ADVANCE SHEET – January 7, 2022

President's Letter

In this issue, we include the classic essay by James Bradley Thayer republished in volume 7 of the Harvard Law Review on judicial restraint, which was frequently referred to by Justices Holmes and Frankfurter. We also present a provocative recent essay on the COVID crisis by former Justice Jonathan Sumption of the British Supreme Court suggesting that public policy on the COVID crisis in both the United States and Great Britain has been driven almost exclusively by hospital capacity (now largely consumed by the unvaccinated) rather than by broader societal considerations.

George W. Liebmann

We're "Here and Now" So "Don't Look Back"

The New Year is always a time for contemplating what was and what will be, for resolving to improve our habits, to be a better version of who we are. January is in fact named after the Roman god Janus, he of the two faces, one looking into the past, the other into the future. I am not quite sure that this is something most of us want to do with regard to 2021. Perhaps for this year we should rename January after Satchel Paige one of the icons of professional baseball who once said "Don't Look Back." The entire quote was "Don't Look Back, Because Something Might Be Gaining On You."

As we look ahead, hopefully not too far, as we forget a Roman god, let us remember the Latin aphorism "Carpe Diem." As we seize the day, let us not worry about looking ahead or behind, but just at the here and the now.

Kenny Chesney released an album in 2020 entitled "Here and Now" which is also the title of one of the songs. The lyrics begin:

I've seen the skyline in New York City
Fireflies in Tennessee
Sipped a little 'shine from a paper sack
That'll knock the horns off a Cadillac
I must've sat on a dozen islands
I've watched the sun sink into the sea
Been there, done that, got the t-shirt and hat
But my favorite place to be is

Here and now.

Hopefully in 2022, for some of you the here and now will include a trip to the Bar Library. The Bar Library harkens back to a less complicated world where people were seemingly moving at a slower pace, but were nevertheless able to accomplish a great deal, in many respects, more than those moving at breakneck speed are able to accomplish today. Stop by and see if it works for you. If you want to maintain that speed, but in an amazing environment, the Library offers an expansive collection of Westlaw databases as well as a wi-fi connection allowing you to do your research on your own devices, cutting and pasting right into your own files. Whatever you could want it is in fact, here and now.

Take care and I look forward to seeing you soon.

Joe Bennett

7 Harv. L. Rev. 129
Harvard Law Review
October 25, 1893

James B. Thayer
Cambridge

THE ORIGIN AND SCOPE OF THE AMERICAN DOCTRINE OF CONSTITUTIONAL LAW[1]

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. 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 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 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 courts in England. These charters were in the strict sense written law: as their restraints upon the colonial legislatures were

enforced by the English courts 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?

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 Connecticut, 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 mentioning that the contrary opinion "is very popular and prevalent." "It will be agreed," he says, "it is as probable that the judiciary will declare laws unconstitutional which are not so, as it is that the legislature will exceed their constitutional authority." But he makes the very noticeable admission that there may be cases so monstrous, — e. g., an Act authorizing conviction for crime without evidence, or securing to the legislature their own seats for life, — "so manifestly unconstitutional that it would seem wrong to require the judges to regard it in their decisions." As late as 1807 and 1808, judges were impeached by the legislature of Ohio for holding Acts of that body to be void.1

II. When at last this power of the judiciary was everywhere established, and added to the other bulwarks of our written constitutions, how was the power to be conceived of? Strictly as a judicial one. The State constitutions had been scrupulous to part off the powers of government into three; and in giving one of them to each department, had sometimes, with curious explicitness, forbidden it to exercise either of the others. The legislative department, said the Massachusetts constitution in 1780,2 —

"Shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers or either of them; the judicial shall never exercise the legislative and executive powers or either of them; to the end, it may be a government of laws, and not of men."

With like emphasis, in 1792, the constitution of Kentucky3 said: —

"Each of them to be confided to a separate body of magistracy; to wit, those which are legislative to one, those which are executive to another, and those which are judiciary to another. No person or collection of persons, being of one of these departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly permitted."

Therefore, since the power now in question was a purely judicial one, in the first place, there were many cases where it had no operation. In the case of purely political acts and of the exercise of mere discretion, it mattered not that other departments were violating the constitution, the judiciary could not interfere; on the contrary, they must accept and enforce their acts. Judge Cooley has lately said:1 —

"The common impression undoubtedly is that in the case of any legislation where the bounds of constitutional authority are disregarded, ... the judiciary is perfectly competent to afford the adequate remedy; that the Act indeed must be void, and that any citizen, as well as the judiciary itself, may treat it as void, and refuse obedience. This, however, is far from being the fact."

Again, where the power of the judiciary did have place, its whole scope was this; namely, to determine, for the mere purpose of deciding a litigated question properly submitted to the court, whether a particular disputed exercise of power was forbidden by the constitution. In doing this the court was so to discharge its office as not to deprive another department of any of its proper power, or to limit it in the proper range of its discretion. Not merely, then, do these questions, when presenting themselves in the courts for judicial action, call for a peculiarly large method in the treatment of them, but especially they require an allowance to be made by the judges for the vast and not definable range of legislative power and choice, for that wide margin of considerations which address themselves only to the practical judgment of a legislative body. Within that margin, as among all these legislative considerations, the constitutional law-makers must be allowed a free foot. In so far as legislative choice,

ranging here unfettered, may select one form of action or another, the judges must not interfere, since their question is a naked judicial one.

Moreover, such is the nature of this particular judicial question that the preliminary determination by the legislature is a fact of very great importance, since the constitutions expressly intrust to the legislature this determination; they cannot act without making it. Furthermore, the constitutions not merely intrust to the legislatures a preliminary determination of the question, but they contemplate that this determination may be the final one; for they secure no revision of it. It is only as litigation may spring up, and as the course of it may happen to raise the point of constitutionality, that any question for the courts can regularly emerge. It may be, then, that the mere legislative decision will accomplish results throughout the country of the profoundest importance before any judicial question can arise or be decided, — as in the case of the first and second charters of the United States Bank, and of the legal tender laws of thirty years ago and later. The constitutionality of a bank charter divided the cabinet of Washington, as it divided political parties for more than a generation. Yet when the first charter was given, in 1791, to last for twenty years, it ran through its whole life unchallenged in the courts, and was renewed in 1816. Only after three years from that did the question of its constitutionality come to decision in the Supreme Court of the United States. It is peculiarly important to observe that such a result is not an exceptional or unforeseen one; it is a result anticipated and clearly foreseen. Now, it is the legislature to whom this power is given, — this power, not merely of enacting laws, but of putting an interpretation on the constitution which shall deeply affect the whole country, enter into, vitally change, even revolutionize the most serious affairs, except as some individual may find it for his private interest to carry the matter into court. So of the legal tender legislation of 1863 and later. More important action, more intimately and more seriously touching the interests of every member of our population, it would be to hard to think of. The constitutionality of it, although now upheld, was at first denied by the Supreme Court of the United States. The local courts were divided on it, and professional opinion has always been divided. Yet it was the legislature that determined this question, not merely primarily, but once for all, except as some individual, among the innumerable chances of his private affairs, found it for his interest to raise a judicial question about it.

