CHAPTER III.

THE FORMATION AND AMPENDMENT OF STATE CONSTITUTIONS.

The Constitution of the United States assumes the existence of thirteen distinct State governments, over whose people its authority was to be extended if ratified by conventions chosen for the purpose. Each of these States was then exercising the powers of government under some form of written constitution, and that instrument would remain unaffected by the adoption of the national Constitution, except in those particulars in which the two would come in conflict; and as to those, the latter would modify and control the former. But besides this fundamental law, every State had also a body of laws, prescribing the rights, duties, and obligations of persons within its jurisdiction, and establishing those minute rules for the various relations of life which cannot be properly incorporated in a constitution, but must be left to the regulation of the ordinary law-making power.

By far the larger and more valuable portion of that body of laws consisted of the common law of England, which had been transplanted in the American wilderness, and which the colonists, now become an independent nation, had found a shelter of protection during all the long contest with the mother country, brought at last to so fortunate a conclusion.

The common law of England consisted of those maxims of freedom, order, enterprise, and thrift which had prevailed in the conduct of public affairs, the management of private business, the regulation of the domestic institutions, and the acquisition, control, and transfer of property from time immemorial. It was the outgrowth of the habits of thought and action of the people, and was modified gradually and insensibly from time to time as those habits became modified, and as civilization advanced, and new inventions introduced new wants and conveniences, and new modes of business. Springing from the very nature of the people themselves, and developed in their own experience, it was obviously the body of laws best adapted to their needs, and as they took with them their nature, so also they would take with them these

laws whenever they should transfer their domicile from one country to another.

To eulogize the common law is no part of our present purpose. Many of its features were exceedingly harsh and repulsive, and gave unmistakable proofs that they had their origin in times of profound ignorance, superstition, and barbarism. The feudal system, which was essentially a system of violence, disorder, and rapine, gave birth to many of the maxims of the common law; and some of these, long after that system had passed away, may still be traced in our law, especially in the rules which govern the acquisition, control, and enjoyment of real estate. The criminal code was also marked by cruel and absurd features, some of which have clung to it with wonderful tenacity, even after the most stupid could perceive their inconsistency with justice and civilization. But, on the whole, the system was the best foundation on which to erect an enduring structure of civil liberty which the world has ever known. It was the peculiar excellence of the common law of England that it recognized the worth, and sought especially to protect the rights and privileges, of the individual man. Its maxims were those of a sturdy and independent race, accustomed in an unusual degree to freedom of thought and action, and to a share in the administration of public affairs; and arbitrary power and uncontrolled authority were not recognized in its principles. Awe surrounded and majesty clothed the king, but the humblest subject might shut the door of his cottage against him, and defend from intrusion that privacy which was as sacred as the kingly prerogatives. The system was the opposite of servile; its features implied boldness and independent self-reliance on the part of the people; and if the criminal code was harsh, it at least escaped the inquisitorial features which were apparent in criminal procedure of other civilized countries, and which have ever been fruitful of injustice, oppression, and terror.

For several hundred years, however, changes had from time to time been made in the common law by means of statutes. Originally the purpose of general statutes was mainly to declare and reaffirm such common-law principles as, by reason of usurpations and abuses, had come to be of doubtful force, and which, therefore, needed to be authoritatively announced, that king and sub-

1 "A feudal kingdom was a confederacy of a numerous body, who lived in a state of war against each other, and of rapine towards all mankind; in which the king, according to his ability and vigor, was either a cipher or a tyrant, and a great portion of the people were reduced to personal slavery." Mackintosh, History of England, c. 3.

2 See post, p. 425, 426.
ject alike might understand and observe them. Such was the purpose of the first great statute, promulgated at a time when the legislative power was exercised by the king alone, and which is still known as the Magna Charta of King John. Such also was the purpose of the several confirmations of that charter, as well as of the Petition of Right, and the Bill of Rights, each of which became necessary by reason of usurpations. But further statutes also became needful because old customs and modes of business were unsuited to new conditions of things when property had become more valuable, wealth greater, commerce more extended, and when all these changes had brought with them new desires and necessities, and also new dangers against which society as well as the individual subject needed protection. For this reason the Statute of Wills and the Statute of Frauds and Perjuries became important; and the Habeas Corpus Act was also found necessary, not so much to change the law, as to secure existing principles of the common law against being habitually set aside and violated by those in power.

From the first the colonists in America claimed the benefit and protection of the common law. In some particulars, however, the common law as then existing in England was not suited to their condition and circumstances in the new country, and those particulars they omitted as it was put in practice by them. They also

---

1 It is justly observed by Sidney that "Magna Charta was not made to restrain the absolute authority, for no such thing was in being or pretended (the folly of such visions seeming to have been reserved to complete the misfortunes and ignominy of our age), but it was to assert the native and original liberties of our nation by the confession of the king then being, that neither he nor his successors should any way encroach upon them." Sidney on Government, c. 3, sec. 27.

2 1 Charles I. c. 1.
3 1 William and Mary, secs. 2, c. 2.
4 22 Henry VIII. c. 7, and 34 & 35 Henry VIII. c. 5.
5 29 Charles II. c. 3.
6 31 Charles II. c. 2.
7 "I dare not advise to cast the laws into a new mould. The work which I propound tendeth to the pruning and grafting of the law, and not the plowing up and planting it again, for such a remove I should hold for a perilous innovation." Bacon's Works, Vol. II. p. 231, Phil. ed. 1852.

