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## THE COURTS, AS CONSERVATORS OF SOCIAL JUSTICE.<sup>1</sup>

The better security of social justice is the main aim of modern political institutions. The paternalism of older forms of government guarded it fairly, provided there were a good and wise king. But good and wise kings were rare. Absolute monarchies, therefore, as soon as it became generally admitted that governments existed for the benefit of the governed, had to give place to constitutional monarchies or to republics. It was easy to write into constitutions declarations as to certain things which social justice demanded, and prohibitions against legislation to the contrary. But the whole field was not thus covered. The constitution might warrant the judiciary in holding a statute void which fell within one of the particular prohibitions; but how if it were legislation plainly contrary to what seems to be natural right, and yet that should not have been expressly forbidden?

There can be found not a few assertions in our reports by American Judges that, in such case, the judiciary could declare it void; but it is believed that, so far as they assert it as a principle needing no support from constitutional provisions, all these are *obiter dicta*.<sup>2</sup>

It is the object of this paper to discuss the bearing on this question of certain constitutional provisions serving, in effect, to confirm the existence of such a power in the judiciary.

These are three:

1. Those against deprivation of life, liberty or property without due process of law.

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<sup>1</sup>In preparing this paper free use has been made of an address delivered by the author before the Maryland State Bar Association, on July 8, 1909, on "The New Reading of Due Process of Law."

<sup>2</sup>Thayer's Cases on Constitutional Law, I, 53.

2. Those granting, in general terms, the legislative power of the State to a legislative body.

3. That as to the guaranty by the United States to each State of a republican form of government.

#### I. DUE PROCESS OF LAW.

Quietly laid away in the Fifth Amendment to the Constitution of the United States slept for more than a century, almost in the sleep of death, the mandate of the American people that no person shall be deprived of life, liberty, or property without due process of law.

The phrase "due process of law" first appears in American constitutional history in the amendments to this Constitution in the nature of a Bill of Rights, proposed in 1788 by some of the States in connection with their votes of ratification. Among these, (124 in number, altogether)<sup>3</sup> was one, emanating from New York, to the effect "that no person ought to be taken, imprisoned, or dis-seized of his freehold, or be exiled or deprived of his privileges, franchises, life, liberty, or property, but by due process of law." Virginia and North Carolina each proposed one quite similar in terms, except that, adhering more closely to the phraseology of *Magna Charta*, they substituted for the closing words, "but by the law of the land."

In none of the Constitutions—eleven in all—adopted by the several States before the Federal Constitution went into effect is the expression "due process of law" to be found.<sup>4</sup> Madison incorporated it in the draft of such amendments to the Constitution of the United States as he thought desirable, which he presented to the first Congress, using the precise words finally incorporated in the Fifth Amendment.<sup>5</sup> The framers of the New York amendments no doubt took it from a legislative Declaration of Rights adopted by her Assembly in January, 1787, and its use there was based on the terms of the Petition of Right approved by Charles I in 1628.

<sup>3</sup>Report of the Am. Hist. Association for 1896, II, 183.

<sup>4</sup>In five of these (those of New Hampshire, New York, Pennsylvania, South Carolina and Virginia) the provisions in *Magna Charta* that no man should be proceeded against by the Crown to the loss of life, liberty or property, but by the legal judgment of his peers or the law of the land was substantially reproduced. In that of North Carolina, they were reproduced with the omission of the reference to the judgment of his peers. New Jersey, Delaware and Georgia made no provision whatever of such a kind. Connecticut and Rhode Island did not adopt Constitutions until the following century.

<sup>5</sup>Thorpe, *Constitutional History of the United States*, II, 216.

The phrase, however, goes back to the fourteenth century. It first appears, so far as I have been able to ascertain, in an Act of Parliament passed in 1355 (28 Edward III, Chapter 3) which provides that no man should be disseized, taken, imprisoned, disinherited, or put to death, without being sent to answer by due process of law; or, to quote the original Norman French, "*saunz estre mesne en respons par due proces de lei.*"

It will be recollected that it was customary in the ancient Parliaments to accompany each enactment with a statement of the reasons for asking the Crown to assent to it. The particular grievance specified in the chapter mentioned in the statute of 28 Edward III, in this connection, was that divers subjects had of late been imprisoned without any cause shown, and to writs of *habeas corpus* duly issued the only return was that they were detained by command of the privy council, and they were thereupon "returned back to their several prisons, without being charged with anything to which they might make answer according to law."

The great mischief to be remedied was unlawful deprivations of liberty, without legal process, and in defiance of the power of the courts to give a remedy by *habeas corpus* proceedings.

