enjoy under the Federal Constitution, are so much less dissimilar and less peculiar than might have been

expected. European statesmen have of late years been accustomed to think of federalism and local autonomy as convenient methods either for recognizing and giving free scope to the sentiment of nationality which may exist in any part of an empire, or for meeting the need for local institutions and distinct legislation which may arise from differences between such a part and the rest of the empire. It is one or other or both of these reasons that have moved statesmen in such cases as those of Finland in her relations to Russia, Hungary in her relations to German Austria, Iceland in her relations to Denmark, Bulgaria in her relations to the Turkish Sultan, Ireland in her relations to Great Britain. But the final causes, so to speak, of the recognition of the States of the American Union as autonomous commonwealths, have been different. Their self-government is not the consequence of differences which can be made harmless to the whole body politic only by being allowed free course. It has been due primarily to the historical fact that they existed as commonwealths before the Union came into being; secondarily, to the belief that localized government is the best guarantee for civic freedom, and to a sense of the difficulty of administering a vast territory and population from one center and by one government.

I return to indicate the points in which the legal independence and right of self-government of the several States appears. Each of the forty-four has its own —

Constitution (whereof more anon).

Executive, consisting of a governor, and various other officials.

Legislature of two Houses.

System of local government in counties, cities, townships, and school districts.

System of State and local taxation.

Debts, which it may repudiate at its own pleasure.

Body of private law, including the whole law of real and personal property, of contracts, of torts, and of family relations.

System of procedure, civil and criminal.

Court, from which no appeal lies (except in cases touching Federal legislation or the Federal constitution) to any Federal court.

Citizenship, which may admit persons (e.g. recent immigrants) to be citizens at times, or on conditions, wholly different from those prescribed by other States.

Three points deserve to be noted as illustrating what these attributes include.

I. A man gains active citizenship of the United States (i.e. a share in the government of the Union) only by becoming a citizen of some particular State. Being such citizen, he is forthwith entitled to the national franchise. That is to say, voting power in the State carries voting power in Federal elections, and however lax a State may be in its grant of such power, e.g. to foreigners just landed or to persons convicted of crime, these State voters will have the right of voting in congressional and presidential elections. The only restriction on the States in this matter is that of the fourteenth and fifteenth Constitutional amendments, which have already been discussed. They were intended to secure equal treatment to the negroes, and incidentally they declare the protection given to all citizens of the United States. Whether they really enlarge it, that is to say, whether it did not exist by implication before, is a legal question, which I need not discuss.

II. The power of a State over all communities within its limits is absolute. It may grant or refuse local government as it pleases. The population of the city of Providence is more than one-third of that of the State of Khode Island, the population of New York City one-fourth that of the State of New York. But the State might in either case extinguish the municipality, and govern the city by a single State

commissioner appointed for the purpose, or leave it without any government whatever. The city would have no right of complaint to the Federal President or Congress against such a measure. Massachusetts lately remodeled the city government of Boston just as the British Parliament might remodel that of Birmingham. Let an Englishman imagine a county council for Warwickshire suppressing the municipality of Birmingham, or a Frenchman imagine the department of the Rhone extinguishing the municipality of Lyons, with no possibility of intervention by the central authority, and he will measure the difference between the American States and the local governments of Western Europe.

III. A State commands the allegiance of its citizens, and may punish them for treason against it. The power has rarely been exercised, but its undoubted legal existence had much to do with inducing the citizens of the Southern States to follow their governments into secession in 1861. They conceived themselves to owe allegiance to the State as well as to the Union, and when it became impossible to preserve both, because the State had declared its secession from the Union, they might hold the earlier and nearer authority to be paramount. Allegiance to the State must now, since the war, be taken to be subordinate to allegiance to the Union. But allegiance to the State still exists; treason against the State is still possible. One cannot think of treason against Warwickshire or the department of the Rhone.

These are illustrations of the doctrine which Europeans often fail to grasp, that the American States were originally in a certain sense, and still for certain purposes remain, sovereign States. Each of the original thirteen became sovereign (so far as its domestic affairs were concerned, though not as respects international relations) when it revolted from the mother country in 1776. By entering the Confederation of 1781-88 it parted with one or two of the

attributes of sovereignty, by accepting the Federal Constitution in 1788-91 it subjected itself for certain specified purposes to a central government, but claimed to retain its sovereignty for all other purposes. That is to say, the authority of a State is an inherent, not a delegated, authority. It has all the powers which any independent government can have, except such as it can be affirmatively shown to have stripped itself of, while the Federal Government has only such powers as it can be affirmatively shown to have received. To use the legal expression, the presumption is always for a State, and the burden of proof lies upon any one who denies its authority in a particular matter.

What State sovereignty means and includes was a question which incessantly engaged the most active legal and political minds of the nation, from 1789 down to 1870. Some thought it paramount to the rights of the Union. Some considered it as held in suspense by the Constitution, but capable of reviving as soon as a State should desire to separate from the Union. Some maintained that each State had in accepting the Constitution finally renounced its sovereignty, which thereafter existed only in the sense of such an undefined domestic legislative and administrative authority as had not been conferred upon Congress. The conflict of these views, which became acute in 1830 when South Carolina claimed the right of nullification, produced Secession and the war of 1861-65. Since the defeat of the Secessionists, the last of these views may be deemed to have been established, and the term " State sovereignty " is now but seldom heard. Even " States' rights " have a different meaning from that which they had thirty years ago.