8 "The common law of England is not to be taken, in all respects, to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their condition." Story, J., in Van Ness v. Pacard, 2 Pet. 137. "The settlers of colonies in America did not carry with them the laws of the land as being bound by them wherever they should settle. They left the realm to avoid the inconveniences and hardships they were under, where some of these laws were in force; particularly ecclesiastical laws, those for payment of tithes, and others. Had it been understood that they were to carry these laws with them, they had better have stayed at home among their friends, unexposed to the risks and toils of a new settlement. They carried with them a right to such parts of laws of the land as they should judge advantageous or useful to them; a right to be free from those they thought hurtful, and a right to make such others
claimed the benefit of such statutes as from time to time had been enacted in modification of this body of rules. 1 And when the difficulties with the home government sprung up, it was a source of immense moral power to the colonists that they were able to show that the rights they claimed were conferred by the common law, and that the king and Parliament were seeking to deprive them of the common birthright of Englishmen. Did Parliament attempt to levy taxes in America, the people demanded the benefit of that maxim with which for many generations every intelligent subject had been familiar, that those must vote the tax


1 The acts of Parliament passed after the settlement of a colony were not in force therein, unless made so by express words, or by adoption. Commonwealth v. Lodge, 2 Grat. 579; Pemble v. Clifford, 2 McCord, 31. See Swift v. Tousley, 5 Ind. 196; Baker v. Mattocks, Quincy, 72; Frechheimer v. Washington, 77 Ind. 356; May v. Sweeney, 14 Bush, 1; Lavalle v. Strobel, 59 Ill. 370; Catcchart v. Robinson, 5 Pet. 204. Those amendatory of the common law, if suited to the condition of things in America, were generally adopted by tacit consent. For the differing views taken by English and American statesmen upon the general questions here discussed, see the observations by Governor Pownall, and the comments of Franklin thereon, 4 Works of Franklin, by Sparks, 271.
who are to pay it. Did Parliament order offenders against the laws in America to be sent to England for trial, every American was roused to indignation, and protested against the trampling under foot of that time-honored principle, that trials for crime must be by a jury of the vicinage. Contending thus behind the bulwarks of the common law, Englishmen would appreciate and sympathize with their position, and Americans would feel doubly strong in a cause that not only was right, but the justice of which must be confirmed by an appeal to the consciousness of their enemies themselves.

The evidence of the common law consisted in part of the declaratory statutes we have mentioned, in part of the commentaries of such men learned in the law as had been accepted as authority, but mainly in the decisions of the courts applying the law to actual controversies. While colonization continued,—that is to say, until the war of the Revolution actually commenced,—these decisions were authority in the colonies, and the changes made in the common law up to the same period were operative in America also if suited to the condition of things here. The opening of the war of the Revolution is the point of time at which the continuous stream of the common law became divided, and that portion which had been adopted in America flowed on by itself, no longer subject to changes from across the ocean, but liable still to be gradually modified through changes in the modes of thought and of business among the people, as well as through statutory enactments.

The colonists also had legislatures of their own, by which laws had been passed which were in force at the time of the separation, and which remained unaffected thereby. When, therefore, they emerged from the colonial condition into that of independence, the laws which governed them consisted, first, of the com-

1 "The blessing of Judah and Issachar will never meet; that the same people or nation should be both the lion's whelp and the ass between burdens; neither will it be that a people overlaid with taxes should ever become valiant and martial. It is true that taxes levied by consent of the State do abate men's courage less, as it hath been seen notably in the exercise of the Law Countries, and in some degree in the subsidies of England, for you must note that we speak now of the heart and not of the purse; so that although the same tribute or tax laid by consent or by imposing be all one to the purse, yet it works diversely upon the courage. So that you may conclude that no people overcharged with tribute is fit for empire." Lord Bacon on the True Greatness of Kingdoms.

2 These statutes upon the points which are covered by them are the best evidence possible. They are the living charters of English liberty, to the present day; and as the forerunners of the American constitutions and the source from which have been derived many of the most important articles in their bills of rights, they are constantly appealed to when personal liberty or private rights are placed in apparent antagonism to the claims of government.
Constitutional Limitations.

Ch. III.

Common law of England, so far as they had tacitly adopted it as suited to their condition; second, of the statutes of England, or of Great Britain, amendatory of the common law, which they had in like manner adopted; and, third, of the colonial statutes. The first and second constituted the American common law, and by this in great part are rights adjudged and wrongs redressed in the American States to this day.

The like condition of things is found to exist in the new States formed and admitted to the Union since the Constitution was adopted. Congress creates territorial governments of different grades, but generally with plenary legislative power either in the governor and judges, a territorial council, or a territorial legislature chosen by the people; and the authority of this body extends to all rightful subjects of legislation, subject, however, to the disapproval of Congress. Vincennes University v. Indiana, 14 How. 205; Miners' Bank v. Iowa, 12 How. 1. Thus the Territory of Oregon had power to grant a legislative divorce. Maynard v. Hill, 125 U. S. 190, 8 Sup. Ct. Rep. 723. A territorial legislature may empower a probate court to grant a divorce. Whitmore v. Harden, 3 Utah, 121, 1 Pac. 405. The legislation, of course, must not be in conflict with the law of Congress concerning the power to legislate, but a variance from it may be supposed approved by that body, if suffered to remain without disapproval for a series of years after being duly reported to it. Clinton v. Englebrect, 13 Wall. 434, 440. See Williams v. Bank of Michigan, 7 Wend. 539; Swan v. Williams, 2 Mich. 427; Stout v. Hyatt, 13 Kan. 232; Himmann v. Warren, 6 Ore. 408. As to the complete control of Congress over the Territories, see United States v. Reynolds, 98 U. S. 145; National Bank v. Yankton, 101 U. S. 120. It may exclude polygamists from the right to vote. [It may declare void the charter of a church granted by the legislature of the Territory. Church of Jesus Christ of Latter Day Saints v. United States, 136 U. S. 1, 10 Sup. Ct. Rep. 782.] Murphy v. Ramsey, 114 U. S. 15, 5 Sup. Ct. Rep. 747. In Treadway v. Schmauber, 1 Dak 280, it was decided that without express authority a territorial legislature could not vote aid to a railroad company.