Three years before, another Act had been assented to by the same sovereign which may serve as a further interpreter. The Parliament from which it proceeded began the session with obtaining one of the many confirmations of *Magna Charta* granted by Edward III. It was then (25 Edward III, V, Chapter IV) enacted that "no one shall be ousted of his franchises or freehold, if he be not duly brought in to answer and forejudged thereof by way of law," or in the words of the original, "*s'il ne soit mesne duement en respons & forjugge dyceles par voie de lei.*"

Obviously here the guaranty was of due proceedings, affording a fair opportunity to answer, and a judgment such as the law of the land demanded.

Sir Edward Coke, in commenting on the phrase "*per legem terræ*" in *Magna Charta*, observed that it meant "by due course and processe of law," that is by due presentment or indictment and being brought in to answer thereto by due process of the common law.<sup>6</sup> Following this line of thought, Story, in his Commentaries on the Constitution,<sup>7</sup> says that the words "due process of law" in the Fifth Amendment were meant to affirm, in

<sup>6</sup> Inst., 44, 50, 51, 52.

<sup>7</sup> III, § 1783.

effect, the right of trial according to the process and proceedings of the Common Law.

The remarks of Coke are especially noteworthy because made in the second volume of his Institutes, a commentary on *Magna Charta*, published in 1642, by direction of the Long Parliament. He undoubtedly used his opportunity to read into the charter much of the law that had been developed long after 1215,<sup>8</sup> but in this instance he narrows rather than enlarges the meaning of the terms employed.

For their true sense and meaning, he says, we must look to another statute of the same King, passed in 1363, in which they are explained as meaning without due process of law.

This Act (37 Edward III, Chapter 18) recites that "though it be contained in the Great Charter that no man be taken nor imprisoned, nor put out of his freehold, without process of the law, nevertheless divers people make false suggestion to the King himself," and it is therefore enacted that those making false suggestions should receive the same punishment to which he whom they accused would have been subject, and that in such case this should not be deemed process of the law made against them contrary to the charter. It will be seen that the word "due" is not used in the statute to qualify process, although Coke treats the matter as if it were. But with or without this word, the natural meaning is the same.

Selden, in the great parliamentary debates which accompanied the Petition of Right, asserted that as early as 1331 (5 Edward III) a petition preferred by Parliament to the King stated that "in Magna Charta it is contained, That none be imprisoned but by due process of law," but added that these words were not, in fact, to be found in it. Another participant in the discussion stated that they were used in the Statute of Explanations (6 Edward I), in 1278.<sup>9</sup> In the ordinary editions of the English statutes at large, however, no such phrases are recorded in the legislation of those years.

It is to be noted that the words of *Magna Charta*, as revised by Parliament under Henry III (1225), assume not only a judgment, but a legal judgment;—"*per legale iudicium parium suorum, vel per legem terræ.*" Commentators have asserted that *vel* is here used in the sense of *et*. A much simpler construction would seem

<sup>8</sup>McKechnie, *Magna Charta*, 208.

<sup>9</sup>Rushworth, Historical Collections, 563, 568.

to be to leave the second clause of the sentence alternative, as it stands, but to take it as another way of defining the condemnatory judgment. In the first clause it is described as being a *legal* one: in the second it is described as one rendered by the law of the land, as if it had been said "by a legal judgment of his peers," or in other words, "by a judgment of his peers rendered in accordance with the law of the land." What was secured was adherence to established rules for judicial proceedings.

Another interpretation, which has the high authority of Hallam and Reeves, is that the *judicium parium* was often used in contradistinction from the decision by battle, or ordeal, though the latter was equally sanctioned by the *lex terræ*. Yet another, favored by Pollock and Maitland in their History of English Law, is that the barons were particularly concerned to prevent any of their order from being judged by his inferiors in rank sitting as Justices on the bench of the King's Court.

But whichever view may be adopted, the original purpose of these phrases was simply to secure to every man a right to the protection of the settled rules established for the administration of justice.

Glanvil, in speaking for the Commons, in 1628 (May 23), before a joint committee of Parliament raised to consider the form of the Petition of Right, said that the words *per legale judicium parium suorum vel per legem terræ* by laws of Edward III, "are expounded to import that none should be put to answer without Presentment or matter of Record, or by due Process, or Writ Original; and if otherwise, it should be void, and holden for error."<sup>10</sup>

The error, it will be noted, is an error of a processual nature, and that alone. It is a defect of legal procedure. What that term means has never been more clearly defined than by Lord Justice Lush. It is, he says in one of his opinions, "the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which by means of the proceeding the Court is to administer;—the machinery, as distinguished from its product."<sup>11</sup>

The main purpose of the clause of *Magna Charta* which we have under consideration, (Chap. 29) was to forbid the Crown thereafter, in Crown cases, "to place execution before judgment."<sup>12</sup>

<sup>10</sup>Rushworth, Historical Collections, 568, 579.

