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# THE NOTRE DAME LAWYER

A Monthly Law Review

*"Law is the perfection of human reason"*

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## CONGRESS AND THE SUPREME COURT

By THOMAS F. KONOP, LL. B.

Part of Plank Five of the Platform of the Independent candidate for President, in 1924, reads as follows:

"We favor submitting to the people, for their considerate judgment, a constitutional amendment providing that Congress may by re-enacting a statute make it effective over a judicial veto."

That the Supreme Court of the United States has now the power to declare an act of Congress unconstitutional and void is settled law. The question was definitely settled by *Marbury v. Madison*, decided in 1803, in which Chief Justice Marshall rendered that memorable opinion, which has since been consistently followed. Were the constitution amended in conformity with Plank Five, it would give Congress the power to repass and make valid law, an act of Congress after the Supreme Court has declared such law contrary to the Constitution and void. Before the American people are led to adopt this fundamental change in our government, a thorough study of the question should be made, and the results of such a change should be carefully considered.

It is frequently asserted that the exercise of the power of the courts to declare null an act of the legislative branch of the government is peculiar to the United States. This assertion is made in the LaFollette-Wheeler campaign text-book, on page 89. "No other government exists in which the courts are permitted to override or nullify the will of the people as *lawfully* declared by their representatives."

Let us see if the power of the courts to nullify a statute is

so unique and so peculiar to the United States. It is true that in some of the continental countries that have written constitutions, to a certain degree this power of the courts is not recognized. But in 1875, in Germany, the Haensatic Court of Appeals did declare void a statute as contrary to the constitution. True this particular decision was expressly overruled in 1883, but in Germany the courts have always exercised the power to declare the acts of the states void as contrary to the Federal constitution. In Switzerland, the courts have the power and do declare acts of the local cantons void if inconsistent with the federal constitution. In France, the courts are expressly forbidden by the constitution to declare a law unconstitutional, but Mr. Dicey in his work, "Law of the Constitution," states, that acts of the French Legislature "are not in reality laws, since they are not rules which in the last resort will be enforced by the courts. Their true character is that of maxims of political morality, which derive whatever strength they possess from being formally inscribed in the constitution, and from the resulting support of public opinion." And, in Argentina, Bolivia, Columbia, Cuba, Mexico, the courts have and do exercise this power.

In England too, the same situation exists. I am going to begin with Lord Coke and the often-cited Dr. Bonham case which was decided about 1610. Parliament passed an act providing that no one should practice medicine in London without a license from the College of Physicians in London. The penalty provided was 100s. for each month, one-half to go to the king and one-half to the college. The act also provided that College Physicians should have the supervision of all physicians practicing in London *and the punishment of them for malpractice*. Dr. Bonham was imprisoned under the act by the College of Physicians for practicing medicine in London without license. He brought action against the College for false imprisonment. Lord Coke, with whom two justices concurred in giving judgment for the plaintiff, declared: "The censors cannot be judges, ministers, and parties; judges to give sentence or judgment; ministers to make summons; and parties to have a moiety of the forfeiture—and it appears in our books, that in many cases, the common law will control acts of parliament and sometimes adjudge them to be utterly void; for when an act

of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void."

Again, in 1612, in the case *Rowles v. Mason* Lord Coke said: "That Fortescue and Littleton and all others agreed, that the law consists of three parts; first, Common Law; secondly, Statute Law, which corrects, abridges and explains the common law; the third, Custom which takes away the common law; but the common law corrects, allows, and disallows both statute law and custom, for if there be repugnancy in statute or unreasonableness in custom, the common law disallows and rejects it."

Lord Coke is sometimes quoted as having in later years, in his "Institutes" repudiated the doctrine in the Bonham case and contended for the supremacy of the Acts of Parliament. That inconsistency is easily explained. When Coke rendered his decision in the Bonham case he was Chief-Justice of the Court of Common Pleas. He had not repudiated that doctrine until after 1620 when he had been removed from King's Bench and Privy Council and after he became a member of Parliament. His repudiation came not when he was a judge holding the common law as "the absolute perfection of reason", but after he became a legislator and political partisan.