It is plain that where a power so momentous as this primary authority to interpret is given, the actual determinations of the body to whom it is intrusted are entitled to a corresponding respect; and this not on mere grounds of courtesy or conventional respect, but on very solid and significant grounds of policy and law. The judiciary may well reflect that if they had been regarded by the people as the chief protection against legislative violation of the constitution, they would not have been allowed merely this incidental and postponed control. They would have been let in, as it was sometimes endeavored in the conventions to let them in, to a revision of the laws before they began to operate.1 As the opportunity of the judges to check and correct unconstitutional Acts is so limited, it may help us to understand why the extent of their control, when they do have the opportunity, should also be narrow.

It was, then, all along true, and it was foreseen, that much which is harmful and unconstitutional may take effect without any capacity in the courts to prevent it, since their whole power is a judicial one. Their interference was but one of many safeguards, and its scope was narrow.

The rigor of this limitation upon judicial action is sometimes freely recognized, yet in a perverted way which really operates to extend the judicial function beyond its just bounds. The court's duty, we are told, is the mere and simple office of construing two writings and comparing one with another, as two contracts or two statutes are construed and compared when they are said to conflict; of declaring the true meaning of each, and, if they are opposed to each other, of carrying into effect the constitution as being of superior obligation, — an ordinary and humble judicial duty, as the courts

sometimes describe it. This way of putting it easily results in the wrong kind of disregard of legislative considerations; not merely in refusing to let them directly operate as grounds of judgment, but in refusing to consider them at all. Instead of taking them into account and allowing for them as furnishing possible grounds of legislative action, there takes place a pedantic and academic treatment of the texts of the constitution and the laws. And so we miss that combination of a lawyer's rigor with a statesman's breadth of view which should be found in dealing with this class of questions in constitutional law. Of this petty method we have many specimens; they are found only too easily to-day in the volumes of our current reports.

In order, however, to avoid falling into these narrow and literal methods, in order to prevent the courts from forgetting, as Marshall said, that "it is a constitution we are expounding," these literal precepts about the nature of the judicial task have been accompanied by a rule of administration which has tended, in competent hands, to give matters a very different complexion.

III. Let us observe the course which the courts, in point of fact, have taken, in administering this interesting jurisdiction.

They began by resting it upon the very simple ground that the legislature had only a delegated and limited authority under the constitutions; that these restraints, in order to be operative, must be regarded as so much law; and, as being law, that they must be interpreted and applied by the court. This was put as a mere matter of course. The reasoning was simple and narrow. Such was Hamilton's method in the Federalist, in 1788,1 while discussing the Federal constitution, but on grounds applicable, as he conceived, to all others. So, in 1787, the Supreme Court of North Carolina had argued that no Act of the legislature could alter the constitution;1 that the judges were as much bound by the constitution as by any other law, and any Act inconsistent with it must be regarded by them as abrogated. Wilson, in his Lectures at Philadelphia in 1790-1791,2 said that the constitution was a supreme law, and it was for the judges to declare and apply it; what was subordinate must give way; because one branch of the government infringed the constitution, it was no reason why another should abet it. In Virginia, in 1793, the judges put it that courts were simply to look at all the law, including the constitution: they were only to expound the law, and to give effect to that part of it which is fundamental.3 Patterson, one of the justices of the Supreme Court of the United States, in 1795, on the Pennsylvania circuit,4 said that the constitution is the commission of the legislature; if their Acts are not conformable to it, they are without authority. In 1796, in South Carolina,5 the matter was argued by the court as a bald and mere question of conformity to paramount law. And such, in 1802, was the reasoning of the General Court of Maryland.6 Finally, in 1803 came Marbury v. Madison,7 with the same severe line of argument. The people, it was said, have established written limitations upon the legislature; these control all repugnant legislative Acts; such Acts are not law; this theory is essentially attached to a written constitution; it is for the judiciary to say what the law is, and if two rules conflict, to say which governs; the judiciary are to declare a legislative Act void which conflicts with the constitution, or else that instrument is reduced to nothing. And then, it was added, in the Federal instrument this power is expressly given.

Nothing could be more rigorous than all this. As the matter was put, the conclusions were necessary. Much of this reasoning, however, took no notice of the remarkable peculiarities of the situation; it went forward as smoothly as if the constitution were a private letter of attorney, and the court's duty under it were precisely like any of its most ordinary operations.

But these simple precepts were supplemented by a very significant rule of administration, — one which corrected their operation, and brought into play large considerations not adverted to in the reasoning so far mentioned. In 1811,1 Chief Justice Tilghman, of Pennsylvania, while asserting the power of the court to hold laws unconstitutional, but declining to exercise it in a particular case, stated this rule as

follows: —

"For weighty reasons, it has been assumed as a principle in constitutional construction by the Supreme Court of the United States, by this court, and every other court of reputation in the United States, that an Act of the legislature is not to be declared void unless the violation of the constitution is so manifest as to leave no room for reasonable doubt."

When did this rule of administration begin? Very early. We observe that it is referred to as thoroughly established in 1811. In the earliest judicial consideration of the power of the judiciary over this subject, of which any report is preserved, — an obiter discussion in Virginia in 1782,2 — while the general power of the court is declared by other judges with histrionic emphasis, Pendleton, the president of the court, in declining to pass upon it, foreshadowed the reasons of this rule, in remarking, —

"How far this court, in whom the judiciary powers may in some sort be said to be concentrated, shall have power to declare the nullity of a law passed in its forms by the legislative power, without exercising the power of that branch, contrary to the plain terms of that constitution, is indeed a deep, important, and, I will add, a tremendous question, the decision of which would involve consequences to which gentlemen may not ... have extended their ideas."

There is no occasion, he added, to consider it here. In 1793, when the General Court of Virginia held a law unconstitutional, Tyler, Justice, remarked,3 —

"But the violation must be plain and clear, or there might be danger of the judiciary preventing the operation of laws which might produce much public good."

In the Federal convention of 1787, while the power of declaring laws unconstitutional was recognized, the limits of the power were also admitted. In trying to make the judges revise all legislative acts before they took effect, Wilson pointed out that laws might be dangerous and destructive, and yet not so "unconstitutional as to justify the judges in refusing to give them effect."1 In 1796 Mr. Justice Chase, in the Supreme Court of the United States,2 said, that without then determining whether the court could declare an Act of Congress void, "I am free to declare that I will never exercise it but in a very clear case." And in 1800, in the same court,3 as regards a statute of Georgia, Mr. Justice Patterson, who had already, in 1795, on the circuit, held a legislative Act of Pennsylvania invalid, said that in order to justify the court in declaring any law void, there must be "a clear and unequivocal breach of the Constitution, not a doubtful and argumentative implication."

In 1808 in Georgia4 it was strongly put, in a passage which has been cited by other courts with approval. In holding an Act constitutional, Mr. Justice Charlton, for the court, asserted this power, as being inseparable from the organization of the judicial department. But, he continued, in what manner should it be exercised?