<sup>11</sup>*Poyser v. Minors* (1881) L. R. 7 Q. B. Div. 329, 333.

<sup>12</sup>McKechnie, *Magna Charta*, 437, 438, 442; Thayer, Preliminary Treatise on Evidence, 65.

The subsidiary purposes were that the judgment must be by a man's peers, Jews for Jews, nobles for nobles, Crown tenants by Crown tenants, manorial under tenants by manorial under tenants in the Court baron; and that there must be an opportunity to defend by the methods then in use, that is, by battle, ordeal, or perhaps by compurgation. The *lex terræ* which the barons had in mind at Runnymede was the law of judicial procedure in causes between King and subject. The same purpose actuated the Parliament which, a hundred and forty years later, obtained from Edward III the more explicit guaranty of due process of law. There was need of greater explicitness, for writs had often been issued with a special reservation of a power of arbitrary arrest by the Crown or the Chief Justiciary.<sup>13</sup>

Similar acts on his part led Parliament to call for the renewal of the guaranty by Charles I.

Was it necessary for the people of the United States to secure themselves in like manner against the new government which they were creating? In the Convention of 1787, which framed the Constitution, the vote of a majority of the States could not be obtained in favor of anything in the nature of a Bill of Rights.<sup>14</sup> It was in the main those who had been unfriendly to anything stronger than a Union of States, whose efforts secured the adoption of the first ten amendments.

The guaranty of due process of law before any person could be deprived of life, liberty, or property, being taken from the Petition of Right, may fairly be assumed to have been intended by Madison and those who voted with him in the first Congress to carry the meaning which it had there, except so far as it was directed, not, as in England, against the Executive alone, but against each department of the government alike. Coke's reading was no doubt accepted by all who gave the matter any real attention.<sup>15</sup> This it is probable that few did. The importance of the first ten amendments was underestimated by the Federalists, and when they were proposed to the States most of the leading public men were of that political school. Gouverneur Morris, who had taken so active a part in the Constitutional Convention of 1787, said of them, in 1811, that considerate men "never believed the

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<sup>13</sup>Mirror of Justice, V, § 1, No. 63, §§ 2, 7.

<sup>14</sup>Elliott's Debates, V, 538.

<sup>15</sup>Murray's Lessee v. Hoboken Co. (U. S. 1855) 18 How. 272, 276.

amendments gave any additional security to life, liberty, or property."<sup>16</sup>

A quarter of a century after their ratification, and when their significance had become more fully recognized, Kent in his Commentaries<sup>17</sup> said, "the better and larger definition of *due process of law* is that it means law in the regular course of administration through courts of justice." This opens the door to a new field. The individual has the right to claim the benefit of a certain law. That he claims it in the course of court proceedings does not limit its scope to court proceedings.

Another quarter of a century passed and Kent's definition was substantially adopted by the Court of Appeals of New York. A legacy to a married woman was claimed by her under a statute passed after the testator died. By the pre-existing law it belonged to her husband, and he asserted that to deprive him of it was to take his property without due process of law. The question arose in the settlement of the estate of the testator before the Surrogate. On appeal, it was held, under the Constitution of New York, that the statute could not deprive him of his vested rights, because it was not "due process of law."<sup>18</sup>

The principle here involved was that no man could be deprived of his property by the act of the government, unless he had legally forfeited it, or unless it were taken for public use on just compensation. It was not a question of legal process, but of substantive right.

A quarter of a century later, Chief Justice Cooley, in his Constitutional Limitations,<sup>19</sup> adopted this view as the true one. "Due process of law," he observes, "in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs." Here "process of law" is treated as something quite other than "process in court." Any act of government is forbidden which violates a personal right. "Due process of law," with reference to a statute, means due exercise of legislative power, and any exercise of legislative power is undue which is not reasonably consistent with the

<sup>16</sup>Diary and Letters, II, 530.

<sup>17</sup>I, 624.

<sup>18</sup>Westervelt v. Gregg (1854) 2 Kernan (12 N. Y.) 202, 212.

<sup>19</sup>Chap. XI, page 434.

settled maxims of Anglo-American law touching the security of life, liberty, or property.

