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THE VETO POWER OF THE JUDICIARY

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John Jay, who rendered distinguished services in securing the adoption of the Federal Constitution and as a diplomat in the perilous and delicate task of negotiating with England the treaty bearing his name, refused to accept a renewed appointment as Chief Justice of the United States Supreme Court because he felt that court could not obtain the essential energy, weight and dignity nor acquire the public confidence and respect which it should possess.¹ Alexander Hamilton, the master intellect of the formative period of this Government in speaking of the judiciary as one of the branches of governmental power said that it, "is, beyond comparison, the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks."² Montesquieu, the French publicist, whose then recent work had a profound influence upon those who framed our constitution, in dwelling on the English Constitution of his day and the three sorts of power—legislative, executive and judiciary—in such a democratic form of government, said, that of such three, "the judiciary is in some measure next to nothing."³

By the Federal Constitution—adopted eagerly by some of the smaller states because of the advantages secured by their equal representation in the Senate with the states of greater population, and reluctantly, and by extremely narrow margins by the larger states, and all influenced by him who outshone them all, George Washington, the judiciary branch of the Government was given the breath of life by Article III thereof.

SECTION 1. The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish. . . .

SECTION 2. The judicial power shall extend to *all cases in law and equity arising under this constitution, the laws of the United States, etc.,*

The Supreme Court as organized by legislation pursuant to such constitutional direction was anything but a commanding spectacle during its infancy. Its decisions were reported sandwiched in with those of the Pennsylvania supreme and inferior

courts in vols. 1 to 4, *Dallas Reports*. It was treated by Congress with disrespect if not contempt. By legislating as to its terms, originally fixed for February and August, then in 1801, to December and June, and again in 1802, to February alone, there occurred an interval of fourteen months after the appointment of John Marshall as Chief Justice in which no court could be held at all.

It is a far cry from such views and treatment of that court to its tremendous importance and power in later years, when, by virtue of an implied authority, it exercises in some respects a greater veto power than that exercised by the President under the express grant by section 7, Article I, reading:

Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment), shall be presented to the President of the United States; and before the same shall take effect shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives according to the rules and limitations prescribed in the case of a bill.

While the veto of the President may be and often is overridden by Congress, yet by the simple declaration of the Supreme Court in a proceeding wherein neither the legislature which passed nor the executive who may have added his approval to the law involved are parties or even heard, that which in such action of *Doe vs. Roe* is declared to be no law so far as Doe and Roe alone are immediately concerned becomes for all practical purposes void for the rest of the world, though it may remain, and often so does, in form a law and a part of the statutes. Though theoretically all others than Doe and Roe, officials to administer it, as well as parties who might claim rights or defenses thereunder, might lawfully continue to recognize such statute as the law in all other instances until each particular instance of claim under it be challenged in court, yet in practice when it is once finally judicially declared to be no law as between John Doe and Richard Roe it is treated by all others as having been effectively and permanently vetoed. Its only prospect of revival is by constitutional amendment or change of views indicated by the court in some subsequent case.

On the other hand, the judicial veto is more limited than that of the executive in that the latter may exercise his power of disapproval because he deems the law in excess of the constitu-

tional power of Congress, or unwise, or inexpedient; the judicial veto is concerned with the question of power alone. Whether the legislative wisdom exercised in the adoption of the particular statute measures up to the standard of judicial wisdom, whether the legislative view of expediency or economics coincides with the judicial view in such debatable fields theoretically at least, cannot be, and practically seldom is, the basis for the exercise by the court of its veto.⁴

When the power now exercised by the judiciary enables it to say to its co-ordinate branch of the Federal Government, Congress; to the people themselves in the exercise of their power to make or amend the state constitutions, far more effectively than weary old King Canute to the advancing tide, "Thus far shalt thou go and no farther," it cannot be wondered at that many cry out to know upon what meat this Caesar hath been fed that he hath grown so great.

The puny congressional football of A.D. 1800 now effectively says to its sister in the governmental triad, Congress, that she may lawfully, in the exercise of the express power granted her by section 8, Article I, "to regulate commerce with foreign nations and among the several states," etc., through her administrative body, the Interstate Commerce Commission, set aside and hold for naught as unreasonable intrastate railroad rates duly declared reasonable by similar administrative bodies in the several states;⁵ yet says that the same body, Congress, in an attempted exercise of the identical constitutional provision may *not* regulate the subject matter of child labor by legislation as to the interstate shipments of the products of such labor.⁶ Again, it tells Congress that it cannot constitutionally prescribe penalties for excessive expenditures in primary elections for United States senators,⁷ although it had just held that a witness before a grand jury could *not* question the legality of this identical and void law.⁸ It speaks, and the statute of Arizona, regulating judicial procedure in Arizona, and denying to its own courts the right to issue preliminary injunctions, under certain conditions, in labor disputes involving the secondary boycott, is wiped off the statute book.⁹ It says to the state of Ohio, a sovereign in its own sphere, and containing more inhabitants within its boundaries than were within the entire United States when the Supreme Court began to function, that it may not embody in its own constitution a provision permitting the submission by referendum to its own people for