"No nice doubts, no critical exposition of words, no abstract rules of interpretation, suitable in a contest between individuals, ought to be resorted to in deciding on the constitutional operation of a statute. This violation of a constitutional right ought to be as obvious to the comprehension of every one as an axiomatic truth, as that the parts are equal to the whole. I shall endeavor to illustrate this: the first section of the second article of the constitution declares that the executive function shall be vested in the governor. Now, if the legislature were to vest the executive power in a standing committee of the House of Representatives, every mind would at once perceive the unconstitutionality of the statute. The judiciary would be authorized without hesitation to declare the Act unconstitutional. But when it remains doubtful whether the legislature have or have not trespassed on the constitution, a conflict ought to be avoided, because there is a possibility in such a case of the constitution being with the legislature."

In South Carolina, in 1812,5 Chancellor Waties, always distinguished for his clear assertion of the power in the judiciary to disregard unconstitutional enactments, repeats and strongly reaffirms it: —

"I feel so strong a sense of this duty that if a violation of the constitution were manifest, I should not only declare the Act void, but I should think I rendered a more important service to my country than in discharging the ordinary duties of my office for many years. ... But while I assert this power and insist on its great value to the country, I am not insensible of the high deference due to legislative authority. It is supreme in all cases where it is not restrained by the constitution; and as it is the duty of legislators as well as judges to consult this and conform their acts to it, so it should be presumed that all their acts do conform to it unless the contrary is manifest. This confidence is necessary to insure due obedience to its authority. If this be frequently questioned, it must tend to diminish the reverence for the laws which is essential to the public safety and happiness. I am not, therefore, disposed to examine with scrupulous exactness the validity of a law. It would be unwise on another account. The interference of the judiciary with legislative Acts, if frequent or on dubious grounds, might occasion so great a jealousy of this power and so general a prejudice against it as to lead to measures ending in the total overthrow of the independence of the judges, and so of the best preservative of the constitution. The validity of the law ought not then to be questioned unless it is so obviously repugnant to the constitution that when pointed out by the judges, all men of sense and reflection in the community may perceive the repugnancy. By such a cautious exercise of this judicial check, no jealousy of it will be excited, the public confidence in it will be promoted, and its salutary effects be justly and fully appreciated."1

IV. I have accumulated these citations and run them back to the beginning, in order that it may be clear that the rule in question is something more than a mere form of language, a mere expression of courtesy and deference. It means far more than that. The courts have perceived with more or less distinctness that this exercise of the judicial function does in truth go far beyond the simple business which judges sometimes describe. If their duty were in truth merely and nakedly to ascertain the meaning of the text of the constitution and of the impeached Act of the legislature, and to determine, as an academic question, whether in the court's judgment the two were in conflict, it would, to be sure, be an elevated and important office, one dealing with great matters, involving large public considerations, but yet a function far simpler than it really is. Having ascertained all this, yet there remains a question — the really momentous question — whether, after all, the court can disregard the Act. It cannot do this as a mere matter of course, — merely because it is concluded that upon a just and true construction the law is unconstitutional. That is precisely the significance of the rule of administration that the courts lay down. It can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one, — so clear that it is not open to rational question. That is the standard of duty to which the courts bring legislative Acts; that is the test which they apply, — not merely their own judgment as to constitutionality, but their conclusion as to what judgment is permissible to another department which the constitution has charged with the duty of making it. This rule recognizes that, having regard to the great, complex, ever-unfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional. This is the principle which the rule that I have been illustrating affirms and supports. The meaning and effect of it are shortly and very strikingly intimated by a remark of Judge Cooley,1 to the effect that one who is a member of a legislature may vote against a measure as being, in his judgment, unconstitutional; and, being subsequently placed on the bench, when this measure, having been passed by the legislature in spite of his opposition, comes before him judicially, may there find it his duty, although he has in no degree changed his opinion,

to declare it constitutional.

Will any one say, You are over-emphasizing this matter, and making too much turn upon the form of a phrase? No, I think not. I am aware of the danger of doing that. But whatever may be said of particular instances of unguarded or indecisive judicial language, it does not appear to me possible to explain the early, constant, and emphatic statements upon this subject on any slight ground. The form of it is in language too familiar to courts, having too definite a meaning, adopted with too general an agreement, and insisted upon quite too emphatically, to allow us to think it a mere courteous and smoothly transmitted platitude. It has had to maintain itself against denial and dispute. Incidentally, Mr. Justice Gibson disputed it in 1825, while denying the whole power to declare laws unconstitutional.1 If there be any such power, he insisted (page 352), the party's rights "would depend, not on the greatness of the supposed discrepancy with the constitution, but on the existence of any discrepancy at all." But the majority of the court reaffirmed their power, and the qualifications of it, with equal emphasis. This rule was also denied in 1817 by Jeremiah Mason, one of the leaders of the New England bar, in his argument of the Dartmouth College case, at its earlier stage, in New Hampshire.2 He said substantially this: "An erroneous opinion still prevails to a considerable extent, that the courts ... ought to act ... with more than ordinary deliberation, ... that they ought not to declare Acts of the legislature unconstitutional unless they come to their conclusion with absolute certainty, ... and where the reasons are so manifest that none can doubt." He conceded that the courts should treat the legislature "with great decorum, ... but ... the final decision, as in other cases, must be according to the unbiassed dictate of the understanding." Legislative Acts, he said, require for their passage at least a majority of the legislature, and the reasons against the validity of the Act cannot ordinarily be so plain as to leave no manner of doubt. The rule, then, really requires the court to surrender its jurisdiction. "Experience shows that legislatures are in the constant habit of exerting their power to its utmost extent." If the courts retire, whenever a plausible ground of doubt can be suggested, the legislature will absorb all power. Such was his argument. But notwithstanding this, the Supreme Court of New Hampshire declared that they could not act without "a clear and strong conviction;" and on error, in 1819, Marshall, in his celebrated opinion at Washington, declared, for the court, "that in no doubtful case would it pronounce a legislative Act to be contrary to the Constitution."

Again, when the great Charles River Bridge Case 3 was before the Massachusetts courts, in 1829, Daniel Webster, arguing, together with Lemuel Shaw, for the plaintiff, denied the existence or propriety of this rule. All such cases, he said (p. 442), involve some doubt; it is not to be supposed that the legislature will pass an Act palpably unconstitutional. The correct ground is that the court will interfere when a case appearing to be doubtful is made out to be clear. Besides, he added, "members of the legislature sometimes vote for a law, of the constitutionality of which they doubt, on the consideration that the question may be determined by the judges." This Act passed in the House of Representatives by a majority of five or six.

"We could show, if it were proper, that more than six members voted for it because the unconstitutionality of it was doubtful; leaving it to this court to determine the question. If the legislature is to pass a law because its unconstitutionality is doubtful, and the judge is to hold it valid because its unconstitutionality is doubtful, in what a predicament is the citizen placed! The legislature pass it de bene esse; if the question is not met and decided here on principle, responsibility rests nowhere. ... It is the privilege of an American judge to decide on constitutional questions. ... Judicial tribunals are the only ones suitable for the investigation of difficult questions of private right."

But the court did not yield to this ingenious attempt to turn them into a board for answering legislative conundrums. Instead of deviating from the line of their duty for the purpose of correcting errors of the legislature, they held that body to its own duty

and its own responsibility. “Such a declaration,” said Mr. Justice Wilde in giving his opinion, “should never be made but when the case is clear and manifest to all intelligent minds. We must assume that the legislature have done their duty, and we must respect their constitutional rights and powers.” Five years later, Lemuel Shaw, who was Webster's associate counsel in the case last mentioned, being now Chief Justice of Massachusetts, in a case1 where Jeremiah Mason was one of the counsel, repeated with much emphasis “what has been so often suggested by courts of justice, that ... courts will ... never declare a statute void unless the nullity and invalidity are placed beyond reasonable doubt.”

