CONSTITUTIONAL LIMITATIONS.

CHAPTER I.

DEFINITIONS.

A STATE is a body politic, or society of men, united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength.[1] The terms *nation* and *State* are frequently employed, not only in the law of nations, but in common parlance, as importing the same thing;[2] but the term *nation* is more strictly synonymous with *people*, and while a single State may embrace different nations or peoples, a single nation will sometimes be so divided politically as to constitute several States.

In American constitutional law the word *State* is applied to the several members of the American Union, while the word *nation* is applied to the whole body of the people embraced within the jurisdiction of the federal government.

Sovereignty, as applied to States, imports the supreme, absolute, uncontrollable power by which any State is governed.[3] A State is called a sovereign State when this supreme power resides within itself, whether resting in a single individual, or in a number of

[1] Vattel, b. 1, c. 1, § 1; Story on Const. § 207; Wheat. Int. Law, pt. 1, c. 2, § 2; Halleck, Int. Law, 63; Bouv. Law Dict. "State." "A multitude of people united together by a communion of interest, and by common laws, to which they submit with one accord." Burlamaqui, Politic Law, c. 5. See Chisholm *v.* Georgia, 2 Dall. 457; Georgia *v.* Stanton, 6 Wall. 65.

[2] *Thompson*, J., in Cherokee Nation *v.* Georgia, 5 Pet. 52; *Chase*, Ch. J., in Texas *v.* White, 7 Wall. 720; Vattel, *supra*.

[3] Story on Const. § 207; 1 Black. Com. 49; Wheat. Int. Law, pt. 1, c. 2, § 5; Halleck, Int. Law, 63, 64; Austin, Province of Jurisprudence, Lec. VI.; Chipman on Government, 137. "The right of commanding finally in civil society." Burlamaqui, Politic Law, c. 5.

individuals, or in the whole body of the people.[1] In the view of international law, all sovereign States are and must be
[* 2] equal in rights, *because from the very definition of sovereign State, it is impossible that there should be, in respect to it, any political superior.

The sovereignty of a State commonly extends to all the subjects of government within the territorial limits occupied by the associated people who compose it; and, except upon the high seas, which belong equally to all men, like the air, and no part of which can rightfully be appropriated by any nation,[2] the dividing line between sovereignties is usually a territorial line. In American constitutional law, however, there is a division of the powers of sovereignty between the national and State governments by subjects: the former being possessed of supreme, absolute, and uncontrollable power over certain subjects throughout all the States and Territories, while the States have the like complete power, within their respective territorial limits, over other subjects.[3] In regard to certain other subjects, the States possess powers of regulation which are not sovereign powers, inasmuch as they are liable to be controlled, or for the time being to become altogether dormant by the exercise of a superior power vested in the general government in respect to the same subjects.

A *constitution* is sometimes defined as the fundamental law of a State, containing the principles upon which the government is founded, regulating the division of the sovereign powers, and directing to what persons each of these powers is to be confided, and the manner in which it is to be exercised.[4] Perhaps an

[1] Vattel, b. 1, c. 1, § 2; Story on Const. § 207; Halleck, Int. Law, 65. In other words, when it is an *independent* State. Chipman on Government, 137.

[2] Vattel, b. 1, c. 23, § 281; Wheat. Int. Law, pt. 2, c 4, § 10.

[3] *McLean*, J., in License Cases, 5 How. 588. "The powers of the general government and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or a State court, as if the line of division was traced by landmarks and monuments visible to the eye." *Taney*, Ch. J., in Ableman *v.* Booth, 21 How. 516. See Tarble's Case, 13 Wall. 406. That the general division of powers between the federal and State governments has not been disturbed by the new amendments to the federal Constitution, see United States *v.* Cruikshanks, 92 U. S. Rep. 542.

[4] 1 Bouv. Inst. 9; Duer, Const. Juris. 26. "By the constitution of

equally complete and accurate definition would be, that body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised.

