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Constitutional Amendments

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The cases are numerous in which garages have been held to be violations of various building restrictions.[20] A few cases, however, disclose a liberal attitude in freeing garages from the withering blight of restrictions placed on premises before automobiles were as numerous as they are today or before they were in existence.[21]

A recent case in Oklahoma decided that a municipal ordinance forbidding a filling station within certain distances of churches and schools was a valid one, the court taking judicial notice that such a station in a residential neighborhood would constitute a nuisance.[22]

In *Blaustein v. Pincus*[23] leased premises were used as a lodging house. The landlord leased the adjoining premises to a tenant to use as a garage. The subsequent use of this land as a garage was held to constitute an eviction of the adjoining tenant so as to relieve from liability for rent.

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UNCONSTITUTIONAL AMENDMENTS—The bald statement that this or that amendment to a constitution is unconstitutional, is more or less startling to those who have given serious thought to the construction and interpretation of constitutions, and their functions in the business of governing a people. Such statements are, however, quite commonly made, seemingly without consciousness of the apparent incongruity involved. In fact, the very frequency with which they are encountered, both within and without the ranks of the legal profession, provokes inquiry as to possible foundations for the statement among the recognized canons of constitutional interpretation.

The ordinary and accepted meaning of 'unconstitutionality', as it is most frequently applied to statutes, is

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[20]Ringgold v. Denhardt, 110 Atl. 321 (Md. 1920); Evans v. Foss, 80 N. E. 587 (Mass. 1907); Riverbank Co. v. Bancroft, 95 N. E. 216 (Mass. 1911); Williams v. Carr, 248 S. W. 625 (Mo. 1923); Hepburn v. Long, 131 N. Y. S. 154 (1911); Perpall v. Gload, 190 N. Y. S. 417 (1921); Wilmot v. Gandy, 203 N. Y. S. 535 (1923).

[21]Beckwith v. Pirung, 119 N. Y. S. 444 (1909); Hammond v. Constant, 168 N. Y. S. 384 (1917); Riverbank Co. v. Bancroft, 95 N. E. 216 (Mass. 1911); Ronan v. Barr, 89 Atl. 282 (N. J. 1913).

[22]**Magnolia Petroleum Co. v. Wright, (Okl. 1926).**

[23]**131 Pac. 1064 (Mont. 1913).**

that the particular enactment in question violates some express or implied principle or precept of the existing Constitution and must fall before it, since the latter, in our system of government, is made the supreme law of the land. Allegations of unconstitutionality, i. e., invalidity because of conflict with the supreme existing law, in the case of an amendment, seem incongruous because the only proper purpose of an amendment is to change or alter the existing Constitution in some respect, and it is diametrically opposed to the idea of the continued supremacy of the elder provision. To defeat an amendment on the ground of inconsistency with the existing general provisions of the Constitution, would be a denial of the power to change the Constitution in the orderly manner therein provided.

It is for this reason that a constitution usually dictates a definite method of amendment, differing, in same important respects, from the requirements in the case of ordinary legislation, chiefly because of the higher sanctity to be accorded to the constitutional enactment. Written constitutions are practically the only examples to be found in the field of legal enactment in which the old law is given the power to destroy the new. True, in legal fiction, constitutions and statutes are the enactments of entirely different legislative bodies. Yet where shall we find any effectual difference between a theoretical expression of the will of the people through the medium of their chosen representatives in legislative assembly met, and through the same, or other, chosen representatives in constitutional convention met? It is absurd to say in either case that it is an expression of the will of the people, or the act of the people in their sovereign capacity, because, and fortunately perhaps for our general welfare, there can be no such thing in our system of government as a direct act of the people, or an authoritative expression of the will of the people. Even revolution, the vaunted last resort of a people, cannot be so classed, as it is outside of government.

Our present government might be classed, by borrowing the adjective, as a "limited" democracy, republican in form. It is a government "of the people, and for the people", though fortunately—saving possible *lese majeste* —NOT "by the people" but by representatives, as we call them. The only step forward (although even the direction of the step is sometimes open to challenge) which we have made, is in the manner of choosing and limiting the activity of our rulers. Popular election does not insure the securing of better rulers, but it does furnish a more hu-

mane, and perhaps easier method of getting rid of the bad ones than did the guillotine and the regicide.

The people, denominated as the source of sovereign power, can act only through representatives in the promulgation of either statutes or constitutions. It would surely be unflattering to suppose either that the constitutional conventions are composed of more capable minds than the legislative assemblies, or that the same representative body would give more unselfish or more carefully considered attention to the problems of government when acting as a constitutional convention that when acting as a legislative assembly. This dual function has been fastened upon our legislative assemblies for the purpose of enacting amendments to the Federal Constitution.

It is not easy to believe that the framers of the Federal Constitution, with all of the wisdom they have shown in other matters, intended to put their trust in any such factors. Instead, they plainly resorted to the more or less mechanical expedient of surrounding the act of constitutional alteration with more than the usual difficulties and checks, and requiring approval by a greater number of assemblies, or a larger proportion of the members thereof, hoping that the increase in the hazard might cause the less worthy proposals to fall by the wayside.

