# "New Glasses for Old Eyes to Use"

RALPH R. MARTIG*

The powers, the jurisdiction, and the decisions of the Supreme Court seem invariably to have been and to be the objects of constant challenge on the part of disaffected groups in one political party or the other. The very nature of the judicial process, which makes it necessary for our court of last resort to determine ultimate rights between the conflicting jurisdictions in our composite Federal-National scheme of government, should convince the skeptic that the Supreme Court cannot hope to escape criticism, opposition, and even resistance on the part of such groups. It is unfortunate that the legislation which must undergo judicial examination is so often of great political, economic, and social importance. That the Court has as often demonstrated rare qualities of courage, in performing its thankless duties, can hardly be denied. Almost as soon as the new Federal Government was formed, the opposition group — the early Republicans, led by Madison and Jefferson — assailed the Court for its failure to hold unconstitutional the act of Congress chartering the First Bank of the United States. Finance was one of the most urgent problems facing the new government, and the Bank Bill[1] was a Hamilton measure designed to aid in establishing the national credit. While the bill was in Washington's hands, awaiting his signature, he asked the Heads of the Departments of State and the Treasury for opinions on the constitutionality of the measure. The two state papers submitted in answer to this request may well be considered the classic expositions of the conflicting theories set forth therein. Jefferson, holding the bill unconstitutional as exceeding the powers expressly delegated to the National Government, ad-

* Ph. D., Illinois; J. D., Michigan; Assistant Professor in History, Ohio State.

[1] 1 Stat. L. 191 (1791).

vanced a doctrine of "strict construction."[2] Hamilton urged a liberal or "loose construction" of the powers delegated in the Constitution.[3]

The failure of the Supreme Court to condemn the Alien and Sedition Laws[4] and the Judiciary Act 1801[5] (Federalist measures) occasioned additional complaints that the Court was indoctrinated with Federalist principles. The Alien and Sedition Acts, drastic pieces of legislation, were vigorously opposed as contrary to the spirit of the Constitution. As a public protest against these acts — and indeed against the entire doctrine of "loose construction"—resolutions were drawn up and submitted to the other States and to Congress by Kentucky and Virginia (1798).[6] The doctrine of states' rights, as developed by Jefferson and Madison, was later quoted by many a State which, in 1798, had resisted the implications of the compact theory. The Judiciary Act, enacted less than three weeks before the end of the Federalist régime, was thought to be an attempt on the part of that party—beaten in the election and consequently deprived of control of the political branches of the Government—to entrench itself in the Judiciary. The Republicans repealed the act (1802), though the measure had some very commendable features.[7]

The Federalists, in turn an opposition party, attacked the Court for failing to hold invalid the treaty of purchase to the Louisiana country. This group, hitherto the staunch advocates

[2] 3 The Writings of Thomas Jefferson, Library ed., 145 (1903).
[3] 3 The Works of Alexander Hamilton, Lodge ed., 180 (1885).
[4] 1 Stat. L. 570 (1798), 596 (1798).
[5] 2 Stat. L. 89 (1801).
[6] The Federalist, Ford ed., app. 679-686 (c. 1898). Authorship of the Kentucky Resolutions has been attributed to Jefferson (then Vice-President of the United States); Madison is recognized as the author of the Virginia Resolutions.
[7] Notably the creation of sixteen new circuit judgeships and the consequent relieving the Supreme Court Justices of the onerous duty of riding circuit. Adams' appointment (under the Act of 1801) of the "midnight judges" was challenged in the case of *Marbury* v. *Madison*, 1 Cranch 137 (1803). For the Act of 1802, see 2 Stat. L. 132 (1802).

of "loose construction", opposed the purchase as an act exceeding the powers expressly delegated to the National Government.[8] It would be difficult to find a clearer instance of the contraditions of politics than this about-face on the part of the Federalists. Perhaps they were only fulfilling their mission as an opposition party, i. e., to oppose. Hostility toward Jefferson's embargo and non-intercourse program[9] was, of course, to be expected from a shipping and commercial center such as Federalist New England. For the same reason, entrance into the War of 1812 (which threatened the English trade) was resisted by the same section. The refusal to comply with the terms of the Militia and Conscription Acts[10] and the assembling of the Hartford Convention (1814)[11] were means calculated to express disapproval of the nation's war policy. The failure of the Court to restrict the exercise of war powers by Congress prompted the usual outcry that the rights of the States were being sacrificed upon the altar of nationalism.

