

THE
AMERICAN LAW REGISTER
AND
REVIEW.

DECEMBER, 1893.

THE JURISDICTION TO DECLARE VOID ACTS
OF LEGISLATION—WHEN IS IT LEGITI-
MATE AND WHEN MERE USURPA-
TION OF SOVEREIGNTY.¹

BY RICHARD C. MCMURTRIE, ESQ.

IN June, 1893, a paper was printed by the AMERICAN LAW REGISTER AND REVIEW, p. 594, on the subject of Constitutional Law. The attempt was there made to point out what was the ground on which the courts have under-

¹ We feel confident that the members of the bar will feel deeply interested in the criticism of the present rather popular theory of constitutional law which causes courts to set aside the acts of the legislatures for unconstitutionality; not on the ground that any clause in the constitution of the State can be pointed to which prohibits the legislation, but that the legislation being contrary to some of the fundamental principles of our political institutions, the power to pass the law has never been conferred on the legislature by the constitution.

This article by Mr. MCMURTRIE is an attack on the doctrine referred to, mainly on the ground that what are the fundamental principles of our institutions, except when they are expressly set forth in a Bill of Rights of a written constitution, are so indefinite that the judge, in declaring a law unconstitutional on this ground, does not apply definite principles of law, but rather sets himself up as the sole and final judge of the law's expediency. In other words, that the judge

taken to assume the power and the right of disregarding a legislative enactment because it is unconstitutional. This power, justified as it is by the Supreme Court on the famous judgment of Chief Justice MARSHALL, in *Marbury v. Madison*,¹ has never been, and certainly cannot be, controverted successfully. It is on p. 176 that the whole subject is reduced to this—the Constitution is the superior paramount *law*, unchangeable by ordinary means; and, as it is a question for the judicial department to say what the *law* is, it must determine which prevails if there is a conflict, just as it does in case of conflicting statutes or by-laws of a corporation that are contrary to law. This power is rested on the fact that the Constitution is written. The Chief Justice then quotes what seems to be rather a weighty and pregnant sentence from the Constitution as the justification for the assumption of the power—*the judicial power shall extend to all cases arising under the Constitution.*

It is, therefore, very clear that the power asserted for the judiciary to disregard legislative enactments was by that judge, who was more of a statesman than lawyer, referred to the *document* or writing called the Constitution, and whenever that word is used that document is the thing intended, and no other system of ethics or national institutions or modes of thought or political theories with which the law under consideration is alleged to conflict. Such a power is not merely essentially judicial, but essentially vested in the judiciary—or the Constitution that confers or restrains the legislative power becomes merely directory and absolutely incapable of being enforced. Up to this

in declaring the law unconstitutional, because against the fundamental principles of the social compact, performs a legislative rather than a judicial act.

Those who are interested in the controversy can find these questions discussed from another standpoint in the "Editorial Notes" of the *AMERICAN LAW REGISTER AND REVIEW* for August (p. 782), October (p. 971), and November (p. 1064).

W. D. L.

¹ 1 Cranch.

point since that judgment there has probably been no dissent that carries any weight from the claim of the judiciary. This was in 1803. Before that time there had been an assertion by a very able man in the same court of the existence of a limitation on the legislative powers as well as rights of a very different character, and of the power or right of the judiciary to determine this. The judgment of CHASE, J., in *Calder v. Bull*,¹ should be read to appreciate this. What this limitation is, where it is to be found, how it is to be ascertained is there stated with probably all the force that is possible and with all the clearness and certainty.

And what is this limitation of the power of a State—the *social compact*? Have any two men agreed as to what that was? Has any one even pretended that it ever had or by possibility could have had an actual existence?

Reduce the proposition to writing and insert it in the Bill of Rights, and could there be found a respectable minority, nay could there be found one man that would consent to thus transfer the sovereignty of the nation from its representatives to a court by enacting *that all legislation contrary to the said compact shall be void, and what that compact is the judges shall be the final arbitrators, and they are to ascertain it from their own notions as to what it ought to be assumed to have been.*

It has been many years since that remarkable contract has been seriously referred to in anything I have read, and never have I heard it mentioned except in ridicule of the minds that could invent such trash. It is, therefore, not worth while spending time upon it.

