CONSTITUTIONAL HISTORY OF THE UNITED STATES AS SEEN IN THE DEVELOPMENT OF AMERICAN LAW

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Constitutional History of the United States as Seen in the Development of American Law by Thomas McIntyre Cooley & Henry Hitchcock & George W. Biddle

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HENRY HITCHCOCK & GEORGE W. BIDDLE

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CONSTITUTIONAL HISTORY OF THE UNITED STATES

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THE DEVELOPMENT OF AMERICAN LAW

A COURSE OF LECTURES BEFORE THE POLITICAL SCIENCE ASSOCIATION OF THE UNIVERSITY OF MICHIGAN

BY

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INTRODUCTION.

THE following lectures on constitutional law were delivered under the auspices of the Political Science Association of the University of Michigan, in the months of March and April, 1889. The thought occurred to Henry C. Adams, Ph.D., the president of that association and Professor of Political Economy and Finance, that it would be of advantage to the students in the various departments of the University, to hear a course of lectures on the constitutional law of the United States historically considered.[1] In accordance with the thought thus conceived this course was planned, and the interest manifested in it from the beginning was such as to lead to the belief that the publication of the lectures in permanent form would meet, in part, the wants of students of law and of political science throughout the country.

The subject to which the lectures relate, the constitutional law of the United States, is a branch of jurisprudence which Chief-Justice Sharswood declared to be "peculiarly the pride and glory" of our country; and it has been said with entire propriety to be "the specially characterizing part of our legal system." One may examine the pages of Blackstone's "Commentaries" from beginning to end and he will not be able to find a word devoted to the subject of constitutional law as such, the

[1] The University Calendar for the year 1888–89 shows the total number of students in the University of Michigan to be 1,882, divided as follows: Department of Literature, Science, and the Arts, 824; Department of Law, 400; Department of Medicine and Surgery, 371; School of Pharmacy, 106; Homœopathic Medical College, 73; College of Dental Surgery, 108.

very term not being even named by the learned commentator on the laws of England. Not only is the term one of modern use, but constitutional law as a distinct branch of jurisprudence had its origin and development in the United States. While the remark of De Tocqueville is certainly not true, that "the English Constitution has no real existence," yet the fact remains, that English constitutional law has been so little developed as a distinct branch of jurisprudence that the latest writer on the British constitution has thought it necessary to go into a learned disquisition to prove that "so-called constitutional law" is, in reality, a part of the law of England. He concludes his argument by declaring that the constitutional law of England "forms as interesting and as distinct, though not as well explored, a field for legal study or legal exposition as any which can be found. The subject is one which has not yet been fully mapped out. Teachers and pupils alike, therefore, suffer from the inconvenience as they enjoy the interest of exploring a province of law which has not yet been reduced to order. This inconvenience has one great compensation. We are compelled to search for the guidance of first principles."[1] It is evident, therefore, that while England may have what Earl Russell was pleased to call "a matchless constitution," yet constitutional law as a distinctive branch of jurisprudence occupies a very subordinate place in the legal system of that country, in comparison with the place which it fills in the system of jurisprudence prevailing in the United States. And what is true of England in this respect is true of the other countries of Europe in greater or less degree. The reason why this is so will appear as we proceed.

It is to be remembered that written constitutions have been the distinguishing feature of American institutions. It was in this country, for the first time in the history of

[1] Dicey's "Law of the Constitution," p. 34 (1886).

the world, that written constitutions, based on the idea of the preëxistent right of all men to be free, became the organic law of government. The Constitution of the United States was not, however, the first of the written constitutions to be adopted in America, even though nothing be said of the Articles of Confederation. The States had adopted written constitutions of their own before the Federal Constitution was established.[1] In this country all constitutions, with two exceptions, have been written, and none are now unwritten.[2] Written constitutions were a necessity with us, because we have insisted from the beginning that sovereignty resided in the people, and as the people could not themselves, in their collective capacity, well exercise the powers of government, they consented, through written constitutions, to entrust the exercise of those powers to their representatives, taking care, however, to prescribe by definite constitutional provisions certain limitations on those powers which their representatives should be unable to transcend. The honor has been said to belong to Virginia of having established the first Republican constitution ever adopted in America.[3]

