THE AMERICAN LAW REGISTER

FOUNDED 1852.

UNIVERSITY OF PENNSYLVANIA

DEPARTMENT OF LAW

VOL. { 47 O. S. }
 { 38 N. S. }

OCTOBER, 1899.

No. 10.

SOME RECENT CRITICISM

OF

GELPCKE VERSUS DUBUQUE.

PART III.

SECTION V.—DISCUSSION OF THE CASE ON PRINCIPLE.

It is neither possible nor desirable in the scope of this paper to go deeply into the subject of judicial legislation, nor is such its purpose. This work was undertaken, primarily, to show that the Supreme Court of the United States is holding two inconsistent positions. If we succeed in showing that, on principle, one of the two must be abandoned we shall feel amply repaid. This inconsistency will be dealt with in the section on Jurisdiction. The present section will be devoted to an endeavor to develop a little more clearly than the cases disclose the theory upon which the courts have been working to reach the conclusions which we have just noted, and to a discussion of the soundness or unsoundness of that theory.

What the courts have said, whether rightly or wrongly, is this: The legislature passes a law, which we will call *A*. The State Supreme Court interprets the law to be valid; this interpretation which is final and conclusive, we will call *B*. The

two combine and the law becomes AB , and is now complete. Subsequently, the court declares the law void. This last interpretation we will call V . The question before the court was this: Are rights acquired under AB to be lost by construction V , and the court said No.

The reasoning runs about as follows: One who relies upon the faith of A really relies upon the accuracy of an interpretation, which he has himself, put upon the words of the act. He may think that the act is valid, when it is really void, but he cannot complain for a loss occurring through his own error, and is not, therefore, protected. The theory is that A alone is incomplete, because the legislative body in this country has no power, as in Europe, to pass upon the validity of its own statutes, and thus to guarantee rights from the moment of their passage; that no rights, therefore, can be acquired until the proper court has declared authoritatively that the law is valid. But as soon as this has been done, then the individual is fully protected. He is protected as to A , because the legislature cannot impair his contract by its repeal; he is protected as to B , because the court cannot impair his contract, by varying its ruling and declaring the law void. This, in brief, is without question what the courts have laid down as law, in those cases which we have examined.

To reach this conclusion it is, of course, necessary to hold that rights may be acquired under a statute afterwards declared to be void. This, in turn, rests upon the theory that a judicial decision, when it construes a state statute, does not merely interpret, but helps to make the law, and that a subsequent judicial decision altering that construction is a "law," within the meaning of the federal clause forbidding the state to pass "laws" impairing the obligation of contracts; and that the federal courts may, for that reason, refuse to apply it. In other words, the whole principle at the bottom of *Gelpcke v. Dubuque*, and all the cases following it, rests upon the assumption, not expressed, it is true, but there, nevertheless, that the function of the Supreme Court of a state, when determining the validity or invalidity of a state statute, is, in its nature, a legislative and not a judicial function.

We fully realize that we shall be treading on very delicate ground if we consider a theory which recognizes that a court's decision may partake of a legislative character. Most of those writers who have supported the case, have carefully avoided the admission that the decision involves this theory, or else have contented themselves with the simple statement that the courts have decided the matter. We do not feel satisfied to stop at this point. We believe, in the first place, that it is a more honest treatment of the case to take the bull by the horns, and admit the principle in its full significance, and, in the second place, we are desirous to see if the rule can be harmonized with the great body of law, of which it forms a part.

A. The rule in Gelpcke v. Dubuque has never been disputed by authority.

Under this phase of the question we will start with the statement, upon which some writers have been content to rest their support of this case, that in this country the courts have laid it down as a rule of law that whenever the Supreme Court of a state determines as to the validity of a statute such decision makes a part of the law of the state—*i. e.*, it is a decision of a legislative character. In opposition to this it is said that it is an ancient and uncontradicted principle, that the courts do not make or change the law, but that they merely expound and apply it; therefore, when a decision is reached, the true theory is that the law always was as last expounded. This was Mr. Justice Miller's great argument in his dissenting opinion in *Gelpcke v. Dubuque*. He says if the courts declare a law void, then it is void absolutely from the beginning, and no rights can be acquired under it.

As we have shown, the courts have absolutely repudiated this view, for they have enforced rights thus acquired in a long line of well-considered opinions. In answer to the argument advanced by Mr. Justice Miller and others, who press the general rule as to the function of courts and judges, it is said: "To this general doctrine there is one well-established exception, as follows: 'After a statute has been settled by judicial construction, the construction becomes, so far as

contract rights are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment.'"¹

To this it is replied: "But there can be no exception to a universal and positive rule of law, and unless you can show some *reason* for your exception you cannot support it on principle." This, then, is now the situation—one side pointing to a long line of Supreme Court decisions to justify the exception, the other citing a positive rule of law.

We wish, at this point, to go a step farther. We propose to show that the rule, as developed in these cases, is not really an exception at all, because the general rule adduced by Mr. Justice Miller *et al.* does not apply to it; but that is a rule, absolutely unique, concerning which there is no authority except in this country.

The rule that courts never make or change, but only interpret, law, was imported into this country from the common law of England. We do not admit nor deny the principle as applied to the common law, though we confess a secret feeling of approval with which we read the language of an old English judge who declared that he, for one, could not understand the theory that the common law had always existed, unknown to man, from the beginning of time, and that the courts were still striving to find out what it was; and who intimated his belief that he himself, together with his companions, was helping to make that same common law.

