CHAPTER II.

WRITTEN CONSTITUTIONS.

TAKING it for granted that it has now been shown that no rule of civil conduct, that is inconsistent with the natural rights of men, can be rightfully established by government, or consequently be made obligatory as law, either upon the people, or upon judicial tribunals—let us now proceed to test the legality of slavery by those written constitutions of government, which judicial tribunals actually recognize as authoritative.

In making this examination, however, I shall not insist upon the principle of the preceding chapter, that there can be no law

* The mass of men are so much accustomed to regard law as an arbitrary command of those who administer political power, that the idea of its being a *natural*, fixed, and immutable principle, may perhaps want some other support than that of the reasoning already given, to commend it to their adoption. I therefore give them the following corroborations from sources of the highest authority.

"Jurisprudence is the science of what is just and unjust." — *Justinian.*

"The primary and principal objects of the law are rights and wrongs." — *Blackstone.*

"Justice is the constant and perpetual disposition to render to every man his due." — *Justinian.*

"The precepts of the law are to live honestly; to hurt no one; to give to every one his due." — *Justinian & Blackstone.*

"LAW. The rule and bond of men's actions; or it is a rule for the well governing of civil society, to give to every man that which doth belong to him." — *Jacob's Law Dictionary.*

"Laws are arbitrary or positive, and natural; the last of which are essentially just and good, and bind everywhere, and in all places where they are observed. * * * * Those which are natural laws, are from God; but those which are arbitrary, are properly human and positive institutions." — *Selden on Fortescue, C. 17, also Jacob's Law Dictionary.*

"The law of nature is that which God, at man's creation, infused into him, for his preservation and direction; and this is an eternal law, and may not be changed."—*2 Shep. Abr. 356, also Jac. Law Dict.*

contrary to natural right; but shall admit, for the sake of the argument, that there may be such laws. I shall only claim that in the interpretation of all statutes and constitutions, the ordinary legal

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"All laws derive their force from the law of nature; and those which do not, are accounted as no laws." — *Fortescue, Jac. Law Dict.*

"No law will make a construction to do wrong; and there are some things which the law favors, and some it dislikes; it favoreth those things that come from the order of nature." — 1 *Inst.* 183, 197. — *Jac. Law Dict.*

"Of law no less can be acknowledged, than that her seat is the bosom of God, her voice the harmony of the world. All things in heaven and earth do her homage; the least as feeling her care, and the greatest as not exempted from her power." — *Hooker.*

Blackstone speaks of law as "A science, which distinguishes the criterions of right and wrong; which teaches to establish the one, and prevent, punish or redress the other; which employs in its theory the noblest faculties of the soul, and exerts in its practice the cardinal virtues of the heart; a science, which is universal in its use and extent, accommodated to each individual, yet comprehending the whole community." — *Blackstone's Lecture on the Study of the Law.*

"This law of nature being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid, derive all their force, and all their authority mediately or immediately, from this original." — *Blackstone, Vol. 1, p. 41.*

Mr. Christian, one of Blackstone's editors, in a note to the above passage, says:

"Lord Chief Justice Hobart has also advanced, that even an act of Parliament made against natural justice, as to make a man judge in his own cause, is void in itself, for *jura naturæ sunt immutabilia*, and they are *leges legum*"—(the laws of nature are immutable — they are the laws of laws.) — *Hob.* 87.

Mr. Christian then adds:

"With deference to these high authorities, (Blackstone and Hobart,) I should conceive that in no case whatever can a judge oppose his own opinion and authority to the clear will and declaration of the legislature. His province is to interpret and obey the mandates of the supreme power of the state. And if an act of Parliament, if we could suppose such a case, should, like the edict of Herod, command all the children under a certain age to be slain, the judge ought to resign his office rather than be auxiliary to its execution; but it could only be declared void by the same legislative power by which it was ordained. If the judicial power were competent to decide that an act of parliament was void because it was contrary to natural justice, upon an appeal to the House of Lords this inconsistency would be the consequence, that as judges they must declare void, what as legislators they had enacted should be valid.

"The learned judge himself (Blackstone) declares in p. 91, if the Parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution, that is vested with authority to control it."

It will be seen from this note of Mr. Christian, that he concurs in the opinion that an enactment contrary to natural justice is *intrinsically* void, and not law; and that the principal, if not the only difficulty, which he sees in carrying out that doctrine, is one that is peculiar to the British constitution, and does not exist in the United States. That difficulty is, the "inconsistency" there would be, if the House of Lords, (which is the highest law court in England, and at the same time one branch of the legislature,) were to declare, in their capacity as judges, that an act was void, which, as legislators, they had declared should be valid. And this is probably the

rules of interpretation be observed. The most important of these rules, and the one to which it will be necessary constantly to refer, is the one that all language must be construed "*strictly*" in favor

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reason why Blackstone admitted that he knew of no power in the ordinary forms of the (British) constitution, that was vested with authority to control an act of Parliament that was unreasonable, (against natural justice.) But in the United States, where the judicial and legislative powers are vested in different bodies, and where they are so vested for the very purpose of having the former act as a check upon the latter, no such inconsistency would occur.