In 1869, the Supreme Court of the United States, for the first time, I believe, ranged itself among the supporters of this doctrine, in the case of *Hepburn v. Griswold*.<sup>20</sup> The Legal Tender Act, it was held, if effectual as to creditors, who at the time of its passage were entitled to payment in gold, would deprive them of property without due process of law. In the *Legal Tender Cases*,<sup>21</sup> of the following year, which overruled *Hepburn v. Griswold*, this construction of the Constitution was not repudiated.

A disposition to take a narrower ground is observable in the case of *Davidson v. New Orleans*, decided in 1877.<sup>22</sup> By this time the effects of the inclusion of a similar provision in the Fourteenth Amendment, directed against action by the States, were beginning to appear. Originally intended there for the protection of the negro, it was soon discovered that it gave new guaranties to every person in the United States. To extend its application has ever since been the common study of the American bar.

The general government, in time of peace at least, seldom has occasion or opportunity to invade the domain of individual right. The States, occupying a much broader field than the United States, are under a constant temptation to do so, under the impulse of a spirit of reform and altruism. To guard against their yielding to such influences has become, during the past thirty years, the frequent task of the federal judiciary, and it has naturally tended to a broader interpretation of the constitutional guaranty.<sup>23</sup>

It was the subject of close examination by the Supreme Court of the United States, in *Hurtado v. California* and, in summing up, their opinion states that "due process of law" in the Fourteenth Amendment "refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure."<sup>24</sup>

<sup>20</sup>8 Wall. 603, 624.

<sup>21</sup>(1870) 12 Wall. 457, 551, 580.

<sup>22</sup>96 U. S. 97, 101-105.

<sup>23</sup>Sinking Fund Cases (1878) 99 U. S. 700; *United States v. Lee* (1882) 106 U. S. 196, 218. Cf., however, *Ex parte Wall* (1882) 107 U. S. 265, 289; *Holden v. Hardy* (1898) 169 U. S. 366, 387.

<sup>24</sup>(1884) 110 U. S. 516, 535.



Here again will be noticed the recurrence of the general declaration that it is a substantive, rather than a processual right, which is secured.

In a more recent case the doctrine, advancing on the same lines, was applied to the power of a State to tax the tangible personal property of its citizens, wherever situated. The general rule of International Private Law had affirmed the existence of this power.<sup>25</sup> In *Union Transit Co. v. Kentucky*,<sup>26</sup> a statute of Kentucky imposing such a tax on a Kentucky corporation on account of movable personal property, which it kept for permanent use in other States, was held to be void because to tax such property was in effect to take it without due process of law. Mr. Justice Holmes observed, in a five-line dissenting opinion, that the result reached was probably a desirable one, but that neither he nor the Chief Justice could understand how it could be deduced from the Fourteenth Amendment.

The State courts, if not going quite as far as the Kentucky tax case, have generally sympathized with this new reading of "Due Process of Law."

It is, however, to say the least, questionable if it finds support in legal history, and takes the words of our Constitutions and constitutional amendments in the sense intended by the men who put them there. It may, indeed, well be doubted if those men would ever have used these words, had they thought them to bear the meaning now attributed to them.

In *Twining v. New Jersey*<sup>27</sup> there is an intimation that the Supreme Court of the United States is not insensible to the gravity of this historical question.

"Is it," said Mr. Justice Moody, of a claim to exemption from compulsory self-incrimination, "a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government? If it is, and it is of a nature that pertains to process of law, this court has declared it to be essential to due process of law."

In other words, it may not be enough, under the Fourteenth Amendment, to justify holding a statute of a State to be void, that it violates a fundamental principle of liberty and justice which is the inalienable right of each of its citizens, unless that right be of a nature that pertains to process of law.

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<sup>25</sup>Wharton, *Conflict of Laws* (3d Ed.) I, § 80, a.

<sup>26</sup>(1905) 199 U. S. 194, 202.

<sup>27</sup>(1908) 211 U. S. 78, 106.

## 2. THE GRANT OF LEGISLATIVE POWER.

The State Constitutions, in creating the legislative department, generally use the phrase that "the legislative power of the State is hereby vested" in a legislative body, of a form described.

What is meant by this term "legislative power of the State"? Surely only such as the authorities of the State can legitimately exercise.

