JUDICIAL VETO AND THE OHIO PLAN.

Recent periodicals testify to a spirit of dissatisfaction among certain groups of people, particularly the labor party, with what they consider the usurped authority of the courts in declaring legislative acts to be void because of unconstitutionality.

Before we can arrive at an adequate conception of the justice of the power exercised by the Supreme Court to declare statutes unconstitutional we must first understand the historical development of the power and its function in our political system. When we have learned something of the origin of the power we will be better equipped to discuss the advisability of modifying it according to the method employed in Ohio.

When the United States saw fit, in April, 1917, to cast her lot with those nations which sought the overthrow of the German Imperial Government, President Wilson said our sons were going into the field of battle to "Make the World Safe for Democracy." Almost any truly patriotic American if he is two or three generations removed from his European ancestors will unhesitatingly admit that we have by far the most democratic form of government in the world. Yet if we accept Mr. Webster's definition that a "Democracy is a form of government where the supreme power is in the hands of the people and directly exercised by them," we shall be compelled to admit that the English system where the prime minister may be removed at any time when his policy becomes incompatible with the wishes of the people, gives the voters a more immediate and direct influence in the guiding of affairs of state.

No eulogy of the English or any other foreign state is comprehended within the scope of this article. It is intended

merely to point out that our system is in many ways rigid and inelastic. We have our own special brand of liberty which is widely divorced from the caprice of the people. In no other particular is the rigidity of the American system better exemplified than in our famous policy of judicial review. We are the only civilized country in the world today where an act of the legislature is subject to nullification by the Supreme Court. In England there is not even a written constitution, while in France and Switzerland, though a written instrument exists, it is left to the honor of the legislators to determine whether or not a particular act is within the powers granted them by the constitution.

Many plausible arguments might be presented to uphold a system of government which protects human rights against the momentary storm of popular enthusiasm or fanaticism. Perhaps we have a higher type of democracy than any other country. We must leave that discussion to the student of political science. Suffice it to state that the theory of judicial review is a unique idea. It is one which will not bear thoughtless handling because it gives to our whole political system an appearance of ultra conservatism which foreign countries regard as undemocratic. As liberty is almost a fetich with Americans, we dare not accept this most significant doctrine as law unless it can be clearly shown that it was so intended by the framers of the Constitution and is specifically stated or inescapably implied therein.

To find the origin of the present theory we must search even back of the Constitution. The charters of the American colonies gave the citizens certain rights which were enforced by the British government. When the fetters of allegiance to Great Britain were severed after the Revolution, the will of the people as expressed in the Constitution was substituted for the power of the crown. Thus the concept of constitutional supremacy arose originally from the colonial charters, and acts were actually held void in New York,

Rhode Island and Virginia before the validity of any federal statute was impeached.

So powerful was the English doctrine of immunity of legislative enactments that no statute was declared unconstitutional until 1814 when one was so held in the case of *Dupuy v. Wickwire.*[1] The question was most ably discussed by C. J. John Marshall in one of the most famous American cases, *Marbury v. Madison.*[2] In this case we agree in the part of the opinion which cites Article VI, Sec. II of the Constitution as vesting an implied duty upon the judges to uphold the Constitution wherever it might conflict with other statutes or acts of the legislature. The article is 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." There seems no escaping the clear meaning of this article, and when it is considered with the oath which all judges must take to support the Constitution there can be little doubt as to its practical effect. The other arguments in the case relative to written constitutions perhaps carried some weight in 1803, but they are not significant now.

Since *Marbury v. Madison* and the Dred Scott[3] case, the theory of the right of courts to declare acts void has been accepted with few dissenting voices in a long series of decisions both in the Federal and State courts. It is admitted by most authorities that the framers of the Constitution intended this great power to vest in the courts, that it is the imperative implication of the document itself and that the judges of our courts are bound to observe the laws and policies of our people as they find them, showing due regard always to the spirit and true purpose of the framers of the law as nearly as they can construe that purpose or intent.

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1. 1 D. Chipman 237 (Vermont).
2. 1 Cranch, 137.
3. Dred Scott v. Sanford, 19 Howard, 393.

Being familiar as we are with the history of the question we cannot agree with those radicals in our body politic who would wholly dispense with judicial review. We regard it as a welcome safeguard and a necessary conclusion under our present Constitution.

However, we do feel that the power of declaring acts unconstitutional as it exists in the Supreme Court today has been abused and exercised in contravention of the spirit of the law as it was expressed by Thomas Jefferson and John Adams, as it is expressed today and as it has been expressed almost with unanimity of feeling by judges since the question was first mooted.

