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HAS THE SUPREME COURT OF THE UNITED STATES THE CONSTITUTIONAL POWER TO DECLARE VOID AN ACT OF CONGRESS?

The question whether the Supreme Court of the United States has the legal authority to pronounce an act of Congress unconstitutional and void, was, early in the present century, answered by that distinguished tribunal in the affirmative. After the lapse of nearly a century, it may be worth while to enquire whether there are not considerations that justify a reconsideration of the question. Among these considerations we venture to suggest the following:

An act of Congress becomes such only after it has passed both houses, and received the approval of the President, or if the latter does not return it, with his approval or disapproval, within ten days (Sundays excepted) after it has been presented to him, it becomes law in like manner as if he had signed it. Thus each house, in the passage of a law, has a veto upon the other, and the President upon both. The House, and the Senate, and the President, all of whom are

sworn to support the Constitution, having reached a common conclusion, and concurred in the passage of a law, in what clause of the Constitution is the Supreme Court empowered to interpose a judicial veto upon their legislation? Where, in the Constitution, is the judicial power associated with the legislative power, and vested with the final veto? When an act has been passed in the constitutional mode, it should seem, in the absence of express authority, to be beyond the power of the judicial branch of the government to nullify it. The judiciary, it should equally seem, is bound to assume that the Legislature, in passing laws has obeyed the Constitution, and that its legislation is in accord therewith.

Otherwise, if the Supreme Court has a veto upon acts of Congress, and can nullify them whenever a case involving them is brought before the court, then, in the words of Mr. Lincoln, in his first Inaugural Message, "the candid citizen must confess that if the policy of the government upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal."

Chief Justice Marshall, in *Marbury* v. *Madison,* decided in 1803 (1. Cranch 137), puts, in the Socratic method, the contrary view thus: "If an act of the Legislature, repugnant to the Constitution is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect?" He holds that it does not. The fallacy involved in the question, however, is, in the assumption that the act of the Legislature in question, is repugnant to the Constitution. On the contrary, in the opinion of both houses of Congress, and in the opinion of the President, it is in accord with, and in pursuance of, the Constitution.

The courts are not required, after the law-making power has spoken, to close their eyes on the Constitution, and see only the law, as the illustrious chief justice, in another part of his opinion, suggests, but they are to consider that the lawmakers have eyes as well as the judges, and have

used them, and that when a law comes before the court, it comes for construction and enforcement, not for the purpose of putting the opinions of judges against the opinions of legislators, as to its constitutionality; and if they are in conflict, to disregard the latter, and to give force and effect to the former. Is the opinion of nine men, composing the Supreme Court, or the opinion of a majority of the nine, infallible? Does the bench act under the impress of greater wisdom, or under a higher sanction than does the Legislature?

No doubt, an act of Congress, which should declare that in treason the testimony of one witness was sufficient to convict, when the Constitution expressly declares that there shall be no conviction unless upon the testimony of two, would not be binding on the courts. An act of that character the courts might disregard, and would have direct authority for so doing in the Constitution itself. For in the few instances of express provisions, like the instance we have cited where the Constitution requires the testimony of two witnesses to convict, in a trial for treason, the judiciary is the immediate department of the government to carry such provisions into effect. In those instances, "the language of the Constitution," to use the words of Chief Justice Marshall himself, "is addressed especially to the courts."

Confessedly, one of the ablest jurists that Pennsylvania has produced, was the late Chief Justice Gibson. He denied the right of the judiciary to pass upon the constitutionality of a Legislative Act, and to declare it void, upon the ground of repugnance. In the case of *Eakin* v. *Raub* (decided in 1824), 12 Sergeant & Rawle, 330, being then a justice of the Supreme Court of Pennsylvania, he said, in delivering his opinion, "that it is not a little remarkable, that although the right in question has all along been claimed by the judiciary, no judge has ventured to discuss it, except Chief Justice Marshall (in *Marbury* v. *Madison*), and if the argument of a jurist so distinguished for the strength of his ratiocinative powers be found inconclusive, it may fairly be set down to the weakness of the position which he attempts to defend."

With this preliminary observation, Mr. Justice Gibson

proceeds to examine the question, on the principles of the Constitution, and he reaches the conclusion that "it is the business of the judiciary to interpret the laws, not scan the authority of the lawgiver; and without the latter it cannot take cognizance of a collision between a law and the Constitution. . . . It will not be pretended, that the Legislature has not at least an equal right with the judiciary to put a construction on the Constitution; nor that either of them is infallible; nor that either ought to be required to surrender its judgment to the other. Suppose, then, they differ in opinion as to the constitutionality of a particular law: if the organ whose business it first is to decide on the subject, is not to have its judgment treated with respect, what shall prevent it from securing the preponderance of its opinion by the strong arm of power? . . . I take it, then, the Legislature is entitled to all the deference that is due to the judiciary; that its acts are in no case to be treated as *ipso facto* void, except where they would produce a revolution in the government; and that, to avoid them, requires the act of some tribunal competent under the Constitution (if any such there be), to pass on their validity."