A few of the States, to get rid of confusion in the law, deemed it desirable to repeal the acts of Parliament, and to re-enact such portions of them as were regarded important here. See the Michigan repealing statute, copied from that of Virginia, in Code of 1820, p. 450. Others named a date or event, and provided by law that English statutes passed subsequently should not be of force within their limits. In some of the new States there were also other laws in force than those to which we have above alluded, as for example, the ordinance of 1787, in the Northwest Territory. There has been much discussion of the question whether that ordinance was superseded in each of the States formed out of that Territory by the adoption of a State constitution, and admission to the Union. In Hogg v. The Zanesville Canal Manufacturing Co., 5 Ohio, 410, it was held that the provision of the ordinance that the navigable waters of the Territory and the carrying places between should be common highways, and forever free, was permanent in its obligation, and could not be altered without the consent both of the people of the State and of the United States, given through their representatives. "It is an article of compact; and until we assume the principle that the sovereign power of a State is not bound by compact, this clause must be considered obligatory." Justice McLean and Judge Leavitt, in Spooner v. McConnell, 1 McLean, 337, examine this subject at considerable length, and both arrive at the same conclusion with the Ohio court. The like opinion was subsequently expressed in Palmer v. Commissioners of Cuyahoga Co., 3 McLean, 226, and in Jolly v. Terre Haute Drawbridge Co., 6 McLean, 237. See also United States v. New Bedford Bridge, 1 Wood. & M. 401; Strader v. Graham, 10 How. 82; Doe v. Douglass, 8 Black. 12; Connecticut Mutual Life Ins. Co. v. Cross, 18 Wis. 109; Milwaukee Gaslight Co. v. Schooner Gmecock, 23 Wis. 144; Wisconsin River
Every colony had also its charter, emanating from the Crown, and constituting its colonial constitution. All but two of these were swept away by the whirlwind of revolution, and others substituted which had been framed by the people themselves, through the agency of conventions which they had chosen. The exceptions were those of Connecticut and Rhode Island, each of which States had continued its government under the colonial charter, finding it sufficient and satisfactory for the time being, and accepting it as the constitution for the State.¹


In some of the States formed out of the territory acquired by the United States from foreign powers, traces will be found of the laws existing before the change of government. Louisiana has a code peculiar to itself, based upon the civil law. Much of Mexican law, and especially as regards lands and land titles, is retained in the systems of Texas and California. In Michigan, when the acts of Parliament were repealed, it was also deemed important to repeal all laws derived from France, through the connection with the Canadian provinces, including the Coutume de Paris, or ancient French common law. In the mining States and Territories, a peculiar species of common law, relating to mining rights and titles, has sprung up, having its origin among the miners, but recognized and enforced by the courts. Regarding the canon and ecclesiastical law, and their force in this country, see Crump v. Morgan, 3 Ired. Eq. 91; Le Barron v. Le Barron, 35 Vt. 305. Those constitutions are supposed to be framed in reference to existing institutions, see Pope v. Phifer, 2 Heisk. 686. A change in a constitution cannot retroact upon legislation so as to enlarge its scope. Dewar v. People, 40 Mich. 401. See Dullam v. Willson, 55 Mich. 392, 19 N. W. 112.

¹ It is worthy of note that the first well-authenticated case in which a legislative act was held void for incompatibility with the constitution of the State, was decided under one of these charters. It was that of Trevett v. Weeden, decided in Rhode Island in 1786. See Arnold’s History of Rhode Island, Vol. II. c. 24. Mr. Brinton Coxe, in his book on Judicial Power and Constitutional Legislation, makes much use of this case, and refers to others decided near the same time. Mr. Gouverneur Morris, in an address to the Pennsylvania Assembly in 1785, speaks of a law passed in New Jersey having been declared unconstitutional and void, and is supposed to have referred to the unreported case of Holmes v.
New States have since, from time to time, formed constitutions, either regularly in pursuance of enabling acts passed by Congress, or irregularly by the spontaneous action of the people, or under the direction of the legislative or executive authority of the Territory to which the State succeeded. Where irregularities existed, they must be regarded as having been cured by the subsequent admission of the State into the Union by Congress; and there were not wanting in the case of some States plausible reasons for insisting that such admission had become a matter of right, and that the necessity for an enabling act by Congress was dispensed with by the previous stipulations of the national government in acquiring the territory from which such States were formed.  

Some of these constitutions pointed out the mode for their own modification; others were silent on that subject; but it has been assumed that in such cases the power to originate proceedings for that purpose rested with the legislature of the State, as the department most nearly representing its general sovereignty; and this is doubtless the correct view to take of this subject.

The theory of our political system is that the ultimate sovereignty is in the people, from whom springs all legitimate authority. The people of the Union created a national constitution, and conferred upon it powers of sovereignty over certain subjects, and the people of each State created a State government, to exercise the remaining powers of sovereignty so far as they were disposed to allow them to be exercised at all. By the constitution which they establish, they not only tie up the hands of their official agencies, but their own hands as well; and neither the officers of the State, nor the whole people as an aggregate body, are at liberty to take action in opposition to this fundamental law. But in

1 W...low, which Mr. Coxe thought must have been decided in 1780 or 1787, but which President Scott of Rutgers' College, who has examined the original files and records, informs us was decided in 1780. The next reported case in which a like result was reached was Bayard v. Singleton, to be found in Martin, N. C. Rep. p. 48.

2 This was the claim made on behalf of Michigan; it being insisted that the citizens, under the provisions of the ordinance of 1787, whenever the Territory acquired the requisite population, had an absolute right to form a constitution and be admitted to the Union under it. See Scott v. Detroit Young Men's Society's Lessee, 1 Doug. (Mich.) 119, and the contrary opinion in Myers v. Manhattan Bank, 20 Ohio, 233. The debates in the Senate of the United States on the admission of Michigan to the Union go fully into this question. See Benton's Abridgment of Congressional Debates, Vol. XIII. pp. 69-72. And as to the right of the people of a Territory to originate measures looking to an application for admission to the Union, see Opinions of Attorney-General, Vol. II. p. 726.

3 See Jameson on Constitutional Conventions, c. 8.

every State, although all persons are under the protection of the
government, and obliged to conform their action to its laws, there
are always some who are altogether excluded from participation
in the government, and are compelled to submit to be ruled by
an authority in the creation of which they have no choice. The
political maxim, that government rests upon the consent of the
governed, appears, therefore, to be practically subject to many
exceptions; and when we say the sovereignty of the State is
vested in the people, the question very naturally presents itself,
What are we to understand by The People as used in this
connection?

