

CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES

I

WHAT IS CONSTITUTIONAL GOVERNMENT?

My object in the following lectures is to examine the government of the United States as a constitutional system as simply and directly as possible, with an eye to practice, not to theory.

And yet at the very outset it is necessary to pause upon a theory. The government of the United States cannot be intelligently discussed as a constitutional system until we clearly determine what we mean by a "constitutional" government; and the answer to that question is in effect a theory of politics.

By a constitutional government we, of course, do not mean merely a government conducted according to the provisions of a definite constitution; for every modern government with which our thoughts deal at all has a definite constitution, written or unwritten, and we should not dream of speaking of all modern governments as "constitutional." Not even when their constitutions are written with the utmost definiteness of formulation. The constitution of England, the most famous of constitutional governments and in a sense the mother of them all, is not

2 CONSTITUTIONAL GOVERNMENT IN UNITED STATES

written, and the constitution of Russia might be without changing the essential character of the Czar's power. A constitutional government is one whose powers have been adapted to the interests of its people and to the maintenance of individual liberty. That, in brief, is the conception we constantly make use of, but seldom analyze, when we speak of constitutional governments.

Roughly speaking, constitutional government may be said to have had its rise at Runnymede, when the barons of England exacted Magna Carta of John; and that famous transaction we may take as the dramatic embodiment alike of the theory and of the practice we seek. The barons met John at Runnymede, a body of armed men in counsel, for a parley which, should it not end as they wished it to end, was to be but a prelude to rebellion. They were not demanding new laws or better, but a righteous and consistent administration of laws they regarded as already established, their immemorial birthright as Englishmen. They had found John whimsical, arbitrary, untrustworthy, never to be counted on to follow any fixed precedent or limit himself by any common understanding, a lying master who respected no man's rights and thought only of having his own will; and they came to have a final reckoning with him. And so they thrust Magna Carta under his hand to be signed, — a document of definition, which spoke of rights which had been disregarded and which must henceforth be respected, of practices until now indulged in which must be given over and remedied altogether, of ancient methods too long abandoned to which the king must return; and their proposal was this: 'Give us your solemn promise as monarch that this document shall be your guide and rule in all your dealings with us,

attest that promise by your sign manual attached in solemn form, admit certain of our number a committee to observe the keeping of the covenant, and we are your subjects in all peaceful form and obedience; — refuse, and we are your enemies, absolved of our allegiance and free to choose a king who will rule us as he should.' Swords made uneasy stir in their scabbards, and John had no choice but to sign. These were the only terms upon which government could be conducted among Englishmen.

That was the beginning of constitutional government, and shows the nature of that government in its simplest form. There at Runnymede a people came to an understanding with its governors, and established once for all that ideal of government which we now call "constitutional," — the ideal of a government conducted upon the basis of a definite understanding, if need be of a formal pact, between those who are to submit to it and those who are to conduct it, with a view to making government an instrument of the general welfare rather than an arbitrary, self-willed master, doing what it pleases, — and particularly for the purpose of safeguarding individual liberty.

The immortal service of Magna Carta was its formulation of the liberties of the individual in their adjustment to the law. The day of Magna Carta was not a day in which men spoke of political liberty or acted upon set programs of political reform; but the history of constitutional government in the modern world is the history of political liberty, the history of all that men have striven for in the reform of government, and one has the right to expect to get out of it at least a workable conception of what liberty is. Certainly the documents of English his-

4 CONSTITUTIONAL GOVERNMENT IN UNITED STATES

tory and the utterances of the greater public men on both sides of the water supply abundant material for the definition. "If any one ask me what a free government is, I reply, it is what the people think so," said Burke, going to the heart of the matter. The Declaration of Independence speaks to the same effect. We think of it as a highly theoretical document, but except for its assertion that all men are equal it is not. It is intensely practical, even upon the question of liberty. It names as among the "inalienable rights" of man the right to life, liberty, and the pursuit of happiness, as does the Virginia constitution and many another document of the time; but it expressly leaves to each generation of men the determination of what they will do with their lives, what they will prefer as the form and object of their liberty, in what they will seek their happiness. Its chief justification of the right of the colonists to break with the mother country is the assertion that men have always the right to determine for themselves by their own preferences and their own circumstances whether the government they live under is based upon such principles or administered according to such forms as are likely to effect their safety and happiness. In brief, political liberty is the right of those who are governed to adjust government to their own needs and interests.