approval or disapproval the action of its own legislature in adopting the eighteenth amendment to the United States Constitution,¹⁰ but that under the identical Ohio constitutional referendum provision the people may vote and reject, if they so will, an act of the legislature redistricting the state for the purpose of electing representatives to Congress.¹¹ The people of the state of Washington are told by the same court, after the exercise by them of the right granted by their own constitution to pass laws by the initiative, that their law so passed forbidding employment agencies charging workmen for obtaining positions was a violation of the fourteenth amendment to the United States Constitution and therefore void.¹²

The above are a few of the many illustrations that might be cited of the wide scope and tremendous effect of the judicial veto. Such extraordinary power which it has grown to be is not based upon any express grant. This is so in the Federal Constitution and so in nearly all of the various state constitutions. Many reasons for this are evident from the inherent nature and functions of the judicial and executive branches of our Government, the one to interpret, the other to enforce the law.

This idea of the necessity for an express grant of the executive veto, and of the judicial veto may rest upon implication, plainly appears through all of the proceedings in the convention at Philadelphia in 1787 for the framing of the constitution. The executive veto was expressly suggested, debated and voted upon.¹³ That the judiciary should have the power to declare that not to be the law which the legislature and executive have declared to be law was never expressly suggested or voted upon in that convention. In the phraseology employed during the debates as to the jurisdiction to be conferred on the Supreme Court from the proposed resolution as to the general form of government to be considered and presented at the opening of the convention by Randolph of Virginia, suggesting that such a court be given jurisdiction, among other things, of, "questions which may involve the national peace and harmony,"¹⁴ and again, "to cases arising under the laws passed by the general legislature and to such other questions as involve the national peace and harmony,"¹⁵ or, "to all cases both in law and equity arising under this constitution and the laws of the United States"¹⁶ up to the perfected form of the instrument, not once was it proposed to put in express language into the constitution that which the Supreme Court

subsequently read out of the language used, and to the far-reaching effect above shown.

Consideration was given at various times during the proceedings of the convention to a proposal to have members of the Supreme Court act with the President as a council of revision or vetoing body on legislation, and in debating such proposal an independent judicial power to declare laws unconstitutional is spoken of, notably, as appears from Madison's notes, by Gerry of Massachusetts, who is quoted as doubting whether the judiciary should be a part of such council, "as they will have a sufficient check against encroachments on their department by their exposition of the laws which involves a power of deciding on their constitutionality. In some states the judges had (actually) set aside laws as being against the constitution. This was done too with general approbation."¹⁷ And again, from Madison's notes of a discussion on the same subject on a later day, Colonel Mason of Virginia said: "They (Supreme Court) could declare an unconstitutional law void."¹⁸

In the debates on the subject of the jurisdiction to be conferred on the Supreme Court, it was repeatedly mentioned that such a court would necessarily have such declaratory power as to unconstitutional laws—by Madison of Virginia,¹⁹ by L. Martin of Maryland,²⁰ by Colonel Mason of Virginia,²¹ by Gouverneur Morris of Pennsylvania,²² by Rufus King of Massachusetts²³ (subsequently United States Senator from New York), Williamson of North Carolina²⁴ and Wilson of Pennsylvania²⁵ with apparent approval; and by Mercer²⁶ and Dickinson of Maryland²⁷ with strong disapproval.

That such an able and distinguished lawyer member of the convention as Luther Martin clearly so understood such to be the result of their deliberations is quite evident from his subsequent report of the proceedings to the Maryland Legislature, wherein referring to the article conferring jurisdiction, he said, "Whether, therefore, any laws or regulations of the Congress, or any acts of its President or other officers are contrary to, or not warranted by the constitution rests only with the judges, who are appointed by Congress to determine; by whose determination every state must be bound."²⁸

It is therefore manifest that those who framed the constitution realized that there was a possible, permissible and reasonable construction proper to be given to the language in Article

III, Federal Constitution, conferring jurisdiction on the courts under which they might thereafter assert the power here being considered.

That this particular question, between the time of the Philadelphia convention and the final adoption or ratification of the constitution, did not attract much comment or attention is equally clear.