Nor was the Court destined to escape the most determined kind of opposition on the part of the Jacksonian Democrats. The Court's pronouncement of the theory of "divided sovereignty" and the doctrine of "implied powers" (1819)[12] was opposed as giving a carte blanche to Congress which had already chartered the Second Bank of the United States (1816), established a protective tariff (1816), and was then considering the

[8] While Jefferson favored an amendment (to the Constitution) authorizing the purchase, he put aside his constitutional scruples in order to consummate the deal while Napoleon I was willing to sell. X The Writings of Thomas Jefferson, Library ed., 425, 427, 432, 434 (1903).

[9] 2 Stat. L. 451 (1807), 453 (1808), 473 (1808), 528 (1809), 547 (1809). For protests by the New England States, see H. V. Ames, State Documents, nos. 15-22 (1906).

[10] 1 Stat. L. 424 (1795); 2 Stat. L. 787 (1812), 794 (1813). See also, Ames, State Documents, nos. 27-32 (1906).

[11] Ames, State Documents, nos. 35-41 (1906).

[12] Marshall said: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." *McCulloch* v. *Maryland*, 4 Wheat. 316 At. 420 (1819).

matter of internal improvements—acts thought to be beyond the scope of Federal powers. The protective tariff and internal improvements were corner-stones in Clay's great edifice: the American System. The East was to profit from the former; the West from the latter; while the South, sensing a sectional bargain at its expense, opposed both measures. Fired by the preachments of Calhoun, the high priest of state sovereignty, South Carolina undertook through an ordinance of nullification to declare the Tariff of 1832 void and inoperative.[13] Congress held out a sword and an olive branch, and South Carolina chose the latter—preferring the terms of the Compromise Tariff of 1833 to those of the Force Bill.[14] The chief opposition to the Second Bank of the United States came from the Western debtor communities which wanted easy credit and cheap money. Viewing the Bank as the creature of Eastern capitalism, several of the States sought to tax the local branches out of existence. The fact that the Supreme Court invalidated the Maryland law taxing the branch at Baltimore (1819)[15] did not deter an agent of the State of Ohio from forcibly entering the vaults of the branch Bank at Chillicothe and from removing the specie which he found there—the Bank having refused to pay the taxes which the State had assessed.[16] Resolutions adopted by the Ohio Legislature asserted the right of the State to tax all private corporations doing business within the State, regardless of any powers of incorporation which Congress may have exercised.[17] The decision in *McCulloch* v. *Maryland* (1819)[18] may have announced the law, but the proper relation of the National Government to the States and the authority of decisions by the Supreme Court were still matters of dispute.

The sustaining of the hated Fugitive Slave Act (of 1850), on the one hand, and the failure to uphold the Legal Tender

[13] Ames, State Documents, no. 83 (1906).
[14] 4 Stat. L. 629 (1833), 632 (1833).
[15] *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819).
[16] *Osborn* v. *Bank of United States*, 9 Wheat. 738 (1824).
[17] Ames, State Documents, no. 45 (1906).
[18] 4 Wheat. 316.

Acts, on the other, were equally resisted by leaders in the Republican party during the Civil War period. The former decision (*Ableman* v. *Booth*),[19] reversing a decision of the Supreme Court of Wisconsin, resulted in that State voicing a protest and declaration of defiance based on extreme state sovereignty concepts.[20] This attempt to practically nullify the Fugitive Slave Law and to obstruct the enforcement of the judgments of the Federal Courts occurred on the very eve of the Civil War. In *Hepburn* v. *Griswold* (1870)[21] the Supreme Court declared that the Legal Tender Acts, passed during the war and making Greenbacks legal tender, were invalid in so far as they applied to preexisting debts. The Court divided five to three—there being a vacancy on the Court, and there were many persons who felt that the decision should be reversed. At this critical point, Justice Grier resigned and Grant appointed Justices Bradley and Strong to the Bench; the *Hepburn Case* was overruled by a vote of five to four in *Knox* v. *Lee* (1871).[22] The majority judges in the *Hepburn Case* read minority opinions in the *Knox Case*. Grant was said to have deliberately "packed" the Court, though the charges were probably unfounded.