What should be the correct rule upon this subject, it does not
fall within our province to consider. Upon this men will theorize;
but the practical question precedes the formation of the Constitu-
tion and is addressed to the people themselves. As a practical
fact the sovereignty is vested in those persons who are permitted
by the constitution of the State to exercise the elective franchise. 1
Such persons may have been designated by description in the en-
abling act of Congress permitting the formation of the constitu-
tion, if any such there were, or the convention which framed the
constitution may have determined the qualifications of electors
without external dictation. In either case, however, it was essen-
tial to subsequent good order and contentment with the govern-
ment, that those classes in general should be admitted to a voice
in its administration, whose exclusion on the ground of want of
capacity or of moral fitness could not reasonably and to the
general satisfaction be defended.

Certain classes have been almost universally excluded,—the
slave, because he is assumed to be wanting alike in the intelli-
gence and the freedom of will essential to the proper exercise of
the right; the woman, from mixed motives, but mainly, perhaps,
because, in the natural relation of marriage, she was supposed to
be under the influence of her husband, and, where the common
law prevailed, actually was in a condition of dependence upon
and subjection to him; 2 the infant, for reasons similar to those
which exclude the slave; the idiot, the lunatic, and the felon, on
obvious grounds; and sometimes other classes for whose exclusion
it is difficult to assign reasons so generally satisfactory.

The theory in these cases we take to be that classes are ex-
cluded because they lack either the intelligence, the virtue, or the

1 "The people, for political purposes, must be considered as synonymous with
qualified voters." Blair v. Ridgely, 41 Mo. 63.
2 Some reference is made to the rea-
sions for the exclusion in the opinions in
Bradwell v. State, 16 Wall. 130, and
Minor v. Happersett, 21 Wall. 102.
liberty of action essential to the proper exercise of the elective franchise. But the rule by which the presence or absence of these qualifications is to be determined, it is not easy to establish on grounds the reason and propriety of which shall be accepted by all. It must be one that is definite and easy of application, and it must be made permanent, or an accidental majority may at any time change it, so as to usurp all power to themselves. But to be definite and easy of application, it must also be arbitrary. The infant of tender years is wanting in competency, but he is daily acquiring it, and a period is fixed at which he shall conclusively be presumed to possess what is requisite. The alien may know nothing of our political system and laws, and he is excluded until he has been domiciled in the country for a period judged to be sufficiently long to make him familiar with its institutions; races are sometimes excluded arbitrarily; and at times in some of the States the possession of a certain amount of property, or the capacity to read, seems to have been regarded as essential to satisfactory proof of sufficient freedom of action and intelligence.1

Whatever rule is once established must remain fixed until those who by means of it have the power of the State put into their hands see fit to invite others to participate with them in its exercise. Any attempt of the excluded classes to assert their right to a share in the government, otherwise than by operating upon the public opinion of those who possess the right of suffrage, would be regarded as an attempt at revolution, to be put down by the strong arm of the government of the State, assisted, if need be, by the military power of the Union.2

In regard to the formation and amendment of State constitutions, the following appear to be settled principles of American constitutional law:

I. The people of the several Territories may form for themselves State constitutions whenever enabling acts for that purpose are passed by Congress, but only in the manner allowed by such enabling acts, and through the action of such persons as the en-

---

1 State v. Woodruff, 2 Day, 604; Catlin v. Smith, 2 S. & R. 267; Opinions of Judges, 18 Pick. 575. See Mr. Bancroft's synopsis of the first constitutions of the original States, in his History of the American Revolution, c. 5. For some local elections it is quite common still to require property qualification or the payment of taxes in the voter; but statutes of this description are generally construed liberally. See Crawford v. Wilson, 4 Barb. 504. Many special statutes, referring to the people of a municipality the question of voting aid to internal improvements, have confined the right of voting on the question to taxpayers.

2 The case of Rhode Island and the "Dorr Rebellion," so popularly known, will be fresh in the minds of all. For a discussion of some of the legal aspects of the case, see Luther v. Borden, 7 How. 1.
ablity acts shall clothe with the elective franchise to that end. If the people of a Territory shall, of their own motion, without such enabling act, meet in convention, frame and adopt a constitution, and demand admission to the Union under it, such action does not entitle them, as matter of right, to be recognized as a State; but the power that can admit can also refuse, and the territorial status must be continued until Congress shall be satisfied to suffer the Territory to become a State. There are always in these cases questions of policy as well as of constitutional law to be determined by the Congress before admission becomes a matter of right,—whether the constitution formed is republican; whether suitable and proper State boundaries have been fixed upon; whether the population is sufficient; whether the proper qualifications for the exercise of the elective franchise have been agreed to; whether any inveterate evil exists in the Territory which is now subject to control, but which might be perpetuated under a State government,—these and the like questions, in which the whole country is interested, cannot be finally solved by the people of the Territory for themselves, but the final decision must rest with Congress, and the judgment must be favorable before admission can be claimed or expected.1

II. In the original States, and all others subsequently admitted to the Union, the power to amend or revise their constitutions resides in the great body of the people as an organized body politic, who, being vested with ultimate sovereignty, and the source of all State authority, have power to control and alter at will the law which they have made. But the people, in the legal sense, must be understood to be those who, by the existing constitution, are clothed with political rights, and who, while that instrument remains, will be the sole organs through which the will of the body politic can be expressed.2

III. But the will of the people to this end can only be expressed in the legitimate modes by which such a body politic can act, and which must either be prescribed by the constitution whose revision or amendment is sought, or by an act of the legislative department of the State, which alone would be author-

1 When a constitution has been adopted by the people of a Territory, preparatory to admission as a State, and Congress prescribes certain changes and additions to be adopted by the legislature as part of the constitution, and declares such changes and additions to be fundamental conditions of admission of the State, and the legislature accepts such changes and additions, and it is admitted, the changes become a part of the constitution, and binding as such, although not submitted to the people for approval. Brittle v. People, 2 Neb. 198; Secombe v. Kittelson, 29 Minn. 565, 12 N. W. 510.