In No. 78 of the *Federalist*,²⁹ written by Alexander Hamilton, the same article in which he suggested a natural weakness in the judiciary branch of the Government and which is quoted from in the beginning hereof, he also discusses quite at length and as a doctrine of importance the power of the courts to declare legislative acts void which are in excess of the powers delegated by the people through the constitution to the legislative body. He shows that such doctrine is not based upon the idea of any superiority of the judiciary over the legislative power, but upon the idea that the power of the people is superior to both. Where legislative will expressed in statute stands in opposition to the will of the people expressed in constitution, the judiciary must regulate its decisions by the fundamental law. He also speaks of the courts as the bulwarks of a limited constitution, such as is that of the United States against the legislative encroachments. Hamilton recurred to this subject in No. 81 of the *Federalist*.³⁰

What Hamilton there said on the general subject, and on the views then and now presented, as to the legislature having the exclusive right to construe its rights and limitations under the constitution, has had but little if anything added to it since. What was subsequently said by Marshall C. J., in the famous case of *Marbury vs. Madison* (1 Cranch (U. S.) 137, 176), is but a paraphrase of Hamilton's argument, and the similarity between the two is striking.

The subject was discussed, so far as the records now show, not at all in some and but scantily in others of the state conventions, which were held to ratify the constitution. Oliver Ellsworth said to the Connecticut convention: "If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the constitution does not authorize, it is void; and the judicial power, the national judges, who to secure their impartiality, are to be made independent, will declare it to be void. On the other hand, if the states go beyond

their limits, if they make a law which is a usurpation upon the Federal Government, the law is void; and upright, independent judges will declare it to be so."³¹ It was mentioned by John Marshall in the Virginia convention in which the constitution was ratified by a very narrow margin and after a bitter contest.³²

Therefore at the time the Federal Court began to function it had a recognized implied power and consequent duty to declare void any law which was beyond the legislative boundaries fixed by the constitution or that infringed on individual rights guaranteed by that document.

The power, however, appears to have remained dormant until declared to be law by Chief Justice John Marshall at the close of that remarkable case of *Marbury vs. Madison* (1 Cranch (5 U. S.) 137.) These proceedings, though commenced in the December Term, 1801, were not argued for a long time, and were decided February 24, 1803. The plaintiffs had been appointed justices of the peace for the District of Columbia by President Adams, and such appointments solemnly confirmed by the United States Senate. The commissions, however, though apparently made out, were not delivered during the official lifetime of President Adams. Upon demand for such commissions they were refused. The Supreme Court held that the plaintiffs had legal right to their commissions, p. 162; that they were entitled to some form of proceedings somewhere to get possession, even as against the Secretary of State, though an agent of the President, pp. 163, 166, 173.

But, then the court held that it, the highest court in the land could only issue the appropriate writ, mandamus, in the exercise of appellate jurisdiction or in aid thereof, and not by original jurisdiction, p. 175—. For that reason relief to the plaintiffs was denied.

Then, without citation of decision or other authority it was declared that Congress could not, under the constitution, confer upon the Supreme Court original jurisdiction to issue such writ of mandamus as Congress had attempted to do in the judiciary act under which the proceedings had been instituted.

This famous case has been so frequently and elaborately discussed, and especially so lately and so completely by Senator Beveridge in his life of John Marshall (vol. 3, ch. 3), that it seems needless here to give it much more attention except to add that though in form it was a proceeding by *Marbury* and others,

claiming to have been deprived of the opportunity of holding the ancient and honorable office of Justice of the Peace against James Madison, under-study and Secretary of State for Thomas Jefferson, it was in substance but an episode in that long series of proceedings which well might have been entitled, *Thomas Jefferson vs. John Marshall*, or *John Marshall vs. Thomas Jefferson*—which proceedings so often illuminated the early history of our nation. In this rather spectacular episode, John Marshall, as Chief Justice of the Supreme Court, with colors flying marched boldly up the hill to the very front door of President Jefferson's citadel, and, there halting, trumpeted forth that even in the Executive Mansion there was no sanctuary against judicial writs, but, and this little word was quite a shield and a haven of refuge, but, because the constitution, either through the design of its framers or by accident, omitted the gift of original jurisdiction for writs of mandamus, the Supreme Court about faced and gracefully went down the hill again. It thundered, therefore, far more in the index than in the body.

Possibly it may not here be out of place to call attention to another case in another court³³ attracting much attention at the time but now scarcely ever recalled, with the feeling that the attitude of the court there concerned, its dignity and firmness, will not suffer in comparison with *Marbury vs. Madison*.

In November, 1855, Coles Bashford of Oshkosh was a candidate for Governor of Wisconsin against the then incumbent William A. Barstow; the former received the actual majority of votes cast, but upon the face of the canvassers' returns the majority was Barstow's, and he continued to hold office. Original proceedings were then brought in the Supreme Court of Wisconsin before Whiton C. J. and Smith and Cole, justices. After a battle royal of the most eminent counsel wherein the fundamentals of our form of government were magnificently discussed, the court decided that it had and would exercise the power to determine who was the lawful governor.