It should be noted that in the above-mentioned attacks upon the Court that body's unpopularity was not based upon its having *restricted* the powers of the National Government. Quite the contrary, the opposition was founded upon the fact that National powers had been upheld to the great curtailment of the rights of the States. Prior to the Civil War, in only two decisions were acts of Congress held unconstitutional by the Supreme Court of the United States.[23]

[19] 21 How. 506 (1859). For the Fugitive Slave Act and the Legal Tender Acts, see 9 Stat. L. 462 (1850); 12 Stat. L. 345 (1862), 709 (1863).

[20] Ames, State Documents, no. 148 (1906).

[21] 8 Wall. 603.

[22] 12 Wall. 457.

[23] *Marbury* v. *Madison*, 1 Cranch 137 (1803), held sec. 13 of the Judiciary Act of 1789 invalid; *Scott* v. *Sandford*; 19 How. 393 (1857), declared sec. 8 of the Missouri Compromise Act (1820) to be unconstitutional.

Attacks upon the Supreme Court may be attributed largely to the fact that neither of its two most important powers are granted in express terms in the Constitution. The author refers, of course, to the Court's powers to pass upon the constitutionality of State and Federal legislation. The former power, conferred by Congress in section 25 of the Judiciary Act of 1789,[24] was held by the Court to be a necessary power in order that Article VI, clause 2, of the Constitution might be made effective.[25] The power of the Court to pass upon the validity of congressional legislation was established by the Court itself (in 1803) as an inherent and necessary judicial function. As stated by Marshall, in *Marbury* v. *Madison*:

"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 conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is 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."[26]

Is this then the language of usurpation?

While it is true that the Constitution contains no express grant of the power to declare acts of Congress unconstitutional, a careful reading of the debates in the Constitutional Convention will lead one to the conclusion that the framers assumed that this power would be exercised by the Court. The Randolph Resolutions contained a provision for a Council of Revision to be composed of the Executive and "a convenient number of the National Judiciary."[27] The Council was to exercise a general

[24] 1 Stat. L. 73 (1789).

[25] *Cohens* v. *Virginia*, 6 Wheat. 264 (1821).

[26] 1 Cranch 137 at 176 (1803).

[27] 1 The Records of the Federal Convention of 1787, Farrand ed., 21 (1911). The Randolph Resolutions (Virginia Plan) were introduced May 29, 1787. See Resolution VIII.

veto power over the National Legislature which might, however, override the veto by a . . .[28] vote in both branches. Elbridge Gerry (Massachusetts), whose substitute motion giving the veto to the Executive (alone) was adopted, expressed an opinion that the Judges had a sufficient check against encroachments by the National Legislature—that the Court's exposition of the laws involved "a power of deciding on their Constitutionality."[29] Later attempts by James Wilson (Pennsylvania) and James Madison (Virginia) to associate the Judges with the Executive in the exercise of the veto power were unsuccessful.[30] In opposing one such motion, Luther Martin (Maryland) said:

"And as to the Constitutionality of laws, that point will come before the Judges in their proper official character. In this character they have a negative on the laws. Join them with the Executive in the Revision and they will have a double negative."[31]

An able argument for including the Judges in the Council was advanced by George Mason (Virginia). He admitted that the Judges had the power to declare an unconstitutional law void, but he also pointed out that much constitutional legislation might be unjust and oppressive and the Court be powerless to strike it down unless the Judges were made a part of the Council.[32]

While the proposed Constitution was before the States, arguments in favor of (and in opposition to) ratification by the States were based upon the Court's powers of judicial review. Oliver Ellsworth, explaining the document to the Connecticut Convention (Jan. 7, 1788), said:

[28] The blank appears in the original resolution; the number was to be decided upon later.

[29] 1 The Records of the Federal Convention of 1787, Farrand ed., 97 (1911). To facilitate reading, parentheses which appear in the Farrand edition have been here omitted.