That is the philosophy of constitutional government. Every generation, as Burke said, sets before itself some favorite object which it pursues as the very substance of its liberty and happiness. The ideals of liberty cannot be fixed from generation to generation; only its conception can be, the large image of what it is. Liberty fixed in unalterable law would be no liberty at all. Government is a part of life, and, with life, it must change, alike in its

objects and in its practices; only this principle must remain unaltered, — this principle of liberty, that there must be the freest right and opportunity of adjustment. Political liberty consists in the best practicable adjustment between the power of the government and the privilege of the individual; and the freedom to alter the adjustment is as important as the adjustment itself for the ease and progress of affairs and the contentment of the citizen.

There are many analogies by which it is possible to illustrate the idea, if it needs illustration. We say of a boat skimming the water with light foot, 'How free she runs,' when we mean, how perfectly she is adjusted to the force of the wind, how perfectly she obeys the great breath out of the heavens that fills her sails. Throw her head up into the wind and see how she will halt and stagger, how every sheet will shiver and her whole frame be shaken, how instantly she is "in irons," in the expressive phrase of the sea. She is free only when you have let her fall off again and get once more her nice adjustment to the forces she must obey and cannot defy. We speak of the 'free' movement of the piston-rod in the perfectly made engine, and know of course that its freedom is proportioned to its perfect adjustment. The least lack of adjustment will heat it with friction and hold it stiff and unmanageable. There is nothing free in the sense of being unrestrained in a world of innumerable forces, and each force moves at its best when best adjusted to the forces about it. Spiritual things are not wholly comparable with material things, and political liberty is a thing of the spirits of men; but we speak of friction in things that affect our spirits, and do not feel that it is altogether a figure of speech. It is not forcing analogies, therefore, to say that that is the

6 CONSTITUTIONAL GOVERNMENT IN UNITED STATES

freest government in which there is the least friction, — the least friction between the power of the government and the privilege of the individual. The adjustment may vary from generation to generation, but the principle never can. A constitutional government, being an instrumentality for the maintenance of liberty, is an instrumentality for the maintenance of a right adjustment, and must have a machinery of constant adaptation.

English writers have not often enough noticed that in the very generation which saw Magna Carta formulated and signed in England, a similar transaction was witnessed in Hungary. Magna Carta was signed in 1215; seven years later, in 1222, the Magyar nobles of Hungary exacted of their king a document which ran upon singularly similar lines, a "Golden Bull," to which those who struggled for privilege in Hungary always looked back as Englishmen looked back to Magna Carta. But two remarkable differences existed between Magna Carta and the Golden Bull which it is worth while to dwell upon for a moment, because of their significance with regard to the question we are discussing, — the nature of constitutional government. For all she made a similar beginning, Hungary did not obtain constitutional government, and England did. Undoubtedly the chief reason was that the nobles of Hungary contended for the privileges of a class, while the barons of England contended for the privileges of a nation, and that the Englishmen were not seeking to set up any new law or privilege, but to recover and reestablish what they already had and feared they should lose. Another and hardly less significant reason was that the Englishmen provided machinery for the maintenance of the agreement, and the Magyars did not.

Of course the parliament of England runs back in its origins beyond 1215; but the parliament which Simon of Montfort set up in 1265 and Edward confirmed in 1295 was the first that definitely received and accepted the trust of preserving the liberties, the free choices, of England against the wilful preferences of her kings, upon the basis laid in Magna Carta; and until that parliament was set up, with its burgesses and knights of the shire, the barons had attempted, as again and again they forced upon their kings a renewal of the great charter, to provide against its infringement by the watchfulness of representatives delegated from their own ranks to see that faith was kept. They had the practical instinct to see that promises upon paper are only promises upon paper, unless the party that demands privilege is as alert and as ready for action as the party that exercises power. The Magyar nobles provided no such machinery of maintenance and adjustment, and lost what they had gained. No doubt free parliaments are as important as definite charters.

