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E. L. Phillips

POLITICAL AND JUDICIAL THEORIES OF CONSTITUTIONAL CONSTRUCTION

E. L. PHILLIPS*

The American doctrine of constitutional law is a unique contribution to the sciences of government and law. Its distinguishing feature is the power of the courts to declare null and void the enactments of the legislative department or the orders of the executive branch of the government. This is in direct contrast to the European practice, where every department is left free to determine the constitutional limitations of its own action, and to the English system based on an unwritten constitution over which the legislative department exercises supreme control. The result in one case is that the constitution is nothing more than a moral or political check upon governmental action with which the courts and lawyers are not concerned save as to throw light upon problems of statutory construction, while in the other case, the constitution being a legal restraint upon all official action, it vitally affects the American judge and practitioner as it is frequently the basis upon which actual litigation must be decided.

When the colonies declared their independence and finally established their government under the Articles of Confederation, they made no provision whatsoever for any executive power, because of their traditional dread of executive action. That was one of the conspicuous reasons that led to the utter failure of the government and resulted in the adoption of the Constitution. The members of the constitutional convention were still sorely afraid of executive power, but from sad experience under the Articles of Confederation, they realized that such power was necessary to a strong and efficient government and consequently provided for it in the Federal Constitution. However they sought to protect themselves against executive tyranny by adopting a doctrine of government (*political* philosophy) known as the separation of powers. By this doctrine each

* Member of Wyoming County Bar, West Virginia.

department—the executive, the legislative, and the judicial —was to be supreme in its own sphere of action and could not encroach upon the prerogatives of the others. And from the political interpretation by each department of its own power has arisen the controversies the judicial interpretation of which has given the American people a Constitution, far more comprehensive and complete than it was when it came fire-new from the hands of the Convention.

The American party system has accentuated the problems of constitutional construction and from the resulting controversies the constitution has always emerged more complete, the Supreme Court, with few exceptions, more respected and the people more enlightened. The party aim has been in every case to give public opinion the force of law by incorporating the issues in their platform and later into statutes. Even then the judicial power to interpret political theory is a latent force until the theory, as enacted into law, is invoked as a means of remedial justice. But generally speaking every law that is a result of political issue before the people, previous to or at the time of enactment, becomes sooner or later, in some form a subject of judicial review. Thus we have been furnished with decisions upon the great and fundamental questions of political theory of constitutional construction the most important of which are: the nature of the Federal Union, the policy of expansion, the theory of the National Bank, the theory of Legal Tender, the protective Tariff, internal improvements, and the Income Tax. About these great questions political debate has raged, and learned and profound judicial opinions have been rendered by the greatest earthly judicial tribunal.

Two theories of construing the Constitution immediately arose upon its adoption, that of liberal construction adopted by Hamilton and the Federalists and followed by the Whigs and Republicans, and that of strict construction held by Jefferson and the Anti-Federalists and followed by Democratic-Republicans and the Democrats. But the first great question to be settled—that of judicial power over legislative enactment—had its inception long before the adoption of the Constitution. The earliest American decision that judges might disregard legislative acts forbidden

by the Constitution appears to have been given in New Jersey in 1780, in the case of *Holmes* v. *Walton.* The supreme Court of New Jersey in that case declared a statute, providing for a jury of six men to try certain cases, to be unconstitutional and void. In this case the legislature acquiesced. A New York case, *Rutgers* v. *Waddington,* followed in 1784, in which the court so construed an act of the New York legislature as to avoid a violation of the treaty of peace with Great Britain. The decision excited considerable popular discontent and the New York Assembly passed a resolution denying the right of the court to dispense with an act of the legislature. A little later the judges in Rhode Island likewise declared void an act of the legislature in violation of the Constitution in the case of *Trevett* v. *Weeden.* The Rhode Island legislature summoned the judges before it to explain their reasons for this, and their explanations not being satisfactory the legislature passed a resolution to dismiss the judges. Many other colonial courts made similar decisions with more or less success before the adoption of the Federal Constitution. When the Philadelphia convention met in 1787 to frame the constitution its legal members, of whom there were a number of much prominence, must have known of these decisions, and it is likely that the convention expected the courts to exercise the power of disregarding unconstitutional acts of Congress. John Francis Mercer of Maryland opposed this view and it was an argument used by the Anti-Federalists against adopting the Constitution. Hamilton thought the people needed to give the courts such power to protect them from obscure and equivocal laws, "for," said he, "all new laws tho penned with the greatest technical skill, and passed on the fullest and most mature deliberation are more or less obscure and equivocal until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."