[30] 1 The Records of the Federal Convention of 1787, Farrand ed., 104 (1911); 2 The Records of the Federal Convention of 1787, Farrand ed., 73, 298 (1911). The motions were offered on June 4, July 21, and August 15 by Mr. Wilson or Mr. Madison.

[31] 2 The Records of the Federal Convention of 1787, Farrand ed., 76 (1911).

[32] 2 The Records of the Federal Convention of 1787, Farrand ed., 78 (1911).

"This Constitution defines the extent of the powers of the general government. If the general legislature should at any time overleap their limits, the judicial department is a constant check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who to secure their impartiality, are to be made independent, will declare it to be void. On the other hand, if the states go beyond their limits, if they make a law which is a usurpation upon the federal government the law is void; and upright, independent judges will declare it to be so."[33]

In an address to the Maryland Legislature (Nov. 29, 1787), Luther Martin opposed this same power as a menace to the States. He said:

"These courts [Federal], and *these only*, will have a right to decide upon the laws of the United States, and all questions arising upon their construction, and in a judicial manner to carry those laws into execution; to which the courts, both superior and inferior, of the respective States, and their judges and other magistrates, are rendered incompetent. To the courts of the general government are also *confined* all cases in law or equity, arising under the proposed constitution, and treaties made under the authority of the United States . . . . Whether therefore, any *laws* or *regulations* of the *Congress*, or any *acts* of its *Presidents* or *other officers*, are *contrary to*, or not *warranted* by the constitution, rests *only* with the judges, who are *appointed* by Congress to *determine;* by whose determinations *every State* must be *bound*."[34]

In an attempt to discredit the arguments of the Anti-Federalist group (led by Governor Clinton) in New York, Madison, Jay, and Hamilton joined forces in preparing a remarkably able defense of the proposed Constitution. The following explanation is by Hamilton:

"Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power . . . . The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact,

[33] 3 The Records of the Federal Convention of 1787, Farrand ed., 240 (1911).

[34] 3 The Records of the Federal Convention of 1787, Farrand ed., 220 (1911).

and must be regarded by the judges, as a fundamental law. It therefore belongs 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; or, in other words, the Constitution ought to be preferred to the statute; the intention of the people to the intention of their agents."[35]

These statements, made by men who were active in the framing of the Constitution, ought to convince the "Doubting Thomases" that the limitations on the powers of Congress were not intended to be left to the sole determination of that body.

Opposition to the decisions of the Court has not been confined to mere expressions of protest. Proposals to provide some check or curb on the Court's power to invalidate congressional legislation have been made from time to time. There has, however, been a singular lack of agreement as to how this check is to be effected. The most extreme proposal, of course, is to deprive the Court completely of its powers of judicial review.[36] The obvious defect in this plan is that the power of review would still remain in the lower Federal courts and in the State courts, and instead of one interpretation of the Constitution there might be many. Whether an amendment to the Constitution would be necessary in order to deprive the Court of its entire appellate jurisdiction is a matter for speculation.[37] The

[35] The Federalist, Ford ed., No. 78, pp. 520-521 (c. 1898). Marshall had quoted from The Federalist, No. 78, in his opinion in *Marbury* v. *Madison*, 1 Cranch 137 (1803)—the case which established the doctrine of judicial review of acts of Congress. This fact led Mr. Ramsay (W. Virginia) to remark in the House (July 12, 1935): "Today we are, in the final analysis, governed by a theory of government that was supposed to have died with the Federalist Party, but we now feel the dead and withered hand of Alexander Hamilton, directing through our Supreme Court, the policies of every administration, regardless of which political party may be in power." 79 Cong. Rec. 11097 (1935).

[36] Charles Warren, Congress, The Constitution, and The Supreme Court, chaps. V and VI (1935). These chapters contain an excellent discussion of the various proposals to curb the Court's powers of judicial review.

[37] For a discussion of the congressional power to prevent the exercise of judicial review, through the withdrawal of the grant of appellate jurisdiction, see 34 Michigan Law Review, 650-670 (March, 1936).

decision in *ex parte McCardle* (1868),[38] however, is clear authority for the contention that Congress can deprive the Court of appellate jurisdiction in any case—even though the Court has taken jurisdiction, has heard the argument, and has taken the case under advisement. This power is vested in Congress by Article III, section 2, clause 2 of the Constitution which reads: "In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make." This is a dangerous power, and one capable of upsetting the tripartite balance, should Congress see fit to abuse it. That Congress has but once (in 1868) undertaken to misuse this grant of power is a happy commentary on the soundness of our basic principles of government.