The constitutions that have been established in the United States, and the discussions had on the formation of them, all attest the importance which our ancestors attached to a separation of the judicial, from the executive and legislative departments of the government. And yet the benefits, which they had promised to liberty and justice from this separation, have in slight only, if any degree, been realized.— Although the legislation of the country generally has exhibited little less than an entire recklessness both of natural justice and constitutional authority, the records of the judiciary nevertheless furnish hardly an instance where an act of a legislature has, for either of these reasons, been declared void by its co-ordinate judicial department. There have been cases, few and far between, in which the United States courts have declared acts of state legislatures unconstitutional. But the history of the co-ordinate departments of the same governments has been, that the judicial sanction followed the legislative act with nearly the same unerring certainty, that the shadow follows the substance. Judicial decisions have consequently had the same effects in restraining the actions of legislatures, that shadows have in restraining the motions of bodies.

Why this uniform concurrence of the judiciary with the legislature? It is because the separation between them is nominal, not real. The judiciary receive their offices and salaries at the hands of the executive and the legislature, and are amenable only to the legislature for their official character. They are made entirely independent of the people at large, (whose highest interests are liberty and justice,) and entirely dependent upon those who have too many interests inconsistent with liberty and justice. Could a real and entire separation of the judiciary from the other departments take place, we might then hope that their decisions would, in some measure, restrain the usurpations of the legislature, and promote progress in the science of law and of government.

Whether any of our present judges would, (as Mr. Christian suggests they ought,) "resign their offices" rather than be auxiliary to the execution of an act of legislation, that, like the edict of Herod, should require all the children under a certain age to be slain, we cannot certainly know. But this we do know — that our judges have hitherto manifested no intention of resigning their offices to avoid declaring it to be law, that "children of two years old and under," may be wrested forever from that parental protection which is their birthright, and subjected for life to outrages which all civilized men must regard as worse than death.

To proceed with our authorities: —

"Those human laws that annex a punishment to murder, do not at all increase its moral guilt, or superadd any fresh obligation in the forum of conscience to abstain from its perpetration. Nay, if any human law should allow or enjoin us to commit it, we are bound to transgress that human law, or else we must offend both the natural and the divine." — *Blackstone, Vol.* 1, *p.* 42, 43.

"The law of nations depends entirely upon the rules of *natural law*, or upon mutual compacts, treaties, leagues and agreements between these several communities; in the construction also of which compacts, we have no other rule to resort to

of natural right. The rule is laid down by the Supreme Court of the United States in these words, to wit:

"Where rights are infringed, where fundamental principles are

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but the law of nature: (that) being the only one to which all the communities are equally subject."—*Blackstone, Vol. 1, p. 43.*

"Those rights then which God and nature have established, and are therefore called natural rights, such as are life and liberty, need not the aid of human laws to be more effectually invested in every man than they are; neither do they receive any additional strength when declared by the municipal laws to be inviolable. On the contrary, no human legislature has power to abridge or destroy them, unless the owner shall himself commit some act that amounts to a forfeiture."—*Blackstone, Vol. 1, p. 54.*

"By the absolute rights of individuals, we mean those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society, or in it."—*Blackstone, Vol. 1, p. 123.*

"The principal aim of society (government) is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature; but which could not be preserved in peace without that mutual assistance and intercourse, which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws is to maintain and regulate these absolute rights of individuals. Such rights as are social and relative result from, and are posterior to, the formation of states and societies; so that to maintain and regulate these, is clearly a subsequent consideration. And therefore the principal view of human law is, or ought always to be, to explain, protect, and enforce such rights as are absolute; which, in themselves, are few and simple: and then such rights as are relative, which, arising from a variety of connexions, will be far more numerous and more complicated. These will take up a greater space in any code of laws, and hence may appear to be more attended to, though in reality they are not, than the rights of the former kind."—*Blackstone, Vol. 1, p. 124.*

"The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind. This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature, being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he endowed him with the faculty of free will."—*Blackstone, Vol. 1, p. 125.*

"Moral or natural liberty, (in the words of Burlamaqui, ch. 3, s. 15,) is the right, which nature gives to all mankind of disposing of their persons and property after the manner they judge most consonant to their happiness, on condition of their acting within the limits of the law of nature, and that they do not any way abuse it to the prejudice of any other men."—*Christian's note, Blackstone, Vol. 1, p. 126.*

"The law of Nature is antecedent and paramount to all human governments. * * * Every individual of the human race comes into the world with rights, which, if the whole aggregate of human power were concentrated in one arm, it could not take away. * * * The Declaration of Independence recognizes no despotism, monarchical, aristocratic, or democratic. It declares that individual man is possessed of rights of which no government can deprive him."—*John Quincy Adams.*

All the foregoing definitions of law, rights and natural liberty, although some of them are expressed in somewhat vague and indefinite terms, nevertheless recognize the primary idea, that law is a fixed principle, resulting from men's natural rights;

overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with *irresistible clearness*, to induce a court of justice to suppose a design to effect such objects."*

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and that therefore the acknowledgment and security of the natural rights of individuals constitute the whole basis of law as a science, and a *sine qua non* of government as a legitimate institution.