Governor Barstow, through his counsel, Carpenter, Arnold and Orton, withdrew from the proceedings, denying the court's jurisdiction, and his counsel, handed to the court his written defiance, closed it by saying, "and I shall deem it my imperative duty to repel, with all the force vested in this department, and infringement upon the rights and powers which I exercise under the constitution." (p. 735) Undismayed the court proceeded to take

testimony, set aside the canvassers' returns and declared that Bashford, not Barstow was the legal holder of the office of Governor, and a judgment of ouster was entered. (p. 802) In spite of Governor Barstow's loud defiance, and of the fact that he then as de facto and acting governor was under the Wisconsin Constitution³⁴ the commander-in-chief of the military forces of the State, nevertheless, without any turmoil or strife, and by virtue of the mandate of the court, Barstow went out and Bashford went in. That court also marched up the hill but it remained there.

In writing for the court the decision on one of the points involved, Justice Cole, subsequently Chief Justice, said: "This is not only a popular government, but it is a representative government—one where the officers are but the agents, not the rulers, of the people, one where no man is so high as to be above the constitution, and no one so low as to be beneath its protection." (p. 743)

It may be interesting to note how this idea was later stated by the United States Supreme Court in *United States vs. Lee*, 106 U. S. 196, 220, "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law, and are bound to obey it."

No decision can be found in Federal or State courts of last resort where any such courts have declined, on ground of want of power to do so, to pass upon the question of the alleged invalidity of a Federal or State law because in excess of the power vested in any such legislative body by the respective constitutions, and the highest courts, in substantially all, if not all of the states, have undertaken jurisdiction and decided such questions.³⁵

This has been done in states, most all of which have constitutions as silent as is that of the United States, so far as any express language as to such power is concerned. It is, however, expressly referred to in a few state constitutions.

Georgia, by her constitution of 1877, provides by Article I, entitled, "Bill of Rights" and by section 4 thereof, "Legislative Acts in violation of this constitution, or the constitution of the United States, are void, and the judiciary shall so declare them."³⁶

West Virginia, by Article VIII, section 3, of her constitution of 1880, provides that the Supreme Court of Appeals shall have

jurisdiction "in cases involving freedom or the constitutionality of the law."³⁷

In Louisiana the constitution as amended in 1913 provides, Article 85, that the Supreme Court shall have jurisdiction in "all cases in which the constitutionality or legality of any toll or impost whatever or of any fine, etc., imposed by a municipal corporation shall be in contestation *and where a law of this state has been declared unconstitutional.*"³⁸ This last clause was in the constitution of 1898, and it has been held that under this decision an appeal does not lie, from a lower court's decision that a challenged statute *is constitutional.*³⁹

Virginia's constitution of 1902, by Article VI, section 88, gives the Supreme Court of Appeals of five judges, "appellate jurisdiction in all cases involving the constitutionality of the law as being repugnant to the constitution of this state, or of the United States, or involving the life or liberty of any person; . . . the assent of at least three of the judges shall be required for the court to determine that any law is, or is not, repugnant to the constitution of this state, or of the United States"; and if in a case involving the constitutionality of any such law, not more than two of the judges sitting agree in opinion on the constitutional question involved, and the case cannot be determined without passing on such question, no decision shall be rendered therein, but the case shall be reheard by a full court; and in no case where the jurisdiction of the court depends solely upon the fact that the constitutionality of the law is involved, shall the court decide the case upon its merits, unless the contention of the appellant upon the constitutional question be sustained."⁴⁰

Ohio's Constitutions of 1802 and 1851 were silent on the subject.⁴¹ By an amendment in 1883 to Article IV, section 2, it was provided that "whenever a case shall involve the constitutionality of an act of the general assembly or of an act of Congress, it shall be reserved to the whole court for adjudication,"⁴² although such power had been exercised continually.⁴³ By amendment in 1913 the number of justices was made seven and there were added clauses giving it, "appellate jurisdiction in all cases involving questions arising under the constitution of the United States or of this state," also, "No law shall be held unconstitutional and void by the supreme court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals (an intermediate

appellate court), declaring a law unconstitutional and void," and also, of significance on another view hereinafter discussed, "no law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court."⁴⁴

Colorado's original constitution of 1876 was also silent on this point. By amendment in 1904 to Article VI, section 3, it provided that "no case involving a construction of the constitution of this state, or of the United States, shall be decided except by the court *en banc* (provision having been made for the court of seven judges to sit in two or more departments).⁴⁵ In 1910, by amendment to Article V, "Legislative Department," the people reserved to themselves the right to legislate by the initiative and referendum,⁴⁶ and then in 1913, by amendment to the Article on the judiciary, provided that "None of said courts except the Supreme Court shall have any power to declare or adjudicate any law of this state, or any city charter, or an amendment thereto adopted by the people in cities acting under Article XX hereof, as in violation of the constitution of this state or of the United States"; then follows a provision permitting a referendum on such decisions holding a law unconstitutional.