In *Calder v. Bull*,<sup>28</sup> Mr. Justice Chase described it thus :

"The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it: the nature and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free Republican governments, that no man should be compelled to do what the laws do not require; nor to refrain from acts which the laws permit. There are acts which the Federal, or State, Legislature cannot do, without exceeding their authority. There are certain vital principles in our free Republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An Act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power on which it is founded. A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a Judge in his own cause; or a law that takes property from A and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit, of our State governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them. The Legislature may enjoin, permit, forbid, and punish; they may declare new crimes; and establish rules of conduct for all its citizens in future cases; they may command what is right, and prohibit what is wrong; but they cannot change innocence into guilt; or punish innocence as a crime; or violate the right of an antecedent lawful private contract; or the right of private property. To maintain that our Federal, or State, Legislature possesses such powers, if

<sup>28</sup>(1798) 3 Dallas 386, 388.

they had not been expressly restrained, would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments."

Few cases have excited more public interest than those turning on the validity of the Georgia grants of the last decade of the eighteenth century, by which large areas of State lands were transferred to companies of speculators. The grants were procured by fraud. The legislature passed an Act annulling them for this cause. But the rights of *bona fide* purchasers from the original grantees were involved. The Act, if valid, destroyed a vested right resting on an executed contract. In *Fletcher v. Peck* these questions came for final determination before the Supreme Court of the United States, which held,

"that the State of Georgia was restrained either by general principles which are common to our free institutions, or by the particular provisions of the Constitution of the United States" from passing the statute under consideration. "It may well be doubted," said Marshall, in pronouncing the final opinion, "whether the nature of society and of government does not prescribe some limits to the legislative power, and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation? To the legislature all legislative power is granted; but the question whether the act of transferring the property of an individual to the public be in the nature of legislative power is well worthy of serious reflection."<sup>29</sup>

In an opinion by that great jurist, Judge Ranney, after referring to the provision of the Ohio Constitution vesting "the legislative power" of the State in the General Assembly, he thus defines the extent of the grant:

"Unlike the Constitution of the United States, and from the necessity of the case, no attempt at a specific enumeration of the items of legislative power is made. This must therefore always be determined from the nature of the power exercised. If it is found to fall within the general terms of the grant, we can only look to the other parts of the constitution for limitations upon it: if none are found, none exist. But as the General Assembly, like the other departments of government, exercises only a delegated authority, it cannot be doubted that any Act passed by it, not falling fairly within the scope of legislative power, is as clearly void as though expressly prohibited."<sup>30</sup>

Here it is assumed as too clear for argument, that the general term "legislative power of the State" is subject to an implied restriction that makes it cover only what is fairly within the scope

<sup>29</sup>(1810) 6 Cranch 87.

<sup>30</sup>*Cincinnati, etc. R. R. Co. v. Commissioners* (1852) 1 Ohio St. 77, 86.

of a delegated power of that description; and that whether a particular statute comes fairly within that scope may present a proper question for judicial determination.

A similar view was taken by the Supreme Court of the United States in the great case of *Loan Association v. Topeka*.<sup>31</sup> This is not that a court of justice, unaided by any constitutional provision, may by its inherent powers treat a statute which seems to it flagrantly unjust as void; but that an American court may properly assume that function because it is aided by constitutional provisions, which imply certain limitations on legislative power.<sup>32</sup>

There were, said Mr. Justice Miller, in giving the opinion of the court, some rights in every free government which were beyond the control of the State, and which could not be impaired by the exercise of that power.

"The theory," he added, "of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are of limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments." \* \* \* "To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms."

These opinions, it will be noticed, rely solely on the implications from the general nature and objects of free governments as serving to limit that legislative power which a State can exercise and therefore can be deemed to have granted to its legislative department. They pay no regard to the effect of the express provision in the federal Constitution, fortifying this view, which is next to be considered.

### 3. THE GUARANTY OF A REPUBLICAN FORM OF GOVERNMENT.

The provision in Sec. 4, Art. 1, of the Constitution of the United States, that "the United States shall guarantee to every State in this Union a Republican Form of Government," has hardly received the attention which it deserves, in respect to the light which it serves to throw on the question under discussion.

In the earlier articles of that instrument, its framers had put certain particular limitations on the legislative power of the States,

<sup>31</sup>(1874) 20 Wall. 655, 662, 663, 664.

<sup>32</sup>See a comment on this case in *State v. Travelers Insurance Co.* (1900) 73 Conn. 255, 286.

such as the prohibition against the issue of paper money as a legal tender, and of bills of attainder. The makers of the early State Constitutions had also put into them certain particular limitations on the power of their legislatures. But in addition to all these was framed this new guaranty, in general terms, of a republican form of government.

It laid down an express rule of duty for the United States. It implied a commensurate rule of duty for each State and the proper authorities of each State.