And yet the other difference is the deeper and, in a sense, the more essential. The barons at Runnymede were not speaking for themselves as a class, but for Englishmen of ^{every rank} ~~every~~ rank and privilege, and they were claiming nothing novel or of their own peculiar preference and invention, but rights which they conceived to be as old as Edward the Confessor. They were speaking, not out of theory, but out of practice and experience, for the maintenance of privileges which they conceived themselves time out of mind to have possessed. They were insisting that government should be adjusted to their actual lives, accommodated to their actual experience. And so Magna Carta speaks of no new rights. It grants nothing. It merely safe-

8 CONSTITUTIONAL GOVERNMENT IN UNITED STATES

guards. It provides methods and reforms abuses. It does not say what men shall have by way of freedom and privilege; it speaks only of what restraints the king's government shall observe in seeking to abridge such freedom and privilege as Englishmen already of right enjoy. Let the famous 29th clause serve as an example. It says nothing of the grant to any man of life, liberty, or property: it takes it for granted that every man has the right to these, as our own Declaration of Independence does, and enacts simply that "no man shall be deprived of life, liberty, or property, save by the judgment of his peers and the law of the land." It is seeking to regulate the exercise of power, to adjust its operation, as safely and conveniently as may be, to that general interest which is the sum of the interest of every man; that he may be dealt with, not as the king arbitrarily pleases, but as his own peers, men of his own kind and interest, deem just, and as laws which deal equally with all men impartially direct.

Look into any constitutional document of the English-speaking race and you shall find the same spirit, the same way of action: its aim is always an arrangement, as if of business: no abstract setting forth of liberties, no pretense of grants of privilege or political rights, but always a formulation of limits and of methods, a regulation of the way governments shall act and individuals be dealt with. Take the first eight amendments to the Constitution of the United States as an example, and see in them the charter of liberties which the States insisted upon having added to the Constitution at the outset. The whole spirit and manner of the thing is exhibited in their businesslike phrases. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures shall not be violated, and no warrants shall be issued but upon probable cause, supported by oath or affirmation, and particularly describing the places to be searched, and the persons or things to be seized," is the quiet language of the Fourth Amendment, denying to the government only unreasonable powers arbitrarily exercised. The words of the Fifth Article are equally business-like and sensible: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on the presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Every clause bears the same practical character. Such provisions make of the Constitution an agreement as feasible and as acceptable as Magna Carta. It is a body of distinct stipulations as to where the lines of privilege shall run, where individual rights shall begin and governmental rights stop, in the more critical dealings between rulers and citizens.

And the whole of constitutional history is similarly concerned with definition, with method, with machinery, as if principles were taken for granted and no one doubted that men should be free, their interests righteously adjusted to the powers of government, securely safeguarded against governments' possible encroachments. The question of machinery, of ways and means, is manifestly of capital importance in a constitutional system. Such a system

10 CONSTITUTIONAL GOVERNMENT IN UNITED STATES

is based upon a definite understanding between governors and governed. No constitutional government has been without explicit written statements of the terms of the understanding such as is contained in Magna Carta. But it is important that these terms should be definite and unmistakable, not merely in order that disputes concerning its meaning and content may be avoided, but also in order that it may be clear what steps should be taken to carry it out; and the means provided for maintaining it in practice are hardly less indispensable than its own definitions. That is the reason why English constitutional history has centred about the development of parliament.

Not until after the Revolution of 1688 was parliament looked upon as modern Englishmen look upon it, as chiefly interesting because of the laws it could make. Not until the eighteenth century had passed its middle term did it come to be what it is now, the maker and unmaker of ministries, the maker and unmaker of governments. For at least four of the six hundred years during which it has been an instrument of constitutional government it was looked upon merely as the "grand assize," the great session, of the nation, whose function was criticism and restraint, which came together to see that the terms upon which English life was understood to rest were being scrupulously respected by the king and his advisers. The thought grew vague enough at times; the nation once and again lost consciousness of what its parliament meant; the parliament itself sometimes forgot for generations together what its trust and duty was; but every critical turn in affairs brought the whole impulse and conception sharply to light again, and the great tradition was never lost.