Minnesota, in 1913, submitted to the people a proposed constitutional amendment increasing the members of the supreme court from four to six and providing: "but no statute shall be declared unconstitutional unless five members of the court shall concur in the decision."⁴⁸ This was defeated, however, by the people.

North Dakota, in 1918, adopted an amendment prohibiting the court from declaring a law unconstitutional if more than one judge dissented.⁴⁹

New York amended its constitution in 1894, but then as before made no reference to this subject. It held in 1915 a convention again to amend or revise the constitution, but, though a resolution appears to have been presented suggesting a change as to the numbers of justices requisite before declaring a law void,⁵⁰ yet it does not appear to have received attention by the convention and was not included in the draft reported by its judiciary committee, Mr. Wickersham, chairman, and was not included in the form of the constitution submitted to and rejected by the people.

Illinois revised its constitution in 1870, and was silent on this subject. A convention has been at work in that state since 1920,

and has drafted a form which is to be submitted to the people in December, 1922. A suggestion was made in that convention that the new instrument should require an extraordinary majority in decisions involving the constitutionality of statutes. Such provision, however, was not adopted and the form of constitution being now submitted provides, in section 87, for a supreme court of seven members, its present number, and requires by section 91, a concurrence of four members for every decision, and by section 93, confers original jurisdiction on that court, among other things in "cases involving questions of great public importance" and appellate jurisdiction in all cases, but makes no specific reference to the kind of decisions here considered.

Massachusetts held such a constitutional convention in 1917 and 1918, pursuant to a popular vote in 1916 of almost two to one, with 320 delegates elected by the people.⁵¹ Its then constitution was that of 1780 as amended. It contained no provision on our subject, and indeed expressly provided, with a corresponding provision as to the executive and legislature, that "The Judicial shall never exercise the legislative and executive powers, or either of them: to the end that it may be a government of laws and not of men," Part the First. Article XXX.⁵² It contained no express grant of judicial power and provided tenure of judicial offices during good behavior.⁵³ Not to exceed fifty-nine instances between 1804 and 1916 were found in which the court set aside statutes as unconstitutional.⁵⁴

There were submitted several proposed changes on the question here considered: viz., in substance, That the supreme court should not hold an act void because unconstitutional, without the concurrence of at least all but one of the justices; or not without concurrence of not less than two-thirds; or not if one justice shall hold or express an opinion that it is constitutional; or, that no court should assume or exercise such power.⁵⁵ They were debated at great length and for several days, and each and all rejected by the Committee of the whole and by the convention itself.⁵⁶ The result of this convention's work was approved by the people in November, 1919,⁵⁷ with no change as to the judiciary power, and expressly providing as to the initiative petition and proceeding then newly provided, that no such initiative should be permitted that related "to the appointment, qualification, tenure, *removal, recall* or compensation of judges; or to *the reversal* of a judicial decision."⁵⁸

Pennsylvania also had such a constitutional convention in 1919-20, and I cannot find from the report of its proceedings that such question was presented, at any rate it is not embodied in the completed draft as indicated in the statement as to the proposed changes⁵⁰ as the result of the convention.

In constitutional conventions held in Alabama in 1901, Connecticut in 1902, New Hampshire in 1912, Louisiana in 1913 and Nebraska in 1919, no suggestion appears even to have been presented looking to the curtailment or taking away of this universally recognized power in the courts to veto unconstitutional legislation. Some suggestion was made in that regard in the Ohio Constitution of 1912, but rejected by the committee and the convention without debate even in the latter. The convention in Virginia in 1901 discussed the provision in the constitution of that state which has been quoted above, but did not suggest the taking away of such power.

The Wisconsin constitution is also silent in this regard. The judicial power is declared to be vested in the supreme court, circuit courts and others by section 2, Article VII, and the supreme court's jurisdiction is defined in section 3. The power so granted has been often construed and held to furnish ample scope to permit the court to restrain officials and others from executing or relying upon laws which are beyond legislative authority. The much broader scope of the original jurisdiction of the state supreme court over that conferred on the United States Supreme Court was pointed out in a very fine discussion of the subject in a very early case.⁶⁰ The doctrine of the judicial veto is firmly established in this state.⁶¹

Though the challenges of this power asserted by the courts have been continuous since *Marbury vs. Madison*, yet so far as the expressions of public will are concerned the power has been permitted to grow rather than curtailed.

The fearless "Old Hickory" in his message of July 10, 1832, returning to the Senate without his approval the act incorporating the Bank of the United States, said: "The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and the President to decide upon the constitutionality of

any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve."⁶² Yet even this King Canute could not stay the tide.

