

resistance, along which, if the humanity they are wrought out of be not strong enough, they will give way, and, having given away, will sink down into a less trying attitude. . . . No philosopher's stone of a constitution can produce golden conduct from leaden instincts. No apparatus of senators, judges and police can compensate for the want of an internal governing sentiment. No legislative manipulation can eke out an insufficient morality into a sufficient one. No administrative sleight of hand can save us from ourselves."

The above address was delivered at the recent Commencement of the Yale Law School by Governor Russell, by whose permission it is here printed.—*Ed.*

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## A LAST WORD ON CONSTITUTIONAL CONSTRUCTION.

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BY RICHARD C. MCMURTRIE, LL.D.

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That there are two standards of constitutional law is evident. They appear to be inconsistent when we see them applied by the judiciary and they are so, but this does not warrant the inference that the standards are faulty. When we compare the modern utterances of judges when assuming the power of disregarding the voice of the State speaking by the legislature, with the severe logic of those who first demonstrated the right of the judiciary to exercise this transcendent power, it seems impossible to find a reason to justify the apparent assumption of the right to limit the power of the State, by what seems to be so evidently the arbitrary and capricious opinions of the occupants of the Bench for the moment. The fact that there is an ethical basis for the opinion is lost sight of because the attention is occupied in the endeavor to find a justification for its application. All men accustomed to think in the ordinary lines would agree in denouncing a court that would refuse to carry into effect a law involving capital punishment because in their opinion such legislation was nothing but a survival of a barbarous age and of a cruel and blood-thirsty people. But

why this should be criminal in a judge and might be praiseworthy in a legislator does not appear to be seen at all, much less to be clearly seen. Believing this to be of the highest importance, every effort, however feeble, to stem the current that has set in this direction within a few years may be of value. It may be that the assertion of the right of the judiciary distinctly and avowedly to disregard the action or command of the State in the exercise of its legislative functions may have led to the notion that there was no other system of constitutional law than the one that conferred this power on the judiciary. It is plain to all that if there be an express prohibition on legislative action, any such action must be nugatory or the Constitution is impotent. If, for instance, Congress or a legislature should impose a tax on exports from a State all will agree that either the Constitution must cease to operate or the law must not be enforced. And if one should justify the seizure or detention of property under such a law, a court must determine which of the two commands, both having the form of law, shall be obeyed.

It seems to be a general notion that, until there were governments established or regulated by instruments of this kind, there never had been committed to the judiciary this power of declaring the action of the State, in the exercise of its law making power void. It did not exist anywhere. And so far as I am aware of, the right was first claimed by the judiciary of this country. I think all agree Lord COKE'S claim is without warrant. The exercise of the power has become so frequent and the details of constitutional restraint so minute that the singular eminence of the power has been lost sight of. In this State a case has occurred that is probably one of the most ludicrous instances of the application of reasoning or logic that can be found in judicial literature. And that is, that the legislation which is void because of want of power in the legislature continues in force and is a justification for all that is done apparently until the court say it is void. There can be but one explanation of a blunder so absurd as this, violating as it does the uniform declarations of all courts, but there is a palliation in the impossible attempt to compel uniformity in

municipal powers.<sup>1</sup> Still no one can help seeing that, for practical purposes, constitutional law with us is confined to those instances that are embodied in the written constitutions. There are protests against this, and by men of great weight—one going so far as to declare that the reason for the prohibitory clauses is to furnish illustrations of the correct path to be pursued; *e. g.*, the prohibition of bills of attainder does not presuppose a power to enact such a bill if there were no prohibition. And then we are launched into those remarkable sentences in our national document, and are told that they embody the principles, to protect which the constitutions were made.

That there are truths, and very valuable truths, embodied in these famous declarations no one will deny. If inalienability can be predicated of the rights to life, liberty, and the pursuit of happiness, it will be admitted they are abstractions or next door to abstractions which to be useful must be embodied in concrete forms in actual legislation. Can anything be more utterly absurd than a repeal of all existing legislation that is cruel, unjust or an interference with liberty or the pursuit of happiness? Conceive of the condition of the prosecuting attorney or the Court of Quarter Sessions when called on to administer such a law. On the other hand, will any one dispute that there should be no cruel or unjust laws? That human liberty should not be unnecessarily interfered with. The difficulty is to determine what is and what is not just. Nothing exhibits this more strikingly than the rules of evidence. The exclusion of hearsay, what is it but a balance of the good over the evil. It cannot be that a rule on which all men act in all affairs can be intrinsically wrong. On the other hand who, with adequate knowledge, would desire to

<sup>1</sup> This amazing proposition of legal logic that in constitutional law a prohibited Act of legislation is valid for certain purposes, was decided in *King v. Philadelphia*, 154 Pa. 160, and on p. 167 it is said, "*It is not to be tolerated* that the right to take private property shall be called in question years afterwards on the ground of the unconstitutionality in the statute authorizing the taking, though that is admitted and decided." I think the only words adequate to describe the feelings of a lawyer on reading such a judgment is abject terror.

have the floodgate opened and everything let in. Or take the rule that governs in the construction of deeds or wills.