The Privy Council of Great Britain still continues to set aside acts of colonial parliaments. The Courts of Australia, New Zealand, South Africa and Canada have and do exercise the power to nullify an act of the legislature. Not so very long ago, Justice Booth, of the Supreme Court of South Australia declared void a legislative act, and when protest was made by both houses of the legislature to the Crown the Governor of Australia was informed that Her Majesty's Government considered "that a colonial judge is not only at liberty but is bound to entertain the question, whether a colonial law material to the decision of the question before him, is or is not valid."

True, some say that these cases merely give the rules of construction, but what difference does it make whether a statute is expressly declared void or by a rule of construction is made ineffective? So the principle of declaring acts of the legislative department of no effect is not so peculiar to the United States.

But it is asserted that the pronouncement of Chief Justice Mar-

shall in *Marbury v. Madison* was the first time that the courts positively assumed the power to declare acts of the legislative branch of the government void in this country; and, it is not infrequently argued that the framers of our constitution did not intend that the courts should exercise this power.

A few citations of cases in colonial times and prior to 1803 will convince any one that this power did not originate with *Marbury v. Madison*.

Prior to the revolution the legislative acts of the colonies were reviewable by the Crown and by the Privy Council, a court in England. From 1660 to 1696 a Special Committee of the Privy Council exercised jurisdiction to pass upon colonial legislation. From 1696 to the time of the Revolution, the "Lords of Trade and Plantation", a board authorized to pass upon colonial legislation disallowed 469 out of 8563 colonial legislative statutes.

And is it not historically true, that the early patriots opposed unjust legislation of parliament, arguing and denouncing many acts of parliament void? In the celebrated Paxton Case of the Writ of Assistance, Otis, although he recognized the jurisdiction of parliament over the colonies, denied that it was the final arbiter of the justice and constitutionality of its acts; and relying upon words of the greatest English lawyers, contended that the validity of statutes must be judged by the courts.

In 1765 Chief Justice Hutchinson in opposing the Stamp Act, said: "The prevailing reason at this time is, that this act of parliament is against the Magna Charta and the natural rights of Englishmen, and therefore according to Lord Coke, null and void".

And Judge Cushing, who was appointed by the Royal Governor, wrote Chief Justice Hutchinson, "It is true it is said that an act of parliament against natural equity, is void. It will be disputed whether this is such an act."

Frequently Colonial courts declared null and void acts of colonial legislatures. The following cases may be cited to that effect: *Holmes v. Walton*, (N. J. 1780); *Commonwealth v. Caton*, (Va. 1782); *Rutgers v. Waddington*, (N. Y. 1784); *Trevett v. Wheedon*, (R. I. 1786); *Bayard v. Singleton* (N. C. 1787).

In *Commonwealth v. Caton*, (Va. 1782) the house of delegates (the senate did not concur) by resolution granted a par-

don to Caton, Hopkins and Lamb, and the prisoners having plead the pardon, the court held the pardon invalid. Justice Wythe used the words: "Nay more, if the whole legislature, an event to be deprecated should attempt to overlap the bounds prescribed them by the people, I, in administering the public justice of the country, will meet the united powers 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 farther."

In the case of *Trevett v. Wheeden* (R. I. 1786) the court dismissed an information against Wheeden, a butcher, for refusing to accept paper money of the state in payment of meat, which was in violation of the state statute. Although the court did not declare the statute unconstitutional and void, it refused to give it effect by dismissing the case. For this dismissal the three judges were summoned before the legislature and after defending their decision, the general assembly passed the following resolution: "That as the judges are not charged with any criminality . . . they are therefore discharged". Two of the judges, however, were not re-elected by the legislature, probably because of this decision.