A rule thus powerfully attacked and thus explicitly maintained, must be treated as having been deliberately meant, both as regards its substance and its form. As to the form of it, it is the more calculated to strike the attention because it marks a familiar and important discrimination, of daily application in our courts, in situations where the rights, the actions, and the authority of different departments, different officials, and different individuals have to be harmonized. It is a distinction and a test, it may be added, that come into more and more prominence as our jurisprudence grows more intricate and refined. In one application of it, as we all know, it is constantly resorted to in the criminal law in questions of self-defence, and in the civil law of tort in questions of negligence, — in answering the question what might an individual who has a right and perhaps a duty of acting under given circumstances, reasonably have supposed at that time to be true? It is the discrimination laid down for settling that difficult question of a soldier's responsibility to the ordinary law of the land when he has acted under the orders of his military superior. “He may,” says Dicey, in his “Law of the Constitution,”1 “as it has been well said, be liable to be shot by a court-martial if he disobeys an order, and to be hanged by a judge and jury if he obeys it. ... Probably,” he goes on, quoting with approval one of the books of Mr. Justice Stephen, “... it would be found that the order of a military superior would justify his inferiors in executing any orders for giving which they might fairly suppose their superior officer to have good reasons. ... The only line that presents itself to my mind is that a soldier should be protected by orders for which he might reasonably believe his officer to have good grounds.”2 This is the distinction adverted to by Lord Blackburn in a leading modern case in the law of libel.3 “When the court,” he said, “come to decide whether a particular set of words ... are or are not libellous, they have to decide a very different question from that which they have to decide when determining whether another tribunal ... might not unreasonably hold such words to be libellous.” It is the same discrimination upon which the verdicts of juries are revised every day in the courts, as in a famous case where Lord Esher applied it a few years ago, when refusing to set aside a verdict.4 It must appear, he said, “that reasonable men could not fairly find as the jury have done. ... It has been said, indeed, that the difference between [this] rule and the question whether the judges would have decided the same way as the jury, is evanescent, and the solution of both depends on the opinion of the judges. The last part of the observation is true, but the mode in which the subject is approached makes the greatest difference. To ask ‘Should we have found the same verdict,’ is surely not the same thing as to ask whether there is room for a reasonable difference of opinion.” In like manner, as regards legislative action, there is often that ultimate question, which was vindicated for the judges in a recent highly important case in the Supreme Court of the United States,1 viz., that of the reasonableness of a legislature's exercise of its most undoubted powers; of the permissible limit of those powers. If a legislature undertakes to exert the taxing power, that of eminent domain, or any part of that vast, unclassified residue of legislative authority which is called, not always intelligently, the police power, this action must not degenerate into an irrational excess, so as to become, in reality, something different and forbidden, — e. g., the depriving people of their property without due process of law; and whether it does so or not, must be determined by the judges.2 But in such cases it is always to be remembered that the judicial

question is a secondary one. The legislature in determining what shall be done, what it is reasonable to do, does not divide its duty with the judges, nor must it conform to their conception of what is prudent or reasonable legislation. The judicial function is merely that of fixing the outside border of reasonable legislative action, the boundary beyond which the taxing power, the power of eminent domain, police power, and legislative power in general, cannot go without violating the prohibitions of the constitution or crossing the line of its grants.3

It must indeed be studiously remembered, in judicially applying such a test as this of what a legislature may reasonably think, that virtue, sense, and competent knowledge are always to be attributed to that body. The conduct of public affairs must always go forward upon conventions and assumptions of that sort. "It is a postulate," said Mr. Justice Gibson, "in the theory of our government ... that the people are wise, virtuous, and competent to manage their own affairs."1 "It would be indecent in the extreme," said Marshall, C. J.,2 "upon a private contract between two individuals to enter into an inquiry respecting the corruption of the sovereign power of a State." And so in a court's revision of legislative acts, as in its revision of a jury's acts, it will always assume a duly instructed body; and the question is not merely what persons may rationally do who are such as we often see, in point of fact, in our legislative bodies, persons untaught it may be, indocile, thoughtless, reckless, incompetent, — but what those other persons, competent, well-instructed, sagacious, attentive, intent only on public ends, fit to represent a self-governing people, such as our theory of government assumes to be carrying on our public affairs, — what such persons may reasonably think or do, what is the permissible view for them. If, for example, what is presented to the court be a question as to the constitutionality of an Act alleged to be ex post facto, there can be no assumption of ignorance, however probable, as to anything involved in a learned or competent discussion of that subject. And so of the provisions about double jeopardy, or giving evidence against one's self, or attainder, or jury trial. The reasonable doubt, then, of which our judges speak is that reasonable doubt which lingers in the mind of a competent and duly instructed person who has carefully applied his faculties to the question. The rationally permissible opinion of which we have been talking is the opinion reasonably allowable to such a person as this.

The ground on which courts lay down this test of a reasonable doubt for juries in criminal cases, is the great gravity of affecting a man with crime. The reason that they lay it down for themselves in reviewing the civil verdict of a jury is a different one, namely, because they are revising the work of another department charged with a duty of its own, — having themselves no right to undertake that duty, no right at all in the matter except to hold the other department within the limit of a reasonable interpretation and exercise of its powers. The court must not, even negatively, undertake to pass upon the facts in jury cases. The reason that the same rule is laid down in regard to revising legislative acts is neither the one of these nor the other alone, but it is both. The courts are revising the work of a co-ordinate department, and must not, even negatively, undertake to legislate. And, again, they must not act unless the case is so very clear, because the consequences of setting aside legislation may be so serious.

If it be said that the case of declaring legislation invalid is different from the others because the ultimate question here is one of the construction of a writing; that this sort of question is always a court's question, and that it cannot well be admitted that there should be two legal constructions of the same instrument; that there is a right way and a wrong way of construing it, and only one right way; and that it is ultimately for the court to say what the right way is, — this suggestion appears, at first sight, to have much force. But really it begs the question. Lord Blackburn's opinion in the libel case1 related to the construction of a writing. The doctrine which we are now considering is this, that in dealing with the legislative action of a co-ordinate department, a court cannot always, and for the purpose of all sorts of questions, say that there is but one

right and permissible way of construing the constitution. When a court is interpreting a writing merely to ascertain or apply its true meaning, then, indeed, there is but one meaning allowable; namely, what the court adjudges to be its true meaning. But when the ultimate question is not that, but whether certain acts of another department, officer, or individual are legal or permissible, then this is not true. In the class of cases which we have been considering, the ultimate question is not what is the true meaning of the constitution, but whether legislation is sustainable or not.