A guaranty imports the existence of a principal obligation. The primary duty rests upon the State. Its authority must be exercised under republican forms. Its Judges, under their oath to support the Constitution of the United States, must recognize and respect, in the decision of causes, this fundamental obligation. Arising by necessary implication, it stands on the same footing as would an express provision of the Constitution of the United States that every State in the Union shall always maintain a republican form of government.

The more one studies this clause of guaranty, the more is felt the far-reaching force of what it necessarily implies.

The position on which the decisions heretofore quoted have been based that the nature of a free government necessarily imposed certain limitations on its legislative power, and that our American State governments were free, is obviously strengthened when due weight is given to what is tantamount to an express constitutional requirement that no State can do any act inconsistent with the essential nature of a republic.

And what is that?

John Adams made this observation in one of his letters to Samuel Adams:

"It is a fixed principle with me that all good government is and must be republican. But, at the same time, your candor will agree with me, that there is not in lexicography a more fraudulent word. Whenever I use the word *republic* with approbation, I mean a government in which the people have, collectively or by representation, an essential share in the sovereignty."<sup>33</sup>

In a letter written the year before to Roger Sherman, he had defined the word more briefly as "a government whose sovereignty is vested in more than one person" and included England

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<sup>33</sup>Life and Works of John Adams, VI, 415.

in that class.<sup>34</sup> Sherman differed from him, and explained the word as signifying to him

“a government under the authority of the people, consisting of legislative, executive, and judiciary powers; the legislative powers vested in an assembly, consisting of one or more branches who, together with the executive, are appointed by the people, and dependent on them for continuance, by periodical elections, agreeably to an established constitution.”<sup>35</sup>

Sherman's definition probably expresses the thought of the day more clearly as well as more fully than that of Adams, but both rested on certain general doctrines then taken as political axioms. All were agreed that no government could be deemed republican in form, in which the entire powers of sovereignty were delegated, without limitation, to a single ruler or a single body of men. They must be to some extent divided. Most of them also agreed that these powers must to some extent be reserved, and undelegated.

The men who gathered at Philadelphia in 1787 to frame the Constitution of the United States, and the people who afterwards ratified it, certainly had, in whatever they did, two main aims, and expressed them plainly in its preamble:—to “establish Justice” and to “secure the Blessings of Liberty” to themselves and their posterity. They were building on the foundation of the Declaration of Independence, and had not forgotten its assertion that governments are instituted to secure certain unalienable rights belonging to all men alike, and that among these are life, liberty, and the pursuit of happiness.

This Declaration is one of our muniments of title. The Constitution leans upon it and can only be understood by entering into its spirit. Chief Justice Waite, at the close of the first century of our national existence, based one of the great judgments of the Supreme Court of the United States largely on the force of its assertions.

“The rights of life,” he said, speaking for the court, “and personal liberty are natural rights of man. ‘To secure these rights,’ says the Declaration of Independence, ‘governments are instituted among men, deriving their just powers from the consent of the governed.’ The very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of these ‘unalienable rights with which they were endowed by their Creator.’ Sovereignty, for this purpose, rests alone with the States.”<sup>36</sup>

<sup>34</sup>Life and Works of John Adams, VI, 428.

<sup>35</sup>*Ibid*, 437.

<sup>36</sup>U. S. v. Cruikshank (1875) 92 U. S. 542, 553.

John Adams once complained that Jefferson received all the credit for the definition of the inherent rights of Americans in the Declaration of Independence, although he (Adams), two years earlier, had stated them in almost the same terms in the "Declarations and Resolves" of the first Continental Congress.<sup>37</sup> There they were founded *inter alia* on "the immutable Laws of Nature" and "the Principles of the English Constitution."

John Locke was regarded throughout the American colonies as a high authority. His views permeate the Massachusetts Constitution of 1780, which more than any other influenced the makers of the federal Constitution, and the Abbé de Mably observed, in 1783, with regard to the former and the Constitutions of New York and Pennsylvania as well, that their framers adopted his "true and wise principles as to the natural liberty of Man and the nature of government."<sup>38</sup> These included the "social compact" as the foundation of civil authority, and freedom, equality, and independence as the original condition of those who entered into it.

Modern philosophy may refuse to acknowledge that such principles exist, and declare that history and biology leave them without support. Well founded or ill founded, however, they exist for us, by reason of their recognition in our constitutional documents. Man, in some future state of society, may deny any right of private property, but for Americans it will continue in full force until they alter the Constitution of the United States.

