CHAPTER XXXIII

THE INTERPRETATION OF THE CONSTITUTION

THE Constitution of England is contained in hundreds of volumes of statutes and reported cases; the Constitution of the United States (including the amendments) may be read through aloud in twenty-three minutes. It is about half as long as St. Paul's first Epistle to the Corinthians, and only one-fortieth part as long as the Irish Land Act of 1881. History knows few instruments which in so few words lay down equally momentous rules on a vast range of matters of the highest importance and complexity. The Convention of 1787 were well advised in making their draft short, because it was essential that the people should comprehend it, because fresh differences of view would have emerged the further they had gone into details, and because the more one specifies, the more one has to specify and to attempt the impossible task of providing beforehand for all contingencies. These sages were therefore content to lay down a few general rules and principles, leaving some details to be filled in by congressional legislation, and foreseeing that for others it would be necessary to trust to interpretation.

It is plain that the shorter a law is, the more general must its language be, and the greater therefore the need for interpretation. So too the greater the range of a law, and the more numerous and serious the cases which it governs, the more frequently will its meaning be canvassed. There have been statutes dealing with private law, such as the Lex Aquilia at Rome and the Statute of Frauds in England, on which many volumes of commentaries have been written, and thousands of juristic and judicial constructions placed. Much more then must we expect to find great public and constitutional enactments subjected to the closest scrutiny in order to discover

every shade of meaning which their words can be made to bear. Probably no writing except the New Testament, the Koran, the Pentateuch, and the Digest of the Emperor Justinian, has employed so much ingenuity and labour as the American Constitution, in sifting, weighing, comparing, illustrating, twisting, and torturing its text. It resembles theological writings in this, that both, while taken to be immutable guides, have to be adapted to a constantly changing world, the one to political conditions which vary from year to year and never return to their former state, the other to new phases of thought and emotion, new beliefs in the realms of physical and ethical philosophy. There must, therefore, be a development in constitutional formulas, just as there is in theological. It will come, it cannot be averted, for it comes in virtue of a law of nature: all that men can do is to shut their eyes to it, and conceal the reality of change under the continued use of time-honoured phrases, trying to persuade themselves that these phrases mean the same thing to their minds to-day as they meant generations or centuries ago. As a great theologian says, "In a higher world it is otherwise; but here below to live is to change, and to be perfect is to have changed often." [1]

The Constitution of the United States is so concise and so general in its terms, that even had America been as slowly moving a country as China, many questions must have arisen on the interpretation of the fundamental law which would have modified its aspect. But America has been the most swiftly expanding of all countries. Hence the questions that have presented themselves have often related to matters which the framers of the Constitution could not have contemplated. Wiser than Justinian before them or Napoleon after them, they foresaw that their work would need to be elucidated by judicial commentary. But they were far from conjecturing the enormous strain to which some of their expressions would be subjected in the effort to apply them to new facts.

I must not venture on any general account of the interpretation of the Constitution, nor attempt to set forth the rules of construction laid down by judges and commentators, for this is a vast matter and a matter for law books. All that this chapter has to do is to indicate, very generally, in what way

[1] Newman, *Essay on Development*, p. 39.

and with what results the Constitution has been expanded, developed, modified, by interpretation; and with that view there are three points that chiefly need discussion: (1) the authorities entitled to interpret the Constitution, (2) the main principles followed in determining whether or no the Constitution has granted certain powers, (3) the checks on possible abuses of the interpreting power.

1. To whom does it belong to interpret the Constitution? Any question arising in a legal proceeding as to the meaning and application of this fundamental law will evidently be settled by the courts of law. Every court is equally bound to pronounce and competent to pronounce on such questions, a State court no less than a Federal court;[1] but as all the more important questions are carried by appeal to the supreme Federal court, it is practically that court whose opinion finally determines them.

Where the Federal courts have declared the meaning of a law, every one ought to accept and guide himself by their deliverance. But there are always questions of construction which have not been settled by the courts, some because they have not happened to arise in a law-suit, others because they are such as can scarcely arise in a law-suit. As regards such points, every authority, Federal or State, as well as every citizen, must be guided by the best view he or they can form of the true intent and meaning of the Constitution, taking, of course, the risk that this view may turn out to be wrong.

There are also points of construction which every court, following a well-established practice, will refuse to decide, because they are deemed to be of "a purely political nature," a vague description, but one which could be made more specific only by an enumeration of the cases which have settled the practice. These points are accordingly left to the discretion of the executive and legislative powers, each of which forms its view as to the matters falling within its sphere, and in acting on that view is entitled to the obedience of the citizens and of the States also.

It is therefore an error to suppose that the judiciary is the only interpreter of the Constitution, for a certain field remains open to the other authorities of the government, whose views

[1] See Chapter XXIV. *ante*.

need not coincide, so that a dispute between those authorities, although turning on the meaning of the Constitution, may be incapable of being settled by any legal proceeding. This causes no great confusion, because the decision, whether of the political or the judicial authority, is conclusive so far as regards the particular controversy or matter passed upon.