Strict compliance with these mechanical or formal requirements of the act of constitutional amendment, has always been regarded, by critics of constitutional theory and by the courts, as absolutely essential if their intended benefit is to be realized. Some authorities suggest that the unanimous consent of the states would be necessary to the validity of an amendment changing that article of the Federal Constitution which declares the due and proper requisites of an amendment which declares the due and proper requisites of an amendment, even though those requisites had been fully observed, and ratification by three-fourths of the states secured.

In this requirement of strict compliance with formal requisites, we seem to find a possible foundation for the idea that an amendment, or at least what purports to be an amendment, may be invalid and inoperative because it has not fulfilled all of the formal requisites set forth in the Constitution. In such case it must be a mere nullity. Here, indeed, is a proper question for someone to decide: whether or not an alleged amendment, apparently proposed and ratified in the manner dictated by Article 5, has, in fact,

failed to measure up in some respects to these requirements, and is really not an amendment at all.

A proper question indeed, but proper for whom, or for what body, to decide? The Constitution is discouragingly silent on the point, so the Supreme Court has once more generously, and with characteristic and engaging modesty, discovered, to its great surprise, that it is the only body in whom the Constitution could have intended to repose this high responsibility of guarding the sanctuary against the assault of pretenders with spurious credentials.

Thus we find that the Supreme Court could, and should, agreeably to reason and the strict principles of constitutional theory, declare unconstitutional an alleged amendment to the Federal Constitution that had not been in fact properly proposed or ratified in the manner set forth in Article 5.

Turning, for the moment, to the field of federal and state sovereignty, we will assume, without argument, the principle which has been established at so great cost, that whenever the provisions of a state constitution are in direct conflict with those of the Federal Constitution, the former must be invalid, i. e., unconstitutional, by force of the latter. Here again, the question being one which directly concerns the Federal Constitution, the Supreme Court, or any other court, could properly declare unconstitutional an alleged amendment to a state constitution. But, of course, it would be not an amendment in the proper sense of the word.

What has been said with reference to alleged amendments to the Federal Constitution being invalid or unconstitutional through non-compliance with the formal requisites therein provided for proposal and ratification of amendments, applies with equal force to amendments to state constitutions. All state constitutions have some similar provisions dictating the formal requisites for amendment. This supplies a third ground for holding alleged amendments unconstitutional.

It would be impossible to pass the subject of this discussion without reference to a fourth ground which has been strongly and ably urged in cases involving the eighteenth amendment, and which challenges attention and inquiry. It is that an alleged amendment, notwithstanding strict compliance with the formal requirements of the Constitution, may be invalid because it is utterly foreign to that intent and spirit which may be gathered from a consideration of the Constitution as a perfect whole, and because it is not properly of that class of provisions which

are, and should be, included in the frame of a government. Or, in other words, that because it is so patently out of place in an instrument of the character of the Federal Constitution, it transcends the whole power of amendment contemplated by Article 5. The proponents of this theory define such an extraordinary power of amendment to be within the purview of the powers reserved expressly to the states or to the people by Article 10, and thus, still by their theory, to be beyond the amending power given by Article 5, and subject to exercise only by unanimous consent of the states and the people thereof.

Two questions seem to present themselves: first, whether such an amendment could be unconstitutional for the reasons advanced; and second, whether, if that be so, the Supreme Court could conceivably declare it invalid. An adequate treatment of the first question would require more space than this inquiry affords, but possibly a brief consideration of the second question may settle, for all practical purposes, the points involved. This discussion therefore, will be confined as much as possible to the latter point.

The power of the Supreme Court to declare amendments invalid, must be analogous to the power which it assumes to declare statutes invalid, and rest on the same foundation. This power has perhaps been too long assumed by the Court to be now called into serious question. The arguments which the Court has advanced in support of the power, seem to be predicated upon the impropriety of allowing nullification of the constitutional action of a people by a legislative department which owes its existence solely to such action.

The Supreme Court, itself a department of the government, is now asked to consider the allegation that an amendment is invalid because its subject matter is not germane to the intent and spirit of the Constitution, and is inimical to the proper functioning of the governmental institutions thereby created. Can the Court even consider such an allegation, although only to say that the amendment does *not* violate the amending power set forth in Article 5? It is not reasonably conceivable that the Court has the power to declare invalid that article of the original Constitution by which the Court itself was created and its powers conferred upon it. Are we to say, then, that the Court has not the power to declare invalid a provision of the existing Constitution, yet has the power to do so with a new amendment? If this state of facts could exist,

would it be because the amendment is not a part of the Constitution until it has been declared valid by the Court? Or because, through infancy or some other disability, the new amendment does not enjoy the same degree of sanctity as the elder provision? The first hypothesis would require a reversal of all accepted theories of the operation of legislation, while the second would require an equally startling revision of the accepted meaning of the word amendment.

The common understanding and construction of an amendment to anything is that it is of higher sanctity than the thing which it amends, which must yield to its operation. Were this not so, it would be futile to attempt to change or amend our institutions to meet the demands of changed economic conditions.