2 Luther v. Borden, 7 How. 1; Wells v. Bain, 10 Pe. & D. St. 30.
ized to speak for the people upon this subject, and to point out a mode for the expression of their will in the absence of any provision for amendment or revision contained in the constitution itself. 1

1 Opinions of Judges, 6 Cush. 573. The first constitution of New York contained no provision for its own amendment, and Mr. Hammond, in his Political History of New York, Vol. I. c. 26, gives a very interesting account of the controversy before the legislature and in the council of revision as to the power of the legislature to call a convention for revision, and as to the mode of submitting its work to the people. Collier v. Freerson, 24 Ala. 101, it appeared that the legislature had proposed eight different amendments to be submitted to the people at the same time; the people had approved them, and all the requisite proceedings to make them a part of the constitution had been had, except that in the subsequent legislature the resolution for their ratification had, by mistake, omitted to recite one of them. On the question whether this one had been adopted, we quote from the opinion of the court: "The constitution can be amended in but two ways: either by the people who originally framed it, or in the mode prescribed by the instrument itself. . . . We entertain no doubt that to change the constitution in any other mode than by a convention, every requisition which is demanded by the instrument itself must be observed, and the omission of any one is fatal to the amendment. We scarcely deem any argument necessary to enforce this proposition. The constitution is the supreme and paramount law. The mode by which amendments are to be made under it is clearly defined. It has been said that certain acts are to be done, certain requisitions are to be observed, before a change can be effected. But to what purpose are those acts required or those requisitions enjoined, if the legislature or any department of the government can dispense with them? To do so would be to violate the instrument which they are sworn to support, and every principle of public law and sound constitutional policy requires the courts to pronounce against any amendment which is not shown to have been made in accordance with the rules prescribed by the funda-
IV. In accordance with universal practice, and from the very necessity of the case, amendments to an existing constitution, or entire revisions of it, must be prepared and matured by some body of representatives chosen for the purpose. It is obviously impossible for the whole people to meet, prepare, and discuss the proposed alterations, and there seems to be no feasible mode by which an expression of their will can be obtained, except by asking it upon the single point of assent or disapproval. But no body of representatives, unless specially clothed with power for that purpose by the people when choosing them, can rightfully take definitive action upon amendments or revisions; they must submit the result of their deliberations to the people — who alone are competent to exercise the powers of sovereignty in framing the fundamental law — for ratification or rejection. The constitutional convention is the representative of sovereignty only in a very qualified sense, and for the specific purpose, and with the restricted authority to put in proper form the questions of amendment upon which the people are to pass; but the changes in the fundamental law of the State must be enacted by the people themselves.¹

Whether or not a proposed amendment has been duly adopted is a question for the courts, and where the Governor has under statute appointed a commission to determine the result of the popular vote upon the proposed amendment, the proceedings of such commission may be reviewed by certiorari, notwithstanding the Governor's proclamation that the amendment has been duly adopted. State v. Wurts, 65 N. J. L. 289, 43 Atl. 744, 45 L. R. A. 251. In voting on a constitutional amendment voters exercise a legislative function and courts cannot enjoin the Secretary of State from publishing notice of the election even though the amendment, if adopted, may be invalid. People v. Mills, — Col. —, 70 Pac. 322 (June 30, 1902).]

¹ See, upon this subject, Jameson on the Constitutional Convention, §§415-418, and 479-520. This work is so complete and satisfactory in its treatment of the general subject as to leave little to be said by one who shall afterwards attempt to cover the same ground. Where a convention to frame amendments to the constitution is sitting under a legislative act from which all its authority is derived, the submission of its labors to a vote of the people in a manner different from that prescribed by the act is nugatory. Wells v. Bain, 75 Penn. St. 32. Such a convention has no inherent rights; it has delegated powers only, and must keep within them. Woods's App. Ch., 75 Penn. St. 50. Compare Loomis v. Jackson, 6 W. Va. 613, 708. The Supreme Court of Missouri has expressed the opinion that it was competent for a convention to put a new constitution in force without submitting it to the people. State v.Neal, 42 Mo. 119. But this was obiter. [But if, after being accepted by the people, the convention modifies it and promulgates it as modified, and the constitution as promulgated is recognized as valid by the executive and legislative branches of the government, the modifications must be deemed valid. Miller v. Johnson, 92 Ky. 569, 15 S. W. 522, 15 L. R. A. 521.] Where proposed amendments are required to be submitted to the people, and approved by a majority vote, it is a mooted question whether a majority of those voting thereon is sufficient, when it appears that they do not constitute a majority of all who voted at the same election. See State v. Swift, 69 Ind. 505; and cases cited, post, 892-894. [That pub-
V. The power of the people to amend or revise their constitutions is limited by the Constitution of the United States in the following particulars:

1. It must not abolish the republican form of government, since such act would be revolutionary in its character, and would call for and demand direct intervention on the part of the government of the United States.¹

2. It must not provide for titles of nobility, or assume to violate the obligation of any contract, or attain persons of crime, or provide ex post facto for the punishment of acts by the courts which were innocent when committed, or contain any other provision which would, in effect, amount to the exercise of any power expressly or impliedly prohibited to the States by the Constitution of the Union. For while such provisions would not call for the direct and forcible intervention of the government of the Union, it would be the duty of the courts, both State and national, to refuse to enforce them, and to declare them altogether void, as much when enacted by the people in their primary capacity as makers of the fundamental law, as when enacted in the form of statutes, through the delegated power of their legislatures.²

VI. Subject to the foregoing principles and limitations, each State must judge for itself what provisions shall be inserted in its constitution; how the powers of government shall be apportioned in order to their proper exercise; what protection shall be thrown around the person or property of the citizen; and to what extent private rights shall be required to yield to the general good.³

¹ Citation of proposed amendments with the statutes adopted at same session of legislature as that in which the amendments were proposed is a sufficient publication if made a sufficiently long time before election, see State v. Grey, 21 Nev. 378, 32 Pac. 160, 19 L. R. A. 134.]
³ Matter of the Reciprocity Bank, 22 N. Y. 9; McMullen v. Hodge, 5 Texas, 31; Penn v. Tollison, 26 Ark. 545; Matter of Oliver Lee & Co’s Bank, 21 N. Y. 9. In the case last cited, Devia, J., says: “The [constitutional] convention was not obliged, like the legislative bodies, to look carefully to the preservation of vested rights. It was competent to deal, subject to ratification by the people and to the Constitution of the Federal government,
And the courts of the State, still more the courts of the Union, would be precluded from inquiring into the justice of their action, or questioning its validity, because of any supposed conflict with fundamental rules of right or of government, unless they should be able to show collision at some point between the instrument thus formed and that paramount law which constitutes, in regard to the subjects it covers, the fundamental rule of action throughout the whole United States.\(^1\)