We speak now always of 'legislatures,' of 'law-making'

assemblies, are very impatient of prolonged debates, and sneer at parliamentary bodies which cannot get their 'business' done. We join with laughing zest in Mr. Carlyle's bitter gibe at "talking shops," at parliaments which spend their days in endless discussion rather than in diligent prosecution of what they came together to 'do.' And yet to hold such an attitude toward representative assemblies is utterly to forget their history and their first and capital purpose. They were meant to be talking shops. The name "parliament" is no accidental indication of their function. They were meant to be grand parleys with those who were conducting the country's business: parleys concerning laws, concerning administrative acts, concerning policies and plans at home and abroad, in order that nothing which contravened the common understanding should be let pass without comment or stricture, in order that measures should be insisted on which the nation needed, and measures resisted which the nation did not need or might take harm from. Their purpose was watchful criticism, talk that should bring to light the whole intention of the government and apprise those who conducted it of the real feeling and desire of the nation; and how well they performed that function many an uneasy monarch has testified, alike by word and act.

It was as far as possible from the original purpose of representative assemblies that they should *conduct* government. Government was of course to be conducted by the immemorial executive agencies to which Englishmen had grown accustomed, and parliaments were to support those agencies and supply them with money, and to assent to such laws as might be necessary to strengthen the government or regulate the affairs of the country, public or

12 CONSTITUTIONAL GOVERNMENT IN UNITED STATES

private. Their function was common counsel; their standard of action the ancient understandings of a constitutional system, — a system based on understandings, written or implicit in the experiences and principles of English life. They were expected to give their assent where those understandings were served, and to withhold it where they were disregarded. They were to voice the conscience of the nation in the presence of government and the exercise of authority.

To recall the history is to recall the fundamental conception of the whole process, and to understand our own institutions as they cannot be understood in any other way. It was only by a very slow and round-about development that representative assemblies — at any rate that the English representative assembly, which is the type of all the rest — came to possess or exercise the right to make laws. Many a generation went by before it was supposed that parliament had anything to do with the laws except to give its assent to them or withhold it when new enactments were submitted to it from the king. In the course of time it found only too often that changes in the law were submitted to it in vague general terms and then, after its assent had been given, were formulated and enforced in terms which gave them another scope and color; and such practices led the leaders of the Commons at last to insist that laws should be submitted to them in the full form and statement in which they were to be enforced. It was an easy step from that to the insistence that formulations which did not suit them should be changed, — an easy step to amendment; but it was a step they were long in taking, and even after they had taken it, they suffered the king's officers to formulate the amendment, and often

found themselves again cheated, their real purpose defeated by the terms in which it was made. Even so, it was a long time before they undertook to draft 'bills' or proposals of their own, and a longer time still before it became settled practice to have the exact wording of every law submitted first to the debate and choice of parliament. To this day the legislation of parliament in all important matters comes to it on the proposal of the ministers of the crown and is formulated by the law officers of the government. Modern English ministries are in effect merely committees of the House of Commons, made and unmade as parties shift and majorities change; but parliament is still in all its larger aspects the grand assize of the nation, assembled not to originate business, but to apprise the government of what the nation wishes.

Our own legislatures were of the same character and origin. Their liberties and functions grew by similar processes, upon similar understandings, out of the precedents and practices of colonial laws and charters and the circumstances of the age and place. There is a passage in Burke which interprets their growth and character with perfect historical insight, as bodies which had grown, almost insensibly, upon the model of parliament itself. He uttered it as part of his defense of American self-government against the encroachment of parliament, and no one writing in a cooler age can improve upon its analysis.

It is plain that parliaments, that representative bodies, free to criticize not only but acting with independence, uttering the voice of those who are governed, and enjoying such authority as no king or president or officer of any kind may question or gainsay, constitute an indispensable part of the institutional make-up of a constitutional govern-

14 CONSTITUTIONAL GOVERNMENT IN UNITED STATES

ment. We sometimes attach a very artificial significance to the word 'institution.' Speaking in the terms of history, and particularly of political history, an institution is merely an established practice, an habitual method of dealing with the circumstances of life or the business of government. There may be firmly established institutions of which the law knows nothing. In casting about for a satisfactory way in which to nominate candidates for the office of President of the United States, for instance, our party leaders devised the national nominating convention, and it has become one of our institutions, though neither the constitution nor any statute knows anything of it. And so the growth of constitutional government has been the growth of institutions, of practices, of methods of perfecting the delicate business of maintaining an understanding between those who conduct the government and those who submit to it. The object of constitutional government is to bring the active, planning will of each part of the government into accord with the prevailing popular thought and need, and thus make it an impartial instrument of symmetrical national development; and to give to the operation of the government thus shaped under the influence of opinion and adjusted to the general interest both stability and an incorruptible efficacy. Whatever institutions, whatever practices serve these ends, are necessary to such a system: those which do not, or which serve it imperfectly, should be dispensed with or bettered. And it may be said that the history of constitutional government has been an experimental search for the best means by which to effect these nice adjustments.

