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CONGRESS AND THE SUPREME COURT

By THOMAS F. KONOP, LL. B.

(Continued from the January Issue.)

Now the assertion is frequently made that there was so much opposition to this decision that the Supreme Court of the U. S. did not again declare an act unconstitutional until the Dred Scot case, decided in 1856. Undoubtedly there was some protest. Political issues had to be made then as now. But did not the Supreme Court pass on the constitutionality of Acts of Congress between 1803 and 1857? In quite a number of cases the Supreme Court did pass upon the constitutionality of acts of Congress. Notable among them are *McCullough v. Maryland*, 1819, and *Gibbons v. Ogden* (1824). If the Supreme Court considered and declared acts of Congress constitutional, it certainly had the power to consider and declare them unconstitutional. Then too, any one who is familiar with the political history prior to the Civil War knows that from 1803 to 1825, the country was in its making. We had the War of 1812. Then we had the "Era of Good Feeling" in Monroe's two terms. From 1820 to 1860 Congress spent most of its time in compromising on the slavery question. But, when compromising failed, the Supreme Court in the Dred Scot case did not shirk its duty and responsibility, even though its decision in part resulted in the Civil War.

Let us see how many acts of Congress have been declared unconstitutional. From 1803 to 1860 inclusive, two acts of Congress were declared unconstitutional; from 1861 to 1890 inclusive, 18; from 1891 to 1920 inclusive, 23; and 1921 to date, 9. So that since 1860, a period of sixty-five years in our history only fifty acts of Congress, less than one a year have been declared unconstitutional. It is true that the average number of acts declared unconstitutional per year has progressively increased from less than one a year to a little less than two a year. But, when in the history of the world has there been a country that has experienced such progress in education; in science, political

as well as general; in invention and industry; in social legislation, as America in the last sixty-five years? When in the history of the world has any country suffered such upheavals, in so short a time? The Civil War, the Reconstruction period, the Spanish-American War, and our participation in the recent World War conflict are examples.

Then too, there is the great industrial conflict. Never in so short a time anywhere else has labor made greater progress than in America. There never has been a civilization more complex than the American in the last half century. Such times demand legislation. And, it did come in good measure; not only from Congress but from forty-eight legislatures. There is today a decided feeling in the minds of the American people that we have too many laws and that we are a "too much governed people". The fifty acts of Congress that have been declared unconstitutional, isn't a drop in the bucket when we consider the many thousands of laws that have been enacted by Congress in the last half a century. Is it not a fortunate thing that we can look to this one branch of government to occasionally put the brakes on this legislato-mania?

The proponents of the change always magnify the occasional nullification of a Congressional Act. Why not call attention to the countless acts of Congress and the State legislatures that have been sustained when their validity was attacked in the Supreme Court? So many have been sustained, that it has become practically impossible to examine them all. Professor Warren in his article in the Columbia Law Review on "Progressiveness of our Supreme Court" (13 Col. L. Rev. 294) states that he made an examination of 560 cases decided by the Supreme Court between 1887 and 1911 involving the constitutionality of so-called "Social Justice" legislation and out of that number only two acts were declared unconstitutional.

Political Science professors in some of our institutions, in books, articles and in class-room advocate this change. They are usually quoted by political proponents of the amendment. Most of their arguments are to the effect that this power of the courts is a political power; that the courts exercise a government-policy determining function; that they pass on questions of public policy. Let me quote from Mr. Ransom: "The Judge

has no more right than any other official to be set up over the people as an irremovable and irresponsible despot. He has no more right than any other official to decide for the people what the people ought to think about questions of vital public policy." Others could be quoted as expressing similar opinions. But the professors are confused. The courts of the states and the United States, and especially the Supreme Court of the United States, in countless decisions have repeatedly refused to exercise political or policy-making powers. They have again and again refused to pass on questions of mere public policy. Courts do not declare statutes void on consideration of policy, wisdom or expediency. The courts pass only upon the bare question of legislative power. The question for the court in each case is: Giving the statute every presumption of constitutionality, and resolving every reasonable doubt in favor of the statute, *is the statute contrary to the constitution?* Nor do the courts inquire into the motives of the legislation and as Black says, "the courts are not the guardians of legislators, nor are they at liberty to impute to them improper motives."

In every case where the constitutionality of an act of Congress was involved, the Supreme Court did not consider, and in many cases in expressed words refused to consider the motives of Congress and questions of public policy. The Supreme Court, very early, refused to pass upon governmental-policy questions.

In the case of *Rhode Island v. Massachusetts* (1883, 9 Law. Ed. 1233) Justice Thompson said: "I certainly do not claim as belonging to the judiciary, the exercise of political power. That belongs to another branch of the government." In *Luther v. Borden*, (1849, 7 How. 1) the court said: "Much of the argument on the part of the plaintiff turned upon political rights and political questions, upon which the court has been urged to express an opinion. We decline doing so."

In *Fletcher v. Peck* (1810) the court said that in determining whether an act is valid the courts do not inquire into the motives of the legislature. In the Dagenhart Case (First Child Labor Case) the Court said: "We have neither authority nor disposition to question the motives of Congress in enacting this legislation. The purposes intended must be attained consistent-

ly with constitutional limitations and not by an invasion of the power of the state."

Chief Justice Taft in the Bailey Case (the Second Child Labor Case) said: "It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not entrusted to Congress, but left or committed by the Supreme law of the land to the control of the states. We cannot avoid the duty even though it requires us to refuse to give effect to legislation designed to promote the highest good".

But how about the Pollock Case? Hammer v. Dagenhart; Child Labor Tax Case? The Newberry Case? and the Adkins Case?