It may be suggested that this is not the way in which the judges in fact put the matter; e. g., that Marshall, in McCulloch v. Maryland,1 seeks to establish the court's own opinion of the constitutionality of the legislation establishing the United States Bank. But in recognizing that this is very often true, we must remember that where the court is sustaining an Act, and finds it to be constitutional in its own opinion, it is fit that this should be said, and that such a declaration is all that the case calls for; it disposes of the matter. But it is not always true; there are many cases where the judges sustain an Act because they are in doubt about it; where they are not giving their own opinion that it is constitutional, but are merely leaving untouched a determination of the legislature; as in the case where a Massachusetts judge concurred in the opinion of his brethren that a legislative Act was "competent for the legislature to pass, and was not unconstitutional," "upon the single ground that the Act is not so clearly unconstitutional, its invalidity so free from reasonable doubt, as to make it the duty of the judicial department, in view of the vast interests involved in the result, to declare it void."2 The constant declaration of the judges that the question for them is not one of the mere and simple preponderance of reasons for or against, but of what is very plain and clear, clear beyond a reasonable doubt, — this declaration is really a steady announcement that their decisions in support of the constitutionality of legislation do not, as of course, import their own opinion of the true construction of the constitution, and that the strict meaning of their words, when they hold an Act constitutional, is merely this, — not unconstitutional beyond a reasonable doubt. It may be added that a sufficient explanation is found here of some of the decisions which have alarmed many people in recent years, — as if the courts were turning out but a broken reed.3 Many more such opinions are to be expected, for, while legislatures are often faithless to their trust, judges sometimes have to confess the limits of their own power.

It all comes back, I think, to this. The rule under discussion has in it an implied recognition that the judicial duty now in question touches the region of political administration, and is qualified by the necessities and proprieties of administration. If our doctrine of constitutional law — which finds itself, as we have seen, in the shape of a narrowly stated substantive principle, with a rule of administration enlarging the otherwise too restricted substantive rule — admits now of a juster and simpler conception, that is a very familiar situation in the development of law. What really took place in adopting our theory of constitutional law was this: we introduced for the first time into the conduct of government through its great departments a judicial sanction, as among these departments, — not full and complete, but partial. The judges were allowed, indirectly and in a degree, the power to revise the action of other departments and to pronounce it null. In simple truth, while this is a mere judicial function, it involves, owing to the subject-matter with which it deals, taking a part, a secondary part, in the political conduct of government. If that be so, then the judges must apply methods and principles that befit their task. In such a work there can be no permanent or fitting modus vivendi between the different departments unless each is sure of the full co-operation of the others, so long as its own action conforms to any reasonable and fairly permissible view of its constitutional power. The ultimate arbiter of what is rational and permissible is indeed always the courts, so far as litigated cases bring the question before them. This leaves to our courts a great and stately jurisdiction. It will only imperil the whole of it if it is sought to give them more. They must not step into the shoes of the law-maker, or be unmindful of the hint that is found in the sagacious

remark of an English bishop nearly two centuries ago, quoted lately from Mr. Justice Holmes1:—

"Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first wrote or spoke them."2

V. Finally, let me briefly mention one or two discriminations which are often overlooked, and which are important in order to a clear understanding of the matter. Judges sometimes have occasion to express an opinion upon the constitutionality of a statute, when the rule which we have been considering has no application, or a different application from the common one. There are at least three situations which should be distinguished: (1) where judges pass upon the validity of the acts of a co-ordinate department; (2) where they act as advisers of the other departments; (3) where, as representing a government of paramount authority, they deal with acts of a department which is not co-ordinate.

(1) The case of a court passing upon the validity of the act of a co-ordinate department is the normal situation, to which the previous observations mainly apply. I need say no more about that.

(2) As regards the second case, the giving of advisory opinions, this, in reality, is not the exercise of the judicial function at all, and the opinions thus given have not the quality of judicial authority.1 A single exceptional and unsupported opinion upon this subject, in the State of Maine, made at a time of great political excitement,2 and a doctrine in the State of Colorado, founded upon considerations peculiar to the constitution of that State,3 do not call for any qualification of the general remark, that such opinions, given by our judges, — like that well-known class of opinions given by the judges in England when advising the House of Lords, which suggested our own practice, — are merely advisory, and in no sense authoritative judgments.1 Under our constitutions such opinions are not generally given. In the six or seven States where the constitutions provide for them, it is the practice to report these opinions among the regular decisions, much as the responses of the judges in Queen Caroline's Case, and in MacNaghten's Case, in England, are reported, and sometimes cited, as if they held equal rank with true adjudications. As regards such opinions, the scruples, cautions, and warnings of which I have been speaking, and the rule about a reasonable doubt, which we have seen emphasized by the courts as regards judicial decisions upon the constitutionality of laws, have no application. What is asked for is the judge's own opinion.

(3) Under the third head come the questions arising out of the existence of our double system, with two written constitutions, and two governments, one of which, within its sphere, is of higher authority than the other. The relation to the States of the paramount government as a whole, and its duty in all questions involving the powers of the general government to maintain that power as against the States in its fulness, seem to fix also the duty of each of its departments; namely, that of maintaining this paramount authority in its true and just proportions, to be determined by itself. If a State legislature passes a law which is impeached in the due course of litigation before the national courts, as being in conflict with the supreme law of the land, those courts may have to ask themselves a question different from that which would be applicable if the enactments were those of a co-ordinate department. When the question relates to what is admitted not to belong to the national power, then whoever construes a State constitution, whether the State or national judiciary, must allow to that legislature the full range of rational construction. But when the question is whether State action be or be not conformable to the paramount constitution, the supreme law of the land, we have a different matter in hand. Fundamentally, it involves the allotment of power between the two governments, — where the line is to be drawn. True, the judiciary is still debating whether a legislature has transgressed its limit; but the departments are not co-ordinate, and the limit is at a different point. The judiciary now speaks as

representing a paramount constitution and government, whose duty it is, in all its departments, to allow to that constitution nothing less than its just and true interpretation; and having fixed this, to guard it against any inroads from without.

I have been speaking of the national judiciary. As to how the State judiciary should treat a question of the conformity of an Act of their own legislature to the paramount constitution, it has been plausibly said that they should be governed by the same rule that the Federal courts would apply. Since an appeal lies to the Federal courts, these two tribunals, it has been said, should proceed on the same rule, as being parts of one system. But under the Judiciary Act an appeal does not lie from every decision; it only lies when the State law is sustained below. It would perhaps be sound on general principles, even if an appeal were allowed in all cases, here also to adhere to the general rule that judges should follow any permissible view which the co-ordinate legislature has adopted. At any rate, under existing legislation it seems proper in the State court to do this, for the practical reason that this is necessary in order to preserve the right of appeal.1

The view which has thus been presented seems to me highly important. I am not stating a new doctrine, but attempting to restate more exactly and truly an admitted one. If what I have said be sound, it is greatly to be desired that it should be more emphasized by our courts, in its full significance. It has been often remarked that private rights are more respected by the legislatures of some countries which have no written constitution, than by ours. No doubt our doctrine of constitutional law has had a tendency to drive out questions of justice and right, and to fill the mind of legislators with thoughts of mere legality, of what the constitution allows. And moreover, even in the matter of legality, they have felt little responsibility; if we are wrong, they say, the courts will correct it.1 If what I have been saying is true, the safe and permanent road towards reform is that of impressing upon our people a far stronger sense than they have of the great range of possible harm and evil that our system leaves open, and must leave open, to the legislatures, and of the clear limits of judicial power; so that responsibility may be brought sharply home where it belongs. The checking and cutting down of legislative power, by numerous detailed prohibitions in the constitution, cannot be accomplished without making the government petty and incompetent. This process has already been carried much too far in some of our States. Under no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere. If this be true, it is of the greatest public importance to put the matter in its true light.2

Footnotes

1 Read at Chicago, August 9, 1893, before the Congress on Jurisprudence and Law Reform.

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.

