AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 4: The Early National Era – Judicial Power and Constitutional Authority

Eakin v. Raub, 12 Serg. & Rawle 330 (1825)

Judicial review by state courts was well-established by the end of the Early National Era and entrenched by the end of the Jacksonian Era. State court justices routinely declared that they had the authority to rule that state laws violated the state constitution. By 1860, state courts had declared at least 150 state laws unconstitutional. Many state court decisions asserting a state power to declare laws unconstitutional repeated Chief Justice John Marshall's claims in Marbury v. Madison *(1803) that the Constitution was the supreme law of the land, that constitutions provided legal limitations on government power, and that courts were responsible for enforcing those legal limitations. State judges in many states also asserted that judicial review prevented majoritarian tyranny. New York judges in* Thorne v. Cramer *(1851) stated that the judicial power to declare laws unconstitutional protected "minorities against the caprices, recklessness, or prejudices of the majorities." Challenges to the judicial power to declare laws unconstitutional grew weaker and weaker over time. Judge John Bannister Gibson in* Eakin v. Raub *(1825) was the only state judge during this period who sought to refute the principles of Marbury. Twenty years later, Gibson conceded defeat.*[1]

James Eakin filed a lawsuit against Daniel Raub for the recovery of some property. Raub claimed that the suit was barred by a state statute that imposed a time limit within which injured parties could file legal claims. Eakin responded by asking the Supreme Court of Pennsylvania to declare the statute of limitations unconstitutional.

The Supreme Court of Pennsylvania allowed Eakin to proceed. The judicial majority briefly noted that judges could declare laws unconstitutional, but then ruled that Pennsylvania law permitted the Eakin lawsuit. Justice John Bannister Gibson (1780–1853), a long-serving member of the Pennsylvania Supreme Court and a respected Democrat, wrote a dissenting opinion aimed at refuting Chief Justice John Marshall's arguments for judicial review in Marbury v. Madison. *Justice Gibson's criticism was limited to claims that judges had the authority to void the acts of coequal branches. While Gibson claimed that state courts could not strike down acts of the state legislature under the state constitution, he acknowledged that state judges were required under the Supremacy Clause to void state laws that were contrary to federal laws or the U.S. Constitution. Does Justice Gibson refute Marshall's argument in* Marbury*? Twenty years later, Justice Gibson finally acknowledged a power of judicial review. In* Norris v. Clymer, *2 Pa. 277 (1845), he explained that he changed his "opinion for two reasons. The late convention [which drafted Pennsylvania's state constitution], by their silence, sanctioned the pretensions of the courts to deal freely with the Acts of the Legislature; and from experience of the necessity of the case." Are these adequate justifications for Justice Gibson's change of heart?*

CHIEF JUSTICE TILGHMAN delivered the opinion of the Court.

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. . . . I adhere to the opinion which I have frequently expressed, that when a judge is convinced, beyond doubt, that an act has been passed in violation of the constitution, he is bound to declare it void, by his oath, by his duty to the party who has brought the cause before him, and to the people, the only source of legitimate power, who, when they formed the constitution of the state, expressly declared that certain things "*were excepted out of the general powers of government, and should forever remain inviolate.*" The people declared, also, on their adoption of the constitution of the United States, "that it should be the supreme law of the land, and that the judges in every state should be bound thereby, anything in the

[1] Robert Lowry Clinton, *Marbury v. Madison and Judicial Review* (Lawrence: University Press of Kansas, 1989); William E. Nelson, *Marbury v. Madison* (Lawrence: University Press of Kansas, 1990).

constitution or laws of any state to the contrary notwithstanding." Upon this subject, I have never entertained but one opinion, which has been strengthened by reflection, and fortified by the concurring sentiments of the Supreme Court of the United States, as well as of lawyers, judges and statesmen of the highest standing in all parts of the United States of America. Nevertheless, the utmost deference is due to the opinion of the legislature; so great, indeed, that a judge would be unpardonable, who, in a doubtful case, should declare a law to be void. . . .

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JUDGE GIBSON, dissenting.

. . . . It seems to me there is a plain difference, hitherto unnoticed, between acts that are repugnant to the constitution of the particular state, and acts that are repugnant to the constitution of the *United States*; my opinion being, that the judiciary is bound to execute the former, but not the latter. I shall hereafter attempt to explain this difference, by pointing out the particular provisions in the constitution of the *United States* on which it depends. I am aware, that a right to declare all unconstitutional acts void, without distinction as to either constitution, is generally held as a professional dogma; but, I apprehend rather as a matter of faith than of reason. . . . But I may premise, that it is not a little remarkable, that although the right in question has all along been claimed by the judiciary, no judge has ventured to discuss it, except Chief Justice MARSHALL, [in *Marbury v. Madison*] and if the argument of a jurist so distinguished for the strength of his ratiocinative powers to be found inconclusive, it may fairly be set down to the weakness of the position which he attempts to defend. . . .

. . . . [W]here the government exists by virtue of a *written* constitution, the judiciary does not necessarily derive from that circumstance, any other than its ordinary and appropriate powers. . . . With us, although the legislature be the depository of only so much of the sovereignty as the people have thought fit to impart, it is nevertheless sovereign within the limit of its powers, and may relatively claim the same pre-eminence here that it may claim elsewhere. It will be conceded, then that the ordinary and essential powers of the judiciary do not extend to the annulling of an act of the legislature. Nor can the inference drawn from this, be evaded by saying that in *England* the constitution, resting in principles consecrated by time, and not in an actual written compact, and being subject to alteration by the very act of the legislature, there is consequently no separate and distinct criterion by which the question of constitutionality may be determined; for it does not follow, that because we have such a criterion, the application of it belongs to the judiciary. I take it, therefore, that the power in question does not necessarily arise from the judiciary being established by a written constitution. . . .

