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THE HISTORIC RELATION OF JUDICIAL POWER TO
UNCONSTITUTIONAL LEGISLATION.

[NOTE: *The following address was delivered by Hon. Hampton L. Carson at the Annual Dinner of the Sharswood Law Club, April 19, 1912.*

After some introductory remarks illustrative of the confusion of thought existing at the present time as to the proper lines of demarcation between executive, legislative and judicial functions, Mr. Carson stated that it was his purpose to review from an historical standpoint the relation of judicial power to unconstitutional legislation. He said that he had seen it intimated that the Supreme Court of the United States had surrendered to the grasp of oligarchies and that if Congress at its next session would impeach the judges for usurpation of legislative power, remove them from office and instruct the President to enforce the laws, the Supreme Court of the United States would never thereafter presume to trench upon the exclusive power of Congress. He also stated that he had met with the contention that we have been living for more than a century under a government not based upon the Federal Constitution but under one created by the plausible sophistries of John Marshall; that it was a bare assumption on the part of the court to declare that the question as to whether a law is constitutional or not is a judicial one, and as the assumption was faulty, therefore the conclusion was unsound.

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He further stated that he had seen it asserted that the power claimed by the Supreme Court of the United States to nullify a law of Congress was entirely a self-made power; that in no decision ever rendered had the court been able to point out the lettered warrant of the Constitution; that it could not be done for it was not there.

Mr. Carson further stated that he had seen it stated that the claim of the Supreme Court to the right to nullify a law of Congress had no other warrant than its own assumption, and he had even met with the extreme statement that at the time of the framing of the Constitution no common law court in all Christendom considered its jurisdiction broad enough to nullify the law of the legislature. Mr. Carson then proceeded as follows.—ED.]

The slightest examination into the history of the origin of Article III of the Constitution of the United States, which, in Section 2, expressly declares that “the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority,” will convict the incautious authors of these statements of blunder upon blunder.

The truth is that there were numerous instances of the exercise of judicial power to set aside acts of the legislature for lack of conformity to state constitutions, or the principles of state constitutions, which were present to the minds of the framers of the constitution, several of whom had, as judges, participated in the exercise of this very power.

David Brearly, Chief Justice of New Jersey, and a member of the Federal Convention, had, in the case of *Holmes vs. Walton* (referred to in *State vs. Parkhurst*,¹ considered most gravely the exercise of such a judicial power. The case was brought by writ of certiorari before the Supreme Court of New Jersey on September 9, 1779, and was argued on constitutional grounds in November of the same year. The court held the matter under advisement for three terms, and on September 7,

¹ 4 Halstead (N. J.) 444.

1780, the judges, Brearly, Smith and Symmes, delivered their opinions seriatim for the plaintiff in certiorari.² In anticipation of the final decision, the legislature amended the statute in question.³

In speaking of this decision, Gouverneur Morris wrote to the Pennsylvania Legislature in 1785:

"In New Jersey the judges pronounced a law unconstitutional and void. Surely no good citizen can wish to see the point decided in the tribunals of Pennsylvania. Such power in judges is dangerous, but unless it somewhere exists the time employed in framing a bill of rights and frame of government was merely thrown away."⁴

The decision of *Holmes vs. Walton* was followed, in 1796, by the case of *Taylor vs. Rodney*.⁵

In the meantime similar decisions had been reached in other states. The case of *Trevett vs. Weeden* was decided in Rhode Island in 1786.⁶ (Pamphlet of J. B. Varnum, Providence, 1787.)

Professor Cooley, in his work on "Constitutional Limitations,"⁷ Mr. Bryce, in his work on the "American Commonwealth,"⁸ Professor Fiske, in his book, "The Critical Period of American History,"⁹ and Professor McMaster, in his "History of the People of the United States,"¹⁰ have fallen into the error of asserting that this case was the first case in which the courts held an act of the legislature unconstitutional and void, on the ground of conflict with the fundamental law. That this is an error is clear from the fact that in Virginia, as early as 1782, the courts had clearly asserted the power to declare a law void for lack of conformity to the Constitution.