But, however this may be, we confine our remarks strictly to cases where state courts are interpreting the validity of state statutes, and we say that the rule, as existing in England, has no application to the case where a court is passing upon the validity of a state statute, because in England *the courts have not, and never have had, the power to pass upon the validity of an act of Parliament.*

Not only is this true of England, but of all other countries as well. Mr. Hannis Taylor, in his work "The Origin and

¹ Ray v. Gas Co., *supra*, p. 550.

Growth of the English Constitution," speaks of this peculiarity in American law; and we must remember that the same remarks will apply to the national and state courts, for they both have the same constitutional power to judge of the validity of legislation.

He says:¹ "The Supreme Court of the United States has no prototype in history. Judicial tribunals have existed as component parts of other federal systems, but the Supreme Court of the United States is the only court in history that has ever possessed the power to finally determine the validity of a national law. Such a jurisdiction necessarily arises out of the American system of constitutional limitations upon the legislative power—a system under which all judges, both state and federal, possess the power, in their respective spheres, to pass upon the validity of every law that can emanate from a state or federal legislature. In the English system such a jurisdiction could not exist, for the reason that the English Constitution imposes no limitation upon its legislative assembly; there is no 'higher law' by which the English courts can test the validity of an act of Parliament."

Without, at this point, going into the question as to whether the function of the court in such cases is actually legislative or judicial, enough has been said to show that the rule of law adduced to overthrow the theory of these cases ought not to be given an authoritative position. To say that in England courts do not make, but only interpret, the common law, does not prove that courts in America do not exercise different functions when performing a different service.

Eliminating that precedent, we have left only the authority of the United States Supreme Court. The principle of *Gelpcke v. Dubuque* has never been questioned in that court. The cases have refused full recognition to the doctrine by disallowing writs of error to state courts, as we shall show in the last section, but they have not attempted to overturn the foundation principle.

That principle is a unique rule, developed exclusively in this

¹ 4 Ed. Vol. I, p. 73.

country, and is an outgrowth of our peculiar system of laws. Unless, therefore, the principle which we have shown to be at the bottom of *Gelpcke v. Dubuque* is intrinsically wrong, the case must be considered to be good law.

We will ask a further indulgence at this point, that we may devote a portion of this section to the purpose of investigating whether it may properly be said that the power to pass authoritatively upon the validity or invalidity of an act of legislature is a power appertaining to the legislative department of government, or whether it is more correctly called a strictly judicial function.

B. Is the function of American courts, when deciding as to the validity of legislative acts, a legislative or judicial function?

We shall discuss this question under three topics :

- (1) The *status* of the power to negative legislative acts in European countries.
- (2) An examination of the opinions of the framers of the Constitution, as expressed in the federal convention.
- (3) The manner in which the exercise of the power was received by the country.

(1) THE STATUS OF THE POWER TO NEGATIVE LEGISLATIVE ACTS IN EUROPEAN COUNTRIES.

As we are now about to discuss the nature of a power, granted over one hundred years ago to one department of our government, it is of the highest importance to see where that power had hitherto rested in European countries, and what was the prevailing opinion as to its nature.

There are two distinct methods of interpretation of laws, recognized by both civil and common law.

- (a) *Authentic interpretation*, which decides the validity or invalidity of the law.
- (b) *Judicial interpretation*, which, according to certain rules, interprets the meaning of the law-making power.

The first belongs to the legislative power; the second to

the judicial. We find this rule laid down in "Merlin's Repertoire:"

*"C'est au législateur qu'il appartient naturellement d'interpréter la loi: ejus est legem interpretari cujus est legem condere. C'est une maxime tirée du droit romain. Quis enim (disait l'Empereur Justinien dans la loi 12 C. de legibus), legum enigmata solvere et aperire idoneus esse videbitur, nisi is cui soli legislatorem esse concessum est. En France nos rois se sont toujours réservé l'interprétation de leur ordonnances."*¹

Authentic interpretation has always been considered, in the European countries, as a function of the supreme law-making power. It overrules the interpretation of judges, if the two conflict. It is said that this must be true, otherwise the legislative body would be deprived of part of its legitimate power, which would thus be given over to the courts.

The German view is well expressed in the case of *K. and others v. The Dyke Board of Niedervieland*:² "The constitutional provision that well-acquired rights must not be injured, is to be understood only as a rule for the legislative power itself to interpret, and does not signify that a command given by the legislative power should be left disregarded by the judge because it injures well-acquired rights." This power, declared to belong to the legislative body, is, it will be noted, precisely the same which our courts possess of determining if the law be contrary to "well-acquired rights," or, in other words, if it be in contravention of the will of the people, as expressed in their constitution.

In Switzerland, where they have a written constitution very similar to ours, we find this rule even more plainly laid down. J. M. Vincent, in his book entitled "State and Federal Government in Switzerland,"³ says: "Contrary to the practice of American courts, the Swiss cantonal tribunal does not try acts of the legislature, because the legislature is regarded as the final authority on its own act." Here the function which the

¹ Cited in Brinton Coxe's "Judicial Power and Unconstitutional Legislation," p. 60.

² Decisions of the Reichsgericht in Civil Causes, Vol. IX, p. 233.

³ P. 34.

Swiss declare to be a legislative function is exactly the same which we have delegated to our judiciary—*i. e.*, the right to decide between the authority of the constitution and of the law enacted by the legislature.

Turning now to the country from which we derive more directly our system of law, we find the same idea followed out. Blackstone¹ says: "But if Parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to control it; and the examples usually alleged in support of this sense of the rule do none of them prove that, where the main object of a statute is unreasonable, the judges are at liberty to reject it, for that were to set the judicial power above that of the legislature, which would be subversive of all government." At the same time, Blackstone recognizes the truth of the observation made by Locke,² where he says: "There still remains inherent in the people a supreme power to remove or alter the legislature, when they find the legislative act contrary to the trust reposed in them."