The constitution of *Pennsylvania* contains no express grant of political powers to the judiciary. But, to establish a grant by implication, the constitution is said to be a law of superior obligation; and, consequently, that if it were to come into collision with an act of the legislature, the latter would have to give way. This is conceded. But it is a fallacy, to suppose that they can come into collision *before the judiciary*. . . .

The constitution and the *right* of the legislature to pass the act, may be in collision. But is that a legitimate subject for judicial determination? If it be, the judiciary must be a peculiar organ, to revise the proceedings of the legislature, and to correct its mistakes; and in what part of the constitution are we to look for this proud pre-eminence? Viewing the matter in the opposite direction, what would be thought of an act of assembly in which it should be declared that the Supreme Court had, in a particular case, put a wrong construction on the constitution of the *United States*, and that the judgment should therefore be reversed? It would doubtless be thought a usurpation of judicial power. But it is by no means clear, that to declare a law void which has been enacted according to the forms prescribed in the constitution, is not a usurpation of legislative power. . . . It is the business of the judiciary to interpret the laws, not scan the authority of the lawgiver; and without the latter, it cannot take cognizance of a collision between a law and the constitution. So that to affirm that the judiciary has a right to judge of the existence of such collision, is to take for granted the very thing to be proved. . . .

But it has been said to be emphatically the business of the judiciary, to ascertain and pronounce what the law is; and that this necessarily involves a consideration of the constitution. It does so: but how

far? If the judiciary will inquire into anything beside the form of enactment, where shall it stop? There must be some point of limitation to such an inquiry; for no one will pretend, that a judge would be justifiable in calling for the election returns, or scrutinizing the qualifications of those who composed the legislature.

It is next supposed, that as the members of the legislature have no inherent right of legislation, but derive their authority from the people . . . that acts not warranted by the constitution are not the acts of the people, but of those that do them; and that they are therefore *ipso facto* void. The concluding inference is, in military phrase, the key of the position, and if it be tenable, it will decide the controversy; for a law *ipso facto* void, is absolutely a *nonentity*. But it is putting the argument on bold ground to say, that a high public functionary shall challenge no more respect than is due to a private individual; and that its acts, although presenting themselves under sanctions derived from a strict observance of the form of enactment prescribed in the constitution, are to be rejected as *ipso facto* void for excess of authority. The constitution is not to be expounded like a deed, but by principles of interpretation much more liberal…. Repugnance to the constitution is not always self-evident; for questions involving the consideration of its existence, require for their solution the most vigorous exertion of the higher faculties of the mind, and conflicts will be inevitable, if any branch is to apply the constitution after its own fashion to the acts of all the others. . . .

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It may be alleged, that no such power is claimed, and that the judiciary does no positive act, but merely refuses to be instrumental in giving effect to an unconstitutional law. This is nothing more than a repetition in a different form of the argument,--that an unconstitutional law is *ipso facto* void; for a refusal to act under the law, must be founded on a right in each branch to judge of the acts of all the others, before it is bound to exercise its functions to give those acts effect. No such right is recognized in the different branches of the national government, except the judiciary. . . . A government constructed on any other principle, would be in perpetual danger of standing still; for the right to decide on the constitutionality of the laws, would not be peculiar to the judiciary, but would equally reside in the person of every officer whose agency might be necessary to carry them into execution. . . .

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But do not the judges do a *positive act* in violation of the constitution, when they give effect to an unconstitutional law? Not if the law has been passed according to the forms established in the constitution. The fallacy of the question is, in supposing that the judiciary adopts the acts of the legislature as its own; whereas the enactment of a law and the interpretation of it are not concurrent acts, and as the judiciary is not required to concur in the enactment, neither is it in the breach of the constitution which may be the consequence of the enactment. The fault is imputable to the legislature, and on it the responsibility exclusively rests. . . .

But it has been said, that this construction would deprive the citizen of the advantages which are peculiar to a written constitution, by at once declaring the power of the legislature, in practice, to be illimitable. I ask, what are those advantages? The principles of a written constitution are more fixed and certain, and more apparent to the apprehension of the people, than principles which depend on tradition and the vague comprehension of the individuals who compose the nation, and who cannot all be expected to receive the same impressions or entertain the same notions on any given subject. But there is no magic or inherent power in parchment and ink, to command respect and protect principles from violation. In the business of government, a recurrence to first principles answers the end of an observation at sea with a view to correct the dead reckoning; and, for this purpose, a written constitution is an instrument of inestimable value. It is of inestimable value, also, in rendering its principles familiar to the mass of the people; for, after all, there is no effectual guard against legislative usurpation but public opinion, the force of which, in this country, is inconceivably great. . . . Once let public opinion be so corrupt as to sanction every misconstruction of the constitution and abuse of power which the temptation of the moment may dictate, and the party which may happen to be predominant, will laugh at the puny efforts of a dependent power to arrest it in its course.

. . . . But in regard to an act of assembly, which is found to be in collision with the constitution, laws, or treaties of the *United States*, I take the duty of the judiciary to be exactly the reverse. By becoming parties to the federal constitution, the states have agreed to several limitations of their individual

sovereignty, to enforce which, it was thought to be absolutely necessary to prevent them from giving effect to laws in violation of those limitations, through the instrumentality of their own judges. Accordingly, it is declared in the fifth article and second section of the federal constitution, that "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 *laws* or *constitution* of any *state* to the contrary notwithstanding."

This is an express grant of a political power, and it is conclusive to show that no law of inferior obligation, as every state law must necessarily be, can be executed at the expense of the constitution, laws, or treaties of the *United States*. . . .