The somewhat impetuous President Roosevelt also devoted considerable energy to this subject in 1910-12. Taking as his first text, his disappointment, to use the mildest designation, at the decisions of the United States Supreme Court in the Knight Sugar Trust and Bakeshop cases,⁶³ he vigorously discussed the subject of possible control of judicial control over legislation in a speech before the Colorado Legislature and state officials, August 29, 1910, and devoted several articles to this subject in *The Outlook* of which he was a contributing editor.⁶⁴ He scathingly criticized the American Bar Association⁶⁵ for its attitude on the referendum, and under the caption "Do You Believe in the Rule of The People?" he advocated the referendum as to judicial decisions.⁶⁶ Yet *The Outlook* agreed in its issue of even date with President Taft's view expressed in his veto in August, 1911, of the bill admitting Arizona and New Mexico to statehood, because of the objectionable provision in the Arizona constitution for the recall of judges.⁶⁷ Arizona, however, in 1912 immediately after admission to Statehood, amended its constitution so as to permit the recall of judicial officers.⁶⁸ Apparently but one state, Colorado, adopted President Roosevelt's idea and that state did in 1912, by constitutional amendment, provide for referendum as to judicial decisions,⁶⁹ which is, however, in effect, but a short method of constitutional amendment; and as we have seen above, Massachusetts in 1921 expressly rejected the idea. It should be noted in this connection that Colorado had already in 1910 provided for the referendum as to legislative action.

While it is true that there is often sincerely felt and forcibly expressed a distrust and fear of this power of the judiciary, yet it must not be overlooked that there has been always an equally or at least a strong distrust and fear of possible abuse of legislative power. Both such views are natural in a form of government

such as ours, based upon the fundamental idea of checks and balances of one branch upon the others or of the people on all three, and upon the still more fundamental idea, which distinguishes this from that of many of the European and Oriental forms or theories of government: viz., that with us governments exist for the good of the people, in the others the people exist for the good of the governing power; here the State is but the instrument to protect and preserve the rights of the people, there the people are but the instrument to protect and preserve the State.

Arbitrary power, says Edmund Burke, in the trial of Warren Hastings is unsafe in any man's hands. To guard against such unsafe power written constitutions have been instituted, feeble it is true at times, but still, seemingly, the best safeguard in that respect that human ingenuity has been able to devise, according at least to the ideas embodied in American Government.

It is a common and apparently inalienable or at least inseparable attribute of human nature that the having of power by one over others pretty surely breeds lust for more power, with an accompanying jealousy of the power resting in or exercised by some one else. The legislator naturally views with alarm the possible encroachment in his chosen field by executive or judiciary, they in turn reciprocate and each, assured of his own rectitude, unconsciously, perhaps, shares in the desire so naïvely expressed by "Old Hickory" in his veto measure quoted above, to have the last say. It would perhaps be not surprising to find that the people at large possess what resembles a conglomeration of the respective jealousies of the respectable three above named. The idea is sometimes expressed or suggested that in some way the legislative branch of our Government is more exclusively, or more nearly, the mouthpiece of the will of the people than any other governmental institution and that therefore its voice is entitled to be heard above all others; but that such doctrine is often heard does not necessarily demonstrate that it is well founded.

If there be just cause for fear of abuse and distrust of the use of judicial power, and I must regretfully admit that there sometimes may be, yet there always has been, and still is, increasingly, a distrust and fear of unbridled legislative power.

One of the great stumbling blocks in the way of the adoption of the Federal Constitution was this very thing, namely, fear that the legislative hands had not been sufficiently tied, and it was met by the immediate adoption of the first ten amendments to that

constitution, and particularly the first eight, the so-called Bill of Rights, echoes, some of them, of Magna Charta, and intended to secure the individual against arbitrary power, that might, it was feared, and with substantial ground for such fear, be exercised by the legislative branch of the government. While these first ten federal amendments are not effective as to the individual states⁷⁰ their counterparts are found in practically all if not all of the state constitutions and generally with many more restraints such as relate to special legislation, debt limits, use of the state credit, etc., all of which are manacles on the legislative arm. Freedom of speech, freedom to worship, to petition, to be secure from unlawful search, to obtain justice without delay, to demand compensation for property taken for public purpose, from bill of attainder, *ex post facto* law or laws impairing the obligation of contracts, from corruption of blood or forfeiture of estate upon conviction, would each seem a fundamental right to which no danger could ever be anticipated; it would seem unlikely that the legislature of a free people would need to be solemnly and specifically enjoined from any infringement of such elementary rights. Yet such reliance upon legislative self-control as would be indicated by a failure to insert such restrictions in our written constitutions is not yet found.

