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WRITTEN AND UNWRITTEN CONSTITUTIONS IN THE UNITED STATES.

Prior to the independence of the American Colonies a fairly just conception of constitutional limitations on the powers of the different departments of government had been developed in Great Britain. The leaders of the revolutionary movement in the Colonies simply amplified and announced in more definite form the propositions which they conceived to be settled rules of constitutional government. But in framing their own State constitutions, and subsequently the federal constitution, they deemed it expedient to express these limitations in their written instruments of government in order that the very documents which contained the grant of power to the governing body should contain also a statement of the limitations upon that power. These limitations were usually embodied in a declaration or bill of rights, although the federal constitution, for reasons which need not now be gone into and which are well known to the students of our constitutional history, was adopted without a definite bill of rights, but with the understanding that by subsequent amendment the usual limitations should be added, as was done. It is doubtful whether the embodiment of limitations in the bills of rights was resorted to with the idea that they would have any greater inherent force by reason of being thus reduced to definite form; but it was natural that they should be thus specifically expressed in order that there should remain no ambiguity as to their recognition. A result fol-

lowed, however, which was probably not anticipated. The courts assumed the power to decide that an exercise of authority by any department of government in contravention of the limitations was illegal and void, and of no effect; and thus it came about that the courts took upon themselves the construction of statutes especially with a view to determining whether they were contrary to any limitations found in the constitution.

It can hardly be claimed at this day, after all the courts of the country have approved of and exercised the power to pass on the constitutionality of statutes, the exercise of that power was in the first instance usurpation on the part of the courts. Under the new theory of government the logical result of saying that the legislative department, for instance, had exceeded the authority conferred upon it was to say also that its act was void and ineffectual, and that in deciding a case in which the validity or interpretation of such statute was involved a court must take notice of the fact. But the important point is that this result was probably not consciously sought, and that written constitutions were not formulated with the purpose that the declarations of rights embodied in them should have any such effect.

The courts have, it is true, fully recognized in theory and generally exercised in practice the presumption that an act of the legislature, being the formal declaration of the will of a co-ordinate branch of the government, should not be set aside on the ground that some restriction or limitation of the constitution has been ignored, unless the unconstitutionality of the statute is clear and plain. But notwithstanding this presumption, a statute which is in any way detrimental to the personal or property interests of individuals or corporations is open to a variety of grounds of attack as to its validity under the State or the federal constitution. The legislative body may have failed in some respect to comply with the specific directions of the State constitutions as to the method of enacting statutes. Then the statute is to be tested as to a variety of independent and disconnected prohibitions in the State constitution. It must not be open to the objection that it is special or class legislation, unless it pertains to some of the groups of subjects as to which special legislation is permissible on the

ground that no general provisions can be made applicable. It must not embrace more than one subject which shall be expressed in the title. It must not provide for or result in the taking of private property for public use without compensation, and in some States it must not even authorize the damaging of private property for public use until compensation for such damage has been provided for. And as it is often a difficult question to determine what is the taking or damaging of private property for a public purpose, this ground of unconstitutionality may sometimes be seriously or even successfully urged although there was no general purpose on the part of the legislature to confiscate property. The statute must not expressly or in effect delegate legislative authority, save in so far as the exercise of legislative functions may be conferred on a subordinate municipal body. It must not constitute an interference with the legitimate exercise of constitutional power by coordinate branches of government, especially by the judicial branch, although it remains still to a great measure uncertain how far the legislature may control the courts in the exercise of their inherent judicial functions. If the statute provides for the imposition of punishment for a prohibited act as a crime, all the guarantees in the constitution as to criminal procedure must have been carefully respected, and the statute must not cast any additional burden either as to procedure or punishment on one who has already done the act which the statute prohibits. And finally the statute must not have the effect of depriving any person of life, liberty or property without due process of law, although the courts themselves have had much trouble in clearly formulating any set rules as to what are the personal and property rights which the legislature in the interest of the public may not impair or take away. If the legislature has to the satisfaction of the court successfully run this gauntlet of prohibitions, it is still open to inquiry in the State court whether it has not over-stepped some of the restraints imposed on State legislation by the federal constitution, such as that no State can impair the obligation of contracts or deprive any person of his life, liberty or property without due process of law or deny to him the equal protection of the laws, and that no State shall deny

full faith and credit to the judicial proceedings of another State or deny to the citizens of another State all the privileges and immunities of citizens of the State in which the law is enacted. And when the State court has found that the statute is not in contravention of any limitation imposed or privilege guaranteed by the State constitution or the constitution of the United States, and is not in conflict with any exercise of lawful authority on the part of the federal government, it is still open to one questioning the validity of the statute to have its conformity with the provisions of the federal constitution tested in the Supreme Court of the United States.