Thus we have, in all events, the same situation as in our country, where the sovereignty resides in the people ultimately, but immediately in their representatives. And, in this same situation, Blackstone declares that for the courts to have the power to choose between the will of the people and the will of Parliament, would be to usurp the power of the legislature.

In *Notley v. Buck*,³ the court say: "The words may probably go beyond the intention, but if they do, it rests with the legislature to make an alteration; the duty of the court is only to construe and give effect to the provisions."

It is, of course, impossible to give anything approaching a thorough discussion of so great a question in this paper, but enough has, perhaps, been said to illustrate the point. We again recall the fundamental distinction between the two interpretations, the authentic or the authoritative, and the purely

¹ Vol. I, p. 91.

² Of Parliament, p. 49.

³ 8 Barn. & Cress. 160.

judicial. The latter does not enter into the discussion, for no one questions the principles applied to it; but we have now endeavored to show that the leading countries of the old world have recognized with great unanimity that the former interpretation belongs to the power which makes the law. Hobbes says: "The legislator is he (not by whose authority the law was first made, but) by whose authority it continues to be law."¹

This power, thus recognized to be legislative in its character, is in America delegated to the Supreme Courts of the United States and of the several states. The question then arises: Is there any ground for the statement that this power, when in this country it is given to the courts, loses its legislative character and becomes purely a judicial function? We are inclined to answer that question in the negative. We are unable to conceive how a change of the body which executes the power can change the inherent nature of the power itself.

Bowyer in his "Readings Before the Middle Temple," enunciates the theory, in pursuance of which so many writers and judges have said the power of the courts to pass upon the validity of a state statute is a purely judicial function. He says:² "But the American courts are invested with a jurisdiction unknown to the constitution of this country. The Constitution of the United States is a written constitution, erected by delegation of powers from the people to the government; and the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people. . . . It follows from these fundamental principles, which, indeed, belong to every federal polity, that the constitution is the supreme law which is the test of the validity of all other laws. And the principle so well laid down by Montesquieu, that the legislative must be separated from the judicial power, applies to the instrument of the constitution. It follows that the power of interpreting the laws, vested in the national courts, involves necessarily the function to ascertain whether

¹ Cited in Austin's Jurisprudence, Vol. I, p. 201.

² P. 81 *et seq.*

they are conformable to the constitution or not; and if not so conformable, to declare them void and inoperative. As the constitution is the supreme law of the land, it becomes the duty of the judiciary, in a conflict between the constitution and the laws, either of Congress or of the state, to follow that only which is of paramount obligation. . . . The judicial power is thus made the guardian of the constitution. . . . This does not imply a superiority of the judicial over the legislative power, though as a general proposition the authority which can declare the acts of another void is superior to the one whose authority may be declared void by the former. The theory of the law on this subject deserves some examination. The act of a delegated authority, contrary to the commission or beyond the commission under which it is exercised, is void. *Diligenter fines mandati custodiendi sunt: nam qui excedit, aliud quid facere videtur.* He who acts beyond his commission, acts without any authority from it. Now the judicial power can declare void the acts of the legislative power, where those acts are beyond the delegated power of the legislature, and, therefore, not legislative acts except in form only. Thus the judicial power is not placed above the legislative power, because the former must obey the valid acts of the latter."

This eminent writer first admits that the power to pass upon the validity of legislative acts is in all other countries a legislative function, then he declares in America it naturally belongs to the courts because

(a) The Constitution is the supreme law of the land and

(b) The Federal Government is one of delegated powers.

It is conceded that the power exercised by the American courts, if exercised by English or Swiss or German or French courts, would be legislation; but, it is said, it is in America a judicial function, because the court does not of its own authority adjudge the law void, but merely chooses between two laws, and enforces the one which is paramount.

To support this distinction is to declare that in all countries, except the United States, the legislative power is absolutely independent of all constitutional restriction, which is far from

true. In Switzerland they have a written constitution very similar to ours. The people are recognized fully as the sovereign power. What then is the function of the legislature of Switzerland? It determines, as a matter of interpretation, that a particular law is consistent with the written constitution, when it passes that law. This interpretation is authoritative and final. The same function is exercised by the legislature of Germany as we have seen. The legislature first decides that a law, if passed, will be consistent with "well-acquired rights," then it passes the law. This interpretation is nothing but a balancing of the proposed law against the acknowledged limitations imposed by the German Constitution. In England, as we have pointed out, the law recognizes the ultimate sovereignty to be in the people. It also recognizes Parliament to be the supreme legislative power; but by no means does this mean that Parliament is actually unlimited. Its acts must conform to the English Constitution, as evidenced by that great body of definite and clear, though unwritten, precedents. It is said that Parliament technically has the power to pass any law, no matter how unreasonable; but, at the same time, it is conceded that practically Parliament cannot do that, because, as Locke says, the people would deprive them of the power of which they have proven themselves unworthy. Because the English people do not possess the machinery which we do, their power is not any the less real, nor any the less potent. Now when Parliament goes to pass a law, what does it do? It frames the bill, and then in the exercise of its power to authoritatively interpret, decides that the law will be consistent with the rights of the British people.

This is done both by debate in the House of Parliament, and by obtaining the opinions of judges, who not only sit in Parliament for that purpose, but are expressly called in to give their opinions in doubtful cases.

The constitutionality of the act is passed upon just as much as if Parliament first blindly passed it, and then delegated the authoritative power to interpret to a court. The act of passing the law decides both points as a finality. Is this any less

real interpretation of a statute than the interpretation which we exercise in this country?