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.

1 Varnum's Report of the case (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. As Mr. Meigs remarks, the New York case does not appear to be really one of holding a law unconstitutional.

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, Johns. Ch. Rep. 162, — will be found, on a careful examination, to require no such explanation.

3 Vol. i. pp. 50 et seq.

1 Cooley, Const. Lim., 6th ed., 193, n.; 1 Chase's Statutes of Ohio, preface, 38-40. For the last reference I am indebted to my colleague, Professor Wambaugh.

2 Part I. Art. 30.

3 Art. I.

1 Journal of the Michigan Pol. Sc. Association, vol. i. p. 47.

1 The constitution of Colombia, of 1886, art. 84, provides that the judges of the Supreme Court may take part in the legislative debates over "bills relating to civil matters and judicial procedure." And in the case of legislative bills which are objected to by "the government" as unconstitutional, if the legislature insist on the bill, as against a veto by the government, it shall be submitted to the Supreme Court, which is to decide upon this question finally. Arts. 90 and 150. See a translation of this constitution by Professor Moses, of the University of California, in the supplement to the Annals of the American Academy of Political and Social Science, for January, 1893.

We are much too apt to think of the judicial power of revising the acts of the other departments as our only protection against oppression and ruin. But it is remarkable how small a part this played in any of the debates. The chief protections were a wide suffrage, short terms of office, a double legislative chamber, and the so-called executive veto. There was, in general, the greatest unwillingness to give the judiciary any share in the law-making power. In New York, however, the constitution of 1777 provided a Council of Revision, of which several of the judges were members, to whom all legislative Acts should be submitted before they took effect, and by whom they must be approved. That existed for more than forty years, giving way in the

constitution of 1821 to the common expedient of merely requiring the approval of the executive, or in the alternative, if he refused it, the repassing of the Act, perhaps by an increased vote, by both branches of the legislature. In Pennsylvania (Const. of 1776, § 47) and Vermont (Const. of 1777, § 44) a Council of Censors was provided for, to be chosen every seven years, who were to investigate the conduct of affairs, and point out, among other things, all violations of the constitution by any of the departments. In Pennsylvania this arrangement lasted only from 1776 to 1790; in Vermont from 1777 to 1870. In framing the constitution of the United States, several of these expedients, and others, were urged, and at times adopted; e. g., that of New York. It was proposed at various times that the general government should have a negative on all the legislation of the States; that the governors of the States should be appointed by the United States, and should have a negative on State legislation; that a Privy Council to the President should be appointed, composed in part of the judges; and that the President and the two houses of Congress might obtain opinions from the Supreme Court. But at last the convention, rejecting all these, settled down upon the common expedients of two legislative houses, to be a check upon each other, and of an executive revision and veto, qualified by the legislative power of reconsideration and enactment by a majority of two-thirds; — upon these expedients, and upon the declaration that the constitution, and constitutional laws and treaties, shall be the supreme law of the land, and shall bind the judges of the several States. This provision, as the phrasing of it indicates, was inserted with an eye to secure the authority of the general government as against the States, i. e. as an essential feature of any efficient Federal system, and not with direct reference to the other departments of the government of the United States itself. The first form of it was that "legislative Acts of the United States, and treaties, are the supreme law of the respective States, and bind the judges there as against their own laws."

1 No. 78, first published on May 28, 1788. See Lodge's edition, pp. xxxvi and xliv.

1 Den d. Bayard v. Singleton, 1 Martin, 42.

2 Vol. i. p. 460.

3 Kemper v. Hawkins, Va. Cas. 20.

4 Vanhorne's Lessee v. Dorrance, 2 Dall. 304.

5 Lindsay v. Com'rs, 2 Bay, 38.

6 Whittington v. Polk, 1 H. & J. 236.

7 1 Cranch, 137.

1 Com. v. Smith, 4 Bin. 117.

2 Com. v. Call, 4 Call, 5.

3 Kemper v. Hawkins, Va. Cases, p. 60.

1 5 Ell. Deb. 344.

2 Ware v. Hylton, 3 Dall. 171.

3 Cooper v. Telfair, 4 Dall. 14.

4 Grimball v. Ross, Charlton, 175.

5 Adm'rs of Byrne v. Adm'rs of Stewart, 3 Des. 466

1 This well-known rule is laid down by Cooley (Const. Lim., 6th ed., 216), and supported by emphatic judicial declarations and by a long list of citations from all parts of the country. In Ogden v. Saunders, 12 Wheat. 213 (1827), Mr. Justice Washington, after remarking that the question was a doubtful one, said: "If I could rest my opinion in favor of the constitutionality of the law ... on no other ground than this doubt, so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of it. It is but a decent respect due to the ... legislative body by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt. This has always been the language of this court when that subject has called for its decision; and I know it expresses the honest sentiments of each and every member of this bench." In the Sinking Fund Cases, 99 U. S. 700 (1878), Chief Justice Waite, for the court, said: "This declaration [that an Act of Congress is

unconstitutional] should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." In Wellington et al., Petitioners, 16 Pick. 87 (1834), Chief Justice Shaw, for the court, remarked that it was proper "to repeat what has been so often suggested by courts of justice, that when called upon to pronounce the invalidity of an Act of legislation [they will] never declare a statute void unless the nullity and invalidity of the Act are placed, in their judgment, beyond reasonable doubt." In Com. v. Five Cents Sav. Bk., 5 Allen, 428 (1862), Chief Justice Bigelow, for the court, said: "It may be well to repeat the rule of exposition which has been often enunciated by this court, that where a statute has been passed with all the forms and solemnities required to give it the force of law, the presumption is in favor of its validity, and that the court will not declare it to be ... void unless its invalidity is established beyond reasonable doubt." And he goes on to state a corollary of this "well-established rule." In Ex parte M'Collum, 1 Cow. p. 564 (1823), Cowen, J. (for the court), said: "Before the court will deem it their duty to declare an Act of the legislature unconstitutional, a case must be presented in which there can be no rational doubt." In the People v. The Supervisors of Orange, 17 N. Y. 235 (1858) , Harris, J. (for the court), said: "A legislative Act is not to be declared void upon a mere conflict of interpretation between the legislative and the judicial power. Before proceeding to annul, by judicial sentence, what has been enacted by the law-making power, it should clearly appear that the Act cannot be supported by any reasonable intendment or allowable presumption." In Perry v. Keene, 56 N. H. 514, 534 (1876) , Ladd, J. (with the concurrence of the rest of the court), said: "Certainly it is not for the court to shrink from the discharge of a constitutional duty; but, at the same time, it is not for this branch of the government to set an example of encroachment upon the province of the others. It is only the enunciation of a rule that is now elementary in the American States, to say that before we can declare this law unconstitutional, we must be fully satisfied — satisfied beyond a reasonable doubt — that the purpose for which the tax is authorized is private, and not public." In The Cincinnati, etc., Railroad Company, 1 Oh. St. 77 (1852), Ranney, J. (for the court), said: "While the right and duty of interference in a proper case are thus undeniably clear, the principles by which a court should be guided in such an inquiry are equally clear, both upon principle and authority. ... It is only when manifest assumption of authority and clear incompatibility between the constitution and the law appear, that the judicial power can refuse to execute it. Such interference can never be permitted in a doubtful case. And this results from the very nature of the question involved in the inquiry. ... The adjudged cases speak a uniform language on this subject. ... An unbroken chain of decisions to the same effect is to be found in the State courts." In Syndics of Brooks v. Weyman, 3 Martin (La.), 9, 12 (1813), it was said by the court: "We reserve to ourselves the authority to declare null any legislative Act which shall be repugnant to the constitution; but it must be manifestly so, not susceptible of doubt." (Cited with approval in Johnson v. Duncan, Ib. 539.) In Cotton v. The County Commissioners, 6 Fla. 610 (1856), Dupont, J. (for the court), said: "It is a most grave and important power, not to be exercised lightly or rashly, nor in any case where it cannot be made plainly to appear that the legislature has exceeded its powers. If there exist upon the mind of the court a reasonable doubt, that doubt must be given in favor of the law. ... In further support of this position may be cited any number of decisions by the State courts. ... If there be one to be found which constitutes an exception to the general doctrine, it has escaped our search."