George Mason, one of the members of the Federal Convention, and no stickler for federal power, had, as far back as

² See paper of Dr. Austin Scott, "Papers of the American Historical Association," Vol. 2, p. 86.

³ Laws of New Jersey, original edition, 4 Halstead 444.

⁴ Sparks' "Life of Gouverneur Morris," Vol. 3, 438.

⁵ 4 Halstead 427.

⁶ Pamphlet of J. B. Varnum, Providence, 1787.

⁷ 6th Ed., 196.

⁸ Vol. 1, p. 532.

⁹ Pp. 175, 176.

¹⁰ Vol. 2, p. 24.

1772, in the case of *Robbins vs. Hardaway*,¹¹ argued against the validity of an act providing for the descendants of Indian women as slaves, on the ground that the act was void as contrary to natural right and justice, and in violation of rights and duties which men owed to each other in a state of nature.

In May, 1778, the Legislature of Virginia passed an act of attainder against one Josiah Phillips, who had been devastating the state. During the year Phillips was captured, convicted and executed for highway robbery, the act of attainder being disregarded. Professor Tucker¹² asserts that the court refused to recognize the act of attainder¹³ and had directed the prisoner to be tried.

In 1776, a law had been passed in Virginia, taking from the executive the power of pardon in cases of treason, and under this act one Caton, having been convicted of treason was pardoned by the House of Delegates without the concurrence of the Senate. The case reached the courts in 1782¹⁴ when the Attorney-General moved for execution upon the prisoner. The latter pleaded the pardon of the House. Under the Constitution, as it then stood, the case was referred to the Court of Appeals, and it was there argued that the act of Assembly was contrary to the plain intent of the Constitution.

Mr. Edmund Randolph, then Attorney-General of Virginia, subsequently the first Attorney-General of the United States, and one of the leading members of the Federal Convention, argued that, whether the act was contrary to the spirit of the Constitution or not, the court was not authorized to declare it void. George Wythe, subsequently a framer of the Constitution, and in this very case sitting as a judge, declared:

“If the whole legislature (an event to be deprecated) should attempt to overleap the bounds prescribed to them by the people, I, in administering the public justice of the country, will meet the united efforts at my seat in this tribunal, and, pointing to the Constitution, will say to them: ‘Here is the limit of your authority, and hither shall you go, but no further.’”

¹¹ Jefferson's Rep. Va. 109.

¹² Tucker's Blackstone, Appendix 293.

¹³ See 4th Burk, Hist. of Va. 305, 306.

¹⁴ Commonwealth v. Caton, 4 Call (Va.) 1.

Chancellor Blair, also a member of the Federal Convention, with the rest of the judges, was of the opinion that the court had power to declare any resolution of the legislature, or of either branch of it, to be unconstitutional and void, if in conflict with the Constitution.

Six years later, in 1788, the question was again raised in the very interesting "Case of the Judges,"¹⁵ which grew out of an attempt by the legislature to impose additional and extra-judicial duties upon the court, and the judges found themselves obliged to decide "that the Constitution and the acts were in opposition; that they could not exist together, and the former must control the operation of the latter."

These views were again declared in several later cases, and were directly enforced in 1793, in *Kemper vs. Hawkins*.¹⁶

In New York the same question was raised in the celebrated case of *Rutgers vs. Waddington*, decided in 1784. There Alexander Hamilton, in a very able argument before the Mayor's Court of New York, contended that the Trespass Act, which authorized actions by owners against those who had occupied their houses under British orders during the British occupation, was unconstitutional. Hamilton argued that the law violated natural justice, and the decision was placed upon that ground.¹⁷

In 1792 the Supreme Court of South Carolina held an act of the Colonial Legislature of 1712 void, as in contravention of common right and of Magna Charta.¹⁸

In North Carolina the power of the court to refuse to enforce a law, because unconstitutional, was elaborately argued and considered in 1787.¹⁹

The argument of Mr. Iredell, subsequently a justice of the Supreme Court of the United States, is notable, and he expressed his views in plain terms in a correspondence held with Richard Dobbs Spaight, himself a member of the Federal Convention,

¹⁵ 4 Call (Va.) 135.