We confess our inability to see the distinction contended for by Mr. Bowyer. The constitution is recognized to be the supreme law of the land in each of the four countries which we have mentioned, and in at least two written constitutions are *expressly declared* to be the supreme authority. As we have shown, the act of interpretation, as performed by the legislatures of those countries, is in its nature the same in all respects as is performed in America by the courts. In both cases the interpretation is a determination between two laws: the constitution and the will of the legislative body, expressed on the one hand by a bill framed, on the other, by a law passed. In the one case the power to interpret its own laws is recognized to be inherent in the legislative body. In the other, that power is taken away from the legislature by the people and given to the judiciary. Does that make it less a legislative power? We are unable to see how the instrument by which the power is executed can change its inherent nature.

In the second place, Mr. Bowyer says that contrary to European governments, the Federal Government of the United States is one of purely delegated powers. We believe this difference to be mainly one of degree, in that the limits beyond which our governmental acts cannot be carried, are more sharply defined, but we will avoid the whole discussion by again calling attention to the fact that we are dealing only with the power of a state court to declare a state statute void, and that the state governments are governments not of delegated, but of inherent powers. Mr. Bowyer's remarks upon this point have no application to our discussion.

We respectfully submit at this point the following conclusions:

(a) *The power given to the Supreme Courts of the United States and of the several states, to authoritatively interpret laws passed by their respective legislatures, is precisely the same power as that exercised by the legislative bodies of Europe, i. e., the power to decide between the expressed will of the legislature, and the constitution of the state.*

(b) *This power is recognized in all nations, except the United States, to belong, as of inherent right, to the legislative department of government.*

It is proper to remark here that all this discussion is quite apart from the right of any court, when applying a statute, to judicially determine the meaning of its words.

(2) AN EXAMINATION OF THE OPINIONS OF THE FRAMERS OF THE CONSTITUTION, AS EXPRESSED IN THE FEDERAL CONVENTION.

After this rather limited discussion, we have arrived at the conclusion that the power to authoritatively determine between the fundamental law of the land, and a law passed by the legislative body of that land, has always in Europe been deemed to be a power appertaining to the legislature. Keeping that thought in mind, we now desire to devote a portion of this section to a brief investigation of the manner in which our courts were granted these extraordinary powers. In conducting this investigation, three things will be considered :

- (a) The end which the framers of the Constitution had in view.
- (b) Methods proposed, by which it was intended to accomplish this result.
- (c) The clause or clauses in the Constitution, by virtue of which, the courts obtained the power to pass upon the validity of legislative acts.

(a) THE END WHICH THE FRAMERS OF THE CONSTITUTION HAD IN VIEW.

There is no difficulty in determining the purpose of the framers of the Constitution during the debates and proposals culminating in the delegation of the whole question to the judicial department. This intention was, to use the expression most often heard, "to put a check upon the legislative department."

The statesmen of that day had had a severe object lesson of the evils that could be inflicted by an unlimited legislative

body, and they determined to provide against a repetition of the experience.

It had already been provided in the proposed constitution, that the powers of the legislature should be exercised only within certain limits, but it was recognized that this was not sufficient. It is true we find occasional references to the power of the courts in such cases, but it is plain that the members of the convention fully realized that, without more, the legislative department would be dangerously powerful, because they still retained the power to decide, whether their action was, in fact, contrary to the Constitution. As will be shown later, various plans were brought forward to accomplish this purpose, *i. e.*, to make some power, outside of the legislature itself, the judge of the validity of its laws.

Now, if, as is sometimes contended, the decision of this question is purely a judicial one, why was any further guarantee necessary? The same constitutional limitations, which we have to-day, had already been drafted. The courts were provided for, and to them it was proposed, of course, to give full *judicial* power. It seems reasonable to suppose that the idea that the legislature was the natural interpreter was present in the minds of the men who were engaged in framing the Constitution.

This is indicated by the language of Mr. Bedford, when discussing a proposed check on the legislature. The report reads: "Mr. Bedford was opposed to every check on the legislature, even the council of revision first proposed. *He thought it would be sufficient to mark out in the Constitution the boundaries to the legislative authority, which would give all the requisite security to the rights of the other departments. The representatives of the people were the best judges of what was for their interest, and ought to be under no external control whatever. The two branches would produce a sufficient control within the legislature itself.*"¹ Mr. Bedford said, "It would be sufficient to mark out the boundaries to the legislative authority" in the Constitution, and gave as his reasons, that in

¹ V. Elliot's Debates, 153.

his opinion the representatives of the people are the best interpreters of legislative acts. Clearly Mr. Bedford thought that in the absence of express provisions to the contrary, the legislature would be the interpreter. We conclude that the convention recognized that some express provision must be inserted, in order to take away from the legislature inherent right to decide as to the validity of its own laws.

(b) METHODS PROPOSED BY WHICH IT WAS INTENDED TO ACCOMPLISH THE RESULT.

The first problem that seems to have presented itself to their minds, was how to force the states to observe the constitutional restraints laid upon them. They seemed to recognize that the extent of the constitutional restraints was to be judged by the legislative department. The question was, by which one, the national, or the state. Mr. Langdon, when a proposition to give this power to the federal legislature was before the convention, said: "He was in favor of the proposition. He considered it as resolvable into the question, *whether the extent of the national Constitution was to be judged of by the general or state governments.*"¹ He seemed to recognize but the two alternatives.