Another proposed check, requiring an amendment to the Constitution, would enable Congress to override the "veto power" (so-termed) of the Supreme Court. The adoption of this means was urged by Senator LaFollette (Wisconsin) in an address before the American Federation of Labor, in Cincinnati (1922).[39] The Supreme Court had (the previous month) ruled the Child Labor Tax Act unconstitutional, in *Bailey* v. *Drexel Furniture Co.* (1922).[40] It was to enable Congress to override this "usurped judicial veto", that Senator LaFollette proposed that Congress be given power to make an act constitutional simply by repassing it. The proposal was later debated in the Senate. It is worth remarking that Senator Kellogg (Minnesota) opposed the plan as a menace to the existing system of checks and balances.[41] The real danger, of course, lies in the abuse of such a power. For under the terms of the proposed amendment, Congress could (by passing an act twice) alter the Constitution, limit or abolish any department, or change the form of government.

[38] 7 Wall 506.
[39] 62 Cong. Rec. 9081 (1922).
[40] 259 U.S. 20.
[41] 62 Cong. Rec. 9073 (1922).

A third proposal has as its goal a congressional act requiring that seven out of the nine Justices concur in pronouncing an act of Congress unconstitutional. In February, 1923, and again in December, Senator Borah (Idaho) introduced such a bill in the Senate. Both of the bills were referred to the Committee on the Judiciary, but neither was reported out of the Committee.[42] During the debate on Senator Black's (Alabama) "6-hour day or 5-day week" bill (April, 1933), Senator Borah expressed a doubt as to the value of 5-to-4 decisions as a guide for future legislation. He said:

"I desire to repeat that I have never felt myself bound by a 5-to-4 decision when it comes to legislating . . . . I am perfectly willing to have the question resubmitted to the Supreme Court of the United States in view of these divided decisions."[43]

To which Senator Barkley (Kentucky) replied:

"The 5-to-4 decision is not the thing that bothers me. It is a perfectly legal and binding decision, just as a law passed by the Senate and the House by a majority of one is just as binding on the people as if it had been passed unanimously . . . . I have just as much respect for a decision of the Supreme Court whether it is unanimous or whether it is rendered by a majority of 5 to 4, because it is binding; and under our theory of the rule of the majority, I think the Court is just as much justified in having its decisions by a majority of one respected as we would be justified in having the people respect our statutes which are passed by a majority of one."[44]

In the five-year period from 1819 to 1824, Marshall performed the labors of a juristic Hercules. His opinions in the *Dartmouth College Case* (1819),[45] *McCulloch* v. *Maryland* (1819),[46] *Cohens* v. *Virginia* (1821),[47] *Osborn* v. *Bank of the United States* (1824),[48] and *Gibbons* v. *Ogden* (1824)[49] as-

[42] 64 Cong. Rec. 3004 (1923); 65 Cong. Rec. 303 (1923).
[43] 77 Cong. Rec. 1185 (1933).
[44] 77 Cong. Rec. 1185 (1933).
[45] 4 Wheat. 518.
[46] 4 Wheat. 316.
[47] 6 Wheat. 264.
[48] 9 Wheat. 738.
[49] 9 Wheat. 1.