Categorically stated, the proposition now under discussion is this:—A grant by the Constitution of a State to its legislature of all the legislative power of the State conveys only such power as can be legitimately exercised in the form of legislation, and to learn what powers can be thus legitimately exercised, courts in cases coming before them have a right to look to the general principles which are common to our free institutions under republican governments.

Daniel Webster, *arguendo*, made this point very clearly in *Wilkinson v. Leland*.<sup>39</sup> It was claimed on the other side that a statute of Rhode Island, on which they relied, (and which in ef-

<sup>37</sup>Oct. 14, 1774. Journals of Congress, I, 27.

<sup>38</sup>*Oeuvres complètes*, XVI, 113.

<sup>39</sup>(1829) 2 Peters 627, 644, 657.

fect took property of A and gave it to B) was valid because the legislature of that State was unrestrained by any State Constitution.

"It would be well," he replied, "to consider how Rhode Island can be a member of this union, with such a form of government as is asserted to exist there. By the constitution of the United States, every state must be a republic, every state must have a judiciary, legislature and executive, or it has no constitution. It is said that Rhode Island has no constitution; that she has grown up without a constitution. If her government has no form, it cannot be a republic, and has no right to come into the union."

Mr. Justice Story, in giving the opinion of the court, took a view substantially similar.

"The fundamental maxims of a free government," he said, "seem to require that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming, that the power to violate and disregard them,—a power so repugnant to the common principles of justice and civil liberty,—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being, without very strong and direct expressions of such an intention. In *Terret v. Taylor*, 9 Cranch 43, it was held by this Court, that a grant or title to lands once made by the legislature to any person or corporation is irrevocable, and cannot be reassumed by any subsequent legislative act; and that a different doctrine is utterly inconsistent with the great and fundamental principle of a republican government, and with the right of the citizens to the free enjoyment of their property lawfully acquired. We know of no case in which a legislative act to transfer the property of A to B without his consent, has ever been held a constitutional exercise of legislative power in any state in the union. On the contrary, it has been constantly resisted as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced. We are not prepared therefore to admit that the people of Rhode Island have ever delegated to their legislature the power to divest the vested rights of property, and transfer them without the assent of the parties."

In *Allyn's Appeal*, the opinion, following this line of thought, contains these words:

"Our Constitution (Article 3, § 1) vests the legislative power of this State in the General Assembly. That power covers the whole field of legitimate legislation, except so far as limitations are to be found in other provisions of this Constitution or in that of the United States. The latter provides (Article 4, § 4) that the



'United States shall guarantee to every State in this Union a Republican Form of Government.' Connecticut is therefore impliedly bound forever to maintain such a form of government. She put her legislative power in the hands of the General Assembly. She put only, because she could put only, such power of that nature as was consistent with a republican form of government."<sup>40</sup>

The opinion has been advanced that the enforcement of this constitutional guaranty belongs only to the legislative department. But its language is that "The United States shall guarantee to every State in this Union a Republican Form of Government."

It is not that Congress shall guarantee it. The United States do. In *Luther v. Borden*<sup>41</sup> the Supreme Court of the United States declared that it rested with Congress to decide, in case of conflict between two so-called governments of a State, which was the established one; and further, that if any State should set up a military rule as its permanent form of government, it would be the duty of Congress to overthrow it. The only question to be determined in that cause, however, was whether, Congress having authorized the President, in case of an insurrection in any State, to call forth the militia on application of the State government, and the President, on application of the Executive of one of two so-called governments of the State of Rhode Island, having recognized him as the head of the lawful and established government, and taken measures to call out the militia to support his authority, if necessary, this recognition did not settle the rightfulness of the government conclusively, so far as the courts of the United States were concerned. This was purely a political question, and therefore one that it belonged to the legislative or executive departments, or both, to decide. But it would seem that the different question, whether statutes or executive orders which have proceeded from the confessedly established government in any State were legally inconsistent with a republican form of government, must be one of judicial cognizance.

*Texas v. White* must be considered as qualifying to some extent the broad statement in *Luther v. Borden* that the enforcement of this particular guaranty belonged to Congress.

Texas, on February 15th, 1867, filed an original bill in the Supreme Court of the United States against certain private individuals. They, in their answer, challenged her existence as a State. In June, 1865, the President had appointed a provisional Governor

<sup>40</sup>Allyn's Appeal (1909) 81 Conn. 534; 71 Atl. 794.