He concludes that the people, in the exercise of the elective franchise, constitute that tribunal. "I am of opinion," he says, "that it rests with the people, in whom full and absolute sovereign power resides, to correct abuses in legislation, by instructing their representatives to repeal the obnoxious act. What is wanting to plenary power in the government, is reserved by the people for their own immediate use; and to redress an infringement of their rights in this respect, would seem to be an accessory of the power thus reserved. It might, perhaps, have been better to vest the power in the judiciary; as it might be expected that its habits of deliberation, and the aid derived from the arguments of counsel, would more frequently lead to accurate conclusions. On the other hand, the judiciary is not infallible: and an error by it would admit of no remedy, but a more distinct expression of the public will, through the extraordinary medium of a convention; whereas an error by the Legislature admits of a remedy by an exertion of the same will, in the ordinary exercise of the right of suf-

frage—a mode better calculated to attain the end, without popular excitement."

But it is said that the judges are sworn to support the Constitution. So are the legislators. And is it meant that more respect is to be paid to the oaths of the judges than to the oaths of the legislators, or that the oath enlarges the scope of legislative power?

. . "What I have in view in this inquiry," said Mr. Justice Gibson in *Eakin* v. *Raub,* "is the supposed right of the judiciary to interfere in cases where the Constitution is to be carried into effect through the instrumentality of the Legislature, and where that organ must necessarily first decide on the constitutionality of its own act. The oath to support the Constitution is not peculiar to the judges, but is taken indiscriminately by every officer of the government, and is designed rather as a test of the political principles of the man, than to bind the officer in the discharge of his duty . . . But granting it to relate to the official conduct of the judge, as well as every other officer, and not to his political principles, still it must be understood in reference to supporting the Constitution, *only as far as that may be involved in his official duty;* and, consequently, if his official duty does not comprehend an inquiry into the authority of the Legislature, neither does his oath. It is worthy of remark here, that the foundation of every argument in favor of the right of the judiciary, is found at last to be an assumption of the whole ground of dispute. . . . The oath was more probably designed to secure the powers of each of the different branches from being usurped by any of the rest; for instance, to prevent the House of Representatives from enacting itself into a Court of Judicature, or the Supreme Court from attempting to control the Legislature."

If "the policy of the government upon vital questions" can be brought to naught by the interposition of the judiciary; if its legislative authority, after being duly exercised, perhaps, too, in time of war, when its armies are on the march, and its resources are all needed to support its warlike measures can be challenged and set aside by the decision of a court, in a personal action between John Doe

and Richard Roe, then, the gravest disasters may occur, and the stability of the national edifice may be put in the gravest peril. Can we enter upon a foreign war, for example; can we acquire foreign possessions, as we seem inclined to do, and adopt measures for their government, when the success of these operations, civil and military, may be thwarted by a judicial decision in favor of Richard Roe, upon a question of taxes, for instance,—the decision being based upon the unconstitutionality of an act of Congress in the premises! In view of such contingencies, may not the time have arrived when the powers of the Supreme Court should be carefully re-examined, and, if found necessary, be more strictly defined by a Constitutional amendment?

Even those who assert the power of the courts—Federal and State—"to scan the authority of the lawgiver" must admit that the frequency with which it is exercised has become matter for serious reflection, and grave concern. The late venerable Chief Justice Tilghman, who agreed with the doctrine declared in *Marbury* v. *Madison,* nevertheless in *Eakin* v. *Raub,* delivered this admonition, namely, that "the utmost deference is due to the opinion of the Legislature—so great, indeed, that a judge would be unpardonable, who, in a doubtful case should declare a law to be void."

Instead of this deference on the part of the courts, how often do we find them exhibiting the refinements of metaphysical reasoning to discover a discrepancy between the law and the Constitution, and, after all, the result only disclosing "a doubtful case" where the law should have been upheld, but, nevertheless, was declared void. In view of this judicial trend, we repeat, may not the time have arrived, when the public interests require an assurance, in constitutional form, that the courts, whether Federal or State, "can exercise no power of supervision over the Legislature, without producing a direct authority for it in the Constitution," Federal or State respectively?

Henry Flanders.