The causes that led this country to separate from England were largely of legislative origin. The Stamp Tax and the Tea Tax were creations of Parliament. It was taxation by Parliament without representation in Parliament that was the ground for bitter complaint. When the discord between the colonies and Great Britain finally culminated in the Declaration of Independence—after the signing of which by the representatives of the various colonies they must, as one of them grimly said, "All hang together or they would all hang separately," they clearly indicated in that immortal instrument their great distrust of legislative authority. After enunciating their list of grievous charges against King George III, most of which, by the way, were made possible by legislation, they, through their scrivener Thomas Jefferson, added this, as their sober reflection upon a system of Government which had no written boundaries to legislative action:

"Nor have we been wanting in attention to our British brethren. We have warned them from time to time of attempts, *by their legislature, to extend on unwarrantable jurisdiction over us.* We

have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity; and we have conjured them, by the ties of our common kindred, to disavow these *usurpations*, which would inevitably interrupt our connections and correspondence. They too, have been deaf to the *voice of justice* and of consanguinity. We must therefore acquiesce in the necessity which denounces our separation, and hold them as we hold the rest of mankind, enemies in war, in peace friends."

Starting with such views it is not to be wondered at that the founders of this Government for the people feared to place unlimited power anywhere, and even tied themselves by written constitutions with labored methods of amendment thereof. They evidently realized that any newly arising breeze of popular feeling might be but a passing whim and not a substantial change of public policy. The one uncontrollable legislative power recognized in our Federal and State constitutions: viz., that each branch of the legislature shall be judge of the qualifications of its members, or as defined in the Wisconsin Constitution, power to expel its members, has never been questioned by the courts or any other branch of the Government. Yet the exercise of that power by the refusal of the New York Assembly in April, and again in September, 1920, to permit five members of a minority party returned as elected to that body to be seated as such caused great comment and was vigorously opposed at the lengthy hearing had before the assembly judiciary committee by leading representatives of the bar, among others Charles E. Hughes and Judge O'Brien, which but illustrates the feelings against unbridled power.

In the Philadelphia convention of 1787 much debate was had on the proposal to create a Council of Revision consisting of the President and members of the Supreme Court to pass on all legislative enactments before they could become laws, and, as mentioned above,⁷¹ though such method was not adopted for the Federal Government, it was by at least one of the states. Illinois had such a council of the governor and the judges of the Supreme Court to revise all legislation in its original constitution of 1818, so remaining until 1848.⁷² Several constitutions provided for councils of State to advise with the governor though seemingly with no revisionary or veto power over legislation—Maryland,⁷³

North Carolina,⁷⁴ and Virginia in 1776,⁷⁵ Maine in 1819,⁷⁶ and Virginia in 1793.⁷⁷

A somewhat similar revising effect or check on unconstitutional acts by the legislature is reached by the governments in the constitutions of several states which contain provisions that the judges of the highest state court may be called upon to give their opinions in advance as to such proposed legislation. It is provided for in Massachusetts in Part II, Chapter 3-2;⁷⁸ Maine, Article VI, section 3;⁷⁹ New Hampshire, Part II, Article 73;⁸⁰ Florida, by the governor only, Article IV, section 13;⁸¹ South Dakota, the same, by Article V, section 13, in 1889.⁸² Rhode Island, as late as 1902, by amendment, Article XII, section 2,⁸³ placed such duty on the supreme court at the request of the governor or the legislature. Colorado in 1886, by amendment to Article VI, section 3,⁸⁴ provided such opinion should be furnished "upon important questions upon solemn occasions when required by the governor, the senate, or the house of representatives."

The primary idea of the duties of a governor of a state is that of the executive, he who executes or carries out the will of the legislature. The idea of his having a voice in the making of the legislation which he is to enforce is somewhat incongruous and a mixture of the two functions. It is, of course, an adjunct to rather than an inherent part of the executive function. Yet such a brake is the executive disapproval, requiring a larger vote to override than to pass the measures originally, is a part of the Federal Constitution and of that of every state in the Union except North Carolina, whose constitution of 1876 contains no provision requiring the approval or signature of the governor to legislation,⁸⁵ and none such is found in its constitution of 1808 or those prior thereto. Rhode Island, the state which did not participate in the Philadelphia convention in 1787, which was the last of the original thirteen colonies to approve of and ratify the Constitution, and the last to adopt a new constitution, remaining under charter from Charles II in 1663 until 1842, by her constitution then adopted gave the governor no veto power, but by amendment as late as 1909 to Article XV, she did expressly vest him with such power.⁸⁶

There has, therefore, been a constantly increasing rather than decreasing tendency in giving the executive a control over the legislative branch of government. In no instance has it been taken away where it once existed.

The initiative and referendum methods of popular or direct legislation of comparatively recent years, apparently starting in South Dakota in 1898, and Utah in 1900, are now found in one form or another in the constitutions of at least the following eighteen states: Arizona, Arkansas, California, Colorado, Massachusetts, Maine, Michigan, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah and Washington; though not as yet in force in Idaho, and not in Utah until 1917 (by Ch.5) of that year for want of appropriate legislation. The extreme length to which Ohio went in her check on legislation even as to the amendments to the Federal Constitution held unconstitutional by the United States Supreme Court, and some of the details as to the proposed Massachusetts amendments, have been commented on above.

