THE ORIGIN AND SCOPE OF THE AMERICAN DOCTRINE OF CONSTITUTIONAL LAW

Published @ 2017 Trieste Publishing Pty Ltd

ISBN 9780649239832

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Edited by Trieste Publishing Pty Ltd.
Cover @ 2017

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BY

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[*A Paper read at Chicago, August 9, 1893, before the Congress on Jurisprudence and Law Reform.*]

BOSTON:
LITTLE, BROWN, AND COMPANY.
1893.

University Press:
John Wilson and Son, Cambridge, U.S.A.

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I. HOW did our American doctrine, which allows to the judiciary the power to declare legislative Acts unconstitutional, and to treat them as null, come about, and what is the true scope of it?

It is a singular fact that the State constitutions did not give this power to the judges in express terms; it was inferential. In the earliest of these instruments no language was used from which it was clearly to be made out. Only after the date of the Federal constitution was any such language to be found; as in Article XII of the Kentucky constitution of 1792. The existence of the power was at first denied or doubted in some quarters; and so late as the year 1825, in a strong dissenting opinion, Mr. Justice Gibson, of Pennsylvania, one of the ablest of American judges, and afterwards the chief justice of that State, wholly denied it under any constitution which did not expressly give it.[1] He denied it, therefore, under the State constitutions generally, while admitting that in that of the United States the power was given; namely, in the second clause of Article VI., when providing that the constitution, and the laws and treaties made in pursuance thereof, "shall be the supreme law of the land; and the judges in every State shall be

[1] Eakin *v.* Raub, 12 S. & R. 330.

bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." [1]

So far as the grounds for this remarkable power are found in the mere fact of a constitution being in writing, or in judges being sworn to support it, they are quite inadequate. Neither the written form nor the oath of the judges necessarily involves the right of reversing, displacing, or disregarding any action of the legislature or the executive which these departments are constitutionally authorized to take, or the determination of those departments that they are so authorized. It is enough, in confirmation of this, to refer to the fact that other countries, as France, Germany, and Switzerland, have written constitutions, and that such a power is not recognized there. "The restrictions," says Dicey, in his admirable Law of the Constitution, "placed on the action of the legislature under the French constitution are not in reality laws, since they are not rules which in the last resort will be enforced by the courts. Their true character is that of maxims of political morality, which derive whatever strength they possess from being formally inscribed in the constitution, and from the resulting support of public opinion." [2]

How came we then to adopt this remarkable practice? Mainly as a natural result of our political experience before the War of Independence, — as being colonists, governed under written charters of government proceeding from the English Crown. The terms and limitations of these charters, so many written constitutions, were enforced by various means, — by forfeiture of the charters, by Act of Parliament, by the direct annulling of legislation by the Crown, by judicial proceedings and an ultimate appeal to the

[1] This opinion has fallen strangely out of sight. It has much the ablest discussion of the question which I have ever seen, not excepting the judgment of Marshall in Marbury *v.* Madison, which, as I venture to think, has been overpraised. Gibson afterwards accepted the generally received doctrine. "I have changed that opinion," said the Chief Justice to counsel, in Norris *v.* Clymer, 2 Pa. St., p. 281 (1845), "for two reasons. The late convention [apparently the one preceding the Pennsylvania constitution of 1838] by their silence sanctioned the pretensions of the courts to deal freely with the Acts of the legislature; and from experience of the necessity of the case."

[2] Ch. ii. p. 127, 3d ed. President Rogers, in the preface to a valuable collection of papers on the "Constitutional History of the United States, as seen in the Development of American Law," p. 11, remarks that "there is not in Europe to this day a court with authority to pass on the constitutionality of national laws. But in Germany and Switzerland, while the Federal courts cannot annul a Federal law, they may, in either country, declare a cantonal or State law invalid when it conflicts with the Federal law." Compare Dicey, *ubi supra*, and Bryce, Am. Com., i. 430, note (1st ed.), as to possible qualifications of this statement.

Privy Council. Our practice was a natural result of this; but it was by no means a necessary one. All this colonial restraint was only the usual and normal exercise of power. An external authority had imposed the terms of the charters, the authority of a paramount government, fully organized and equipped for every exigency of disobedience, with a king and legislature and courts of its own. The superior right and authority of this government were fundamental here, and fully recognized; and it was only a usual, orderly, necessary procedure when our own courts enforced the same rights that were enforced here by the appellate court in England. These charters were in the strict sense written *law:* as their restraints upon the colonial legislatures were enforced by the English court of last resort, so might they be enforced through the colonial courts, by disregarding as null what went counter to them.[1]

The Revolution came, and what happened then? Simply this: we cut the cord that tied us to Great Britain, and there was no longer an external sovereign. Our conception now was that "the people" took his place; that is to say, our own home population in the several States were now their own sovereign. So far as existing institutions were left untouched, they were construed by translating the name and style of the English sovereign into that of our new ruler, — ourselves, the People. After this the charters, and still more obviously the new constitutions, were not so many orders from without, backed by an organized outside government, which simply performed an ordinary function in enforcing them; they were precepts from the people themselves who were to be governed, addressed to each of their own number, and especially to those who were charged with the duty of conducting the government. No higher power existed to support these orders by compulsion of the ordinary sort. The sovereign himself, having written these expressions of his will, had retired into the clouds; in any regular course of events he had no organ to enforce his will, except those to whom his orders were addressed in these documents. How then should his written constitution be enforced if these agencies did not obey him, if they failed, or worked amiss?