How far the constitution of a State shall descend into the particulars of government, is a question of policy addressed to the administration of President Johnson; but as it is the hope and trust of our people that the occasion for discussing such questions will never arise again, we do not occupy space with them in this work. It suffices for the present to say, that Congress claimed, insisted upon, and enforced the right to prescribe the steps to be taken and the conditions to be observed in order to restore these States to their former positions in the Union, and the right also to determine when the prescribed conditions had been complied with, so as to entitle them to representation in Congress. There is some discussion of the general subject in Texas v. White, 7 Wall. 700. And see Gunn v. Barry, 5 Wall. 610.

When a constitution has been regarded by the people of a State as valid, and it has never been adjudged illegal by the courts, a Federal circuit court will not question its legal adoption. Smith v. Good, 34 Fed. Rep. 294.

It has been decided in some cases that a constitution is to have effect from the time of its adoption by the people, and not from the time of the admission of the State into the Union by Congress. Scott v. Young Men's Society's Lessee, 1 Doug. (Mich.) 119; Campbell v. Fields, 35 Tex., 751. The Texas reconstruction constitution became operative before the State was admitted to representation in Congress. Peak v. Swindle, 68 Texas, 242, 4 S. W. 478. An amendment to the Minnesota original constitution adopted before formal admission of the State is valid. Any irregularity is healed by the admission, and the subsequent recognition of the validity of the amendment by the State. Secomb v. Kittelson, 29 Minn. 555, 12 N. W. 519.

with all private and social rights, and with all the existing laws and institutions of the State. If the convention had so willed, and the people had concurred, all former charters and grants might have been annihilated. When, therefore, we are seeking for the true construction of a constitutional provision, we are constantly to bear in mind that its authors were not executing a delegated authority, limited by other constitutional restraints, but are to look upon them as the founders of a State, intent only upon establishing such principles as seemed best calculated to produce good government and promote the public happiness, at the expense of any and all existing institutions which might stand in their way.\(^1\)

\(^1\) All the State constitutions now contain within themselves provisions for their amendment. Some require the question of calling a convention to revise the constitution to be submitted to the people at stated periods; others leave it to the legislature to call a convention, or to submit to the people the question of calling one; while the major part allow the legislature to mature specific amendments to be submitted to the people separately, and these become a part of the constitution if adopted by the requisite vote.

When the late rebellion had been put down by the military forces of the United States, and the State governments which constituted a part of the diyalogal system had been displaced, serious questions were raised as to the proper steps to be taken in order to restore the States to their harmonious relations to the Union. These questions, and the controversy over them, constituted an important part of the history of our country during the
CONSTITUTIONAL LIMITATIONS. [CH. III.

convention which forms it. Certain things are to be looked for in all these instruments; though even as to these there is great variety, not only of substance, but also in the minuteness of their provisions to meet particular cases.

I. We are to expect a general framework of government to be designed, under which the sovereignty of the people is to be exercised by representatives chosen for the purpose, in such manner as the instrument provides, and with such reservations as it makes.

II. Generally the qualifications for the right of suffrage will be declared, as well as the conditions under which it shall be exercised.

III. The usual checks and balances of republican government, in which consists its chief excellence, will be retained. The most important of these are the separate departments for the exercise of legislative, executive, and judicial power; (a) and these are to be kept as distinct and separate as possible, except in so far as the action of one is made to constitute a restraint upon the action of the others, to keep them within proper bounds, and to prevent hasty and improvident action. Upon legislative action there is, first, the check of the executive, who will generally be clothed with a qualified veto power, and who may refuse to execute laws deemed unconstitutional; and, second, the

(a) [Authority in one department of government to interfere with another will always be strictly construed. Where the constitution provides for sessions of the legislature to be held at the State capital, "except in case of war, insurrection or pestilence, when it may by proclamation of the governor assemble for the time being elsewhere," it does not empower the governor to adjourn the Houses after they have convened, even though he declares a state of insurrection to exist; neither can he under his power to adjourn the legislature, in case of disagreement between the two Houses in regard to their adjournment, adjourn them to meet at a stated time at another place when there has been no disagreement between the two Houses. Taylor v. Beckham, — Ky. —, 49 L. R. A. 258, 56 S. W. 177. See this case in Supreme Court of the United States, where the writ of error after discussion was dismissed on the ground that no deprivation of rights secured by the fourteenth amendment, without due process, was shown, nor was there any case made of a violation of the guaranty of a republican form of government. Taylor v. Beckham, 178 U. S. 548, 20 Sup. Ct. Rep. 399. Dissenting opinion of Harlan, J., 20 Sup. Ct. Rep. 1009. Where the legislature is empowered to remove judges for cause, but is required to give notice and opportunity to appear, this imports that the cause shall be one personal to the judge, and he cannot be removed merely to cut down expenses. But if his court is one which the legislature is authorized to ordain and establish, the legislature may abolish the court, and the judge's office and salary will thereupon cease. McCulley v. State, 102 Tenn. 569, 31 S. W. 131, 46 L. R. A. 557.]
check of the judiciary, who may annul unconstitutional laws, and punish those concerned in enforcing them. Upon judicial action there is the legislative check, which consists in the power to prescribe rules for the courts, and perhaps to restrict their authority; and the executive check, of refusing aid in enforcing any judgments which are believed to be in excess of jurisdiction. Upon executive action the legislature has a power of restraint, corresponding to that which it exercises upon judicial action; and the judiciary may punish executive agents for any action in excess of executive authority. And the legislative department has an important restraint upon both the executive and the judiciary, in the power of impeachment for illegal or oppressive action, or for any failure to perform official duty. The executive, in refusing to execute a legislative enactment, will always do so with the peril of impeachment in view.