A European who now looks calmly back on this tremendous controversy of tongue, pen, and sword, will be apt to express his ideas of it in the following way. He will remark that much of the obscurity and perplexity arose

from confounding the sovereignty of the American nation with the sovereignty of the Federal Government. The Federal Government clearly was sovereign only for certain purposes, i.e. only in so far as it had received specified powers from the Constitution. These powers did not, and in strict legal construction do not now, abrogate the supremacy of the States in their proper sphere. A State still possesses one important attribute of sovereignty — immunity from being sued except by another State. But

them ever was for international purposes a free and independent sovereign State. Abraham Lincoln was in this sense justified in saying that the Union was older than the States, and had created them as States. But what are we to say of North Carolina and Rhode Island, after the acceptance of the Constitution of 1787-89 by the other eleven States? They were out of the old Confederation, for it had expired. They were not in the new Union, for they refused during many months to enter it. What else can they have been during those months except sovereign commonwealths?

the American nation which had made the Constitution, had done so in respect of its own sovereignty, and might well be deemed to retain that sovereignty as paramount to any rights of the States. The feeling of this ultimate supremacy of the nation was what swayed the minds of those who resisted Secession, just as the equally well-grounded persuasion of the limited character of the central Federal Government satisfied the conscience of the seceding South.

The Constitution of 1789 was a compromise, and a compromise arrived at by allowing contradictory propositions to be represented as both true. It has been compared to the declarations made with so much energy and precision of language in the ancient hymn *Quicunque Vult,* where, however, the apparent contradiction has always been held to seem a contradiction only because the

human intellect is unequal to the comprehension of such profound mysteries. To everyone who urged that there were thirteen States, and therefore thirteen governments, it was answered, and truly, that there was one government, because the people were one. To everyone who declared that there was one government, it was answered with no less truth that there were thirteen. Thus counsel was darkened by words without knowledge; the question went off into metaphysics, and found no end, in wandering mazes lost.

There was, in fact, a divergence between the technical and the practical aspects of the question. Technically, the seceding States had an arguable case; and if the point had been one to be decided on the construction of the Constitution as a court decides on the construction of a commercial contract, they were possibly entitled to judgment. Practically, the defenders of the Union stood on firmer ground, because circumstances had changed since 1789 so as to make the nation more completely one nation than it then was, and had so involved the fortunes of the majority which held to the Union with those of the minority seeking to depart that the majority might feel justified in forbidding their departure. Stripped of legal technicalities, the dispute resolved itself into the problem often proposed but capable of no general solution: When is a majority entitled to use force for the sake of retaining a minority in the same political body with itself? To this question, when it appears in a concrete shape, as to the similar question when an insurrection is justifiable, an answer can seldom be given beforehand. The result decides. When treason prospers, none dare call it treason.

The Constitution, which had rendered many services to the American people, did them an inevitable dis-service when it fixed their minds on the legal aspects of the question. Law was meant to be the servant of politics, and must not be suffered to become the master. A case had

arisen which its formulae were unfit to deal with, a case which had to be settled on large moral and historical grounds. It was not merely the superior physical force of the North that prevailed; it was the moral forces which rule the world, forces which had long worked against slavery, and were ordained to save North America from the curse of hostile nations established side by side.

The word " sovereignty," which has in many ways clouded the domain of public law and jurisprudence, confused men's minds by making them assume that there must in every country exist, and be discoverable by legal inquiry, either one body invested legally with supreme power over all minor bodies, or several bodies which, though they had consented to form part of a larger body, were each in the last resort independent of it, and responsible to none but themselves. They forgot that a Constitution may not have determined where legal supremacy shall dwell. Where the Constitution of the United States placed it was at any rate doubtful, so doubtful that it would have been better to drop technicalities, and recognize the broad fact that the legal claims of the States had become incompatible with the historical as well as legal claims of the nation. In the uncertainty as to where legal right resided, it would have been prudent to consider where physical force resided. The South however thought herself able to resist any physical force which the rest of the nation might bring against her. Thus encouraged, she took her stand on the doctrine of States' Rights: and then followed a pouring out of blood and treasure such as was never spent on determining a point of law before, not even when Edward III. and his successors waged war for a hundred years to establish the claim of females to inherit the crown of France.

What, then, do the rights of a State now include? Every right or power of a Government except: —

The right of secession (not abrogated in terms, but admitted since the war to be no longer claimable. It is

expressly negatived in the recent Constitutions of several Southern States).

Powers which the Constitution withholds from the States (including that of intercourse with foreign governments).

Powers which the Constitution expressly confers on the Federal Government.

As respects some powers of the last class, however, the States may act concurrently with, or in default of action by, the Federal Government. It is only from contravention of its action that they must abstain. And where contravention is alleged to exist, whether legislative or executive, it is by a court of law, and, in case the decision is in the first instance favorable to the pretensions of the State, ultimately by a Federal court, that the question falls to be decided.

A reference to the preceding list of what each State may create in the way of distinct institutions will show that these rights practically cover nearly all the ordinary relations of citizens to one another and to their Government, nearly all the questions which have been most agitated in England and France of recent years. An American may, through a long life, never be reminded of the Federal Government, except when he votes at presidential and congressional elections, buys a package of tobacco bearing the government stamp, lodges a complaint against the post-office, and opens his trunks for a custom-house officer on the pier at New York when he returns from a tour in Europe. His direct taxes are paid to officials acting under State laws. The State, or a local authority 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 license), 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 skillful 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. 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.

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."

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. In most cases it was remodeled, with large alterations, by the revolting colony. But in three States it was maintained unchanged, except, of course, so far as Crown authority was concerned, viz. in Massachusetts till 1780, in Connecticut till 1818, and in Rhode Island till 1842. 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. 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. Nor is this 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 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. 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.

The people of a State retain forever 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 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, 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. Hence we may expect, and shall find, that these instruments are altered more 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.

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. 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 of law, and is to be solved by determining whether or no a law of inferior authority is inconsistent