It is not to be denied that in the application of the particular guarantees as to procedure in criminal cases men who ought to be punished have often escaped their just deserts. The zeal with which the constitution makers have guarded the rights of individuals against the exercise of any kind of inquisitorial power on the part of the government save in accordance with a procedure that seems to be framed much more zealously for the protection of the innocent than for the punishment of the guilty, has its historical reason in the fact that the Colonists were rebelling against a government which they believed was attempting to exercise arbitrary and unwarranted powers; and in their natural distrust, resulting from that situation, of all exercise of power on the part of government they did not, perhaps, sufficiently realize that a government founded on the consent of the people and controlled largely in its operation by the will of the people and through officers selected by the people might be reasonably expected to refrain from such legislation as they found objectionable on the part of the British parliament. They thought it necessary to make assurance doubly sure by imposing on their own government those limitations they should like to have had imposed on the government of Great Britain in which they had no representation, and which recognized no responsibility to them.

The courts have, however, confined themselves in the exercise of the power to declare acts of other departments of the government to be unconstitutional and therefore void, to the interpretation of the written constitutions,

which they have treated as specific instruments containing general or express grants and limitations of power. They have, it is true, been liberal in their interpretation and have by means of the exercise of a considerable latitude in construction extended the constitutions to cover cases which could not be presumed to have been in the minds of their framers or the people who adopted them. They have been praised indeed for accepting the theory of liberal interpretation, but it may well be said that any other theory would have been absurd. Not only are written constitutions like other instruments intended to cover cases which may arise, but which cannot be anticipated, and which must therefore be decided in accordance with the general intent exemplified by the instruments themselves; but they are charts for governments intended to be perpetual and which must necessarily deal with new conditions though wholly outside of the anticipation or experience of the men who framed the instruments. The courts have, however, frequently been asked and sometimes evidently have been tempted to go beyond the construction of the written instruments and to declare the general purpose for which constitutional governments in the American sense are created, and to impose restrictions on executive and legislative power not warranted by any interpretation, even the most liberal, of the language found in the written documents. But, with a self-restraint for which they are not usually given credit, they have entirely and emphatically declined to become the constitution-making power in our governmental system. They have refused to exercise supervision over the other departments of government save as those departments are in the exercise of their powers limited by the written constitutions. They have refused to be appealed to for relief against legislative or executive action on the ground that it was unwise, unjust or oppressive save so far as protection could be found in the instruments on which the legislative or executive action was predicated.

The result of the exercise by the courts of the power to declare statutes unconstitutional because of some express or implied restrictions or limitations found in the State or federal constitution, has been to give to constitutional law a broader meaning and scope than it was conceived of

as having when the colonists discussed the constitutionality of the acts of the British King or parliament. When we now speak in the United States with reference to an act of congress or of a State legislature as being unconstitutional, we mean that it is invalid, and not recognized by the courts as entitled to any effect. It is true that the courts only decide the cases before them; but when in deciding a particular case they have held a statute to be in excess of the power granted to the legislature enacting it, or in violation of some limitation or prohibition in the constitution which is binding upon that legislature, then we say with propriety that the statute is unconstitutional and invalid, meaning thereby that whenever that statute is called in question any court recognizing the authority of the court which has first passed upon the question will undoubtedly follow its decision, and the statute will thus be in effect inoperative because judicially unrecognized. The statute is not expunged from the statute books, nor is it impossible that it may be given some force and effect by officers whose action may not be subject to review in the courts, but so far as the courts are concerned we treat it as not existing. Likewise we speak of a constitution as a written instrument having binding effect on all the departments of government and recognized by the courts as prescribing and circumscribing either expressly or by implication, by specific provisions or in general terms, the powers and functions of the departments of government for which it provides. We do not regard it as the source of sovereign power but as the written voice of the body of the people in which sovereign power exists, and as the only expression of their will in conferring upon organized government the powers which it shall exercise. It is evident, therefore, that a statute which might in a proper sense have been spoken of as unconstitutional before written constitutions came into use might not be unconstitutional under the constitutions as written; and on the other hand that many statutes which would have been recognized as perfectly legitimate under the unwritten constitution of Great Britain would be unconstitutional and therefore invalid under the provisions of our written constitutions. It would no doubt be perfectly proper to speak of

an unwritten constitution of a State or of the United States if it were understood that the speaker was referring to some general principle of constitutional government recognized in Great Britain, but not embodied in specific form in our written constitutions, but as this language would now be misunderstood without a specific explanation of its meaning, we might with propriety confine the use of the terms "constitutional" and "unconstitutional" to acts which the courts in the interpretation of the constitutions will declare valid or invalid. It may be that in a general discussion of constitutional law in the broadest sense of that term we can still properly include the discussion of the principles of our government, without particularly limiting ourselves to those principles which are expressly recognized in our written instruments of government; but the general effect of the introduction of written constitutions and of the exercise by the courts of the power to interpret and apply them as restraints on the power of other departments of government has been to give a different meaning to constitutional law from that which was recognized by the American people before the States had adopted written constitutions.