¹⁶ 2 Va. Cases 20. See also *Turner v. Turner*, 4 Call (Va.) 234; *Page v. Pendleton*, Wythe's Rep. 211.

¹⁷ *Rutgers v. Waddington*, Dawson's Pamphlet 44; *Hamilton's Works*, Edited by J. C. Hamilton, Vol. 5, pp. 115-16; Vol. 7, 197.

¹⁸ *Bowman v. Middleton*, 1 Bay 252.

¹⁹ *Bayard v. Singleton*, Martin (N. C.) 42.

and at the time of the receipt of the letter engaged in the very act of considering the question of federal judicial power.²⁰

It is beyond the reach of controversy, therefore, that when the Federal Convention met in 1787 for the purpose of framing a constitution for the United States, the idea of controlling the legislature through the judiciary was familiar to its leading members. It had been asserted in New Jersey, Virginia, New York, Rhode Island and North Carolina. The members of the Convention who had, either as counsel or as judges, considered such a question, were among the most prominent on the floor. There were: From Virginia, George Wythe, John Blair, Edmund Randolph and George Mason; from New Jersey, David Brearly; from New York, Alexander Hamilton; from North Carolina, Richard Dobbs Spaight, informed specifically by his correspondence with Iredell, of counsel in the case of *Bayard vs. Singleton*.²¹

As to the views of the members of the Federal Convention, my time does not permit me to go into detail in quoting the language of the debates, but no careful student of Madison's Notes, or of the Journal of the Convention, can fail to reach the conclusion that it was generally admitted by the delegates that the courts would have the power under the Constitution, without any express gift. Such a power was commented upon with approval in the Convention by Gerry, Morris, James Wilson, Mason and Luther Martin. It was opposed by Mercer, of Maryland, and Dickinson, of Delaware. A few references must suffice.

On June 4, 1787, Mr. Gerry, of Massachusetts, in speaking of the judiciary under the new Constitution, said:

"They will have a sufficient check against encroachments on their own department by their exposition of the laws, which involves a power of deciding on their constitutionality. In some of the states

²⁰McRae's "Life and Letters of Iredell," Vol. 2, pp. 172-6. Compare Spaight's views, *Ibid.*, pp. 167-9.

²¹See a learned paper entitled "The Relation of the Judiciary to the Constitution," by William M. Meigs, of Philadelphia, *American Law Review* for March and April, 1885, pp. 177 to 203. See, also, a paper entitled "The Legislatures and the Courts: The Power to Declare Statutes Unconstitutional," by Charles B. Elliott, Ph. D., *Political Science Quarterly*, Vol. 5, No. 2. Also, "The Origin and Scope of the American Doctrine of Constitutional Law," Vol. 7, *Harvard Law Review*, p. 129.

the judges had actually set aside laws, as being against the Constitution. This was done too, with general approbation:"²²

The cases to which he referred were undoubtedly the seven cases in five states, all older than the Constitution of the United States, which have been presented in the foregoing review.

On July 17th, Mr. Madison distinctly alluded, with approval, to the case of *Trevett vs. Weeden*, saying:

"In Rhode Island, the judges who refused to execute an unconstitutional law were displaced, and others substituted by the legislature, who would be the willing instruments of their masters:"²³

"A law that ought to be negatived will be set aside in the judiciary Department, and if that security should fail, may be repealed by a national law."