In the case of *Bayard and wife v. Singleton* (N. C. 1787) the legislature passed an act providing that in an action for the recovery of property, if the defendant makes an affidavit that he holds the disputed property under a sale from the Commissioner of Forfeited Estates, the court is required to dismiss the action on motion. Action was brought to recover a house and lot, the defendant filed the affidavit as required by statute and his attorney, Nash, moved to dismiss. The court, overruling the motion, expressed a feeling of reluctance in involving itself in a dispute with the legislature but declared the act was null and void as depriving a citizen of his property without a trial by a jury. The court said: "If the legislature could take away this right and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken away without a trial by jury, or that he should stand condemned to die, without the formality of any trial at all."

But, it is argued that as the United States Supreme Court did not assert this power until 1803, fourteen years after the

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adoption of the Constitution, the framers of the constitution did not intend that it should exercise this power. Let us see what the historical facts are. In 1790 Chief Justice Jay and several of the judges of the Supreme Court in a letter intended for President Washington had expressed their opinion that the judiciary act of 1789 was unconstitutional. In the *Hayburn* case, (4 Dall. 409) in 1792, the justices of the Supreme Court announced in their opinion in cases in U. S. Circuit Court that an act of Congress of March 23, 1792 was unconstitutional; and some claim to this day that in the case of the *United States v. Todd*, (13 How 30) decided in February 17, 1794, an act of Congress was declared unconstitutional by the Supreme Court of the United States and this case is sometimes cited as being the first exercise of this power by that court, and not *Marbury v. Madison*. In the case of *Hylton v. United States*, the Supreme Court, with Ellsworth as Chief Justice, and Patterson associate (both members of the constitutional convention) exercised the power of passing upon the constitutionality of an act of Congress imposing a duty on carriages.

In the case of *Van Horne's Lessee v. Dorrance* (2 Dall. 304) which was tried before the Circuit Court of the United States for the Pennsylvania District in 1795, Justice Patterson, who was a member of the Constitutional Convention, instructed the jury that an act of the legislature repugnant to the constitution is void. He said: "Omnipotence in legislation is despotism. According to this doctrine, we have nothing that we call our own, or are sure of for a moment; we are all tenants at will, and hold our landed property at the mere pleasure of the legislature; and yet we boast of property and its security of laws, of courts or constitutions and call ourselves free; in short gentlemen, the confirming act is void; it never had constitutional existence; it is a dead letter, of no more avail than if it never had been made." These are the words of a jurist who sat in the constitutional convention.

And after 1789, the beginning of the Government under the constitution, the State courts continued to exercise the power of declaring acts of the state legislatures void. The cases of *Bowman v. Middleton* (S. C. 1892) and *Ogden v. Witherspoon* (N. C. 1802) sustain that statement.

In the Virginia convention called to act on the United States

Constitution, Marshall declared: "If they (the members of Congress) were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void." Patrick Henry (who opposed the Constitution) in the same convention said: "I take it as the highest ecomium of this country, that the acts, of the legislature if unconstitutional, are liable to be opposed by the judiciary." Ellsworth, Samuel Adams, Charles Pinckney, and James Wilson expressed similar opinions.

Alexander Hamilton in the Federalist says: "The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded as a fundamental law. It must therefore belong to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity, ought of course, to be preferred. In other words, the constitution ought to be preferred to the statutes, the intention of the people to the intention of their agents."

I do not mean to contend that all men in the past conceded this power to the courts. Of course there were legislators who were jealous of this power and contested this power of the courts. Coke himself, as jurist, upheld this power; but when he became a member of parliament, he contended that the power of parliament was supreme. So too, in the early history of our country, the legislatures of Ohio and Rhode Island, denied that the courts had this power. Thomas Jefferson, when speaking as a leader of his party contended that the courts had no such power; but, when speaking as a sage and advisor he stated, that not in the power of the courts or the executive but in the "tyranny of the legislative power is really the danger most to be feared."

Undoubtedly, in the political contests between the Federalists and the anti-Federalists both sides of this question were discussed.

As stated before, I do not maintain that everybody conceded this power to the courts. But I do contend that the jurists when on the bench exercised the power, and that the great lawyers



and statesmen maintained that the courts had this power. The existence of this power by the Privy Council over the colonial legislation, the exercise of this power by the Courts of England and her colonies, the exercise of this power by the colonial and state and United States courts immediately following the adoption of the constitution, and the utterances of the framers of the constitution, should convince any one that at the time of the constitutional convention, the framers of that document never doubted that this power rested in the courts.