The most recent utterance in the same direction that can carry force is that of FULLER, C. J.,² when he says: "Irrespective of the operation of the Federal Constitution and *restrictions asserted to be inherent in the nature of American institutions*, the general rule is that there are no

¹ 3 Dall., 386.

² 148 U. S., 661.

limitations upon the legislative power of the legislature of the State, except those imposed by its written constitution."

Test this restriction by a clause in the Bill of Rights, as the social compact was just now tested, and the result must be the same. Nor is any one justified in imputing this as an opinion to the Chief Justice. He is speaking of *assertions* which can hardly be applicable to his own views.

There is a third illustration to be found in the dissenting opinion of BREWER, J., in *Budd v. New York*.¹ It is legislation that is described as *paternal government*, which to him is odious, and just below his dissent from the recognition of the power of the State to regulate its internal affairs is based on this, *because the statute compels service without compensation*—that is, the State is powerless to compel property-owners to keep the side-walks clear of snow or to serve gratis in any office. In this FIELD and BROWN, JJ., concur. Surely the English Government to-day cannot be said to be too absurd to be possible, and yet their scheme very largely rests on this odious custom of compelling work without pay. Mr. BURKE thought it the glory of the French. Yet Mr. J. BREWER says that such law is not within the power of a State, the constitution being silent.

It will be observed we are not dealing with anything in the Constitution of the United States, and outside of that instrument one may ask where do these gentlemen find their authority to pass a judicial sentence in the case. Apart from that instrument they have no more power to express an opinion than any other judge, and what they say can have no more weight in the State courts than the dictum of any other court of concurrent jurisdiction.

They have no *right* to express an opinion on the subject on appeals from a judgment of the State courts, because their right is confined to alleged violations of the Federal Constitution. They are confined to cases originating in the Federal courts, as matter of power as well as

¹ 143 U. S., 551.

right, as to all matters involving the powers of the State legislatures outside of the restraints of the Federal Constitution.

It does, therefore, seem to be a little obtrusive to be thus volunteering a suggestion which is about as remote from their judicial office as can well be stated. They disclaim the right to say a word as to the meaning of the written constitution of the States, and yet volunteer a statement which many persons will assume to carry with it the weight of a judgment of the court from which there is no appeal. Let the action of this court in *Satterlee v. Matthew*¹ be compared with this dissenting declaration. There the legislature *divested* a legal right to property without compensation by giving effect to a contract in form which when it was made was absolutely void, not voidable, but void. It was there said by this court that it had no jurisdiction, and hence it declined interfering. This apparent enormity of the legislature was perfectly just. It made valid an actual contract by one perfectly competent in fact, but disabled by the most absolutely technical of all rules of law—the contracting party was a married woman and in theory of law had no will of her own. There is a passage on p. 414 that shows how utterly different were the rules in 1829 from those assumed in 1889 without apparently even the consciousness that a doubt ever existed as to the powers of the judiciary, much less that the court had repudiated it expressly. When a sentence in the judgment of *Fletcher v. Peck*, of the same tendency as that I have cited from BREWER, J., was quoted, the reply which is there assumed to be sufficient is—*it is nowhere intimated in that opinion that a State Statute which divests a vested right is repugnant to the Constitution of the United States, and unless that is so this Court has no jurisdiction to re-examine and reverse the judgment of the Supreme Court*, which had affirmed the power to exist in the legislature of the State of divesting a legal right of property at its pleasure and without compensation.

¹ 2 Pet., 380.

It may be answered, and gentlemen holding the opinion that to them is committed the power of determining whether acts of legislative power are nullities because contrary to American institutions or as exercises of an odious form of government or that can be stigmatized as paternal are certainly likely so to answer—"I am not bound by the opinions of my predecessors; if I were there would be nothing to do but to allege the constitution, and failing that I would be powerless. It is therefore idle to discuss the question of power." These gentlemen sit in a court from which there is no appeal saving through the House to the Senate as a court for trying an impeachment, and we may be quite sure from past experience that this will never be called into exercise for any such trifle as the exercise of a jurisdiction in a private case where it does not exist. No one engaged in public affairs apparently thinks this is worthy of serious consideration.