IV. Local self-government having always been a part of the English and American systems, we shall look for its recognition in any such instrument. And even if not expressly recognized, it is still to be understood that all these instruments are framed with its present existence and anticipated continuance in view.¹

V. We shall also expect a declaration of rights for the protection of individuals and minorities. This declaration usually contains the following classes of provisions:—

1. Those declaratory of the general principles of republican government; such as, that all freemen, when they form a social compact, are equal, and no man, or set of men, is entitled to exclusive, separate public emoluments or privileges (a) from the

¹ Park Commissioners v. Common Council of Detroit, 28 Mich. 228; People v. Albertson, 55 N. Y. 50. [Under the constitution of Georgia it is held that municipalities cannot maintain the proposition of absolute local self-government and the State legislature may by direct enactment control the local police. American v. Perry, 114 Ga. 871, 42 S. E. 1004, 57 L. R. A. 239. It is held in White v. Barker, — Iowa, —, 86 N. W. 204, 57 L. R. A. 214 (Feb. 13, 1902), that the legislature could not take from the municipality the management of a municipal water supply system. That action to that effect was invalid for violation of the principle of municipal self-government. This case is valuable for its historical discussion of the principle.

The legislature cannot fix the salaries of firemen employed by municipalities, although there is no limitation on such action in the constitution, since this is a matter of purely local concern. Lexington v. Thompson, — Ky. —, 68 S. W. 477, 57 L. R. A. 775 (May 28, 1902). A legislature may create a school district and appoint its officers. Kies v. Lowery, — Mich. —, 92 N. W. 289 (Nov. 18, 1902). For a discussion of the "Right to Local Self-Government," see article by Mr. Amasa M. Eaton, 13 Harv. L. Rev. 441, 570, 658, 14 id. 20, 116.]

(a) [The provision that no corporation shall be granted any special or exclusive privilege or immunity is not violated by an act which allows trustees of an estate to charge the estate any reasonable sum which they may have paid "to a company," authorized by law so to do, for becoming surety upon their bonds. Re Clark, 185 Pa.
community but in consideration of public services; that absolute, arbitrary power over the lives, liberty, and property of freemen exists nowhere in a republic, not even in the largest majority; that all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, happiness, security, and the protection of property; that for the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform, or abolish their government in such manner as they may think proper; that all elections shall be free and equal; that no power of suspending the laws shall be exercised except by the legislature or its authority; that standing armies are not to be maintained in time of peace; that representation shall be in proportion to population; that the people shall have the right freely to assemble to consult of the common good, to instruct their representatives, and petition for redress of grievances; and the like.

2. Those declaratory of the fundamental rights of the citizen: as that all men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, (a) and pursuing and obtaining safety and

520, 46 Atl. 127, 48 L. R. A. 687. But the privilege of taking oysters in public waters cannot be restricted to taxpayers. Gustafson v. State, 40 Tex. Cr. 67, 45 S. W. 717, 48 S. W. 618, 43 L. R. A. 615. But labor unions may be granted right to register their trade marks and labels and have them protected from infringement. Schmalz v. Woolley, 57 N. J. Eq. 363, 41 Atl. 939, 43 L. R. A. 86, 73 Am. St. 637; Perkins v. Heeert, 158 N. Y. 306, 53 N. E. 18, 43 L. R. A. 856, 70 Am. St. 433. Sale of ferry franchise to highest bidder is not a grant of special or exclusive privilege, even though the franchise be exclusive, all persons being free to bid. Patterson v. Wollman, 5 N. D. 608, 67 N. W. 1040, 33 L. R. A. 630; Nixon v. Reid, 8 S. D. 507, 67 N. W. 57, 32 L. R. A. 315. Law making an exception from civil service regulations in case of veteran soldiers, and compelling their appointment to vacancies upon their sworn statements of qualification, is void. Brown v. Russell, 100 Mass. 14, 43 N. E. 1005, 52 L. R. A. 253, 55 Am. St. 357. Statute authorizing the levy of an arbitrary tax upon ordinary and lawful occupations is void. State v. Coulon, 65 Conn. 478, 33 Atl. 510, 31 L. R. A. 55, 43 Am. St. 227. Statute granting to trade unions copyright in their trade marks is valid. State v. Bishop, 128 Mo. 373, 31 S. W. 9, 29 L. R. A. 200, 49 Am. St. 569, and see note hereto in L. R. A. Statute specifying number of deputies to be allowed county officers in certain counties, but leaving it to discretion of county court in other counties is void. Weaver v. Davidson County, 101 Tenn. 915, 69 S. W. 1108.]

(a) [An act which makes it unlawful to hire any laborer to work more than eight hours per day in any mine or smelter is void. Re Morgan, 26 Colo. 415, 58 Pac. 1071, 47 L. R. A. 52, 77 Am. St. 269. But a State may require that its contractors and builders shall employ their laborers only eight hours per day. Re Dalton, 61 Kan. 257, 59 Pac. 356, 47 L. R. A. 350. The right to liberty does not give to insurance corporations the right to contract among themselves to maintain stipulated rates. State v. Firemen's Fund Ins. Co., 162 Mo. 1, 52 S. W. 595, 45 L. R. A. 363. Right to engage in ticket brokerage cannot be restricted to persons designated by
happiness; that the right to property is before and higher than any constitutional sanction; that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed; 1 that every man may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that every man may bear arms for the defence of himself and of the State; that the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, nor shall soldiers be quartered upon citizens in time of peace; and the like.