The Federal Courts were not long in asserting the doctrine, but it was not until 1803 in the case of *Marbury* v. *Madison* that the question was finally settled. In that case Marbury held a judicial appointment under Adams, which had been duly approved by the Senate, his commission was duly signed and sealed but not delivered when Adams was succeeded by Madison who refused to deliver the commis-

sion. Marbury applied to the Supreme Court for a writ of mandamus to compel the delivery of the commission. Chief Justice Marshall delivered the opinion of the Court sustaining the contention of Marbury, but in so doing held that that clause of the Judiciary Act that gave the Supreme Court original jurisdiction in issuing writs of mandamus was unconstitutional; hence, inoperative and void. Thus the Supreme Court in establishing the supremacy of the Constitutional limitations on the departments did so in a most democratic way,—by rejecting an extension of its own jurisdiction,—and settled for all time that the supreme sovereignty resides in the people; that they have the power to organize the government and to assign to the different departments their respective powers; that the constitution defined the limits of legislative power, and beyond these limits congress could not go, without the expressed will of the people in the form of constitutional amendments. It was to be definitely understood that under our written constitution Congress did not possess, and could not exercise, the omnipotence of Parliament.

The logic of Chief Justice Marshall in this historic opinion is illustrated in the following extracts:

> "The question whether an act repugnant to the Constitution can become the law of the land, is a question deeply interesting to the United States, but happily not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles supposed to have been long and well-established to decide it * * *. The powers of the Legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written. * * * The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the Legislature shall please to alter it. If the former part of the alternative be true, then written Constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable. * * * If an act of the Legislature repugnant to the Constitution is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not a law, does it constitute a rule as operative as if it were a law? This would be to overthrow in fact what was established in theory, and would seem at first view

an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration. It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So is a law in opposition to the Constitution; if both the law and Constitution apply to a particular case, so that the Court must either decide that case conformable to the law, disregarding the Constitution, or conformable to the Constitution, disregarding the law,—the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution and not such ordinary act, must govern the case to which they both apply."

Rufus Choate has said, with reference to this decision and the importance of the doctrine enunciated:

"I do not know that I can point to one achievement in American statesmanship which can take rank for its consequences of good above that single decision of the Supreme Court, which adjudged an act of the Legislature contrary to the Constitution to be void, and that the judicial department is clothed with the power to ascertain the repugnancy, and pronounce the legal conclusion. That the framers of the Constitution intended this to be so is certain; but to have asserted it against Congress and the Executive, to have vindicated it by that easy, yet adamantine demonstration than which the reasoning of mathematics shows nothing surer, to have inscribed this vast truth of conservatism upon the public mind, so that no demagogue, not in the last stage of intoxication, denies it—this is an achievement of statesmanship (of the judiciary) of which a thousand years may not exhaust or reveal all the good."

But one step remained and that was to declare a state law void and of no effect because it violated a principle of the Federal Constitution. An opportunity was soon given in the case of *Fletcher* v. *Peck*. In that case the state of Georgia had sought, by legislative enactment to dispossess a landholder of his property, which had been acquired under a previous statute of the same state. The Supreme Court held that a grant thus acquired was an executed

contract and that the owner could not be dispossessed even by subsequent legislation. Of this decision Carson says, in his history of the Supreme Court:

> "It towers above the decisions of a period of many years, important and imposing though they are, and, with *Marbury* v. *Madison*, stands as an outspur of that magnificent range of adjudications which bear to our constitutional jurisprudence the relative strength and majesty of the Rocky Mountains to our physical geography."

This doctrine was now complete and has never since been seriously controverted. The principle was maintained by the colonial court in colonial days, and early declared with reference to Federal statutes by the Supreme Court, and it was but a logical and natural step to reaffirm the doctrine with reference to the acts of the legislatures of the various states.