Roger Sherman said:

"Such a power involves a wrong principle, to wit: that a law of a state contrary to the articles of union would, if not negatived, be valid and operative:"²⁴

The Convention then *rejected a legislative negative*, and made a long leap forward, and adopted the language of the Constitution as it now stands in Article III, and adopted also the second paragraph of Article VI., which reads as follows:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

On the 23rd of August, an ineffectual effort was made by Mr. Charles Pinckney, of South Carolina, in favor of a legislative negative. Mr. Williamson, of North Carolina, thought it was unnecessary, and having already been decided, "a revival was a waste of time."

In a work entitled "An Essay on Judicial Power and Un-

²² 5 Elliott's Debates 151.

²³ 5 Elliott, p. 321.

²⁴ 5 Elliott, 321, 322.

constitutional Legislation, Being a Commentary on Parts of the Constitution of the United States," Mr. Brinton Coxe, a most accomplished member of the Philadelphia bar, a Democrat of the strictest standing, and a strict constructionist, contends most strongly that the framers of the Constitution actually intended by express enactment that the Supreme Court of the United States should be competent in all litigations before it to decide upon the question of the constitutionality of state laws and state constitutions, and to hold the same to be void in so far as contrary to the Constitution and constitutional laws and treaties of the United States. The same view is taken in an able paper in the June number of this Review, by Charles H. Burr, Esq.²⁵

In the State conventions, the matter was discussed in Connecticut by Oliver Ellsworth, who called the judiciary "a constitutional check;" in North Carolina by Davies, in Pennsylvania by Wilson, and in Virginia by John Marshall, Edmund Randolph and Patrick Henry. The last named was a decided opponent of the Constitution, but he was an earnest advocate of the independence of the judiciary. He believed that the judges should decide upon the constitutionality of a law, and feared that the National Judiciary, as organized, would not possess sufficient independence for this purpose. He used the following language:

"The honorable gentleman did our judiciary honor in saying that they had firmness enough to counteract the legislature in some cases. Yes, sir, our judges opposed the acts of the legislature. We have this landmark to guide us. They had fortitude to declare that they were the judiciary, and would oppose unconstitutional acts. Are you sure that your Federal Judiciary will act thus? Is that judiciary so well constituted, and so independent of the other branches, as our State Judiciary? Where are your landmarks in this government? I will be bold to say you cannot find any."²⁶

In the Federalist, No. 78 and No. 80, the independence of the judiciary is elaborately discussed, and the existence of the power to pass upon questions of constitutionality is taken for granted. It is there commented upon, not as a mere possibility,

²⁵ "Unconstitutional Laws and the Federal Judicial Power," 60 U. of P. Law Review 624.

²⁶ 2 Elliott's Debates 248.

but in order to remove any lingering objections there might be to such a practice.²⁷

The Judiciary Act of 24th September, 1789, which was the work, almost exclusively, of Oliver Ellsworth, himself a member of the Federal Convention, and familiar with the views of his colleagues, provided for the review in the Supreme Court of the United States of judgments in the circuit courts and district courts upon writs of error, as well as upon a certificate of division of opinions, whether the causes originated in the circuit courts, or were removed there *from the state courts, as well as for the review of cases where the validity of state statutes or any exercise of state authority should be drawn in question on the ground of repugnancy to the Constitution, treaties or laws of the United States, and the decision should be in favor of their validity.* This statute, which it is no exaggeration to term a veritable bond of union, is a clear legislative expression of the views of the First Congress under the Constitution—that the questions referred to are judicial questions, and that the determination of them belongs, under the Constitution, to the Supreme Court.

The first case, in which the power of the Federal courts to decline to enforce an act of Congress was asserted, illustrates the prevailing idea as to the position of the judiciary as well as the extreme modesty of the judges. The case is *Hayburn's*.²⁸ Congress had passed an act in March, 1792, providing for the settlement of claims of widows and orphans barred by certain limitations, and regulating claims for invalid pensions. The act directed the United States circuit courts to pass upon such claims, and made their decisions subject to review by the Secretary of War and by Congress. In the circuit Court for the District of New York, Chief Justice Jay, Justice Cushing, and District Judge Duane, filed an order declining to execute the act as judges, but declaring that “as the objects of this act are exceedingly benevolent, and do honor to the humanity and justice of Congress, and as the judges desire to manifest on all proper occasions, and in every proper manner, their highest respect for the national

²⁷ See 19 Am. Law Review 184.