I admit that these decisions were unpopular and that much of the agitation for a change is due to these decisions. I voted for two of the above acts that were declared unconstitutional. I am convinced that I was wrong and the Supreme Court is right, as to their constitutionality. These cases were not decided because the majority of the Supreme Court were against the Income Tax or in favor of exploiting Child Labor. They were declared invalid because they were in conflict with the constitution and for no other reason.

Let me briefly state what these recent cases were:

In the *Pollock Case* (1895) (157 U. S. 429) the Supreme Court decided the Income Tax law unconstitutional because it was contrary to the apportionment clause of the constitution. In *Hammer v. Dagenhart* (1918, 427 U. S. 251) it was decided that the first Child Labor Act of Sept. 1, 1916, was unconstitutional because Congress under its power to regulate interstate commerce, had no power to control the manufacture of articles intended for interstate commerce. In *Bailey v. Drexel Furniture Co.*, (1923, 259 U. S. 20) the Supreme Court declared the Second Child Labor Act of Feb. 24, 1919 unconstitutional, on the ground that it was manifestly not a tax law, as it purported to be, but was intended to regulate the employment of children which is a matter reserved to the states under the 10th Amendment. In *Adkins v. Children's Hospital* (43 Sup. Ct. Rep.) 1923, the Supreme Court declared unconstitutional the Minimum Wage Law (Act of Sept. 19, 1918) as an arbitrary interference with freedom of contract in violation of the Fifth Amendment.

But proponents of this change do not state that during the same period of the above cases, the Supreme Court has consistently sustained many state child labor laws, anti-trust laws, Pure Food Laws, Regulatory laws of railroads, banks, insurance companies, telegraph companies, taxation laws, public improvement laws and countless others. We must not forget that the Federal Government is a government of limited powers; that Congress has only such powers as are expressly granted; that all other legislative powers are left to the States; that it is the states that have practically unlimited legislative powers in matters of social legislation and police.

On this, let me quote you from the case of *U. S. v. Lee*, (106 U. S. 196)—

"While by the Constitution the Judicial department is recognized as one of the three great branches among which all the powers and functions of the Government are distributed, it is inherently the weakest of them all. Dependent as its courts are for the enforcement of their judgments upon officers appointed by the executive and removable at his pleasure, with no patronage and no control of the purse or sword, their power and influence rest solely upon the public sense of the necessity of the existence of a tribunal to which all may appeal for the assertion and the protection of rights guaranteed by the Constitution, and by the laws of the land, and on the confidence reposed in the soundness of their decisions and the purity of their motives."

The fact that the Supreme Court now has the power to declare acts of Congress unconstitutional should not foreclose to American citizens the right to advocate a change. I have the highest regard for men who honestly and conscientiously advocate this change. They have just as much right to favor a change as I have to stand steadfastly by the courts in the exercise of this power. I have known Senator LaFollette for 20 years both socially and in a political way. He has opposed my elections, and I have opposed his. He was a so-called progressive-Republican; I, a Democrat. I believe LaFollette was conscientious and honest in the movement he represented. He was honest in his belief that the courts should be curbed of this power. He was a brilliant and courageous leader. For 25 years he fought his own party valiantly. Those who are opposed to

this change cannot defeat this movement by shouting as was done in the Chicago Republican Convention in 1912, "Take your Socialistic Doctrines back to Wisconsin". The adoption of this fundamental change in our government cannot be prevented by accusing its proponents of Bolshevism and Anarchy. They have a perfect right to advocate this change. For us who are opposed to this change it would be far better to study this question and prepare ourselves to refute the arguments made and point out the dangers to American institutions and to American liberties.

I for one am unalterably opposed to this change, for I believe that this change will not cure the ills of society as some claim. I contend that this change would destroy constitutional government. Take away the power of the courts to declare which, the constitutional or the statute law is the law, and you permit the statutes to override the fundamental law, the constitution. You create a government by legislative majority. You destroy the fundamental law that protects the minority. Rule by majority is the most tyrannical government, that can be conceived. Override the constitution of the United States by a legislative majority, however great that majority, and you will destroy the executive and judicial departments of the government. You will make the president a mere puppet and an ornament, and the judges mere hypocrites with their ears to the ground deciding cases according to the election results. Montesquieu, although probably not the first to advocate three departments of government, was the first to clearly point out the necessity for the separation of these powers for true liberty. In his "Spirit of Laws", he says:

"In every government there are three sorts of power; the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law. . . . When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with

the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression."

Montesquieu also says in his "Spirit of Laws": "The political liberty of the subject is a tranquility of mind arising from the opinion of each person has of his safety. In order to have liberty, it is requisite the government be so constituted that one man need not be afraid of another".

How can we have tranquillity if there is no finality? If A takes property from B and the court reverts it in B and the Congressional majority votes it back to A and Congressional majority after the next election votes it back to B, there is no finality. Thus there can be no liberty. Upon the finality of the decision of courts rests the Peace of our Society. We can never be sure of what we can do.

Chief Justice Taney, who died before he was able to read his opinion in the case of *Gordon v. United States*, (117 U. S. 697—1865) said: "It was to prevent an appeal to the sword and dissolution of the compact that this court, by the organic law, was made equal in origin and equal in title to the legislative and executive branches of the government; its powers defined, and limited and made strictly judicial, and placed therefore beyond the reach of the powers delegated to the legislative and executive departments."

There are those who believe that the old constitution has outlived its usefulness. I am not of that faith. For 150 years it has preserved us as a nation. For 150 year it has been the guardian of our liberties. I am not yet ready for "a dissolution of that compact", the Constitution of the United States.

But it is said, that if Congress were given this power it would not abuse constitutional rights. That only begs the question. Knowing how easily public sentiment is swayed by passion and prejudice; knowing the volume of ridiculous bills that are annually offered to Congress for passage, it is a rash thing to say that Congress will always keep within bounds.