Supplementary Material

Chapter 7: The Republican Era—Foundations/Principles/Judicial Power to Protect Rights

## *James Bradley Thayer,* **The Origin and Scope of the American Doctrine of Constitutional Law** (1893)[1]

*James Bradley Thayer (1831-1902) was a successful lawyer, a consultant who helped draft several state constitutions, a founding member of both the American Social Science Association and the Association of American Law Schools, and an influential professor at Harvard Law School. Thayer was the author of the first casebooks in constitutional law and the law of evidence (also the subject of an important treatise).*

*"The Origin and Scope of the American Doctrine of Constitutional Law," which Thayer had outlined in a long letter to the* Nation *in 1884, responded to the growing movement of more conservative lawyers calling on the courts to exercise actively the power of judicial review to constrain the economic regulations being adopted by state and national legislatures. Marshaling a long catalog of quotes from state and federal judicial opinions (omitted from this excerpt), Thayer argued that such judicial activism was a radical departure from the historic standard by which judges had exercised the power of judicial review. That traditional standard, Thayer argued, was the "clear mistake rule." courts should strike down legislation only when the law very clearly violated constitutional requirements. In developing this standard, Thayer changed the terms of the theoretical debate of judicial review by introducing the notion that there could be reasonable disagreement over the meaning of the Constitution. The problem confronting judges and others at the turn of the twentieth century was not merely one of preserving constitutions against violation, but also one of coming to terms with constitutional uncertainty and persistent debate about fundamental constitutional principles. Thayer's counsel of judicial restraint in the face of this constitutional disagreement had a profound influence in the early twentieth century on Progressives of the "Harvard School," including Justice Oliver Wendell Holmes, Jr., Justice Louis Brandeis, Judge Learned Hand, and Justice Felix Frankfurter.*



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?

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. . . [W]here the power of the judiciary did have place, its whole scope was this; namely, to determine, for 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. . . . [These questions] 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 entrust to the legislature this determination; they cannot act without making it. . . . [I]t is the legislature to whom this power is given,—this power, not merely of enacting laws, but of putting an interpretation on

[1] Excerpt taken from James Bradley Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," *Harvard Law Review* 7 (1893): 129.

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. . . .

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 entrusted 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. . . .

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. . . 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 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 the 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. . . .

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. . . 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 the legislation is sustainable or not.

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. . . 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.