It is, however, most fitting that there should be very distinctly stated what are the consequences of this new departure and of its supreme importance under our system.

It is a marked feature of the Constitution of the United States, and probably of most of the States, that there is no absolute restriction on the enactment of anything as law other than the declarations in the Constitution limiting the legislative power. The veto power is probably never *absolute*. The State speaks in this way and can speak in this way only. The latter part of the sentence I am about to quote, probably, no one will dispute, that *the legislature is the supreme authority except as limited by the constitution of the State and sovereignty of the people is exercised through their representatives in the legislature, unless, by the fundamental law, power is elsewhere reposed*, FULLER, C. J. *McPherson v. Blacker*,¹ that is so far as the capacity of a State to speak or declare its will is concerned. No one will probably dispute this.

It is also clear that, excepting the jurisdiction as to all

¹ 146 U. S., 25.

matters arising under the Federal Constitution, the judicial power is not authorized to interfere in the question of *power*, except by a necessary implication as demonstrated in *Marbury v. Madison*, and on that ground only, viz., that there are two statutory enactments, one we call the constitution which binds and limits the legislature, and if their acts conflict with this they are not legal and the judiciary, of necessity, must so decide when deciding the question of law.

When the Constitution commands and prohibits, anything contrary to these commands or prohibitions is void, not voidable. It is like an unexecuted deed or will, or a forged document: *Naughton v. Selby*.¹ When this occurs we speak of the effect of the Constitution as sovereign. It is the highest act of sovereignty that restricts the nation itself in respect of the power to speak. It is a self-imposed restraint and the legislature and the courts are both addressed by the nation through that instrument. And when the courts have exercised that power of disregarding legislation, it has always been conceived to be the highest possible of their judicial functions.

Is this less an act of sovereignty when the will of the nation in the only way it can express itself is disregarded, and required by all to be disregarded as an act of usurpation because it has violated some other code of political ethics? And is there a possible escape from the conclusion that the persons by whom this can be effectually done, in fact, exercise the sovereignty of the State? Do they not establish the law, not only without the aid of the legislative power, but in spite of it?

It is quite impossible that anything new in the form of argument or suggestion or illustration, can be presented to minds such as they must possess who occupy the place of justices of the Supreme Court. We are dealing with the very first and most elementary principles of a government that has been administered for a century, and with a question mooted before the government was organized.

¹ 118 U. S., 425.

The claim that is now set up was advanced three centuries ago, and having been maintained by the most profound and arrogant of lawyers, it had been abandoned long before the foundations of our existing system were laid and it is referred to only because it serves as *the example* of what constitutes the sovereignty of the nation. What is said by Mr. GARDINER in his "History of England," Vol. III, p. 2-7, and the passage from DE TOQUEVILLE,¹ there extracted will to all reasonable men demonstrate that upon this theory and that by implication and without a word in any constitution or act of government or of the people to warrant it, the body of men selected to determine what is the law are endowed with the power of making, as well as construing, the law to the extent of prohibiting legislation and that to the exclusion of all right of interference by any legislative power of the nation. For it is *this* that claim is—a claim to declare a rule of law to exist which *the nation cannot alter*. DE TOQUEVILLE asserts this even of a written constitution. GARDINER says of COKE that where precedent failed he had recourse to the invention of a principle to justify him in deciding as he pleased (p. 6).²

We have but to test this by assuming there had been inserted in the Constitution as proposed an authority for the President with the consent of the Senate to organize such a body of nine men with a life tenure and ask how would the proposition have been received, to appreciate the absolute absurdity of the claim.

If we turn to page 550, of 143 United States, it would really seem that Mr. Justice BREWER, and the two who agreed with him, are of opinion that Mr. JEFFERSON'S assertions in the Declaration of Independence, that there is an inalienable right to life, liberty, and the pursuit of happiness, are really foundations on which one may securely rest when testing the validity of a statute. He tells us that governments were instituted to *secure*, not to create these.

¹ Dem. en Amerique, Vol. I.

² The point this is quoted for is to determine where sovereignty lies.

That all this is absolute truth to the legislator, though rather puerile, just as it is true that foolish and silly, or cruel and wicked laws should not be passed, is self-evident, but to say that legislation is void if I *think* it silly or foolish is absurd, and it is not material whether it is the judges or any one else who are to possess the power, for every one at his peril must determine this question when called on to act under any statute, for of necessity it is a law, or it is a nullity *ab initio*.