The above is the doctrine now generally accepted in America. But at one time the Presidents claimed the much wider right of being, except in questions of pure private law, generally and *prima facie* entitled to interpret the Constitution for themselves, and to act on their own interpretation, even when it ran counter to that delivered by the Supreme court. Thus Jefferson denounced the doctrine laid down in the famous judgment of Chief-Justice Marshall in the case of *Marbury* v. *Madison;*[1] thus Jackson insisted that the Supreme court was mistaken in holding that Congress had power to charter the United States bank, and that he, knowing better than the court did what the Constitution meant to permit, was entitled to attack the bank as an illegal institution, and to veto a bill proposing to re-charter it.[2] Majorities in Congress have more than once claimed for themselves the same independence. But of late years both the executive and the legislature have practically receded from the position which the language formerly used seemed to assert; while, on the other hand, the judiciary, by their tendency during the whole course of their history to support every exercise of power which they did not deem plainly unconstitutional, have left a wide field to those authorities. If the latter have not used this freedom to stretch the Constitution even more than they have done, it is

[1] As the court dismissed upon another point in the case the proceedings against Mr. Secretary Madison, the question whether Marshall was right did not arise in a practical form.

[2] There was, however, nothing unconstitutional in the course which Jackson actually took in withdrawing the deposits from the United States Bank and in vetoing the bill for a re-charter. It is still generally admitted that a President has the right in considering a measure coming to him from Congress to form his own judgment, not only as to its expediency but as to its conformability to the Constitution. Judge Cooley observes to me: "If Jackson sincerely believed that the Constitution had been violated in the first and second charter, he was certainly not bound, when a third was proposed, to surrender his opinion in obedience to precedent. The question of approving a new charter was political; and he was entirely within the line of duty in refusing it for any reasons which, to his own mind, seemed sufficient."

not solely the courts of law, but also public opinion and their own professional associations (most presidents, ministers, and congressional leaders having been lawyers) that have checked them.

II. The Constitution has been expanded by construction in two ways. Powers have been exercised, sometimes by the President, more often by the legislature, in passing statutes, and the question has arisen whether the powers so exercised were rightfully exercised, *i.e.* were really contained in the Constitution. When the question was resolved in the affirmative by the court, the power has been henceforth recognized as a part of the Constitution, although, of course, liable to be subsequently denied by a reversal of the decision which established it. This is one way. The other is where some piece of State legislation alleged to contravene the Constitution has been judicially decided to contravene it, and to be therefore invalid. The decision, in narrowing the limits of State authority, tends to widen the prohibitive authority of the Constitution, and confirms it in a range and scope of action which was previously doubtful.

Questions of the above kinds sometimes arise as questions of Interpretation in the strict sense of the term, *i.e.* as questions of the meaning of a term or phrase which is so far ambiguous that it might be taken either to cover or not to cover a case apparently contemplated by the people when they enacted the Constitution. Sometimes they are rather questions to which we may apply the name of Construction, *i.e.* the case that has arisen is one apparently not contemplated by the enactors of the Constitution, or one which, though possibly contemplated, has for brevity's sake been omitted; but the Constitution has nevertheless to be applied to its solution. In the former case the enacting power has said something which bears, or is supposed to bear, on the matter, and the point to be determined is, What do the words mean? In the latter it has not directly referred to the matter, and the question is, Can anything be gathered from its language which covers the point that has arisen, which establishes a principle large enough to reach and include an unmentioned case, indicating what the enacting authority would have said had the matter been present to its mind, or had it thought fit to enter on an enumeration of specific instances?[1] As the Constitution is not only a well-drafted instrument with few ambiguities but also a short instrument which speaks in very general terms, mere interpretation has been far less difficult than construction.[2] It is through the latter chiefly that the Constitution has been, and still continues to be, developed and expanded. The nature of these expansions will appear from the nature of the Federal government. It is a government of delegated and specified powers. The people have entrusted to it, not the plenitude of their own authority but certain enumerated functions, and its lawful action is limited to these functions. Hence, when the Federal executive does an act, or the Federal legislature passes a law, the question arises — Is the power to do this act or pass this law one of the powers which the people have by the Constitution delegated to their agents? The power may never have been exerted before. It may not be found expressed, in so many words, in the Constitution. Nevertheless it may, upon the true construction of that instrument, taking one clause with another, be held to be therein contained.

[1] For example, the question whether an agreement carried out between a State and an individual by a legislative act of a State is a "contract" within the meaning of the prohibition against impairing the obligation of a contract, is a question of interpretation proper, for it turns on the determination of the meaning of the term "contract." The question whether Congress had power to pass an act emancipating the slaves of persons aiding in a rebellion was a question of construction, because the case did not directly arise under any provision of the Constitution, and was apparently not contemplated by the framers thereof. It was a question which had to be solved by considering what the war powers contained in the Constitution might be taken to imply. The question whether the National government has power to issue treasury notes is also a question of construction, because, although this is a case which may possibly have been contemplated when the Constitution was enacted, it is to be determined by ascertaining whether the power "to borrow money" covers this particular method of borrowing. There is no ambiguity about the word "borrow"; the difficulty is to pronounce which out of various methods of borrowing, some of which probably were contemplated, can be properly deemed, on a review of the whole financial attributes and functions of the National government, to be included within the borrowing power.

As to the provision restraining States from passing laws impairing the obligation of a contract, see note at the end of this volume on the case of *Dartmouth College* v. *Woodward*.

[2] As the Constitution is deemed to proceed from the People who enacted it, not from the Convention who drafted it, it is regarded for the purposes of interpretation as being the work not of a group of lawyers but of the people themselves. For a useful summary of some of the general rules of constitutional interpretation, see Patterson's *Federal Restraints on State Action*, pp. 215–217.