1 Const. Lim., 6th ed., 68; cited with approval by Bryce, Am. Com., 1st ed., i. 431.

1 Eakin v. Raub, 12 S. & R. 330.

2 Farrar's Rep. Dart. Coll. Case, 36.

3 7 Pick. 344.
1 Wellington, Petr., 16 Pick. 87.
1 3d ed., 279-281.
2 It was so held in Riggs v. State, 3 Cold. 85 (Tenn., 1866), and United States v. Clark, 31 Fed. Rep. 710 (U. S. Circ. Ct., E. Dist. Michigan, 1887, Brown, J.). I am indebted for these cases to Professor Beale's valuable collection of Cases on Criminal Law (Cambridge, 1893). The same doctrine is laid down by Judge Hare in 2 Hare, Am. Const. Law, 920.
3 Cap. & Counties Bank v. Henty, 7 App. Cas., p. 776.
4 Belt v. Lawes, Thayer's Cas. Ev. 177, n.
1 Chic. &c. Ry. Co. v. Minnesota, 134 U. S. 418. The question was whether a statute providing for a commission to regulate railroad charges, which excluded the parties from access to the courts for an ultimate judicial revision of the action of the commission, was constitutional.
2 Compare Law and Fact in Jury Trials, 4 Harv. Law Rev. 167, 168.
3 There is often a lack of discrimination in judicial utterances on this subject, — as if it were supposed that the legislature had to conform to the judge's opinion of reasonableness in some other sense than that indicated above. The true view is indicated by Judge Cooley in his Principles of Const. Law, 2d ed., 57, when he says of a particular question: “Primarily the determination of what is a public purpose belongs to the legislature, and its action is subject to no review or restraint so long as it is not manifestly colorable. All cases of doubt must be solved in favor of the validity of legislative action, for the obvious reason that the question is legislative, and only becomes judicial when there is a plain excess of legislative authority. A court can only arrest the proceedings and declare a levy void when the absence of public interest in the purpose for which the funds are to be raised is so clear and palpable as to be perceptible to any mind at first blush.” And again, on another question, by the Supreme Court of the United States, Waite, C. J., in Terry v. Anderson, 95 U. S. p. 633: “In all such cases the question is one of reasonableness, and we have therefore only to consider whether the time allowed in this Statute [of Limitations] is, under all the circumstances, reasonable. Of that the legislature is primarily the judge; and we cannot overrule the decision of that department of the government, unless a palpable error has been committed.” See Pickering Phipps v. Ry. Co., 66 Law Times Rep. 721 (1892), and a valuable opinion by Ladd, J., in Perry v. Keene, 56 N. H. 514 (1876).
1 Eakin v. Raub, 12 S. & R., p. 355.
2 Fletcher v. Peck, 6 Cr., p. 131.
1 Cap. & Count. Bank v. Henty, 7 App. Cas. 741.
1 4 Wheat. 316.
2 Per Thomas, J., the Opinion of Justices, 8 Gray, p. 21.
3 “It matters little,” says a depressed, but interesting and incisive writer, in commenting, in 1885, upon the Legal Tender decisions of the Supreme Court of the United States, “for the court has fallen, and it is not probable it can ever again act as an effective check upon the popular will, or should it attempt to do so, that it can prevail.” The “Consolidation of the Colonies,” by Brooks Adams, 55 Atlantic Monthly, 307.
1 By Professor Gray in 6 Harv. Law Rev. 33, n., where he justly refers to the remark as showing “that gentlemen of the short robe have sometimes grasped fundamental legal principles better than many lawyers.”
2 Bishop Hoadly's Sermon preached before the King, March 31, 1717, on “The Nature of the Kingdom or Church of Christ.” London: James Knapton, 1717. It should be remarked that Bishop Hoadly is speaking of a situation where the supposed legislator, after once issuing his enactment, never interposes. That is not strictly the case in hand; yet we may recall what Dicey says of amending the constitution of the United States: “The sovereign of the United States has been roused to serious action but once during the course of ninety years. It needed the thunder of the Civil War to break his repose,

and it may be doubted whether anything short of impending revolution will ever again arouse him to activity. But a monarch who slumbers for years is like a monarch who does not exist. A federal constitution is capable of change, but, for all that, a federal constitution is apt to be unchangeable."

1 Com. v. Green, 12 Allen, p. 163; Taylor v. Place, 4 R. I., p. 362. See Thayer's Memorandum on Advisory Opinions (Boston, 1885), Jameson, Const. Conv., 4th ed., Appendix, note e, p. 667, and a valuable article by H. A. Dubuque, in 24 Am. Law Rev. 369, on "The Duty of Judges as Constitutional Advisers."

2 Opinion of Justices, 70 Me., p. 583 (1880). Contra, Kent, J., in 58 Me., p. 573 (1870): "It is true, unquestionably, that the opinions given under a requisition like this have no judicial force, and cannot bind or control the action of any officer of any department. They have never been regarded as binding on the body asking for them." And so Tapley, J., ibid., p. 615: "Never regarding the opinions thus formed as conclusive, but open to review upon every proper occasion;" and Libby, J., in 72 Me., p. 562-3 (1881): "Inasmuch as any opinion now given can have no effect if the matter should be judicially brought before the court by the proper process, and lest, in declining to answer, I may omit the performance of a constitutional duty, I will very briefly express my opinion upon the question submitted." Walton, J., concurred; the other judges said nothing on this point.

3 In re Senate Bill, 12 Colo. 466, — an opinion which seems to me, in some respects, ill considered.

1 Macqueen's Pract. Ho. of Lords, pp. 49, 50.

1 Gibson, J., in Eakin v. Raub, 12 S. & R., p. 357. Compare Ib., p. 352. The same result is reached by the court, on general principles, in The Tonnage Tax Cases, 62 Pa. St. 286: "A case of simple doubt should be resolved favorably to the State law, leaving the correction of the error, if it be one, to the Federal judiciary. The presumption in favor of a co-ordinate branch of the State government, the relation of her courts to the State, and, above all, the necessity of preserving a financial system so vital to her welfare, demand this at our hands" (Agnew, J., for the court).