What would be thought of the claim to enforce BLACKSTONE'S definitions of municipal law as we do what we call constitutional restrictions, and give to the courts the power to disregard all law that does not command *what is right, and prohibit what is wrong*, as if that were not the definition of what *ought* to be, not of what *can* be enacted. Will the common law stand this test?

It is not inconsistent that a court which cannot even inquire if a law is unconstitutional when sitting on appeal from a State court should have the power to disregard a law where the constitution is silent, and declare it is a nullity, and is not this absurd? And is it not clear that any system of words or ideas which restricts or limits, or confines the *legislative power* of the State is *ex vi termini* its constitution; and is it more or less its constitution, whether it be written or unwritten? Surely it is the power and not the paper or the writing which is the constitution. And if the unwritten system of judicial ethics is a part of the constitution, for the purpose of restricting the legislative powers of the State, a court of error certainly, if not all courts, and even all men, are authorized to enunciate rules of constitutional law from time to time. Courts of error doing this without appeal, other courts and private men at their peril, the one by impeachment, the other by indictment or action.

Can anything exceed for extravagance in political science the assertion of there being in America an unwritten, undefined constitution which binds the State itself? For if the legislative power of the State is thus bound

is it the less so when it is used to frame a written constitution?

Can anything illustrate this better than the oleomargarine legislation which has met the approval of this court without dissent? There is a prohibition to make and sell food, professedly founded on an assertion by a legislature that it is unwholesome. The assertion is conclusive of this fact says this court.¹ Is there one man so ignorant as not to know this is without any foundation in fact, that it is as untrue as were the recitals in Henry the VIII divorce acts. That the French Government should have, with the aid of its scientific men, invented and used an article of food for its army that is *unwholesome* is too absurd for discussion. Nor could any one who inquired how the food is made possibly believe that the manufactory could convert suet into poison. Every one knows it is the dairymen, who by combining got the legislation, and now enforce it by their paid attorneys. But we have here a picture lesson that is better than any abstract of argument as to what inconsistencies men's minds are capable of when the pursuit of happiness is solemnly declared to be inalienable, but it does not extend to making imitation butter for use as an article of food because that lessens the profits of the dairymen.

But, really, when we hear it stated by a jurist that the *pursuit of happiness* is inalienable as a *proposition of law*, that is that a man cannot contract himself out of the legal right, nor can the State narrow it, it must be admitted that there is no standard more certain than the mere caprice of a tyrant for determining what is and what is not within the legislative power in America. And the evil is aggravated not lessened by the fact that the decision of caprice cannot be ascertained when the form of the law is adopted, and men are subjected to its penalties.

The mistake is in forgetting that the legislature within the limits of its powers is the final arbitrator of what is

¹ A recital as in an act of parliament is mere evidence. An enactment is conclusive: 1 El. Bl., 511.

right or proper, and its *power* extends to determining what are the proper limits of the natural rights of pursuing happiness, exercising liberty and even retaining life, or it ceases to be sovereign, and this *legislative* power is transferred to the court.

It may possibly assist some persons in appreciating the importance of this subject to state some of the objections to the jurisdiction.

(1) To say that it is usurpation is, of course, begging the question in the eyes of the those who claim it. But it lies on the claimant to justify. It certainly does not arise out of the power to determine constitutional questions, for ex-hypothesi, the constitution has nothing to do with the matter. It also seems that the laborious demonstration of the power when there is a conflict with the constitution, implies that it was thought by that court that it was this *conflict* that gives the jurisdiction. It is difficult to suppose that such men as sat in *Marbury v. Madison* would have deemed the elaborate argument there put forth to be necessary or even pertinent, if *anything* in legislation inconsistent with the puerilities of the Declaration of Independence, or what may be described as the social pact or as American institutions, or as being an instance of paternal government, is illegal and void.

(2) The consequences are theoretically appalling, and practically as serious and ruinous as it is possible for anything in the nature of law to be. An unconstitutional law is a nullity *ab initio*. This is self-evident, but we have it decided, *Naughton v. Shelby*,¹ and as this is so because of illegality it is immaterial *why* the legislation was void.²

¹ 118 U. S., 425.