The modern development of the functions of representative assemblies has been in many ways inconsistent with

the real origins and purposes of the practices or institutions in which they had their rise and justification. We now regard them, not as bodies assembled to consult with the government in order to apprise it of the opinion of the nation with regard to what the government is planning or doing, not as bodies outside the government set to criticize, restrain, and guide it, but as themselves parts of the government, its originating, law-making parts. What used to be called the Government, we now speak of only as the 'Executive,' and regard as little more than an instrumentality for carrying into effect the laws which our representative assemblies originate. Our laws abound in the most minute administrative details, prescribe the duties of executive officers and the method by which statutes are to be put into practice with the utmost particularity, and all the reins of government seem to have fallen to those who were once only its censors. It is, of course, a necessary inference from even the most superficial analysis of constitutional government that under it those who administer the law and direct the policy of the nation in its field of action shall be strictly subject to the laws, must observe the prescribed methods and understandings of the system very precisely; but it is by no means a necessary inference that they shall be in leading strings and shall be reduced to be the mere ministerial agents of a representative assembly; and the inconveniences and anomalies of this new practice and conception in the use of assemblies will, many of them, become manifest enough in our subsequent examination of our government in its practical operations.

To inquire into such matters is to make intimate approach to the very essence of constitutional government; but we approach that essence still more intimately when we turn

16 CONSTITUTIONAL GOVERNMENT IN UNITED STATES

from the community, from the nation, and from the assembly which represents it, to the individual. No doubt a great deal of nonsense has been talked about the inalienable rights of the individual, and a great deal that was mere vague sentiment and pleasing speculation has been put forward as fundamental principle. The rights of man are easy to discourse of, may be very pleasingly magnified in the sentences of such constitutions as it used to satisfy the revolutionary ardor of French leaders to draw up and affect to put into operation; but they are infinitely hard to translate into practice. Such theories are never 'law,' no matter what the name or the formal authority of the document in which they are embodied. Only that is 'law' which can be executed, and the abstract rights of man are singularly difficult of execution. None the less, vague talk and ineffectual theory though there be, the individual is indisputably the original, the first fact of liberty. Nations are made up of individuals, and the dealings of government with individuals are the ultimate and perfect test of its constitutional character. A man is not free through representative assemblies, he is free in his own action, in his own dealings with the persons and powers about him, or he is not free at all. There is no such thing as corporate liberty. Liberty belongs to the individual, or it does not exist.

And so the instrumentalities through which individuals are afforded protection against the injustice or the unwarranted exactions of government are central to the whole structure of a constitutional system. From the very outset in modern constitutional history until now it has invariably been recognized as one of the essentials of constitutional government that the individual should be provided with

some tribunal to which he could resort with the confident expectation that he should find justice there, — not only justice as against other individuals who had disregarded his rights or sought to disregard them, but also justice against the government itself, a perfect protection against all violations of law. Constitutional government is *par excellence* a government of law.

I am not repeating the famous sentence of the Massachusetts Bill of Rights, "to the end that this may be a government of laws and not of men." There never was such a government. Constitute them how you will, governments are always governments of men, and no part of any government is better than the men to whom that part is intrusted. The gauge of excellence is not the law under which officers act, but the conscience and intelligence with which they apply it, if they apply it at all. And the courts do not escape the rule. So far as the individual is concerned, a constitutional government is as good as its courts; no better, no worse. Its laws are only its professions. It keeps its promises, or does not keep them, in its courts. For the individual, therefore, who stands at the centre of every definition of liberty, the struggle for constitutional government is a struggle for good laws, indeed, but also for intelligent, independent, and impartial courts. Not only is it necessary that the people should be spoken for in the conduct of the government by an assembly truly representative of them; that only such laws should be made or should be suffered to remain in force as effect the best regulation of the national life; and that the administration should be subject to the laws. It is also necessary that there should be a judiciary endowed with substantial and independent powers and secure against all corrupting or perverting

18 CONSTITUTIONAL GOVERNMENT IN UNITED STATES

influences; secure, also, against the arbitrary authority of the administrative heads of the government.