The two theories of Constitutional construction were not destined to be easily or permanently reconciled. Jefferson supported his doctrine of strict construction with the ninth and tenth amendments which are as follows: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people," and "The powers not delegated to the United States by the Constitution nor prohibited by it to the states, are reserved to the states respectively or to the people." While Hamilton made his maxim, "If the end is clearly defined, the means must be employed to reach it," justify his belief in the implied powers and loose construction. There can be little doubt that strict construction was a sound principle in theory but the difficulty of amending the Constitution led to the adoption of the principle of liberal construction. In fact Jefferson found himself compelled to violate his cherished doctrine in the purchase of the Louisiana Territory which was beyond any possible express power granted in the constitution. He recognized his inconsistency and sought to have his act ratified by constitutional amendment, but the general approval of the people caused congress to ignore the request. Woodrow Wilson characterizes Jefferson's recognition of his inconsistency as a manifestation of mediocrity, yet one wonders what

Marshall's reaction would have been, at the time, to the Eight Hour Law.

While the courts have often affirmed the doctrine of loose construction, the justification has resulted from a very limited number of provisions under Section VIII of the Constitution, in which certain very definite powers have been granted to Congress. The exercise of these powers granted in paragraphs 1, 2, 3, and 18 of Section VIII has most often called into question the limitation of Congressional power, both in the courts and political debate. The first paragraph gives to Congress power "to pay the debts and provide for the common defense and general welfare of the United States;" the second "to borrow money on the credit of the United States;" and the third, "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." This is true especially of that phrase, "among the several states," in the third paragraph, and the eighteenth, which is the general clause giving to Congress power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, etc." The commerce clause (paragraph 3) has been more often referred to by the courts than any other clause of the constitution, and since the passage of the Interstate Commerce act in 1884, and the recognition of the constitutionality of the act by the courts it has become of great importance. The first Federal decision involving the commerce clause was that of *Gibbons* v. *Ogden* in which Ogden sought to enjoin Gibbons from running a steamboat between New York and New Jersey under a New York statute. Chief Justice Marshall again asserted the doctrine of loose construction, justifying it in this case upon authority of the "elastic clause" (Sec. VIII, Cl. 18) holding that the power to regulate commerce among the several states comprehended the regulation of navigation between the states.

Growing out of the financial plans of Hamilton, Congress, in 1791, passed a law creating the first United States Bank. The power to "emit bills of credit and make them legal tender in payment of debts" was denied to the Federal Government by the Constitution. So the friends of the Bank sought justification in the power granted to Congress "to borrow money upon the credit of the United States."

But the Bank was destined to have a hectic career for it was only chartered for twenty years and Clay, who was later to become the Bank's greatest champion, opposed a recharter on the ground that it was not originally authorized by the Constitution and therefore a renewal would be unconstitutional. Largely through his influence the charter was defeated. Immediately thereafter a great number of wild-cat banks sprang up. The country was flooded with cheap paper money and national finances were in a chaotic condition. Clay, returning from abroad, confessed his views had changed and Madison also shifted from the opposition and when he became president sent a message to Congress recommending a national bank. A bill was soon introduced and passed and the Bank again opened its doors for business. The constitutionality of the Bank Act was soon to be upheld in the historic opinion of Marshall in the case of *McCullough* v. *The State of Maryland.* This decision was sustained in the case of *Osborn* v. *The United States Bank* and the friends of the Bank were jubilant. But its charter was again to lapse under the strong will of Jackson and remain dormant until the exigencies of the Civil War caused to be passed the National Banking Act. This act never became the subject of attack on constitutional grounds.

The Supreme Court met with its greatest difficulty in applying the doctrine of loose construction to the second clause of Section VIII, which gives Congress power to "borrow money on the credit of the United States." This clause was invoked to support the theory of Legal Tender. Upon this question the Court decided three ways. The first case involving the constitutionality of the Legal Tender Acts was that of *Hepburn* v. *Griswold* in which the court held the Acts unconstitutional. A little later, the court held the Acts constitutional on the ground of public necessity and expediency for self-preservation as a result of the Civil War. The Court finally in the case of *Julliard* v. *Greenbaum* came straight out and held these acts constitutional on the broad grounds of the power of Congress, not only to provide for the common defense, but also as a result of the power "to borrow money on the credit of the United States." This decision was rendered in 1884, and, it has been said, carries

the doctrine of loose construction further than any other opinion ever announced by the Supreme Court.

Although the two major parties still adhere to their traditional views on interpretation, strictly speaking, however, the party in power has been loose constructionists and their opponents strict constructionists. Bryce justifies the doctrine in the following language:

> "The interpretation which has thus stretched the Constitution to cover powers once undreamt of may be deemed a dangerous resource. But it must be remembered that even the constitutions we call rigid must make their choice between being bent or being broken. The Americans have more than once bent their Constitution in order that they might not be forced to break it."