In pursuance of this purpose, and recognizing this principle, the following resolution, embodied in the Virginia plan, was proposed to the convention by Mr. Randolph:

"*Resolved . . . that the national legislature ought to be empowered . . . to negative all laws passed by the several states contravening, in the opinion of the national legislature, the articles of the Union, or any treaty subsisting under the authority of the Union.*"²

This proposition, to vest the power of determining the extent of the federal limitations in the national legislature, was upheld in the most determined manner by such men as Madison, Jefferson (who first proposed it), Randolph and Pinckney. Their support of this proposition shows that they

¹ V. Elliot's Debates, 168.

² V. Elliot's Debates, 128.

considered the legislative power to be the natural judge of questions of this character.

This proposal, in one form or another, was brought up again and again, thoroughly debated and finally rejected, not because of any inherent, wrong principle which it contained, but because it was deemed inexpedient to adopt it, owing to the procedural difficulty of applying it. Mr. Lansing, objecting, said: "It is proposed that the general legislature shall have a negative on the laws of the states. Is it conceivable that there will be leisure for such a task? There will, on the most moderate calculation, be as many acts sent up from the states as there are days in the year."¹ Mr. Dickinson favored an absolute negative in the national legislature. He said: "We must take our choice of two things. We must either subject the states to the danger of being injured by that of the national government, or the latter to the danger of being injured by that of the states. He thought the danger greater from the states. To leave the matter doubtful would be opening another spring of discord, and he was for shutting as many of them as possible."² He did not seem to conceive that the judiciary could fill this need. It is true in some places we find vague references to the power of the judiciary to judge of the laws, but it is impossible to believe that, at this time, the framers of the Constitution had fully conceived the feasibility of vesting such powers in the judiciary, or they would not have considered that a like power should be given to the national legislature.

The observations last referred to were made on June 8, 1787, before the convention had more than begun its labors. As the discussion went on, the convention leaned more and more toward a plan to give over the whole matter to the courts. They were inclined to this course for two reasons: First, because of procedural difficulties as we have seen; and, secondly, because the judiciary was recognized to be more conservative and, therefore, less liable to radical action. On July 17th, the clause granting a legislative negative was lost

¹ V. Elliot's Debates, 215.

² V. Elliot's Debates, 173.

by a vote of three for and seven against. Mr. Madison favored it still because he thought nothing less would control the states.¹ Mr. Morris and Mr. Sherman favored giving the matter over to the courts.²

Immediately after the motion was lost, Mr. Martin, who had been one of its active opponents, moved a resolution,³ which vested in the judiciaries of the several states the authority to decide between the acts of the national and of the state governments. This motion was agreed to without dissent. The convention apparently receiving it as a substitution for the motion just lost. Mr. Brinton Coxe observes, "In finally rejecting the legislative negative, and overruling its previous action, the convention took a step backwards only to make a leap forwards. Luther Martin's motion in favor of the plan of what is now paragraph 2, Article VI, was, as before stated, immediately offered and adopted without opposition, and apparently without debate. Such action is incomprehensible, if the framers intended to abandon what had been their avowed object, as well as to abandon the measure by which they had intended previously to secure that object. In first adopting and then discarding a legislative negative to be applied with legislative discrimination, and substituting therefor a judicial discrimination applying a general clause of derogation, they intended only to change the means of accomplishing their object, and not to abandon that object itself."⁴ If Mr. Coxe's reasoning be sound, we must conclude that the framers of the Constitution, having first recognized as a legislative function the power to judge as to the constitutionality of laws passed by the state legislatures, which it was proposed to vest in the national legislature, then concluded to accomplish the same end by delegating this power to the courts. This delegation, of course, could not change the nature of the power.

The legislative negative, however, was not yet entirely killed. It came up twice more and was finally disposed of

¹ V. Elliot's Debates, 321-2.

² V. Elliot's Debates, 321-2.

³ V. Elliot's Debates, 321-2.

⁴ Judicial Power and Unconstitutional Legislation, p. 333.

only on September 15th. On that day the committee laid before the convention a substitute for Article I, Section 10, which, after providing that no state should lay any imposts or duties on imports, etc., etc., without the consent of Congress, concluded: "and all such laws shall be subject to the revision and control of Congress."¹ This was a last attempt to give to Congress precisely the power which the courts of the several states and of the United States now exercise. The motion was lost by a vote of seven to three.

This discussion of the legislative negative is here given to show that, at first, the men who composed the convention thought only of giving the discriminating power to a legislative body. That they abandoned the means on account of procedural difficulties, mainly, and, keeping the same object before them, delegated this power to the judiciary. The avowed purpose of thus depriving the state legislatures of the interpretation of their own laws, was to limit their power still further than could be done merely by constitutional restrictions, the extent of which they had the power to judge. As this power was taken from a legislative body, it must have been a legislative power. Giving it to the judiciary did not make it a judicial power.

This was, perhaps, the critical point in the history of this important question, when the eminent founders of our Constitution, though recognizing the character of the power with which they were dealing, by a wise and provident policy, took it away from the legislative department of government and gave it to another department of co-ordinate authority, thus permitting the one to be a check upon the other, constituting the judiciary the perpetual safeguard of the liberties of the people, protecting them against arbitrary usurpation of power by the legislature.

There is little reason to doubt that, had the legislative negative become a part of our Constitution, the power of authoritative interpretation of its own laws would have been given to Congress, as a necessary adjunct of legislative power; and

¹ V. Elliot's Debates, 548.

would have been left in the state legislatures where it already was, by virtue of the inherent sovereignty of the state. But, having once decided that the judiciary could be entrusted with so great a power to revise and check the acts of the legislature, the conclusion was natural and logical, that it should be given that power in all cases.

