JUDICIAL SETTLEMENT OF CONTROVERSIES BETWEEN STATES OF THE AMERICAN UNION

CASES DECIDED IN THE SUPREME COURT OF THE UNITED STATES

COLLECTED AND EDITED BY
JAMES BROWN SCOTT, A.M., J.U.D., LL.D.

IN TWO VOLUMES

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BY THE EDITOR OF AND UNIFORM WITH THIS COLLECTION OF CASES

Judicial Settlement of Controversies Between States of the American Union

An Analysis of Cases decided in the Supreme Court of the United States

The United States of America

A Study in International Organization

I can not refrain from asking your Lordships to consider how the subject has been viewed by our brethren in the United States of America. They carried the common law of England along with them, and jurisprudence is the department of human knowledge to which, as pointed out by Burke, they have chiefly devoted themselves, and in which they have chiefly excelled. (*Lord Campbell in Regina* v. *Millis, 10 Clark & Finnelly, 777, decided in 1844.*)

Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand. (*Chief Justice Fuller in Kansas* v. *Colorado, 185 United States, 125, 146–147, decided in 1902.*)

Confederations have existed in other countries than America; republics have been seen elsewhere than upon the shores of the New World; the representative system of government has been adopted in several states of Europe; but I am not aware that any nation of the globe has hitherto constituted a judicial power in the same manner as the Americans. (*Alexis de Tocqueville, De la Démocratie en Amérique, 2 Vols., 1835, Vol. I, p. 158.*)

The Supreme Court of the United States, which is the American Federal institution next claiming our attention, is not only a most interesting but a virtually unique creation of the founders of the Constitution. . . . The success of this experiment has blinded men to its novelty. There is no exact precedent for it, either in the ancient or in the modern world. (*Sir Henry Sumner Maine, Popular Government, 1886, pp. 217–218.*)

American experience has made it an axiom in political science that no written constitution of government can hope to stand without a paramount and independent tribunal to determine its construction and to enforce its precepts in the last resort. This is the great and foremost duty cast by the Constitution, for the sake of the Constitution, upon the Supreme Court of the United States. (*Edward John Phelps, The United States Supreme Court and the Sovereignty of the People, 1890, Orations and Essays, 1901, pp. 58–59.*)

The extraordinary scope of judicial power in this country has accustomed us to see the operations of government and questions arising between sovereign states submitted to judges who apply the test of conformity to established principles and rules of conduct embodied in our constitutions.

It seems natural and proper to us that the conduct of government affecting substantial rights, and not depending upon questions of policy, should be passed upon by the courts when occasion arises. It is easy, therefore, for Americans to grasp the idea that the same method of settlement should be applied to questions growing out of the conduct of nations and not involving questions of policy. (*Elihu Root, Judicial Settlement of International Disputes, 1908, Addresses on International Subjects, 1916, pp. 151–2.*)

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America has emerged from her struggle into tranquility and freedom, into affluence and credit.—The authors of her Constitution have constructed a great permanent *experimental answer* to the sophisms and declamations of the detractors of liberty. (*Sir James Mackintosh, Vindiciæ Gallicæ; Defence of the French Revolution and its English Admirers, 1791, p. 78.*)

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PREFATORY NOTE

From time to time, the undersigned has had occasion to consider those controversies between the States of the American Union, which have been decided in the Supreme Court of the United States; and like all others interested in these matters, he has been forced to consult the many volumes of Reports, through which these decisions run like threads of gold. It has occurred to him that it would be no mean service to the cause of judicial settlement between the States, if the decisions of these controversies were brought within narrower compass, so as to be readily accessible not only to the lawyer, but to the layman as well. They have therefore been gathered together and form the larger part of two volumes.

While this would be a sufficient reason for their publication, the present collection may properly be expected to subserve a larger purpose, for the Supreme Court of the United States is, in its origin, and in fact, an international tribunal, created by the States meeting by their delegates in conference, in Philadelphia, in 1787, which conference, commonly called the Constitutional Convention, as it drafted the Constitution of the United States, devised a court of the States, in which they consented to be sued for the settlement of the controversies bound to arise between and among them, renouncing the right of settlement by diplomacy, and wisely eschewing the resort to force. There was, in the opinion of its members then, as in the view of their fellow countrymen today, only a court of justice between the breakdown of diplomacy on the one hand, and the outbreak of war on the other.

In a little over a century, beginning with 1799, and ending with June 10, 1918, when the latest was considered in the Supreme Court, some eighty odd controversies between the States have been argued, debated and decided by that tribunal. As the result of argument, debate and decision, practice has been settled, and procedure adopted in the light of experience as applicable to States of the Society of Nations, as to States of the American Union. The essence, function and limits of judicial power have been noted and analyzed; the distinction between judicial power, on the one hand, and legislative and executive, or political power, on the other, has been made so clear in a long course of decisions, that he who runs may read, and the judicial settlement of justiciable disputes by a court has been justified by precept, demonstrated by practice and vindicated by results.

The judicial power to which the Constitution of the more perfect Union refers is that of the United States, and it must be made plain at the outset that we are dealing not with provinces but with States, which granted to the Union of their own creation certain sovereign powers, while retaining the exercise of such powers as they did not expressly or impliedly grant to the Government of that Union, or which they did not prohibit to themselves. Therefore, some leading decisions of the Supreme Court have been prefixed, dealing with the origin and nature of the United States, and of the States composing the American Union.