If the Supreme Court, created by, and owing its authority and existence to the Constitution, should assume the power to consider the validity or invalidity of a constitutional amendment on other than the strictly formal ground of due and proper observance of the requisites for proposal and ratification, it would be assuming the power to nullify and destroy itself, of its own force, a power which no artificial creation can conceivably possess. The power to consider at all the validity of any legislative or constitutional act, can only mean the power to declare whether or not it is valid. The fact that it is declared valid, must necessarily comprehend the fact that it could have been declared invalid if competent facts had been shown which would establish its invalidity. Otherwise a declaration of its validity would be but the most ridiculous *brutum fulmen.*

The impotence of a court to decide constitutional questions involving its own existence has long been recognized. In *Luther v. Borden, 7 Howad 1, (1849),* the Court, speaking through the Chief Justice, said: "* * * and if a state court should enter upon the inquiry proposed in this case, and should come to the conclusion that the government under which it acted had been put aside and displaced by an opposing government, it would cease to be a court, and be incapable of pronouncing a judicial decision on the question it undertook to try. If it decides at all as a court, it necessarily affirms the existence and the authority of the government under which it is exercising judicial power".

This reasoning is cited with approval by Chief Justice Day, of the Supreme Court of Iowa in the case of *Koehler v. Hill, 60 Ia. 543 (1883),* commenting on it as follows: "That this reasoning is eminently sound, no one can doubt.

A court which, under the circumstances named, should enter into an inquiry as to the existence of the constitution under which it was acting, would be like a man trying to prove his personal existence, and would be obliged to assume the very point in dispute before taking the first step in the argument".

The decision that an amendment, properly proposed and ratified, was invalid as in violation of the intent and spirit of the Constitution, would in itself be a change in the Constitution by the judicial department, since it would introduce a test not contemplated by the Constitution. The carefully stated provisions of Article 5, setting forth the only aceptable modes of amendment, reveal a distrust on the part of the framers in the theory of constitutional changes by any or all of the departments of government. It is to be remembered that the framers had an intimate acquaintance with the English system of constitutional changes by legislative act or judicial decision. Is it illogical to suppose that a strong belief in the responsibility of this system for some of the grievances which led up to the struggle for independence, may have impelled the new nation to put temptation out of their reach? It may well have been the most impelling reason for the making of any written constitution at all, and therefore the very ark of the covenant.

The Supreme Court seems to suggest this view in the case of *Dillon v. Gloss, 256 U. S. 368 (1921)*, by the use of the following language: "The plain meaning of this (Art. 5) is that all amendments must have the sanction of the people of the United States, the original fountain of power, acting through representative assemblies, and that ratification by these assemblies in three-fourths of the states shall be taken as a decisive expression of the people's will and binding upon all". Surely this high sanction would be discredited, and the flow of this fountain stopped, by the decision of any court that an amendment, duly proposed, and ratified with all solemnity by the people in their chosen medium of constitutional activity, was invalid because of conflict with the intent and spirit of the existing Constitution.

And yet the Supreme Court has been asked, in the *National Prohibition Cases, 253 U. S. 350 (1920)*, to take jurisdiction of just such a question. And the Court not only took jurisdiction, but rendered a decision on the validity of the eighteenth amendment, on the ground, *inter alia*, that its terms did not overstep any implied limitations on

the amending power, which could be gathered only from the general intent and spirit of the Constitution. Unfortunately the Court declined to answer categorically the arguments advanced in support of the theory, so it is impossible to be certain of its reasons for taking jurisdiction of such a question.

Considering the arguments advanced in the above cases, to establish the invalidity of the amendment, it is undoubtedly sound principle that such substantive and municipal legislation as there exists, restrictive in high degree of the sphere of individual activity and existing property rights, is out of place in a relatively unchangeable constitution, which is properly classed as a framework of government and the repository of fundamental rights. Such legislation represents only a transitory wave of public opinion and should be in a form more easily responsive to public opinion. However, saving all of the arguments against it, is it not possible that they were submitted to the wrong tribunal? The Supreme Court has not the power to take cognizance of the question on such grounds. The Court decided that the eighteenth amendment met all of the formal requisites of proposal and ratification and is thus a part of the Constitution. Beyond this, the Court cannot go. The only tribunal which can give ear to these arguments is a constitutional convention, having due and proper authority to speak for the people, the constitution makers. "Vox populi, vox Dei."

JOS. F. INGHAM

EVIDENCE—SCOPE OF DYING DECLARATIONS—RESTORATION OF ORIGINAL SCOPE—No case will suggest the above heading more strongly than *Donnelly v. United States*[1] and similar ones. In that case one Donnelly was tried for the murder of Chickasaw, an Indian, in California. Evidence was sought to be introduced of a dying confession of one Joe Dick, another Indian, which confession was corroborated by other plausible circumstantial evidence. But the confession was excluded by a majority of the court against the protest of three members—a strong minority protest. Justices Holmes, Hughes and Lurton said that such a confession under the circum-

[1]228 U. S. 243; 33 Sup. Ct. 449 (1913).