In the campaign text-book on page 89, this statement appears: "In England no power to veto acts of Parliament is possessed by the courts and no English king dared to exercise a veto for generations." This statement may mislead. Of course the Courts of England have no power to veto acts of parliament. They never attempted to exercise such power. Nor has the Supreme Court of the United States the power to veto acts of Congress. Nor has it ever exercised it. The Supreme Court of the United States does sit in Washington as a department of Government watching Congress and when Congress makes a mis-step declares its conduct void. The Judges of the Supreme Court do not sit in Washington with halos about their heads declaring unconstitutional acts of congress. They would have a merry time reading over the thousands of acts that are the annual grist of our Congress.

There must be a justiciable case or controversy before the court will act. There must be a bona-fide case brought into the courts by litigants and then, and not until then, it becomes the duty of the court to determine what the law of this bona-fide case is. And in order to determine what the law of the case is, it must determine which law is paramount, the constitution, or the statute. To determine what the law of a given case is, is the province of the courts in every civilized country. If a tribunal can not exercise this power to determine what the law is, then it is not a court.

In the case of *Muskrat v. U. S.* (219 U. S. 346) the Supreme Court refused to pass upon the constitutionality of an act of Congress without there being a bona-fide case or controversy before it. The Supreme Court of the United States is not a department of government that watches Congress for misdeeds. I do not want to

detract from that memorable opinion of Justice Marshall in *Marbury v. Madison*; but I am of the opinion that Justice Marshall could not as a lawyer and a judge, have reached a different conclusion. His decision is consonant with sense and reason. Now what was the case of *Marbury v. Madison* decided in 1803?

The Supreme Court of the United States was created and organized under the Constitution of the United States which specifies in what cases it shall have original and in what cases appellate jurisdiction. In other words, it is a constitutional court. Congress by the act establishing the judicial courts of the United States, gave original jurisdiction to the Supreme Court to issue writs of mandamus to public officers. Under this act, Marbury made application to the Supreme Court of the United States for a writ of mandamus to compel Madison, Secretary of State, to issue to him his commission as justice of the peace in the District of Columbia. The court held that the act giving the Supreme Court original jurisdiction in mandamus was unconstitutional and void.

Now let me quote Marshall's reasons for holding congressional acts unconstitutional:

"It is, emphatically, the province and duty 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. So, if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case, conformable to the law, disregarding the constitution; or conformable to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case; this is of the very essence of judicial duty. If then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution and not such ordinary act, must govern the case to which they both apply. . . . . The judicial power of the United States is extended to all cases arising under the constitution. Could it be the intention of those who gave this power to say, that in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the

instrument under which it arises? This is too extravagant to be maintained. In some cases, then, the constitution must be looked into by judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

"There are many other parts of the constitution which serve to illustrate this subject. It is declared that "no tax or duty shall be laid on articles exported from any state". Suppose, a duty on the export of cotton, tobacco, or flour; and a suit were instituted to recover it. Ought judgment to be rendered in such a case? Ought the judges to close their eyes on the constitution, and only see the law?

"The constitution declares 'that no bill of attainder or ex post facto law shall be passed.' If, however, such a bill should be passed, and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve? " 'No person,' says the constitution, 'shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court'. Here, the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?"

The little that I have quoted gives us an idea how clearly Justice Marshall demonstrated that the Supreme Court must have the power to declare acts of Congress unconstitutional and void. Chancellor Kent declared "this opinion approaches to the precision and certainty of a mathematical demonstration;" and Rufus Choate said: "I do not know that I can point to one achievement in American statesmanship which can take rank for its consequences of good above that single decision of the Supreme Court which adjudged an act of the legislature contrary to the constitution is void, and that the judicial department is clothed with the power to ascertain the repugnancy and pronounce the legal conclusion."

(To be Continued in the February Issue.)