One other proposition should be discussed before we take up the question of the actual delegation of this power, and that is the effort to establish a revisory council, composed of executive and judges, who should pass upon the constitutionality of proposed laws. The measure was moved by Mr. Madison. It provided that "every bill which shall have passed the two houses, shall, before it becomes a law, be severally presented to the President of the United States, and to the judges of the Supreme Court, for the revision of each." It also made provision for passage, in spite of disapproval, by certain specified majorities.

We wish, particularly, to call attention to the argument of Mr. Mercer, who "heartily approved the motion. It is an axiom that the judiciary ought to be separate from the legislative; but equally so that it ought to be independent of that department. The true policy of the axiom is, that legislative usurpation and oppression may be obviated. *He disapproved of the doctrine that the judges, as expositors of the Constitution, should have authority to declare a law void. He thought laws ought to be well and cautiously made, and then to be uncontrollable.*"¹ Mr. Morris favored the motion. "Mr. Dickinson was strongly impressed with the remark of Mr. Mercer, as to the power of the judges to set aside the law. He thought no such power ought to exist. He was at the same time, at a loss what expedient to substitute. The justiciar of Arragon, he observed, became by degree the law-giver."²

The remarks of these members lead us irresistibly to the conclusion that they both considered that this power, about to be given to the courts, was a legislative power, and that they, for that reason, disapproved of it. It is clear that the

¹ V. Elliot's Debates, 429.

² V. Elliot's Debates, 429.

idea was one comparatively new, and the members had not yet concluded that it was a wise step. Mr. Madison favored giving to the judiciary this power, but put his opinion on the ground of utility, without replying to Mr. Mercer's suggestion that they ought not to have the power for *a priori* reasons. Indeed, it must be conceded that Mr. Mercer's suggestion that laws should "be well and cautiously made," with advice by judges, and then be uncontrollable, is one eminently reasonable and extremely difficult to answer. It would, at least, have the merit of precluding the possibility of cases similar to *Gelpcke v. Dubuque* ever arising.

However, the motion to provide a revisory council of judges to examine laws before their passage, was lost,¹ and thus it seemed, at last, to be definitely settled that the interpretation of the laws should be given to the courts.

(c) THE CLAUSE OR CLAUSES IN THE CONSTITUTION, BY VIRTUE OF WHICH THE COURTS OBTAINED THE POWER TO PASS UPON THE VALIDITY OF LEGISLATIVE ACTS.

The importance of this question, as a means of determining the opinions of the framers of the Constitution, cannot be overestimated. If the power was not directly conferred by the Constitution upon the courts, this would be competent evidence that the framers were of the opinion that no such express delegation was necessary; but that the courts already possessed the power, as a strictly judicial function. We do not find it necessary to enter into the discussion, whether this power was expressly given or not, in view of the very able and exhaustive book upon the subject which has decided the question for us. Mr. Brinton Coxe, after a most searching analysis of the Constitution and the opinions of its founders, has come to the conclusion that the framers did intend, and did actually confer, express authority upon the courts to declare laws invalid.²

The clauses which confer this power are two in number. Paragraph 2, Article VI, which lays upon the state courts the

¹ V. Elliot's Debates, 429.

² See "Judicial Power and Unconstitutional Legislation."

duty to decide between national and state laws, and Section 2, Article III, which extends the judicial power to all cases arising under the Constitution of the United States. Mr. Coxe observes "From this and the preceding chapter, it appears that paragraph 2, VI, and the beginning of section 2, III, have a common origin. This fact is of much importance in any commentary upon the Constitution. It is especially important in this essay, which makes the following contentions concerning those constitutional texts :

(1) In part IV of the Historical Commentary, it is contended that the evidence makes it clear that the two texts were closely connected in the framing thereof, and that the framers intentionally framed them, so as to be adapted to each other.

(2) In the Textual Commentary, it is contended that, independent of the extra-textual evidence, the two texts can be shown to be so intimately related, that they are twin texts."¹

As we have seen, paragraph 2 of Article VI was adopted without dissent, immediately after the defeat of the legislative negative, and as Mr. Coxe declares, as a substitute therefor. The clause giving to the judiciary power to decide all cases arising under the Constitution of the Union, *was not adopted nor even proposed until August 27th, after it had become evident to the members of the convention that no other practicable plan could be adopted for enforcing obedience to the Constitution.*

On that day Dr. Johnson moved to insert the words "this Constitution and the" before the word "laws," in the clause which is now Article III, Section 2.²

That this vested a great and unusual power in the courts, was realized. "Mr. Madison doubted whether it was not going too far, to extend the jurisdiction of the court generally to cases arising under the Constitution, and whether it ought not to be limited to cases of a judiciary nature. The right of expounding the Constitution, in cases not of this nature, ought not to be given to that department." No one remarking upon this point, the motion was passed without dissent, to

¹ P. 292.

² V. Elliot's Debates, 483.

make the alteration proposed, the reporter observing that it was understood by the members that the jurisdiction of the courts was limited to cases of a judiciary nature.

In this manner was granted to the courts a power never before, in the history of the world, granted to a judicial body.

Mr. Madison was still not satisfied as to his point, and moved "to strike out the beginning of the third section, 'The jurisdiction of the Supreme Court,' and to insert the words 'the judicial power,'"¹ which was agreed to.