Indeed there is a sense in which it may be said that the whole efficacy and reality of constitutional government resides in its courts. Our definition of liberty is that it is the best practicable adjustment between the powers of the government and the privileges of the individual; and liberty is the object of constitutional government. The ultimate and characteristic object of a constitutional system is not to effect the best possible adjustment between the government and the community, but the best possible adjustment between the government and the individual; for liberty is individual, not communal. Throughout English history, throughout all the processes which have given us constitutional government as the modern world knows it, those who strove to restrain or to moralize government have perceived that the whole reality of the change must find its expression in the opportunity of the individual to resort for the vindication of his rights to a tribunal which was neither government nor community, but an umpire and judge between them, or rather between government and the man himself, claiming rights to which he was entitled under the general understanding.

Nothing in connection with the development of constitutional government is more remarkable, nothing commends itself more to the understanding of those who perceive the real bases of human dignity and capacity, than the way in which it has exalted the individual, and not only exalted him, but at the same time thrown him upon his own resources, as if it honored him enough to release him from leading strings and trust him to see and seek his own rights. The theory of English and American law is that no man

must look to have the government take care of him, but that every man must take care of himself, the government providing the means and making them as excellent as may be, in order that there may be no breach of the peace and that everything may be done, so far as possible, with decency and in order, but never itself taking the initiative, never of its own motion intervening, only standing ready to help when called on. Such an attitude presupposes both intelligence and independence of spirit on the part of the individual: such a system elicits intelligence and creates independence of spirit. The individual must seek his court and must know his remedy, and under such a compulsion he will undertake to do both. The stimulation of such requirements is all that he needs, in addition to his own impulses and desires, to give him the attitude and habit of a free man; and the government set over such men must look to see that it have authority for every act it ventures upon.

It further emphasizes this view and purpose of our law, that no peculiar dignity or sanctity attaches amongst us to any officer of government. The theory of our law is that an officer is an officer only so long as he acts within his powers; that when he transcends his authority he ceases to be an officer and is only a private individual, subject to be sued and punished for his offense. An officer who makes a false arrest without warrant is liable to civil suit for damages and to criminal prosecution for assault. He has stepped out of the ranks of public officers, represents nobody but himself, and is merely committing a private wrong. That is the explicit principle of American law not only, but of English law also: the American practice is derived from the English. It is a logical, matter-of-course

inference of the constitutional system: representatives of government have no authority except such as they derive from the law, from the regulations agreed on between the government and those who are to be governed. Whoever disregards the limits of the law transgresses the very fundamental presumptions of the system and becomes merely a lawbreaker, enjoying no privilege or exemption. Such a principle in effect repeats the understanding of Runnymede: 'Here is this charter; sign it and observe it, and you are our king; refuse to sign it, violate or ignore it, and you are not our king, but a man without kingly authority who has done us wrong, and we are your enemies and shall seek redress.' It is the same understanding from the king at the top to the constable at the bottom.

It remains only to note what may be called the atmosphere of constitutional government. It is the atmosphere of opinion. Opinion is, of course, the atmosphere of every government, whatever its forms and powers: governments are contrasted with one another only by the degree and manner in which opinion affects them. There is nowhere any such thing as a literally absolute government. The veriest despot is a creature of circumstances, and the most important circumstance of all, whether he is conscious of adjusting himself to it or not, is the disposition of those about him to obey him or to defy him. Certain things are definitely expected of him: there are certain privileges which he must always respect, certain expectations of caste and of rank which he must always punctiliously regard. Above all there is the great body of habit, the habitual frame of the life in which his own people have been formed, which he would throw himself against in vain. The boundaries of his authority lie where he finds the limits

of his subjects' willingness or ability to obey him. They cannot obey him if he seek to force upon them rules too strange to their habit: they will not know how, and their spirits will revolt. They will not obey him if he outrage them by too gross a violation of the understandings which they have come to regard as sacred and of the very essence of their life and happiness. The difference between a constitutional system and an unconstitutional is that in a constitutional system the requirements of opinion are clearly formulated and understood, while in an unconstitutional they are vague and conjectural. The unconstitutional ruler has to guess where his subjects will call a halt upon him, and experiment at the hazard of his throne and head; the constitutional ruler definitely knows the limits which he must not transgress and is safe in his authority so long as he does not overstep them.