[1] For the famous cases of Lechmere *v.* Winthrop (1727–28), Phillips *v.* Savage (1734), and Clark *v.* Tousey (1745), see the Talcott Papers, Conn. Hist. Soc. Coll., iv. 94, note. For the reference to this volume I am indebted to the Hon. Mellen Chamberlain, of Boston. The decree of the Privy Council, in Lechmere *v.* Winthrop, declaring "null and void" a provincial Act of nearly thirty years' standing, is found in Mass. Hist. Soc. Coll., sixth series, v. 496.

Here was really a different problem from that which had been presented under the old state of things. And yet it happened that no new provisions were made to meet it. The old methods and the old conceptions were followed. In Connecticut, in 1776, by a mere legislative Act, the charter of 1662 was declared to continue "the civil Constitution of the State, under the sole authority of the People thereof, independent of any King or Prince whatsoever;" and then two or three familiar fundamental rules of liberty and good government were added as a part of it. Under this the people of Connecticut lived till 1818. In Rhode Island the charter, unaltered, served their turn until 1842; and, as is well known, it was upon this that one of the early cases of judicial action arose for enforcing constitutional provisions under the new order of things, as against a legislative Act; namely, the case of Trevett *v.* Weeden, in the Rhode Island Supreme Court in 1786.[1]

But it is instructive to see that this new application of judicial power was not universally assented to. It was denied by several members of the Federal convention, and was referred to as unsettled by various judges in the last two decades of the last century. The surprise of the Rhode Island legislature at the action of the court in Trevett *v.* Weeden seems to indicate an impression in their minds that the change from colonial dependence to independence had made the legislature the substitute for Parliament, with a like omnipotence.[2] In Vermont it seems to have been the established doctrine of the period that the judiciary could not disregard a legislative Act; and the same view was held in Connec-

[1] Varnum's Report (Providence, 1787); s. c. 2 Chandler's Crim. Trials, 269.

[2] And so of the excitement aroused by the alleged setting aside of a legislative Act in New York in 1784, in the case of Rutgers *v.* Waddington. Dawson's edition of this case, "With an Historical Introduction" (Morrisania, 1866), pp. xxiv *et seq.* In an "Address to the People of the State," issued by the committee of a public meeting of "the violent Whigs," it was declared (pp. xxxiii) "That there should be a power vested in Courts of Judicature, whereby they might control the Supreme Legislative power, we think is absurd in itself. Such powers in courts would be destructive of liberty, and remove all security of property." For the reference to this case, and a number of others, I am indebted to a learned article on "The Relation of the Judiciary to the Constitution" (19 Am. Law Rev. 175) by William M. Meigs, Esq., of the Philadelphia bar. It gives all the earliest cases. The first, so far as is now known, was the unreported New Jersey case of Holmes *v.* Walton, in 1780. This date has been ascertained by Professor (now President) Scott, of Rutgers College. See 2 Am. Hist. Assoc. Papers, 45 (1886). For this reference I am indebted to the courtesy of Mr. Meigs since this paper was in print.

The early practice of repealing Acts which had been held unconstitutional is signif cant. Meigs, in 19 Am. Law Rev. 188.

ticut, as expressed in 1795 by Swift, afterwards chief justice of that State. In the preface to 1 D. Chipman's (Vermont) Reports, 22 *et seq.*, the learned reporter, writing (in 1824) of the period of the Vermont constitution of 1777, says that "No idea was entertained that the judiciary had any power to inquire into the constitutionality of Acts of the legislature, or to pronounce them void for any cause, or even to question their validity." And at page 25, speaking of the year 1785, he adds: "Long after the period to which we have alluded, the doctrine that the constitution is the supreme law of the land, and that the judiciary have authority to set aside . . . Acts repugnant thereto, was considered anti-republican." In 1814,[1] for the first time, I believe, we find this court announcing an Act of the State legislature to be "void as against the constitution of the State and the United States, and even the laws of nature." It may be remarked here that the doctrine of declaring legislative Acts void as being contrary to the constitution, was probably helped into existence by a theory which found some favor among our ancestors at the time of the Revolution, that courts might disregard such acts if they were contrary to the fundamental maxims of morality, or, as it was phrased, to the laws of nature. Such a doctrine was thought to have been asserted by English writers, and even by judges at times, but was never acted on. It has been repeated here, as matter of speculation, by our earlier judges, and occasionally by later ones; but in no case within my knowledge has it ever been enforced where it was the single and necessary ground of the decision, nor can it be, unless as a revolutionary measure.[2]

In Swift's "System of the Laws of Connecticut," published in 1795,[3] the author argues strongly and elaborately against the power of the judiciary to disregard a legislative enactment, while men-

[1] Dupuy *v.* Wickwire, 1 D. Chipman, 237.

[2] This subject is well considered in a learned note to Paxton's Case (1761), Quincy's Rep. 51, relating to Writs of Assistance, understood to have been prepared by Horace Gray, Esq., now Mr. Justice Gray, of the Supreme Court of the United States. See the note at pp. 520–530. James Otis had urged in his argument that "an Act of Parliament against the Constitution is void" (Quincy, 56, n., 474). The American cases sometimes referred to as deciding that a legislative Act was void, as being contrary to the first principles of morals or of government, — *e. g.*, in Quincy, 529, citing Bowman *v.* Middleton, 1 Bay, 252, and in 1 Bryce, Am. Com., 431, n., 1st ed., citing Gardner *v.* Newburgh, 2 Johns. Ch. Rep. 162, — will be found, on a careful examination, to require no such explanation.

[3] Vol. i. pp 50 *et seq.*