3. Those declaratory of the principles which ensure to the citizen an impartial trial, and protect him in his life, liberty, and property against the arbitrary action of those in authority: as that no bill of attainder or ex post facto law shall be passed; that the right to trial by jury shall be preserved; that excessive bail shall not be required, nor excessive punishments inflicted; that no person shall be subject to be twice put in jeopardy for the same offence, nor be compelled in any criminal case to be a witness against himself, (a) nor be deprived of life, liberty, or property without due process of law; that private property shall not be taken for public use without compensation; and the like. (b)

1 Hale v. Everett, 53 N. H. 9; Board of Education v. Minor, 23 Ohio St. 211.

transportation companies. People v. Warden, &c., 157 N. Y. 116, 51 N. E. 1006, 43 L. R. A. 264, 68 Am. St. 763. But see, in this connection, cases cited in note 3, page 886, post. No man can be held to answer for the act of another over whom he has no control or authority. Durkin v. Kingston Coal Co., 171 Pa. 193, 33 Atl. 237, 29 L. R. A. 808, 60 Am. St. 801, declaring invalid an act making the proprietor of a mine responsible for the acts and neglects of a licensed mine foreman whom he was by statute compelled to employ. Right of employer to discharge employees joining or refusing to withdraw from labor unions cannot be taken from him. State v. Julow, 129 Mo. 163, 31 S. W. 731, 29 L. R. A. 257, 50 Am. St. 443, a statute fixing a license fee of $1,300 for persons engaged in hiring laborers in one State to be employed in another is invalid. State v. Moore, 113 N. C. 607, 18 S. E. 342.

(a) [See latter part of note 1, page 442.]

(b) [The provision that courts of justice shall be open to every person and that right and justice shall be administered without denial, sale, or delay is violated by a statute which allows an attorney's fee to successful lien claimants but not to successful defendants. Davidson v Jennings, 27 Colo. 187, 60 Pac. 354, 48 L. R. A. 340, 83 Am St. 49. Such fees are allowed in Florida. Dell v. Marvin, 41 Fla. 221, 28 So. 188, 45 L. R. A. 201, 79 Am St. 171. Further proceedings in an action may be stayed until costs of an appeal are paid. Knee v. Baltimore City Pass. Ry. Co., 87 Md. 223, 40 Atl. 800, 42 L. R. A. 363. A person is not deprived of property or particular services without compensation by a statute which compels him to appear before the court and testify in criminal cases, and deprives him of all right to fees thereafter or makes such right contingent upon conviction of accused. State v. Henley, 98 Tenn. 655, 41 S. W. 392, 29 L. R. A. 126. And an expert witness can not claim higher fees than other witnesses, nor can he refuse to testify until such
Other clauses are sometimes added declaratory of the principles of morality and virtue; and it is also sometimes expressly declared—what indeed is implied without the declaration—that everything in the declaration of rights contained is excepted out of the general powers of government, and all laws contrary thereto shall be void.

Many other things are commonly found in these charters of government; but since, while they continue in force, they are to remain absolute and unchangeable rules of action and decision, it is obvious that they should not be made to embrace within their iron grasp those subjects in regard to which the policy or interest of the State or of its people may vary from time to time, and which are therefore more properly left to the control of the legislature, which can more easily and speedily make the required changes.

In considering State constitutions we must not commit the mistake of supposing that, because individual rights are guarded and protected by them, they must also be considered as owing their origin to them. These instruments measure the powers of the rulers, but they do not measure the rights of the governed.

"What is a constitution, and what are its objects? It is easier to tell what it is not than what it is. It is not the beginning of a community, nor the origin of private rights; it is not the fountain of law, nor the incipient state of government; it is not the cause, but consequence, of personal and political freedom; it grants no rights to the people, but is the creature of their power, the instrument of their convenience. Designed for their protection in the enjoyment of the rights and powers which they possessed before the constitution was made, it is but the frame-

1 "This, then, is the office of a written [true] constitution: to delegate to various public functionaries such of the powers of government as the people do not intend to exercise for themselves; to classify these powers, according to their nature, and to commit them to separate agents; to provide for the choice of these

agents by the people; to ascertain, limit, and define the extent of the authority thus delegated; and to reserve to the people their sovereignty over all things not expressly committed to their representatives." E. P. Hurlbut in Human Rights and their Political Guarantees.

fees are secured to him. Dixon v. People, 168 Ill. 179, 48 N. E. 108, 39 L. R. A. 116; upon right of State to require services of witnesses without compensation, see note to Dixon v. People, above, in L. R. A. Moderate court fees may be exacted of parties to legal proceedings. Northern Counties Inv't Trust v. Sears, 30 Or. 388, 41 Pac. 931, 35 L. R. A. 188. Repel of statute giving right of action against county for injury resulting from defective bridge does not violate a provision that every man shall have remedy by due course of law for all injuries done him. Templeton v. Linn Co., 22 Ore. 313, 29 Pac. 795, 15 L. R. A. 730. Proceedings in a second action in ejectment may be stayed until costs in the first are paid. Shear v. Box, 92 Ala. 596, 8 So. 792, 11 L. R. A. 520, and note.]
work of the political government, and necessarily based upon the pre-existing condition of laws, rights, habits, and modes of thought. There is nothing primitive in it: it is all derived from a known source. It presupposes an organized society, law, order, property, personal freedom, a love of political liberty, and enough of cultivated intelligence to know how to guard it against the encroachments of tyranny. A written constitution is in every instance a limitation upon the powers of government in the hands of agents; for there never was a written republican constitution which delegated to functionaries all the latent powers which lie dormant in every nation, and are boundless in extent and incapable of definition.”


“Written constitutions sanctify and confirm great principles, but the latter are prior in existence to the former.” 2 Webster’s Works, 392. See also 1 Bl. Com. 124; 2 Story, Life and Letters, 278; Sidney on Government, c. 5, secs. 27 and 33. “If this charter of State government which we call a constitution were all there was of constitutional command; if the usages, the customs, the maxims that have sprung from the habits of life, modes of thought, methods of trying facts by the neighborhood, and mutual responsibility in neighborhood interests; the precepts that have come to us from the revolutions which overturned tyrannies; the sentiments of manly independence and self-control which impelled our ancestors to summon the local community to redress local evils, instead of relying upon king or legislature at a distance to do so,—if a recognition of all these were to be stricken from the body of our constitutional law, a lifeless skeleton might remain, but the living spirit; that which gives it force and attraction, which makes it valuable and draws to it the affections of the people; that which distinguishes it from the numberless constitutions, so called, which in Europe have been set up and thrown down within the last hundred years, many of which, in their expressions, seemed equally fair and to possess equal promise with ours, and have only been wanting in the support and vitality which these alone can give,—this living and breathing spirit which supplies the interpretation of the words of the written charter would be utterly lost and gone.”