That this has been the general understanding as to the meaning of these terms as applied in the States of the Union seems to be unquestionable, but we have now been brought to confront a situation which may require a considerable revision of our conceptions as to the meaning of these terms and a return to the recognition of the broader meaning necessitated by the conception of an existing unwritten constitution. It is hardly necessary to suggest that this new situation has arisen out of recent decisions of the Supreme Court of the United States to the effect that in legislating for our newly acquired insular possessions congress is not limited by the restrictions found in the federal constitution as originally adopted and the amendments subsequently added to it. The anomaly of the situation is not, however, merely the result of a decision of the Supreme Court, but has arisen from the different relations to the federal government existing on the part of those people who live in territories or territorial possessions of the United States, as distinct from those who live in the States

of the Union. The relations of the people within State limits to the federal government, irrespective of whether they are citizens or aliens, are not in any way affected by these decisions and the powers of the federal government as to the people of the States and the property within their limits are determined by the rules of interpretation of the federal constitution which have been evolved through the judicial development of our theory of government. But not until recently have the relations of the people in the territories and territorial possessions and the powers of the federal government with reference to them and their property been fully discussed. At last, however, the fundamental basis on which rests the power of the federal government with reference to people and property in the territories has been settled (unfortunately by a divided court), and while the results of the application of these fundamental principles to particular cases may still remain subjects for discussion, it seems useless to assume that there is any uncertainty as to the proposition that congress legislates for these people in pursuance of the power given it in brief terms in Section 3 of Article IV of the federal constitution "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," and that in thus legislating it is not bound by the general provisions of the first eight articles of amendment to the constitution which have been found to be applicable only with reference to legislation for the people of the States.

And here it seems proper to remove all ambiguity of language for further consideration of the question by saying that there cannot be any fundamental difference as to the powers of congress between the organized territories on the continent and the unorganized territories recently acquired from Spain; for while the federal constitution in all its provisions is no doubt in fact applicable to the people in all the territories which had been organized with territorial governments prior to the acquisition of our insular possessions, they are in force in such territories by virtue of action of congress or treaty and not by their inherent force, and it is possible, in discussing the question as to the powers of congress, to draw a distinct line between the

people in the States and the people in the territories and territorial possessions, whatever may be the form of government created for them by congress.

In the case of Dorr *v.* United States,[1] the court distinctly reaffirms and applies to the solution of the questions involved in it the conclusions announced in some of the opinions rendered in the previous so-called Insular Cases, to the effect that the fifth and sixth amendments to the federal constitution guaranteeing in general terms common law procedure, including indictment and jury trial in criminal cases, are not binding upon congress in providing for such procedure in the insular possessions. It is not necessary now to review in detail the controversy on this question between the judges of the Supreme Court as shown in their various opinions. It is enough to say that a conclusion has been definitely reached, and that it is now acquiesced in by all the judges but one; and the only legitimate question open for discussion is as to the extent to which the principles announced shall be carried and their bearing on the constitutional rights of the inhabitants of our insular possessions.

The final conclusions of the Supreme Court in the Dorr case with reference to the fifth and sixth amendments are plainly applicable also to the other amendments to the federal constitution composing what is generally denominated the bill of rights of that instrument. It is true that the court quotes with approval language used in Hawaii *v.* Mankichi,[2] in which it is said that trial by jury and indictment by grand jury are not fundamental in their nature, but concern merely a method of procedure. But if the court may at its discretion determine which of the guaranties contained in the first eight amendments are fundamental and which are only incidents of a method of procedure, they may determine what are and what are not constitutional provisions applicable in the insular possessions, not in an interpretation of the language of the amendments, which makes no distinction between fundamental rights and methods of procedure, but in accordance with some general principles of constitutional law not found in the written instrument, and which therefore must be in nature

[1] (1904) 195 U. S. 138. [2] (1903) 190 U. S. 197.

unwritten, and a part of a cumulative or evolved constitution resting on general consent and not a part of a conventional or enacted constitution. We have here then for the first time the suggestion that there is an unwritten constitution regulating the exercise of power by congress in respect of matters not controlled by provisions of the written constitution. It seems that it is not to be understood from what is said by the court that the rights of people in the States in their relations to the federal government are to be determined by any provision of an unwritten constitution, but as the first eight amendments are applicable only to the people in the States and not to the people of the territories, therefore with reference to legislation for the territories the limitations on the power of congress are unwritten and are to be deduced by analogy from the provisions of the written constitution so far as they are applicable to the condition of those people and, no doubt, also from the general principles of the unwritten constitution of Great Britain as it was recognized by the people of the Colonies and from the generally accepted theory of our system of government.