²⁸ 2 Dallas 409.

legislature, they will execute this act in the capacity of commissioners." Justices Wilson and Blair, and District Judge Peters, of the Circuit Court for Pennsylvania, absolutely refused to execute the act.

Justice Iredell, and District Judge Sitgreaves, of the North Carolina Circuit, before any case came before them, joined in a letter to the President, expressing their doubt as to their power under the law to act even as commissioners.

The question reached the Supreme Court at the August Term, 1792, on an application for a mandamus to the District Court for the District of Pennsylvania. Attorney General Randolph entered into an elaborate discussion and analysis of the powers and duties of the court, and advised the execution of the law. Of his argument, he said: "The sum of my argument was an admission of the power (of the court) to refuse to execute, but the unfitness of this occasion."²⁹ No doubt existed in the minds of the judges, yet so great was the desire to avoid a conflict that the motion was taken under advisement, and held until the statute was amended.

A subsequent case, however, was brought by amicable action against one Yale Todd, to recover money paid him under a finding of Chief Justice Jay, and Judges Cushing and Law, acting as commissioners. After argument, judgment was rendered against the defendant. No opinion, stating the grounds of the decision, was filed, but the result was a determination that, as the power conferred by the Act of 1792 was not judicial within the meaning of the Constitution, the act was unconstitutional. Chief Justice Jay and Justices Cushing, Wilson, Blair and Patterson were present at the decision, which seems to have been unanimous.³⁰

The question was again raised in 1798, in the case of *Calder vs. Bull*,³¹ and some doubts were expressed by Mr. Justice Chase, as to the jurisdiction of the court to determine that any law of a state legislature contrary to the Constitution of the state was void, but he declined to express an opinion whether the

²⁹ See Conway's "Life of Edmund Randolph," 144-145.

³⁰ See note 1, *United States v. Ferreira*, 13 How. 40 and 52.

³¹ 3 Dallas 386.

Supreme Court could declare void an act of Congress contrary to the Federal Constitution.

A similar question was raised in the case of *Cooper vs. Telfair*,³² where Mr. Justice Chase said:

“It is a general opinion, indeed it is expressly admitted by all this bar, and some of the judges have, individually, in the circuits, decided that the Supreme Court can declare an act of Congress to be unconstitutional, and, therefore, invalid; but there is no adjudication of the Supreme Court itself upon the point. I agree, however, in the general sentiment.”

The learned judge had evidently forgotten the decision in the case of *United States vs. Yale Todd*. The question was directly raised before Chief Justice Marshall, in the famous case of *Marbury vs. Madison*, decided in 1803, in which, as Chancellor Kent declares:³³ “The power and duty of the judiciary to disregard an unconstitutional act of Congress, or of any state legislature, were declared in an argument approaching to the precision and certainty of a mathematical demonstration.”

The language of Chief Justice Marshall is clear and conclusive:

“The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like any other act, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law. If the latter part be true, then written constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable—If an act of a legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as though it was a law. This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted upon. It shall, however, receive more attentive consideration. It is emphatically the province of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. This is the very essence of judicial duty. If, then, the courts are to regard the Constitution, and the Constitution is superior to

³² 4 Dallas 194.

³³ 1 Kent's Commentaries 453.

any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply. Those, then, who controvert the principle that the Constitution is to be considered in court as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution and see only the law."