How far written constitutions are advantageous, whether their excellencies are greater than their defects, are questions upon which political theorists have been divided in opinion, and concerning which it is not our purpose here to make inquiry. European nations have been watching our experiment from the beginning, and the tendency of European states, from the time we set the example, has been plainly in the direction of written constitutions. John Adams, writing in 1815, said:

[1] The dates of adoption were as follows: Delaware, 1776; Georgia, 1777; Maryland, 1776; Massachusetts, 1780; New Hampshire, 1784; New Jersey, 1776; New York, 1777; North Carolina, 1776; Pennsylvania, 1776; South Carolina, 1778; Virginia, 1776.

[2] At the time of the Revolution Connecticut and Rhode Island had unwritten Constitutions, which continued in force until 1818 and 1842 respectively.

[3] Cooke's "Virginia," p. 440.

"Since we began the career of written constitutions, the wisest, most learned, and scientific heads in France, Holland, Geneva, Switzerland, Spain and Sicily have been busily employed in devising written constitutions for their several nations. . . . But has there been one that satisfied the people? One that has been observed and obeyed, even for one year or one month? The truth is, there is not one people of Europe that knows or cares anything about written constitutions. There is not one nation in Europe that understands, or is capable of understanding, any constitution whatever. *Panem et aquam, et vinum et circenses* are all that they understand, or hope, or wish for. If there is a colorable exception, it is England. . . . These, sir, were the results of ten years' careful, attentive, anxious, and [if without vanity I may use the word] philosophical observation in France, Spain, Holland, Austrian Netherlands, and England."[1]

But notwithstanding these somewhat pessimistic views of the elder Adams, the tendency then manifested in Europe in favor of written constitutions was not so wholly ephemeral as he imagined, and to-day written constitutions constitute the fundamental law of most of the European governments. The idea that may be said to have originated in America, has not only taken good root in Europe, but has made its appearance on the Continent of Asia. While these lectures were being delivered the Emperor of Japan was promulgating a written constitution at the Imperial Palace in Tokio, and making solemn oath to abide thereby.[2] The reasons which induced this action on his part are of interest, as showing the tendency of the times. The Emperor at the time of promulgation said:

"In consideration of the progressive tendency of the course of human affairs, and in parallel with the advance of civilization, We deem it expedient, in order to give clearness and distinctness to the instructions bequeathed by the Imperial

[1] "Life and Works of John Adams," vol. X., p. 150.

[2] On February 11, 1889, a written constitution was promulgated in Japan.

Founder of Our House and by Our other Imperial Ancestors, to establish fundamental laws formulated into express provisions of law, so that, on the one hand, Our Imperial posterity may possess an express guide for the course they are to follow, and that on the other, Our subjects shall thereby be enabled to enjoy a wider range of action in giving us their support, and that the observance of Our laws shall continue to the remotest ages of time."

However, it does not follow that because a State has a written constitution, constitutional law is to become a recognized branch of its jurisprudence. Constitutional law is a branch of the jurisprudence of our country because in our written constitutions we have not only divided the powers of government between the three great departments, but have made the judiciary coördinate with the legislative and executive departments, giving it power to pass on the constitutionality of laws. This is a peculiarity of the American system of government, and explains why it is that constitutional law is the characterizing feature of our legal system. Foreign commentators on the Federal Constitution have, like Sir Henry Maine, spoken of the Federal Supreme Court as a "unique creation of the founders of the Constitution."[1] As a matter of fact, however, there is little in the Constitution of the United States that is new. A learned writer has recently said that the method provided for the election of the President was about the only feature which it contained that was not suggested by the State Constitutions.[2] But even that was borrowed from the Constitution of Maryland, which provided a similar method for the election of its senators.[3] Before the Federal Constitution was framed the constitutions of the several States had established supreme courts within their States, and those courts exercised the power of declaring legislative acts void, when

[1] Maine's "Popular Government," p. 217.

[2] *New Princeton Review*, September, 1887.

[3] See 2 Pitkin's "Political and Civil History of the United States," p. 302.