The court does, however, quote with approval language of Mr. Justice Curtis in the Dred Scott Case[1] to the effect that congress is restrained by express limitations in the federal constitution as originally adopted, such as that it shall not pass *ex post facto* laws or bills of attainder; but, turning to the instrument, it appears that these express limitations in the article relating to the power of congress include no subjects aside from those just mentioned except the suspension of the writ of *habeas corpus* and the power with reference to taxation and the regulation of commerce. As to commerce it has already been decided in the Insular Cases that congress in the exercise of its power to legislate for territorial possessions outside of the States may impose tariffs which are not uniform with those applicable to the ports of the States, and therefore it is evident that the express limitations which the court can hereafter recognize as controlling congress in its legislation for the insular possessions are of very narrow scope.

[1] (1856) 19 How. 393, 604.

We come, then, to the question, what, if any, limitations exist on the powers of the federal government in legislating for the people of the insular possessions, and where are these limitations to be found?

To say that the federal government is as to these people an arbitrary and unlimited sovereign power would be to declare the federal government as to them to be a government without a constitution, a government as arbitrary and despotic and as unlimited in the exercise of its power as that of the Czar of Russia or the Sultan of Turkey, more arbitrary and unlimited than that of King George III in its rule over the people of the English Colonies in America. That no civilized nation, and especially no nation whose system of government has been developed in accordance with the principles of constitutional government as it has existed in England and America for many centuries, will assert the right to govern any portion of its subjects without any constitutional limitations or restrictions, is too self-evident to justify argument. All will concede that even though the general constitutional guaranties for the protection of life, liberty and property found in the federal constitution are not applicable in terms, many of them are applicable in principle to the federal government in legislating for the subjects of the United States wherever they may be and whatever may be their condition.

But the constitutional restrictions thus resting on the exercise of federal power with reference to the territories will be the restrictions of an unwritten, not those of a written, constitution, and if we are not mistaken as to the foundation on which rests the power of the courts to declare acts of co-ordinate branches of the government to be invalid because in violation of constitutional restrictions, it will necessarily follow that the limitations of this unwritten constitution cannot be enforced by judicial action, but must depend for their enforcement upon the same influences which have enforced the rules of the unwritten constitution of Great Britain. It will not be safe nor expedient to recognize the power of a court to determine what acts of the executive or legislative department are in contravention of these unwritten and necessarily somewhat indefinite restrictions.

But why should courts have such authority? The judicial power is co-ordinate, only, with the power of the executive and legislative departments. Those departments are bound and may reasonably be expected to conform to constitutional restrictions on their own responsibility, and not merely because in the event of over-stepping proper bounds their action may be held to be invalid. The application of these broad constitutional principles will involve great questions of public policy and public welfare; they will be questions largely of a political nature, political in the broad and proper sense of the term; and it is yet to be proven that in the solution of such questions the judiciary is any better qualified than the executive or the legislative branch of government, to reach wise and sound conclusions. But, whatever may be our individual opinions as to the responsibility of the executive and legislative departments to the controlling mandates of an unwritten constitution, I think we must agree that it is unwise and impracticable to recognize the paramount supremacy of the courts in the application of such a constitution. They may properly be relied upon to construe and apply the provisions of a definite written instrument, but they are not well fitted for the determination of political questions.

If we may be somewhat concerned as to the consequences which are to follow the recognition of the principle that federal power in the territories is subject only to the limitations of an unwritten constitution, we may on the other hand be relieved by the thought that greater elasticity will be given to the institutions established in our territorial possessions, and greater adaptability to conditions there existing will be made possible, conditions for which the provisions of the federal constitution were never intended and which they could not without great strain be made to meet; and we shall avoid the danger that, in the effort by liberal interpretation to make the provisions of the written constitution fit these new conditions, violence shall be done to the spirit of the instrument itself, and the legitimate protection which it should afford within the limits of its proper application shall be lost. We have every reason to hope and expect that out of the strain and stress incident to the adaptation of our institutions to new conditions, there shall

be a new development of principles of constitutional law, consistent with national integrity, promotive of the welfare of the people to be governed, and in harmony with the principles of free government as it has been developed among the Anglo-Saxons.

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