To characterize such reasoning as sophistry is childish. A school-boy might as well challenge a proposition of Euclid, or attempt to ridicule the Principia of Newton. Thomas Jefferson stormed at it in impotent rage, and since his time a few atrabilious critics have denounced it as mere *obiter dictum*; but, notwithstanding all assaults, it stands as an adamantine piece of reasoning, and constitutes an invincible buttress of our nationality.

The power was not again seriously questioned in the federal courts for many years, until the question directly arose in *Cohens vs. Virginia*.³⁴ The reasoning of Marshall in that case has settled it forever. Nothing but a political earthquake can unsettle it. The pyramid of Cheops has stood for six thousand years unshaken by the barkings of the jackals at its base. The power has been constantly exercised, and the instances in which statutes of the United States have been held to be unconstitutional by the Supreme Court of the United States, stated in order of time, are as follows:—

- 1792, Hayburn's Case, 2 Dallas, 409;
- 1794, U. S. vs. Yale Todd, 13 Howard, 52;
- 1803, Marbury vs. Madison, 1 Cranch, 137;
- 1851, U. S. vs. Ferreira, 13 Howard, 40;
- 1864, Gordon vs. U. S., 2 Wallace, 561;
- 1866, Ex parte Garland, 4 Wallace, 333;
- 1869, Hepburn vs. Griswold, 8 Wallace, 603;
- 1869, U. S. vs. DeWitt, 9 Wallace, 41;
- 1869, The Justices vs. Murray, 9 Wallace, 274;
- 1870, Collector vs. Day, 11 Wallace, 113;
- 1871, United States vs. Klein, 13 Wallace, 128;
- 1872, U. S. vs. R. R. Co., 17 Wallace, 322;
- 1875, U. S. vs. Reese, 92 U. S. 214;
- 1877, U. S. vs. Fox, 95 U. S. 670;
- 1879, Trademark Cases, 100 U. S. 82;
- 1879, Colburn vs. Thompson, 103 U. S. 168;
- 1882, U. S. vs. Harris, 106 U. S. 629;

³⁴6 Wheaton 264.

1883, *Civil Rights Cases*, 109 U. S. 3;
1885, *Boyd vs. U. S.*, 116 U. S. 616;
1887, *Callahan vs. Wilson*, 127 U. S. 540, and in
1894, *Pollock vs. Farmers Loan & Trust Co.*, 157 U. S. 429.

Thus, from 1790 to 1894 inclusive, the Supreme Court has exercised the power to declare acts of Congress unconstitutional, because of conflict with the Constitution, in twenty-one separate instances. I find none since. During the same period it exercised the same power without challenge of remark, as to jurisdiction, in relation to the statutes of the states and territories in one hundred and eighty-two instances.³⁵

After these numerous and repeated exercises of power, all of which, even the earliest, rest upon the soundest and broadest foundations, it is preposterous to speak of a decision of the Supreme Court as an "assumption of authority."

Whether the act itself was in terms just or unjust, wise or foolish, does not touch the question. If Congress does not possess the power to pass such an act under the Constitution, there is no law of which the features can be discussed.

To attempt to reverse the decision of the court on the ground of the supposed justice of the act reviewed, or to vindicate the act upon the false and untenable assertion that the court has usurped authority, is to argue in a vicious circle. It indicates an entire lack of comprehension as to the distinction existing between legislative and judicial power.

He who railed against the government, and preached sedition was, in former days, after conviction, either hanged or sent to Botany Bay. As this is an age of milder manners, it may be sufficient to suggest to all those who are disappointed in the effort to incite the people to pull down about their own ears the fabric of the government, in the effort to produce a condition of "harmony," that they are at liberty to secure a continent, or if that be too small, a separate hemisphere of their own.

³⁵ A partial list of these cases (complete, however, up to 1888), is to be found in the Centennial Appendix to Volume 131 of the United States Reports. See, also, Appendix No. 2 to the Annual Address of J. H. Benton, Jr., of Boston, Mass., printed in the proceedings of the Southern New Hampshire Bar Association, 1894.