The judicial power, however, is not exercised in the abstract but in the concrete case, controversy or suit as it arises and is presented in actual litigation to the Court. Therefore certain cases have been added showing the sense in which these terms are used in the Constitution in order that the judicial power shall extend to the dispute and the Court decide the issue.

The case, controversy or suit is, as expressly or impliedly stated in the Constitution, one involving common law, equity, admiralty, maritime and interna-

tional law. Therefore cases have been selected to show how and to what extent the judicial power extends to and embraces them within its jurisdiction.

Still other cases have been chosen showing, what indeed does not need demonstration, the immunity of nations and States from suit except by their express consent, which, fortunately for us, has been given in general terms in the Constitution of these United States.

By the Eleventh Amendment to the Constitution the judicial power of the United States was withdrawn from suits by citizens of a State against other States of the Union; it has, however, been thought advisable to include these earlier cases, interesting in themselves and important in that they furnish the procedure later followed in suits between States. Some cases in which attempts were made by private suitors to reach the States through their officials, and thus to circumvent the amendment, have been added, in order that it may be seen how a court of limited jurisdiction can be trusted to keep within the spirit as well as the letter of its limitation.

It will be observed that the first volume carries the cases through the first final decision in a controversy between States and at the same time the procedure to be followed in reaching a decision is devised, ascertained and set forth in detail in the judgments. The second volume may therefore be looked upon as decrees of the court after the principle had been established and the procedure adopted and as so many variations in the exercise of the jurisdiction conferred by the Constitution upon the Supreme Court in the matter of controversies between States.

The fact that two volumes were required for the text of the controversies between States, even although small quarto was employed, made it possible to prefix certain preliminary matter which is believed to be not only useful but also essential in order to enable advocates of judicial settlement to understand the controversies and to read the cases involving them with pleasure as well as instruction.

It is believed that a perusal of this preliminary material, and a careful consideration of the controversies between the States, decided in the Supreme Court, will convince the layman, as well as the practitioner, that what forty-eight States of the American Union do, a like number of States forming the Society of Nations can also do, so that the Supreme Court of the one, and, in the future, an International Court of Justice of the other, will, in appropriate instances, decide controversies between the States of the American Union and disputes between members of the Society of Nations according to that due process of law which obtains between individuals, and without which, neither States nor Nations can hope to endure.

To many it seems that the Court of the American Union—in which coercive measures are not taken to compel the appearance of the defendant State, but, in its absence, permission is given to the plaintiff State to proceed *ex parte*, and in which hitherto no judgment against a State has been executed by force either because it was felt that no power existed so to do or its exercise was not considered necessary—is the prototype of that tribunal which they would like to see created by the Society of Nations, "accessible to all, in the midst of the independent Powers."

JAMES BROWN SCOTT.

WASHINGTON, D. C.
September 30, 1918.

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VOLUME II

VII. CONTROVERSIES BETWEEN STATES (Continued)

INTRODUCTION

In the government of this Commonwealth, the legislative department 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. (*Constitution of Massachusetts, 1780, Part I, Art. 30; The Constitutions of the Several Independent States of America, etc., Published by order of Congress, and printed by Francis Bailey, Philadelphia, 1781, p. 14.*)

The object of the constitution was to establish three great departments of government; the legislative, the executive, and the judicial departments. The first was to pass laws, the second, to approve and execute them, and the third to expound and enforce them. (*Mr. Justice Story in Martin* v. *Hunter, 1 Wheaton, 304, 329, decided in 1816.*)

1. The federal government is one of *enumerated powers,* the Constitution being the measure thereof, and the powers not delegated thereby being reserved to the individual States or to the people. . . .

2. The powers of sovereignty not thus delegated rest in the people of the individual States, who confer the same for ordinary exercise, with such exceptions and limitations and under such regulations as they see fit to establish, upon the departments and officers of government which by their constitutions they create for the States respectively.

3. The municipal organizations exercise a delegated authority under the State, and may also be regarded as governments of enumerated powers. The State legislative authority shapes their charters according to its view of what is proper and politic, and it determines their territorial extent. (*Mr. Justice Cooley, of the Supreme Court of Michigan, in Mr. Justice Story's Commentaries on the Constitution of the United States, 4th ed., 1874, Vol. I, p. 196.*)

America has emerged from her struggle into tranquility and freedom, into affluence and credit.—The authors of her Constitution have constructed a great permanent *experimental answer* to the sophisms and declamations of the detractors of liberty. (*Sir James Mackintosh, Vindiciæ Gallicæ; Defence of the French Revolution and its English Admirers, 1791, p. 78.*)

A federal state derives its existence from the constitution, just as a corporation derives its existence from the grant by which it is created. Hence, every power, executive, legislative, or judicial, whether it belong to the nation or to the individual States, is subordinate to and controlled by the constitution. Neither the President of the United States nor the Houses of Congress, nor the Governor of Massachusetts, nor the Legislature or General Court of Massachusetts can legally exercise a single power which is inconsistent with the articles of the Constitution. (*A. V. Dicey, The Law of the Constitution, 1885, p. 132.*)

But if their notions were conceptions derived from English law, the great statesmen of America gave to old ideas a perfectly new expansion, and for the first time in the history of the world formed a constitution which should in strictness be the "law of the land," and in so doing created modern federalism. For the essential characteristics of federalism—the supremacy of the constitution—the distribution of powers—the authority of the judiciary—reappear, though no doubt with modifications, in every true federal state. (*A. V. Dicey, The Law of the Constitution, 1885, p. 152.*)

The Constitution of the United States of America is much the most important political instrument of modern times. (*Sir Henry Sumner Maine, Popular Government, 1886, p. 196.*)