All such measures are express reservations by the people to themselves of powers that otherwise belong to the legislative branch, they are born from distrust of or dissatisfaction with legislative action. The initiative is the popular medicine applied when the legislature is torpid or sluggish, the referendum when the legislative action is too hasty or fractious. The increased demand for these measures would seem to be an emphatic denial that there is too much curb or control over the legislature.

Occasional comparisons are made of our system of judicial review or veto with the English system, where, it is said, no court dares to declare an act of Parliament void. Manifestly the comparison is of no avail. The English are willing to rest their rights as they do, in the rulings of Parliament, a body subject to recall, not at any stated period, but at any moment the Ministers of the Crown are outvoted in any measure they propose, by the members of Parliament, in response to what such members believe is the wish of the people whom they represent.

Having established no standard, wherewith could the English courts take measure? The substantial difference between the two ideas is well evidenced in the form of the official oaths required in the two countries. Here it is to support and maintain the constitution;—and see what the court said in *United States vs. Lee*, 106 U. S., at p. 220. There such judicial officers, and others that are required to take oath prior to assuming duties, say, just as do members of Parliament, the law-making body; "I (name) do swear that I will be faithful and bear true

allegiance to (the reigning sovereign) his heirs and successors, according to law. So help me God."⁸⁷

One of the reasons why the founders of this nation separated from England was because they did not like a form of government where legislative license was unbridled and unhampered. and they elected to build foundations for this nation's greatness and that of her states upon written constitutions filled with checks and balances and restrictions upon legislative power. Such written covenants by the people, with the people, for the people, are the law of this land as distinguished from the laws of Parliament which form the law of that land.

The very nature of a written constitution is such that to its language as applicable to any given situation there can be but one interpretation which can be the correct one and it does not permit of a diversity as to its right construction and real meaning, however diverse views may be. If there be three opposing views as to the construction of the language of a constitution it is possible that the three may be wrong but it is absolute that two must be wrong. Somewhere, of necessity, there must be a power to declare, subject of course to the inherent weakness of human instruments to err, what is the one right construction of such an instrument. That the constitutional declaration may be antiquated and unfit for present modern conditions is a ground for amendment thereof rather than for disregard or false constructions. It cannot rest in two or more places or bodies to pronounce an ultimate result.

To adopt the theory of President Jackson as expressed in his veto message quoted above, that there may be as many permissible interpretations of a constitution as there are possible interpreters, recalls to mind the memorable encounter between Sir Hugh and Sir Oliver in the days of chivalry. They discussed, upon breaking their noonday bread by the sparkling spring, the shield that had hung at the four corners which they had just passed. "Foresooth," said Sir Hugh, "it was a goodly shield and silver bright." "Nay," said Sir Oliver, "it was indeed a goodly shield, but of yellow gold." Then followed the necessary challenge to mortal combat and after gentle joust in which Sir Hugh was killed and Sir Oliver disabled, a post mortem examination disclosed that the shield was silver on the side from which Sir Hugh approached and of beaten gold from Sir Oliver's.

A constitution on the contrary must read the same however viewed.

Apparently recognizing the wisdom of that which has been for centuries a judicial axiom, that no man can be judge in his own cause, the people of this nation have indicated by acquiescence and, by express declarations that power shall rest with the courts rather than with the body which enacts the law and views it with all the natural pride of authorship. It has been suggested that it is just such pride of authorship which makes motions for rehearings in appellate courts so generally unabating.

What the compass is to the sailor on the sea, such is the constitution to those who have a part in the sailing of the ship of state over the troubled waters that surround all human enterprises. If captain and mate insist on following their different readings of the same compass the ship goes on the rocks. It is firmly fixed now, as the law of this land, that the courts are the final arbiters in disputes arising from or under enactments by another branch of the Government, the legislature, and though the duty is often an unpleasant one yet it is one that the constitution requires as much as though expressly so set forth.

That such duty may involve a seeming disregard or disrespect of another branch of the Government adds to the difficulty but does not lessen the obligation. The strong and the majority generally can take care of themselves; the weak and the minority need the protection of the written guarantees, which the genius of the fathers and founders of this Government have accorded them, and which it is the duty of those sworn to uphold and support the constitutions, state and Federal, to defend and maintain.

The individual, however humble, oppressed by a law which the law-making body has no constitutional warrant for making, is entitled to as much solicitude, care and protection by the courts, indeed to greater care and solicitude, because the odds are greater than when he complains of the unlawful acts of an individual neighbor. Thus may, and may only, and must be, secured and preserved those guaranteed inherent rights of the individual for whose security and preservation our Government is instituted and stands solemnly pledged.⁸⁸

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