<sup>41</sup>(1849) 7 How. 1, 42, 44.

for the State of Texas and directed the formation by her people of a State government, through a Constitutional Convention. Such a convention was soon held, the previously existing Constitution amended, and elections ordered in 1866, under which a Governor was elected. Under his directions the suit was instituted. On March 2, 1867, an Act of Congress was passed, declaring this government of Texas an illegal one and provisional only, to be continued, if at all, only by direction of the military power of the United States. A military Governor was thereupon appointed, who ratified the institution of the suit.

The court held that, whether or not the Act of March 2, 1867, was in all respects constitutional, Texas was a State when the action was brought, and remained a State notwithstanding that statute. The State of Texas had been indestructible. The power to carry into effect the guaranty clause is "primarily a legislative power, and resides in Congress," but until Congress acted the President could make temporary provision.<sup>42</sup>

The germ of this clause appears in the Virginia resolutions introduced by Randolph at the outset of the Federal Convention.<sup>43</sup> One of these is "that a republican government and the territory of each State, except in the instance of a voluntary junction of government and territory ought to be guaranteed by the United States to each State."

The Convention, in June, remoulded it thus: "that a republican Constitution, and its existing laws, ought to be guaranteed to each State by the United States," and a month later put it in this form: "that a republican form of government shall be guaranteed to each State."<sup>44</sup> The Committee on Style gave it its final shape.

Madison, in discussing this provision in No. XLIII of the *Federalist*, makes no suggestion that Congress is the only department of government to enforce the guaranty; nor does Hamilton in his more general reference to the same subject in No. XXI.

On principle, it would seem that every branch of the federal government, as well as every branch of the State government, is equally bound, when it is called to act in a matter turning upon the effect of this provision, to accord it such effect as may be necessary and proper to achieve its purpose.

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<sup>42</sup>(1868) 7 Wall. 700, 729-731.

<sup>43</sup>Elliot's Debates, V, 128.

<sup>44</sup>*Ibid.*, 182, 190, 333.

In the most recent case in which the Supreme Court of the United States has had occasion to comment on the clause, these words were used:

“By the Constitution a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, National and State, have been limited by written constitutions, and they have themselves set bounds to their own power, as against the sudden impulses of mere majorities.”<sup>45</sup>

Here is to be marked the emphasis placed on legitimate acts of legislative power.

In *Minor v. Happersett*, a woman brought an action against a registrar of voters in Missouri for refusing to put her name on the list. She claimed that as a citizen of the United States, as well as of Missouri, her right to vote could not be denied on the ground of sex. The Supreme Court of the United States, to which the cause came on error, said that while it was true that the United States guaranteed a republican form of government to Missouri, her government could not be deemed unrepresentative because it excluded women from suffrage, in view of the fact that when the Constitution was adopted every State excluded them.<sup>46</sup>

Here it is seemingly assumed that, had the court been satisfied that such exclusion was inconsistent with a republican form of government, it might have reversed the judgment of the Missouri courts.

*Ex parte McCordle* is another case in point. McCordle, a civilian, had been arrested in Mississippi, in 1867, for trial before a Military Commission, under the Reconstruction Acts of that year. He claimed that these Acts were an unconstitutional attempt to set aside constitutional State governments, republican in form, and replace them by military governments. Such action would, of course, be in the teeth of the constitutional guaranty now under consideration. The court observed that, if his arrest were unlawful, he was entitled to seek judicial interposition;<sup>47</sup> and thereupon

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<sup>45</sup>*In re Duncan* (1891) 139 U. S. 449, 461.

<sup>46</sup>(1874) 21 Wall. 162, 175.

<sup>47</sup>(1867) 6 Wall. 318, 327.

Congress, to avoid a decision of that question, repealed the statute under which his appeal had been taken.<sup>48</sup>

The men who framed the Constitution of the United States advisedly used general terms, without defining them. One of these terms was "Republican Form of Government." History had assigned a meaning to those words. History, as it proceeded on its course, they knew, might somewhat enlarge that meaning, or might somewhat restrict it. In either event, so far as History followed the essential principles of social order in a republic, it would make no change in substance as to the form which that order must assume in an American State. In either event they relied on the authority they had reposed in the different departments of the national government to see to it that nowhere should there be a departure from those essential principles. They looked for this to the President in his proper sphere of activity, to the Congress in its proper sphere of activity, to the Judiciary in its proper sphere of activity.

The maintenance of a republican form of government in every State was a matter of vital concern both to every other, and to the United States as a whole. Union of executive and legislative functions, for instance, in one State, if allowed, might in course of time be adopted in another. The principle of the Monroe doctrine applies. The area of freedom must be preserved in its entirety.

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NEW HAVEN, CONN.

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<sup>48</sup>s. c. (1868) 7 Wall. 506.