Possibly Woodrow Wilson sounded the popular note of the present time on this subject when he said: "Liberal construction of the Federal charter the people want, but not a false construction of it."

Party conviction has always been recognized as an essential qualification for the Supreme Bench, in addition to legal learning and public service. And while the first twelve years of the Court were tentative and incipient in so far as results were concerned, only ardent supporters of a strong federal system were elevated to the Bench, and the unanimity of opinion in the early decisions had here its explanation. In 1801 Adams appointed Marshall Chief Justice which at once facilitated the Federalist view of a strong central government and launched the most remarkable judicial career of modern times. In 1835, after thirty-five years of continuous service as Chief Justice, Marshall passed away at the advanced age of four-score years. His death came during critical times, and furnished the opportunity for a decided change in the policy of the Court. He left a Bench of able associates, the most learned being Story, who in legal scholarship was the equal of Marshall. The elevation of Story to the Chief Justiceship was, however, impossible, for Jackson was now serving his second term as President, and he had often found himself in opposition to the rulings of the Court, and never hesitated to ignore any of its decisions that represented views at variance with his own. His opportunity had now come to re-

model the Court after his own fashion, and he did not hesitate to make use of his opportunity. Three of the five associates—McLean, Baldwin, and Wayne—held commissions signed by Jackson, and the resignation of Duval in 1836 enabled him to appoint Barbour, of Virginia, who made the fourth. But the real triumph of Jackson came with his opportunity to name a Chief Justice. He appointed Roger B. Taney of Maryland, whose political views and public conduct were in perfect harmony with those of the President, and the influence of these views and those of his associates was soon to be manifested in judicial opinions. At the time of the death of Marshall there were three cases pending which involved the questions of the constitutionality of state laws. These had been argued before the Court, and Justice Story asserted that Marshall had expressed the view that each law was unconstitutional. But as no opinion had been handed down before the death of Marshall, it became necessary to re-argue these cases, and it was soon found that the view of the Court would now be different.

The first case was that of the *Mayor of the City of New York* v. *Miln,* which involved the constitutionality of an act of the New York State Assembly, requiring the master of every vessel arriving in the port of New York to report in writing his passenger list, and imposing a penalty for non-compliance. Although it was argued that the statute was obnoxious to the Constitution because in violation of that provision of the Constitution that gave Congress the power to regulate commerce, and although this view was supported by the decisions of *Gibbons* v. *Ogden* and *Brown* v. *The State of Maryland,* the state law was held by the majority of the Court to be valid, the statute being a mere regulation of police, and not an attempt to regulate commerce. Justice Barbour delivered the opinion of the court, and Justice Story rendered a dissenting opinion.

A second departure from the doctrine of Marshall was in the case of *Bristoe* v. *Bank of the Commonwealth of Kentucky,* holding a state law empowering a bank to issue bills to circulate as money to be valid in direct conflict with the case of *Craig* v. *State of Missouri.* Justice Story again dissented and referred to Marshall as having denied that state

institutions had the power to issue bank-notes.

The third case was that of the *Charles River Bridge* v. *The Warren Bridge,* a case that is notable from the fact that it is the first expression of Chief Justice Taney on a constitutional question, and the first case in which Daniel Webster as counsel sustained defeat on a constitutional question before the Supreme Court. The facts are these: A ferry from Boston to Charlestown on the Charles River had been authorized by the Legislature of Massachusetts, and the tolls were to be paid to the Corporation of Harvard College. In 1785, the Legislature authorized a bridge company to construct a bridge across the river which took the place of the ferry, and the company agreed to pay to Harvard College an annual rental for a definite number of years, after which the rental should cease and all profits should go to the bridge company. In 1828, the Legislature incorporated another company, known as the Warren Bridge Company, with power to erect a second bridge across the river. The older corporation sought an injunction to prevent the erection of the bridge and the exercise of the franchise. The state court upheld the validity of the law granting the right of incorporation to the Warren Bridge Company and appeal was made to the Supreme Court of the United States on the ground that the state had attempted to impair the obligation of contract, as the contract of the older company with Harvard College lacked a number of years of expiring. The Supreme Court sustained the right of the state to incorporate the second bridge company. This was in absolute conflict with the Dartmouth College Case and the case of *Fletcher* v. *Peck,* both decisions of Marshall. For the third time, Justice Story dissented, and this time he was joined by Justice Thompson.

