Eakin v. Raub

12 SARGENT & RAWLE 330 (PA. 1825)

John Gibson was a well-regarded judge who served on the Pennsylvania Supreme Court for thirty-seven years and nearly obtained a seat on the U.S. Supreme Court. His dissent in *Eakin v. Raub* is not significant because it came in a case of any great moment—indeed, the facts are not particularly important. But even today scholars maintain that it provides one of the finest rebuttals of Marshall's opinion in *Marbury v. Madison*.[23]

GIBSON, J., dissenting.

I am aware, that a right to declare all unconstitutional acts void, without distinction as to either state or federal constitution, is generally held as a professional dogma; but I apprehend, rather as a matter of faith than of reason. 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; and if the argument of a jurist so distinguished for the strength of his ratiocinative powers be found inconclusive, it may fairly be set down to the weakness of the position which he attempts to defend. . . .

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 preeminence? 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 an act of sovereignty; and sovereignty and legislative power are said by Sir William *Blackstone* to be convertible terms. 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 will not be pretended, that the legislature has not, at least, an equal right with the judiciary to put a construction on the constitution; nor that either of them is infallible; nor that either ought to be required to surrender its judgment to the other. Suppose, then, they differ in opinion as to the constitutionality of a particular law; if the organ whose business it first is to decide on the subject, is not to have its judgment treated with respect, what shall prevent it from securing the preponderance of its opinion by the strong arm of power? The soundness of any construction which would bring one organ of the government into collision with another, is to be more than suspected; for where collision occurs, it is evident, the machine is working in a way the framers of it did not intend. . . .

But the judges are sworn to support the constitution, and are they not bound by it as the law of the land? The oath

23. Melvin I. Urofsky, ed., *Documents of American Constitutional History*, vol. 1 (New York: Knopf, 1989), 183–185.

to support the constitution is not peculiar to the judges, but is taken indiscriminately by every officer of the government, and is designed rather as a test of the political principles of the man, than to bind the officer in the discharge of his duty: otherwise, it were difficult to determine, what operation it is to have in the case of a recorder of deeds, for instance, who, in the execution of his office, has nothing to do with the constitution. But granting it to relate to the official conduct of the judge, as well as every other officer, and not to his political principles, still, it must be understood in reference to supporting the constitution, *only as far as that may be involved in his official duty;* and consequently, if his official duty does not comprehend an inquiry into the authority of the legislature, neither does his oath. . . .

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.

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For these reasons, I am of opinion, that it rests with the people, in whom full and absolute sovereign power resides, to correct abuses in legislation, by instructing their representatives to repeal the obnoxious act. * * * It might, perhaps, have been better to vest the power in the judiciary; as it might be expected, that its habits of deliberation, and the aid derived from the arguments of counsel, would more frequently lead to accurate conclusions. On the other hand, the judiciary is not infallible; and an error by it would admit of no remedy but a more distinct expression of the public will, through the extraordinary medium of a convention; whereas, an error by the legislature admits of a remedy by an exertion of the same will, in the ordinary exercise of the right of suffrage—a mode better calculated to attain the end, without popular excitement. It may be said, the people would probably not notice an error of their representatives. But they would as probably do so, as notice an error of the judiciary; and besides, it is a *postulate* in the theory of our government, and the very basis of the superstructure, that the people are wise, virtuous, and competent to manage their own affairs; and if they are not so, in fact, still, every question of this sort must be determined according to the principles of the constitution, as it came from the hands of its framers, and the existence of a defect which was not foreseen, would not justify those who administer the government, in applying a corrective in practice, which can be provided only by a convention.

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