But there is this radical difference between the opinion which limits the power of an unconstitutional ruler and that which limits the powers of a constitutional government: that the one is unorganized opinion, the other organized; the one hardly more than an impatient stir at any disturbance of tradition or of habit, the other a quick concert of thought, uttered by those who know how to guide both counsel and action. Indeed, there has seldom been in the case of a despotic government anything that really corresponded with what in constitutional government is known as public opinion. The wit who described the government of France as despotism tempered by epigram was really formulating one of the approaches to constitutional government. When opinion spoken in the salon begins to be a definite organ of criticism, when criticism has become concerted and powerful enough and

sufficiently mixed with the passion of action to serve from time to time as a modifying, guiding, and controlling force, the development of constitutional government has begun.

It is therefore peculiarly true of constitutional government that its atmosphere is opinion, the air from which it takes its breath and vigor. The underlying understandings of a constitutional system are modified from age to age by changes of life and circumstance and corresponding alterations of opinion. It does not remain fixed in any unchanging form, but grows with the growth and is altered with the change of the nation's needs and purposes. The constitution of England, the original and typical constitutional government of the world, is unwritten except for its statement of individual right and privilege in Magna Carta, in the Bill of Rights, and in the Petition of Right; is, in other words, only a body of very definite opinion, except for occasional definitions of statute here and there. Its substance is the thought and habit of the nation, its conscious expectations and preferences; and around even a written constitution there grows up a body of practices which have no formal recognition or sanction in the written law, which even modify the written stipulations of the system in many subtle ways and become the instrument of opinion in effecting a slow transformation. If it were not so, the written document would become too stiff a garment for the living thing.

It is in this sense that institutions are the creatures of opinion. Their breath and vigor goes out of them when they cease to be sustained by the conscious or habitual preference of the people whose practice has created them; and new institutions take their place when once that practice is altered. That is what gives dignity to citizenship

WHAT IS CONSTITUTIONAL GOVERNMENT?

among a free people. Every man's thought is part of the vital substance of its institutions. With the change of his thought, institutions themselves may change. That is what constitutes citizenship so responsible and solemn a thing. Every man in a free country is, as it were, put upon his honor to be the kind of man such a polity supposes its citizens to be: a man with his thought upon the general welfare, his interest consciously linked with the interests of his fellow-citizens, his sense of duty broadened to the scope of public affairs. Every generation in a free state realizes that the perpetuation of its institutions depends upon the thought and disposition of the generations which are to follow, and busies itself to hand the impulse and the conception on by careful processes of education, stamping its thought upon young men, seeking to make its own frame of mind permanent. Old phrases spring to new significance as one's thought clears in such matters. "Eternal vigilance is the price of liberty." The threadbare phrase seems new stuff when we wear it on our understandings. The vigilance of intelligently directed opinion is indeed the very soil of liberty and of all the enlightened institutions meant to sustain it. And that will always be the freest country in which enlightened opinion abounds, in which to plant the practices of government. It is of the essence of a constitutional system that its people should think straight, maintain a consistent purpose, look before and after, and make their lives the image of their thoughts.*

We may summarize our view of constitutional government by saying that its ultimate and essential objects are:

1st. To bring the active and planning will of each part of the government into accord with the prevailing popular thought and need, in order that government may be the

** always true this last*

A. . . .

- CONSTITUTIONAL GOVERNMENT IN UNITED STATES -

Impartial instrument of a symmetrical national development;

2d. To give to the law thus formulated under the influence of opinion and adjusted to the general interest both stability and an incorruptible efficacy;

3d. To put into the hands of every individual, without favor or discrimination, the means of enforcing the understandings of the law alike with regard to himself and with regard to the operations of government, the means of challenging every illegal act that touches him.

And that, accordingly, the essential elements and institutions of a constitutional system are: —

1st. A more or less complete and particular formulation of the rights of individual liberty, — that is, the rights of the individual against the community or its government, — such as is contained in Magna Carta and in the Bills of Rights attached to our constitutions;

2d. An assembly, representative of the community or of the people, and not of the government: a body set to criticize, restrain, and control the government;

3d. A government or executive subject to the laws, and

4th. A judiciary with substantial and independent powers, secure against all corrupting or perverting influences; secure, also, against the arbitrary authority of the government itself.