The convention apparently realized that they had given to the courts a power which might be exercised in cases "not of a judiciary nature," and Mr. Madison was anxious that it should be limited to cases of that nature. This was the purpose of his last motion. The tables were now turned. The convention had been considering a means of checking the legislature. They decided to give a part of the legislative prerogative to the courts. Fears now arose whether they had not gone too far in giving to the courts the right to expound the Constitution in all cases. It was then suggested that the courts should only use this power in cases "of a judiciary nature." If the courts had no powers given them except those usually appertaining to courts, it would of course be an absurdity to speak of limiting their action to cases of a "judiciary nature." It is clear from Mr. Madison's remark and the assent of the Assembly to it, that they fully realized that they had given to the judicial department a power, which might be used not only outside of the usual field of judicial action, but also outside of the field in which the framers intended it to be exercised.

For this reason, they took additional precautions that the courts might not unduly encroach upon the legislature by refusing to sanction laws which they might think to be improper. That their fears were not groundless, is seen from an examination of an ever-increasing multitude of cases in the state courts, where these "judicial bodies" have even gone so far as to declare laws void, because they are opposed

¹ V. Elliot's Debates, 483.

to the "inalienable rights" which belong to every citizen.¹ The evident meaning of the framers was that this quasi-legislative power should not be exercised, except where there was a clear conflict between the Constitution and the law.

(3) THE MANNER IN WHICH THE EXERCISE OF THE POWER WAS RECEIVED BY THE COUNTRY.

Before finally leaving this branch of the subject, it may not be out of place to see how the exercise of this power was viewed in cases in which it was first actually applied. We cannot better summarize the matter than by a quotation from the address of Mr. Battle, delivered before the Supreme Court Bench and Bar of North Carolina. He says, "These, our earliest judges, are entitled to the eminent distinction of contesting with Rhode Island, the claim of being the first in the United States to decide that the courts have the power and duty to declare an act of the legislature, which, in their opinion, is unconstitutional, to be null and void. The doctrine is so familiar to us, so universally acquiesced in, that it is difficult for us to realize that when it was first mooted, the judges who had the courage to declare it, were fiercely denounced as usurpers of power. Speight, afterwards governor, voiced a common notion, when he declared that 'the state was subject to three individuals, who united in their own persons the legislative and judicial power, which no monarch in England enjoys, which would be more despotic than the Roman Triumvirate, and equally insufferable.' In Rhode Island the legislature refused to re-elect judges who decided an act, contrary to their charter, to be null and void. In Ohio, in 1807, judges who had made a similar decision were impeached, and a majority, but not two-thirds, voted to convict them. . . . New York follows with a similar decision in 1791. South Carolina in 1792. Maryland in 1802. The Supreme Court of the United States in *Marbury v. Madison* in 1801."²

¹ See *Godcharles v. Wigeman*, 113 Pa. 431; *State v. Goodwill*, 33 W. Va. 179; *Re Jacobs*, 98 N. Y. 98.

² 103 N. C., 472-3.

Although in a few isolated cases these powers had been exercised by state courts before the Revolution, that they could not *legitimately* be exercised without express power given by the Constitution, seems to be clear. This was the cause of the fierce assault which was made upon those judges, who dared to assume this function prior to, or immediately following, the adoption of the Constitution. The objections were put upon the ground that the function was a legislative one. The power was defended, not on the theory that it was one naturally belonging to the judiciary, so much as that there was in America no other body competent or appropriate to discharge this duty.

After the adoption of the Constitution this power was recognized by its defenders to be one, not inherently belonging to the courts, but a "legislative judicial power" granted to them by the Constitution. Chief Justice Marshall, whose opinion in *Marbury v. Madison* is most often quoted to show that he considered this to be a judicial function, said, while arguing the case of *Ware v. Knowlton*,¹ "The legislative authority of any country can only be restrained by its own municipal constitution. This is a principle that springs from the very nature of society; and the judicial authority can have no right to question the validity of a law, unless such a jurisdiction is expressly given by the Constitution."

As Mr. Marshall was one of the most prominent of those men who conferred this power, he above all others should have known its nature. His decision in *Marbury v. Madison* does not contradict this view. He recognized the undoubted right of the court to decide between the law and the Constitution, because he believed that power to have been conferred. He says "The judicial power of the United States is extended to all cases arising under the Constitution.

"Could it be the intention of those who gave this power to say that, in using it, the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises?

¹ 3 Dall. 199-211.

"This is too extravagant to be maintained."¹

Mr. McMurtrie held the same view as Mr. Marshall as to the original nature of the power, but he differed with him as to whether it had been properly conferred. He says in his observations: "Let me ask whence is derived this power that we are now discussing, that of declaring void a legislative act? Was such a political power ever heard of before? Did any state ever grant to its judicial functionaries the power of declaring and enforcing the limits of its own sovereignty? What state before conferred on a court of justice, in determining the rights of two suitors, as a mere incident, and without a hearing on behalf of the state, the power to determine that its legislative acts, approved and sanctioned by all its statesmen for thirty years, had always been mere nullities—nullities *ab initio*?"² Mr. McMurtrie, however, finally admits that such a power was granted, though he thinks improperly.

In the course of a debate in the Senate on the Judiciary System, in the year 1802, Mr. Breckenridge gave expression to his opinion that the power given to the courts was a legislative power, and disapproved of it for that reason. He said:³ "To make the Constitution a practical system, the power of the courts to annul the laws of Congress cannot possibly exist. My idea of the subject, in a few words, is that the Constitution intended a separation only of the powers vested in the three great departments, giving to each the exclusive authority of acting on the subjects committed to each: That each are intended to revolve within the sphere of their own orbits, are responsible for their own motion only; and are not to direct or control the course of others. That those, for example, who make the laws, are presumed to have an equal attachment to, and interest in, the Constitution are equally bound by oath to support it, and have an equal right to give a construction to it. That the construction of one department of the powers particularly

¹ 1 Cr. 178-9.

² P. 13, 14, 15, cited in Coxe on Judicial Power and Unconstitutional Legislation.