And yet writers generally, who acknowledge the true theory of government and law, will nevertheless, when discussing matters of legislation, violate continually the fundamental principles with which they set out. On some pretext of promoting a great public good, the violation of individual rights will be justified in particular cases; and the guardian principle being once broken down, nothing can then stay the irruption of the whole horde of pretexts for doing injustice; and government and legislation thenceforth become contests between factions for power and plunder, instead of instruments for the preservation of liberty and justice equally to all.

The current doctrine that private rights must yield to the public good, amounts, in reality, to nothing more nor less than this, that an individual or the minority must consent to have less than their rights, in order that other individuals, or the majority, may have more than their rights. On this principle no honest government could ever be formed by voluntary contract, (as our governments purport to be;) because no man of common sense would consent to be one of the plundered minority, and no honest man could wish to be one of the plundering majority.

The apology, that is constantly put forth for the injustice of government, viz., that a man must consent to give up some of his rights, in order to have his other rights protected — involves a palpable absurdity, both legally and politically. It is an absurdity in law, because it says that the law must be violated in some cases, in order that it may be maintained in others. It is an absurdity politically, because a man's giving up one of his rights has no tendency whatever to promote the protection of others. On the contrary, it only renders him less capable of defending himself, and consequently makes the task of his protection more burdensome to the government. At the same time it places him in the situation of one who has conceded a part of his rights, and thus cheapened the character of all his rights in the eyes of those of whom he asks assistance. There would be as much reason in saying that a man must consent to have one of his hands tied behind him, in order that his friends might protect the rest of his body against an enemy, as there is in saying that a man must give up some of his rights in order that government may protect the remainder. Let a man have the use of both of his hands, and the enjoyment of all his rights, and he will then be more competent to his own defence; his rights will be more respected by those who might otherwise be disposed to invade them; he will want less the assistance and protection of others; and we shall need much less government than we now have.

If individuals choose to form an association or government, for the mutual protection of each other's rights, why bargain for the protection of an *indefinite* portion of them, at the price of giving to the association itself liberty to violate the equally indefinite remainder? By such a contract, a man really surrenders everything, and secures nothing. Such a contract of government would be a burlesque on the wisdom of asses. Such a contract never was, nor ever will be *voluntarily* formed. Yet all our governments act on that principle; and so far as they act upon it, they are as essentially usurping and tyrannical as any governments can be. If a man pay his proportion of the aggregate cost of protecting all the rights of each of the

* United States *vs.* Fisher, 2 Cranch, 390.

It will probably appear from this examination of the written constitutions, that slavery neither has, *nor ever had* any constitutional existence in this country; that it has always been a mere abuse, sustained, in the first instance, merely by the common consent of the strongest party, without any law on the subject, and, in the second place, by a few unconstitutional enactments, made in defiance of the plainest provisions of their fundamental law.

For the more convenient consideration of this point, we will divide the constitutional history of the country into three periods; the first embracing the time from the first settlement of the country up to the Declaration of Independence; the second embracing the time from the Declaration of Independence to the adoption of the Constitution of the United States in 1789; and the third embracing all the time since the adoption of the Constitution of the United States.

Let us now consider the first period; that is, from the settlement of the country, to the Declaration of Independence.

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members of the association, he thereby acquires a claim upon the association to have his own rights protected without diminution.

The ultimate truth on this subject is, that man has an inalienable right to so much personal liberty as he will use without invading the rights of others. This liberty is an inherent right of his nature and his faculties. It is an inherent right of his nature and his faculties to develope themselves freely, and without restraint from other natures and faculties, that have no superior prerogatives to his own. And this right has only this limit, viz., that he do not carry the exercise of his own liberty so far as to restrain or infringe the equally free development of the natures and faculties of others. The dividing line between the equal liberties of each must never be transgressed by either. This principle is the foundation and essence of law and of civil right. And legitimate government is formed by the voluntary association of individuals, for the mutual protection of each of them in the enjoyment of this natural liberty, against those who may be disposed to invade it. Each individual being secured in the enjoyment of this liberty, must then take the responsibility of his own happiness and well-being. If his necessities require more than his faculties will supply, he must depend upon the voluntary kindness of his fellow-men; unless he be reduced to that extremity where the necessity of self-preservation over-rides all abstract rules of conduct, and makes a law for the occasion — an extremity, that would probably never occur but for some antecedent injustice.