1 "A singular result of the importance of constitutional interpretation in the American government ... is this, that the United States legislature has been very largely occupied in purely legal discussions ... Legal issues are apt to dwarf and obscure the more substantially important issues of principle and policy, distracting from these latter the attention of the nation as well as the skill of congressional debaters." — 1 Bryce, Am. Com., 1st ed., 377. On page 378 he cites one of the best-known writers on constitutional law, Judge Hare, as saying that "In the refined and subtle discussion which ensues, right is too often lost sight of, or treated as if it were synonymous with might. It is taken for granted that what the constitution permits it also approves, and that measures which are legal cannot be contrary to morals." See also Ib., 410.

2 La volonté populaire: tel est, dans les pays libres de l'ancien et du Nouveau Monde, la source et la fin de tout pouvoir. Tant qu'elle est saine, les nations prospèred malgré les imperfections et les lacunes de leurs institutions; si le bon sens fait défaut, si les passions l'emportent, les constitutions les plus parfaites, les lois les plus sages, sont impuissantes. La maxime d'un ancien: quid leges sine moribus? est, en somme, le dernier mot de la science politique. — Le Système Judiciaire de la Grande Bretagne, by le Comte de Franqueville, i. 25 (Paris: J. Rothschild, 1893).

It's irrational to ruin our lives to save the NHS
It's time to question the sacred cow of modern Britain: that controlling Covid to protect the health service trumps everything else

JONATHAN SUMPTION

31 December 2021 • 5:00pm, Daily Telegraph

Jonathan Sumption

The abiding vice of the Government's handling of the Covid-19 pandemic until recently has been an obstinate refusal to look at the problem as a whole. Ministers have treated it as a pure question of public health management.

In fact, it is not and never has been a pure question of public health management. It is a complex question of medical, economic, social, and educational policy, as well as a profound moral issue. There have been occasional nods at these other aspects of the crisis, but the Government has acted as if the only thing that really mattered was keeping infections down.

Epidemiologists and mathematical modellers can take this blinkered line, but governments cannot. The essence of government is the assessment of the broadest possible range of factors, which usually point in different directions. One-dimensional solutions are almost always bad ones.

This is what made December 20 2021 such a landmark date. The Government had the courage to reject the epidemiologists' advice on the ground that other things mattered at least as much.

Ironically, we owe this improvement in the quality of government to the collapse of the Prime Minister's political standing among his own MPs and in the country at large. The result was to widen the decision-making process beyond a tiny cabal of the Prime Minister, the Health Secretary, the Chief Scientific Adviser and the Chief Medical Officer. The move to Plan B on December 8 had taken most ministers by surprise. That was not a sensible way of conducting our affairs.

For seemingly the first time, on December 20 the Cabinet had a real role in the decision. At least some of its members were prepared to do what the Prime Minister has hardly ever done – drill down into the detail and question some highly questionable assumptions.

The "precautionary principle" is essentially a principle for making decisions radically affecting people's lives without adequate evidence. Its rejection was a heartening development from which other European governments could learn.

There is just one problem. We are still being told that the Government will do whatever is thought necessary to "save" the National Health Service. The idea that we must – at whatever human cost – keep the transmission of Covid at a level within the NHS's capacity to cope is taken for granted by many people. It is one of the sacred cows of modern Britain. It is time that we started questioning it.

The NHS's capacity to cope is determined by political decisions taken over a long period of time. Governments do not like spending money on things which are badly needed but only at occasional moments of peak demand. It is an inefficient use of public funds.

Decisions about the capacity of emergency facilities generally involve a trade-off between trying to meet peak demand and avoiding heavy expenditure on facilities that are underused the rest of the time. This is a particularly difficult dilemma when it comes to critical care in hospitals, which calls for expensive equipment and high levels of trained staff.

All governments make this trade-off. But recent British governments of all political complexions have carried the process further than most.

The number of NHS beds has declined for 30 years. On the eve of the pandemic, the UK's critical care capacity per hundred thousand of population was among the lowest in the world: better than India's or China's but only half that of Italy or France and less than a quarter of that of Germany or the United States.

Underproviding for peak demand is a perfectly rational policy, given competing calls on scarce resources. Every pound spend on critical care facilities is a pound not spent on other pressing concerns, like education, social security or policing. But it inevitably involves accepting that in health emergencies the NHS will be overwhelmed at the peak.

Epidemics of respiratory disease have regularly exceeded hospital capacity before anyone had heard of Covid-19. Asian flu (1957-8) and Hong Kong flu (1968-9), although less serious than Covid-19, swamped the NHS. Ordinary winter flu regularly overwhelms it. It happens roughly every two to three years, most recently in 2014-15, in 2016-17 and again in 2017-18. People died, sometimes in large numbers.

So when governments tell us that we must behave in a way that "saves" the National Health Service, what they really mean is that we, the healthy and the vulnerable alike, must "save" it from the choices made by those same governments.

Of course, we are where we are, and many people will say that we have to address the current health emergency regardless of how it came about. But that is only a rational point of view if one accepts its implications.

Of course we should spend more on the NHS, but spending more will not avoid the dilemma. Either we must prioritise health spending over everything else, to a degree which no government in the world has ever attempted. Or else we must allow governments to put our lives on hold with annual lockdowns and the like as a way of limiting public expenditure on emergency facilities in the NHS. The rational alternative is to do what human beings have done from time immemorial, namely to take periodical epidemics of potentially mortal diseases on the chin.

An overwhelmed health service is a bad thing. We can all agree on that. But it is not the worst thing that can happen to a society.

The worst thing that can happen to a society is that its members use the coercive powers of the state so as systematically to stunt their own lives and those of their fellow citizens.

Take education, for example. In the first lockdown, the Government closed schools in order to slow the transmission of Covid-19 and relieve pressure on the NHS. Governments have done the same all over the world.

The brighter pupils and those with strong parental support will probably make up the lost time. But all the research suggests that the more vulnerable and marginal learners will suffer serious and irreversible damage to their life chances. This will have a major impact on future inequality. Sending whole classes or whole years home if any of them are infected produces the same result in slow motion.

This is a less visible and less dramatic catastrophe than piling up the dying on trolleys in hospital corridors, which is why politicians care less about it. But it is arguably even

more serious.

The same point can be made about the other indirect consequences of heavy-handed government intervention, for example on mental health, culture and sheer human misery.

The economic implications of lockdowns and other measures of compulsory distancing will be with us for many years. In the long run, no country ever improved human welfare or even public health by making itself poorer.

The NHS is a facility, not a regulator. It is there to enrich and not to impoverish our lives. It exists to serve us, and not the other way round. We need not blame the epidemiologists. It is their job to think about nothing but epidemics. But this is not a sensible priority for government or for the rest of us.

We have lives to live, and there is more to life than the avoidance of death.

Lord Sumption is a historian and sat on the UK's Supreme Court from 2012 to 2018