³ IV. Elliot's Debates, 444.

vested in that department, is of as high authority, at least, as the construction given to it by any other department; that is, it is in fact more competent to that department, to which powers are exclusively confided, to decide upon the proper exercise of those powers, than any other department to which such powers are not entrusted, and who are not consequently under such high and responsible obligations for their constitutional exercise; and that, therefore, the legislature would have an equal right to annul the decisions of the courts, founded on their construction of the Constitution, as the courts would have to annul the acts of the legislature, founded on their construction.

“Although, therefore, the courts may take upon them to give decisions which go to impeach the constitutionality of a law, and which for a time may obstruct its operation, yet I contend that such a law is not the less obligatory, because the organ through which it is to be executed has refused its aid.”

This quotation well expresses the views of those who oppose this system of interpreting laws proposed by the Constitution. Mr. Hamilton, in defence, thus replies to this view in the *Federalist*:¹ “If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be recollected from any particular provisions in the Constitution. It is not otherwise to be supposed that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents.”

In other words, Mr. Hamilton does not deny the nature of the power, but declares that in a government where the legislative power is limited, it *must be* that the power to judge of their own laws shall be taken away from them, otherwise they would not be limited. While this is not strictly true (a constitution operating only on the conscience of the legislature,

¹ LXXVIII, p. 426.

being a very powerful check), yet the founders of the Constitution deemed it necessary for their security, that this should be done. With this thought in mind they cast about for a co-ordinate department in which to deposit the legislative power which they were withholding from the legislative department, and naturally decided upon the judiciary, which, as is easily seen, is peculiarly well fitted for such a task. This is the thought expressed by Hamilton when he says, "The interpretation of the laws is the proper and peculiar province of the courts."

We conclude, after this cursory examination of the debates and writings of the men who are responsible for our Constitution.

(1) *They recognized that the power to interpret authoritatively the laws passed by the legislature was a power naturally belonging to that body.*

(2) *They desired to withhold that power from the legislature in order to further limit that department.*

(3) *They finally made provision for this power to be vested in the judiciary, because that department was deemed best fitted to carry out this purpose.*

We close the discussion by remarking, once more, that as the power is in its nature a legislative power, it is not changed because it is exercised through the medium of the judiciary.

C. Concluding observations.

We now approach the end of the discussion of the principle involved in *Gelpcke v. Dubuque*. As we have previously pointed out, the case rests upon the theory that the function of state courts when declaring legislative acts void, is of a legislative character. This section has been devoted to an investigation of the soundness of that theory. We have shown

(1) *That in all nations except the United States the power to interpret their own laws actually belongs to the legislative department.*

(2) *That the power granted to the courts by the federal Con-*

stitution was recognized, by its framers, to be a legislative-judicial power.

In considering the second point, we have discussed more particularly the federal courts. The same reasoning, however, will apply to the state courts, even more forcibly. First, because state constitutions are modelled after the federal Constitution, and, secondly, because the state governments are inherent sovereignties.

When we conclude that the function of declaring acts invalid is a legislative function, we do not mean to say that it is not performed in a judicial manner. From its very nature, it must be. In countries where the legislature possesses the power to interpret its own laws, it always calls in the aid of judges to assist it in determining between the law and the constitution. Nor would we wish to have it supposed that we are not in favor of that wise and far-seeing policy, which gave this important power to a functionary so able to exercise it.

But, at the same time, we insist that this power should be recognized in its true character. The fundamental difference between our government and the governments of all other countries, is that their constitutions are binding only on the consciences of their legislative bodies. The framers of our Constitution had learned by experience to fear a legislature limited only by its own judgment as to its powers. This was the moving cause of the constitutional provision.

Recognizing, therefore, the power to be legislative, on principle, its exercise should be given the effect of a legislative enactment. And this is precisely what the courts have done ever since the first case arose, where rights depended upon the view taken of the nature of this power. All through the cases we find the expression continually repeated, "a change of judicial interpretation should be given the same effect as a legislative amendment." It has been consistently asserted that a "state can impair the obligation of contracts, no more by decisions of its courts, than by legislative acts." Thus continually recognizing, without actually saying it, that the two stand, in this regard, upon an equal footing. The courts

have reached this conclusion because they realize that any other course would be most unjust to the individual, and most dangerous in its influence upon the state. But that they have not fully accepted the court's action to be legislative in its *intrinsic character*, is inferrible from their action in refusing writs of error to state courts.

The application to *Gelpcke v. Dubuque* is plain. . The later decision of the Iowa court declaring the act invalid, was of course an exercise of the legislative prerogative of the Supreme Court of a state. It was, therefore, exactly in the position of a repealing act, and if given retroactive effect, it would impair the obligation of contracts entered into before its enactment.

The Circuit Court did so apply it. The Circuit Court, therefore, gave it such an effect that it did impair the obligation of contracts. Therefore the Supreme Court very properly said, "This amendment to the law, promulgated by the State of Iowa, you have so applied to a contract, as to impair its obligation. Therefore we will reverse you. This amendment is valid as to the future, but cannot affect vested rights which are protected by the federal Constitution."

Our final conclusion is that *Gelpcke v. Dubuque* is sound, not only because the peculiar rule as there laid down has never been contradicted by any court or by any principle of law applicable to it, but because, starting from *a priori* grounds, we arrive on principle at the same conclusion.

We cannot close the subject, however, without devoting a closing section to a discussion of the anomalous position of the Supreme Court, in refusing to allow writs of error to state courts in cases similar to *Gelpcke v. Dubuque*.

Thomas Raeburn White.

(To be continued.)