² It is proper to say that the Supreme Court of this State has recently stated the rule to be that unconstitutional laws are valid until called in question, and so are all acts done under them: *Dunn v. Mellon*, 147 Pa., 11; *King v. Philadelphia*, 154 Pa., 160. But when it is seen that it is supposed that *the familiar principle* that acts of officials are not avoided by reason of the illegality of their election or appointment governs the case, it is not likely that such a doctrine will be accepted elsewhere.

There is about the same connection between the principle and the

How far-reaching this is. It certainly leaves room for the gravest doubts whether a judge is protected, if he, though unawares, acts on such a law. It is only necessary to put a clear case and the difficulty is apparent, for can there be a line drawn that separates the debatable from the undebatable if it be a *nullity*? Then take the case of a sentence of death imposed under a statute that directs it without trial or assigned cause. The sheriff certainly could not justify the execution of a man under a writ from the chancery. Can the chancellor? ¹

But if we look only to the possible and practical, consider the effect on contracts, on titles, on ordinary conduct. Chief Justice TILGHMAN points out that all judgments of the courts founded on such a law become void—that is, are ascertained to have *always been void*, and this years after every one has acted on them in perfect good faith. Some can remember how this line of argument impressed us when we learned that the Missouri Compromise was unconstitutional, and therefore that the men who framed it were a mere parcel of ignoramuses, though they were the most experienced statesmen and their condemners something very unlike statesmen.

(3) The uncertainties of law is a recognized misfortune, but it is inherent in the subject, and the attempts to cure them by legislation are only proofs that they are incurable. Take, for instance, the attempt to define the outward and visible tests of what is adverse possession and what is not. ²

subject it is applied to as between the rule in Shelly's case and the rule that a will must be proved before the register. Both are rules of law and in this respect we have the authority of Captain Fluellan as a support for such a line of argument. But the one rule avoids what has been *supposed* to be done but never was done because the power to do it did not exist—the other requires the State to object and obtain a judgment before the objection can be taken, and then it operates for the future only. The quotation on page 168 assigns this very reason for the later rule, and certainly this excludes its application to questions of constitutionality, for that requires that the State retains or holds the power to elect, whether to ratify or avoid an unconstitutional law which is a *reductio ad absurdum*.

¹ See 6 Car. and Pay., 249; *Dicas v. Lord Brougham*.

² *Dayman v. Moore*, 9 Q. B., 555; *Landsell v. Gowen*, 17 Q. B., 589

These instances show that if there be difficulty in determining in a particular case what possession is adverse, it is quite impossible to define it *a priori* in any way that does not involve the uncertain elements of the secret *intention* of the mind. Look again at the statutory attempt to transfer the contract of a carrier by the transfer of the right to receive under the bill of lading.¹

If certainty is impossible in such cases, if the views that will be taken cannot be foreseen in such commonplace cases as these, what is to become of us when the standard has never been defined in words and the mass of mankind never heard of it, and when it is an even chance if any two men would agree to any definite and accurate statement of the rule. Mr. Justice BREWER'S standard, that anything requiring service for the State without compensation is counter to one-half the English system of government, and even to that of Pennsylvania, for here, at least, we do compel offices requiring time, trouble and responsibility to be filled, and that without compensation. -

It is sometimes said that the jurisdiction to determine the validity of a statute rests in the fact that the powers of the legislature are *legislative*, and that we must look to the effect of the action of the legislature to determine whether it is legislative, and a law that affects only A or B by name is not a *law* at all.

Now, when we are dealing with such a subject as the capacity of the State to declare its will—to establish rules of conduct, to determine which is right and what is wrong—one may ask with considerable confidence, can this have been the intention of the nation? The makers of all constitutions on this side of the Atlantic were dealing with and for a civilized State having already *a constitution*, and by that constitution a State speaking through the legislature was unrestrained. It undoubtedly could, by the action of the legislature in the form of a statute, take life and property without inquiry, notice or trial—and they did it—and no one has ever questioned the validity of these acts

¹ Sewell v. Burdick, 10 Ap. Cases, 74.

of tyranny. It could do anything in the way of dealing with persons, rights and property that could be done by prospective legislation and formal trials in pursuance of those laws. It could divest one man of ownership and vest it in another, and that from mere caprice.