In a much qualified and very imperfect sense every State may be said to possess a constitution; that is to say, some leading principle has prevailed in the administration of its government, until it has become an understood part of its system, to which obedience * is expected and habitually yielded; [* 3] like the hereditary principle in most monarchies, and the custom of choosing the chieftain by the body of the people which prevails among some barbarous tribes. But the term *constitutional government* is applied only to those whose fundamental rules or maxims not only locate the sovereign power in individuals or bodies designated or chosen in some prescribed manner, but also define the limits of its exercise so as to protect individual rights, and shield them against the assumption of arbitrary power.[1] The number of these is not great, and the protection they afford to individual rights is far from being uniform.[2]

In American constitutional law, the word *constitution* is used in a restricted sense, as implying the written instrument agreed upon by the people of the Union, or of any one of the States, as the absolute rule of action and decision for all departments and officers of the government, in respect to all the points covered by it, which must control until it shall be changed by the authority which established it, and in opposition to which any act or regulation of any such department or officer, or even of the people themselves, will be altogether void.

a State I mean the body of those written or unwritten fundamental laws which regulate the most important rights of the higher magistrates and the most essential privileges of the subjects." Mackintosh on the Study of the Law of Nature and Nations.

[1] Calhoun's Disquisition on Government, Works, I. p. 11.

[2] Absolute monarchs, under a pressure of necessity, or to win the favor of their people, sometimes grant them what is called a constitution; but this, so long as the power of the monarch is recognized as supreme, can be no more than his promise that he will observe its provisions, and conduct the government accordingly. The mere grant of a constitution does not make the government a constitutional government, until the monarch is deprived of power to set it aside at will. The grant of Magna Charta did not make the English a constitutional monarchy; it was only after repeated violations and confirmations of that instrument, and when a further disregard of its provisions had become dangerous to the Crown, that fundamental rights could be said to have constitutional guaranties, and the government to be constitutional.

The term *unconstitutional law* must vary in its meaning in different States, according as the powers of sovereignty are or are not possessed by the individual or body which exercises the powers of ordinary legislation. Where the law-making department of a State is restricted in its powers by a written fundamental law, as in the American States, we understand by unconstitutional law one which, being opposed to the fundamental law, is therefore in excess of legislative authority, and void. Indeed, the term unconstitutional law, as employed in American jurisprudence, is a misnomer, and implies a contradiction; that enactment which is opposed to the constitution being in fact no law at all. But where, by the theory of the government, the exercise of complete sovereignty is vested in the same individual or body which enacts the ordinary laws, any law, being an exercise of power by the sovereign authority, must be obligatory, and, if it varies from or conflicts with any existing constitutional principle, must have the effect to modify or abrogate such principle, instead of being nullified by it. This must be so in Great Britain with every law not in harmony with pre-existing constitutional principles; since, by the theory of its government, Parliament exercises sovereign authority, and may even change the Constitution * at any time, as in many instances it has done, by declaring its will to that effect.[1] And when thus the power to control and modify the constitution resides in the ordinary law-making power of the State, the term *unconstitutional law* can mean no more than this: a law which, being opposed to the settled maxims upon which the government has habitually been conducted, *ought not* to be, or to have been, adopted.[2] It follows, therefore, that in Great Britain constitutional questions are for the most part to be discussed before the people or the Parliament, since the declared will of the Parliament is the final law; but in America, after a constitutional question has been passed upon by the legislature, there is generally a right of appeal to the courts when it is attempted to put the will of the legislature in

[* 4]

[1] 1 Black. Com. 161; De Tocqueville, Democracy in America, c. 6; Broom, Const. Law, 795.

[2] Mr. Austin, in his Province of Jurisprudence, Lec. VI., explains and enlarges upon this idea, and gives illustrations to show that in England, and indeed under most governments, a rule prescribed by the law-making authority may be unconstitutional, and yet legal and obligatory.

force. For the will of the people, as declared in the Constitution, is the final law; and the will of the legislature is only law when it is in harmony with, or at least is not opposed to, that controlling instrument which governs the legislative body equally with the private citizen.[1]

[1] See Chapter VII. *post*.