In theory our government is divided into three separate and distinct branches. To the legislative branch is delegated the making of the laws. The men who compose this branch of the government are much more directly the representatives of the people than are the judges of the Supreme Court. Many of them are as able lawyers as any who sit upon the bench. They are under oath not to violate the Constitution and surely it was never intended that the judicial branch of the government by its implied power should declare their acts void except on the clearest and most palpable violation of the inalienable rights granted by the supreme law of the land.

This view has always been expressed by the courts from the very earliest cases. In *Com. v. Smith,*[4] C. J. Tilgham said: "For weighty reasons it has been assumed as a principle in constitutional construction by the Supreme Court of the United States, by this court and by every other court of reputation in the United States that an act of the legislature is not to be declared void unless the violation of the constitution is so manifest as to leave no room for reasonable doubt."

In 1796 C. J. Chase said:[5] "I would never exercise the

4. 4 Binn., 117 (Penn.)
5. Ware v. Hylton, 3 Dall. 171.

power to declare an act unconstitutional except in a very clear case."

In *Grimball v. Ross*,[6] J. Charlton said: "No nice doubts, no critical exposition of words, no abstract rules of interpretation suitable in a contest between individuals ought to be resorted to in deciding the constitutionality of a statute. This violation of a constitutional right ought to be as obvious to the comprehension of every man as an axiomatic truth, as that the parts are equal to the whole."

The people of Ohio in 1912, influenced by the legal considerations which have just been mentioned amended their constitution of 1852, by a vote of 264,922 to 244,375 to include the following phrase in Article four, Section two: "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 judgment of a court of appeals declaring a law unconstitutional and void."

Ohio is today the only State in the Union which possesses a clause in the constitution directly conferring this power upon the courts. The dissatisfaction with the implied power of the courts as it is exercised in other States can no longer exist in Ohio.

The Ohio plan is distinctly a compromise between two factions and it is becoming more popular there all of the time as a law which eliminates the four to three decision, so justly criticised, and yet affords ample protection for all fundamental rights.

There have been but two cases referring directly to this particular clause of the fourth Article since its enactment.

The first was *State ex rel. v. Fidelity Co.*,[7] and the second was *State ex rel. v. Miller*.[8] In both these cases the constitutionality of the act in question was upheld. In the latter case by a three to three vote, one judge being absent. In

6. T. U. P. Charlt. 175 (Georgia).
7. 96 Ohio St. 259.
8. 87 Ohio St. 30.

both cases the judges stressed the point which had been maintained by their predecessors since the earliest times in Ohio; that to hold an act unconstitutional it must be clearly and beyond any per-adventure in opposition to fundamental rights.

In the Fidelity case the Judge makes some remarks which throw some light upon the reason for the general approval which the law has met with in the courts of the State. He says: "The veto power was exercised almost from the beginning by the Supreme Court of Ohio, but always by an implied power. A vast amount of discussion with a display of much learning was displayed in recent years with regard to the exercise of this implied power, both as to state and federal courts. As to the merits of this controversy we are not called upon to answer, and do not answer, for happily in Ohio our power in this respect, with its pronounced limitations, is one of express grant."

The same motives which prompted the people of Ohio to amend the Constitution might well prompt a similar change in the federal law. To declare any act void after it has been in operation for a year or perhaps even two years must almost of necessity work a great hardship upon a large number of people. It should never be done except in a perfectly clear case.

Since 1814 the United States Supreme Court has held acts of the legislature unconstitutional in nine cases by a vote of five to four. This means that the opinion of a single judge has outweighed the will of the people as expressed through their representatives in nine cases where the unconstitutionality was neither clear nor axiomatic but must of necessity have been very doubtful indeed. Such a policy is directly subversive of the spirit of the law as it is everywhere expressed in our courts.

It will be contended by those who are satisfied with the present system that the law implies only that a majority of the judges shall be of the opinion that the statute

is CLEARLY unconstitutional. The actual cases prove, however, that the decisions have turned on technicalities, and that quibbling and fine discriminations in construction have been resorted to.

Usually when a human being, and even judges are human, becomes convinced that a certain proposition is true or false he is simultaneously of the conviction that the truth or falsity of the proposition is perfectly clear and that any one should be able to see it. Unfortunately the same love of logic and clarity of thought leads his brother in the learned profession just as honestly to the opposite conclusion which is quite as obvious and apparent as the first. The fact is that the only way to eliminate the evil of the doubtful decision in these cases where such a decision was never intended to control is some plan similar to the Ohio scheme or such an amendment as is to be presented by Senator Borah at the next Congress, providing, "That no law shall be declared unconstitutional without the vote of at least seven of the nine judges." There are other solutions offered such as the increase of the judiciary to ten judges. The adoption of one of these suggestions or of some other directed toward the same end, should, we believe, be a matter for the very careful consideration of the legislators when Congress again assembles.

EDWARD SELDEN, '24.