It has appeared to me that the fallacy of the argument that sets up any abstract rules as the guides to determine the legality of the legislative action of the State can only be distinctly seen by looking at the question from the standpoint of history.

It is just as certain that we, the inhabitants of the thirteen colonies, were living under a Constitution and a constitutional government before the separation of the colonies from England, as that we were governed by English law and by Acts of Parliament. The law that governed the rights of property and persons was not changed by the separation or the revolution in the political relations of the people. In what respect was the Constitution changed? In what did it consist? It was nothing but rules that were borne in mind or ought to be whenever political or personal rights or the rights of property were being dealt with. But while these were admitted no one ever disputed the power of Parliament, that is the legislature of the nation to limit or restrict the application. There is nothing inconsistent or unreasonable in embodying some of these principles into a code which should bind the State itself until it saw fit to alter the code. If this were done this consequence must follow, as it seems to me inevitably, the residue of the Constitution remained just where it had been. It governed the legislature as it always had, just as the maxim that there should be no unjust or cruel laws.

But who shall determine this? Mr. Justice BLACKSTONE in his Commentaries has a definition of municipal law that has been ridiculed, but really embodies the whole of this subject. It is the power of the State commanding what is right and prohibiting what is wrong. Who is to determine the right and wrong? If the court are entitled to bring the legislation to this test as they do when the written Constitution forbids the imposition of a tax or duty on exports it is needless to say that the legislative power is transferred to the courts. True, it is but the negative and not the initial power. There is not any power of substitution or restriction, but if the measure of

punishment for crime be not a legislative question one may ask what is. If the power to prescribe the term of service in the field and enrollment into the army be not legislative, what is the power and what is its definition? Grant that we should relegate this to the police—that power which overrides all others, that power is certainly within legislative control. It seems incredible that any system of law can emancipate the police of a government from its legislature.

There being then two constitutional systems, one of them consisting in so much of the original inherited but unwritten law intended to govern or rather direct the legislature and all organs of the State, as the State has seen fit to embody in a written code, and by making it part of the law of the land superior to any rule of the common law or any enactment of the legislature, has given to the judiciary by implication a right to that extent to control the legislation, where does the power reside to enforce the residue of the Constitution not incorporated into the written code?

Is there any ground for asserting that the residue of the Constitution is repealed by the enactment of a part? If the position of the Constitution before anything was adopted as a code to control legislatures and executives, and subject them to courts in ascertaining the extent of their powers, is considered it is obvious that a particular restraint could not be construed as giving a license in all other particulars.

If the unwritten Constitution, prior to the adoption of a written one, served as a guide to which to appeal as far as reason or conscience could exercise sway, what is there in the fact of the adoption of a written Constitution to change the tribunal to terminate this appeal? It cannot be that all such appeals to Senate, House and Governor, are no longer legitimate on the question of legislating. Having had its influence then, what is there in the Constitution that confers the power to make the same appeal to the judges, not as aids in construction about which no one doubts, but as limits restraining the action of the State regardless of necessity or prudence.

Is it not plain that so far as the State has not seen fit to trammel its own action the course of action is left for those to

whom is committed the power of the State in the particular case.

The moment we get beyond the limit defining *power* and come to the region in which *right* should govern—the question is not judicial for that applies to power—but it has nothing to do with the wisdom or folly, the right or the wrong, if you can predicate these things of legal powers.

Probably there never will be an end of the controversy. There is no standard to appeal to. The practical argument of greatest efficiency is to ask, do you believe the nation would have consented to endow a court with this unlimited and undefined power to stop the action of government, if they had been asked to do so? Is it becoming in a judicial tribunal to arrogate such a power by mere implication? For myself I cannot see even an excuse.

The fact that all men are compelled to obey the legislature at the peril of legislation being illegal is a dreadful consequence of a written Constitution—so much so that the want of any provision for the case is *the blot* on the wisdom of the framers. But what is to be our fate if a standard that *may or may* not be applied at the caprice of such judge such as have been selected? Will the standard be the social compact, the principles called American institutions or a paternal government? Are the rules of socialism or anarchy more certain? And is not certainty in law the first of all requisites?

No one expects certainty in the ordinary sense of the word, it is impossible. The principles being admitted and the language selected, there remains and always must remain all the uncertainty that we all see and feel and lament. But if the meaning of a testator is a never-failing source of uncertainty when the problem is only what his language means, what a chaos it becomes if there is to be no language in which the intention is expressed nor any definition of the principles to be applied in ascertaining that intention?

This it seems to me is the canon by which constitutional law is to be ascertained if the written document is not the sole guide for a judiciary, and it is a consequence that would

warrant an amendment restricting the powers of the judiciary as to all such questions if the State is to remain free.

If this is a mistake will not some one come to the rescue and justify on a rational basis, the claim to authority to declare as the law of the land, that the legislative power of a State is restrained by rules not to be looked for in any written document, but which may be evolved out of the inner consciousness of the judiciary, and possibly out of that of a majority of one out of nine. And secondly that this power, if it exists, is conferred on the judiciary only and not on the mob.