The climax of the judicial career of Chief Justice Taney came with the Dred Scott decision which was handed down on March 6, 1857. This decision by the court of last resort finally resulted in an appeal to arms which was destined to reverse the decree of the nation's highest court of law. The Civil War was then at hand, and it is remarkable and interesting that during the period covered by the War no echo of it was reflected from the Supreme Court. The only

change that the War produced was in the resignation of Justice Campbell, who left the Bench to devote his efforts to the cause of the South.

In 1862, the Prize Cases arose, in which the Supreme Court upheld the President's right to institute a blockade. These decisions were of great importance to the cause of the North. The President had appointed three new justices—Swayne, Miller, and Davis—whose selection made these decisions possible. The attitude of the Chief Justice was clearly indicated by his decision from the Circuit Bench in the Merryman Case in which he denied the right of President Lincoln to suspend the Act of Habeas Corpus. But the career of Justice Taney was about at an end. He was unable to serve on the Bench during 1863, and in October of the following year he died. On the sixth of December, 1864, Chase was appointed to succeed him.

The new Chief Justice held views also at wide variance to those of his predecessor. He held pronounced views in opposition to slavery, and in 1841 he had become one of the leaders of the Liberty Party. The fact that many of his acts while Secretary of the Treasury during the early years of the War were unconstitutional, did not deter him as Chief Justice from reverting to principles of interpretation established by Marshall.

Political influence was held responsible for the reversal by the Court of the decision in the case of *Hepburn* v. *Griswold*, one of the Legal Tender Cases. This case declared the Legal Tender acts unconstitutional much to the chagrin of President Grant and other prominent Republicans. The Court at this time consisted of eight judges, the Chief Justice and seven associates. The Chief Justice (Chase) and four associates concurred, and three dissented from the opinion. By the provisions of an act of Congress which took effect on the first Monday in December, 1869, it was enacted that "the court should consist of a chief justice and eight associates, and that, for the purpose of this act, there should be appointed an additional judge." Justice Grier, who had voted with the majority in this case, resigned February 1, 1870. President Grant, under the provisions of the judiciary act of 1869, appointed to the Supreme Bench Justices Strong and Bradley. When the

case of *Hepburn* v. *Griswold* came up for rehearing, both of these new justices voted for reversal, which gave a majority of one. The Court and President Grant were severely criticized, but in later years the new decision has been more generally approved.

The Supreme Court remained comparatively free from party criticism from 1870 to the time it rendered the income tax decisions in May, 1895. This decision was arrived at by a vote of five to four, and reversed the decision of 1880. The later decision was severely condemned by the Democratic and Populist platforms of 1896, and finally resulted in the sixteenth amendment. For this decision the Court was derided as the ally of the rich, and the defender of special privilege, and there has been an increasing tendency since that time to criticize the Court. The decisions are so often rendered by a divided Court, often by a five to four vote, and the diversity of grounds on which the various members have reached their diverging conclusions has suggested that the justices are prompted by party convictions rather than established and infallible guiding principles of law. The climax of opposition to the courts came in 1912, when the recall of judicial decisions became a national issue. Although it must be admitted that the members of the Court have not always been able to free themselves from party conviction it is qually true that they have not debased their decisions with political doctrine in giving effect to their respective views. Carson discusses the influence of party convictions on judicial decisions as follows:

> "The theories of the Constitution entertained by Marshall and Taney were those of their respective parties, and are irreconcilable. Without imputing to either a desire to extend unnecessarily or immoderately the doctrines of their schools it can be safely asserted that although partisan politics should have no place upon the Bench, yet it is impossible to expect men to divest themselves of certain fundamental views in relation to the nature of our Government simply because they have ascended the Bench and thrown aside the contentions of the political arena."

The history of these onslaughts of criticism has been that when political ammunition has spent itself and the smoke

of battle has cleared away the principles enunciated by the Court are found anchored to fundamental principles of law. And those who find themselves at variance with the views of the Court for the moment can console themselves with the thought that the Constitution of the United States, in its principles and in its main features, is no longer the subject of controversy, of debate or of doubt. The line of sovereignty in the states and the nature, extent, and limits of the sovereignty of the national Government have been distinctly marked; and thus the gravest questions that have arisen under the Constitution—questions that disturbed the harmony and threatened the existence of the Union—have passed from the field of debate into the realm of settled law.