Certainly this was the constitution prior to 1776, at least, in Pennsylvania.

It is also quite clear that the constitutions very soon recognized the evil and provided a remedy so far as it was deemed proper. Is it possible with any fairness to assert that it was the intention of the State when it adopted the constitution to confer on the judiciary the power to veto any law which by a process of reasoning could be said not to be within the legislative powers conferred on a legislature according to the scientific meaning of the word legislation, and that they put forth these specific restrictions only as guides or finger-posts for the judiciary?

Is this standard any better, as a rule, than the imaginary one of the *social pact*? But there is another aspect of the same fact. The revolution of 1776 was described by the late Mr. MEREDITH in a remarkable argument bearing on this very question. A conveyancer suggested a doubt as to the power of the legislature to confer a power of sale on a trustee under a will which had created life estates with remainders, that made the ownership uncertain for years and therefore a sale impossible; and there is little room to doubt that the testator meant to compel the property to be held in specie. He was insisting that we inherited the constitution of our ancestors, and under that the custom had been uniform. In demonstrating this he said "Revolution!" It was no revolution; it was but a severance of the umbilical cord which bound the child to the mother.

It is this view of our system which separates our race from that which about the same period on the other side of the channel began its career of constitution making. One grew as a plant, the other was manufactured out of

cobwebs of the mind. It is nothing to the purpose that these cobwebs are brilliant while the plant is dull and apparently immovable. It is quite clear to my mind that, if we are dealing with a question of *power*, the conferring on a trustee the right to sell and convey must be irrespective of the use made of the price. The *right* to convey is one thing, the power is another. It is clear this is so under all wills and deeds. The conveyance is not the less void for want of power, whatever may be the use made of the price, till the equitable owner ratifies by acceptance. And what sort of notions of legislation must they be which recognize the right to confer the authority on A to sell B's property without consulting him as a legitimate act of legislation, but denies the power to enact a law if it applies to one person only? Such notions are out of place for the conclusive reason that they furnish no basis more definite than arbitrary caprice, and it is certain, whatever folly in constitution making may have been committed, no one has ever intended to confer this power on the judiciary.

What is, then, to become of the nation which has surrendered its most beneficent sovereignty, as far as it may clash with an imaginary contract, or with the unwritten institutions of a country certainly not a century old, or when liable to be stigmatized as a *paternal* act? And to give particular instances, I would ask, does anything savor more of the paternal than interfering in respect of contracts because of the assumed inability of men to protect themselves; and what are the statutes regulating the enlistment of seamen but one of these, and what are all the regulations for the protection of miners, and the enlargement of the employers' liability, but instances? Are not usury laws, and the doctrine of courts of equity as to redemption of mortgages, and countless other rules under which we live, all instances? And can it be possible to believe that any nation intentionally surrendered the right of self-government in all this class of subjects, and that five out of nine men can be allowed to exercise such a power?

To summarize: (1) It is plain that sovereignty rests

in those who can establish and enforce their rule of law. (2) The judiciary confessedly possess this power to the extent of declaring the meaning and determining the effect of constitutional restrictions or directions. (3) They also possess it in respect of all unwritten law, and in their right to determine the meaning of written law. But this is held in check by the capacity of the State to change the law, or to give another meaning to the law for the future at least.

Up to this point, if there be anything objectionable, no one probably can suggest a better scheme to secure liberty and avoid anarchy.

The point of the new scheme is that there is thus created a class of rules which the legislature is powerless to change, and what these are rests with the judiciary to state from time to time.

This, it appears to me, is the usurpation of sovereignty without even a colorable warrant, and it also appears to be of sufficient importance to excuse the attempt to call attention to the claim, and to invite discussion if there is any explanation or justification which may be given.

A remarkably competent critic on PYM'S view of the law of treason, which he proposed to apply to STRAFFORD, has a sentence that seems to me most happily to apply to such notions of constitutional law: "It has," he says, "*the incurable defect of want of definiteness*" not curable by being reduced to written words. What is such a power but sheer tyranny, and not the less so because it is wisely or beneficently exercised?