serted the competence of the National Government to act within its sphere of sovereignty, and laid down decisive limitations on the States. During this Golden Age of expanding nationalism, Kentucky too had its cause célèbre. Troublesome controversies arising out of the desperate condition of land titles had prompted the Kentucky Legislature to enact a measure called the "Occupying Claimant Law" for the settlement of conflicting land claims. This act provided that no claimant, though he prove title to the land in dispute, should be awarded possession until he compensate the occupier for all improvements on the land. The State courts upheld the act, but in 1819 the question of constitutionality was raised in the Federal Circuit Court. The case of *Green* v. *Biddle*[50] reached the Supreme Court in 1821; Justice Story delivered the opinion of the Court, and held that the Kentucky law was unconstitutional. When the news of this decision reached the West, all Kentucky was aflame. Henry Clay was directed to ask for a reargument of the case, and in 1822 the case was argued a second time. The following year (Feb. 27, 1923) the Court rendered its decision; it affirmed its former holding and again declared that the act was unconstitutional. Marshall refused to sit in the case, and Todd and Livingston were prevented by ill-health from taking any part in the decision. Thus the burden of deciding the case fell upon four of the seven Justices, and, as Johnson dissented, the Kentucky law was declared unconstitutional by but three Justices—less than a majority of the membership of the Court. The Court's first decision in *Green* v. *Biddle* (March, 1821) prompted Senator Johnson (Kentucky) to propose an amendment to the Constitution (Dec. 12, 1821) depriving the Supreme Court of appellate jurisdiction over cases involving the validity of State constitutions or statutes. He proposed that the Senate be given this appellate jurisdiction.[51] Some weeks later (Jan. 15, 1822), Senator Holmes (Maine) moved a substitute amendment providing that any Federal judge (or Justice) be

[50] 8 Wheat. 1.

[51] Annals of Cong., 17 Cong., 1 Sess., col. 23 (1821-1822).

removed from office by the President of the United States, upon the address of both Houses of Congress.[52] In December, 1823, Senator Johnson suggested an inquiry into the advisability of amending the Constitution in order to require that at least seven Justices (the membership of the Court was seven) concur in any opinion "which may involve the validity of *the laws of the United States*, or of the States respectively."[53] Similar amendments were proposed, by Kentucky's representatives, in 1824, 1825, 1826, and 1829.[54] The requisite number of concurring Justices was variously fixed at seven, five out of seven, or two-thirds of the membership of the Court. Senator Rowan (April 10, 1826) proposed the only amendment comprehensive enough to include acts of Congress within its scope.[55]

In the heyday of Reconstruction, when the Radicals in Congress were overriding all opposition, a motion was carried in the House to amend a bill referred to them by the Senate (January, 1868). The amendment provided that two-thirds of the Justices of the Supreme Court must concur in declaring a Federal law invalid. During the debate in the House, Mr. Williams (Pennsylvania) proposed that a unanimous Court be required to invalidate Federal legislation. Mr. Maynard (Tennessee) suggested that this proposal be moderated so as to require the concurrence of only three-fourths of the Court. The amended bill died in the Senate.[56]

Returning now to the Borah proposal, it should be noted that the Senator's bill made no provision for an amendment to the Constitution. The question may fairly be raised whether such an amendment would not be necessary. The right of a mere majority of the Court to decide a case might well fall

[52] Annals of Cong., 17 Cong., 1 Sess., col. 114 (1821-1822).

[53] Italics mine. Annals of Cong., 18 Cong., 1 Sess., col. 28 (1823-1824).

[54] Annals of Cong., 18 Cong., 1 Sess., cols. 336, 2513, 2635 (1823-1824); Register of Debates, 18 Cong., 2 Sess., col. 365 (1825); Register of Debates, 19 Cong., 1 Sess., col. 423 (1826); Register of Debates, 19 Cong., 2 Sess., col. 775 (1826-1827); Register of Debates, 20 Cong., 2 Sess., col. 152 (1828-1829).

[55] Register of Debates, 19 Cong., 1 Sess., cols. 423, 424 (1825-1826).

[56] Cong. Globe, 40 Cong., 2 Sess., pp. 478, 479, 489, 503 (1868).

within the Court's judicial power. And while the Constitution authorizes the Congress to regulate and make exceptions to the appellate jurisdiction of the Court (Art. III, Sec. 2, Cl. 2), the judicial power as vested in the Court is absolute and free from control by Congress (Art. III, Sec. 1).[57]

President Roosevelt's present plan for the reorganization of the Federal judicial system suggests yet another means for providing a curb on the Supreme Court. By enlarging the membership it is possible to "pack"—or, in light of the current controversy, "unpack" if you prefer—the Court in order to insure that a majority will sustain any and all legislation which the party (politically dominant at the time) may enact. The remarkable feature of this device is that it can be accomplished through an act of Congress. While there is nothing sacred about the number " nine"—the number of Justices on the Supreme Bench has been changed five times since the Court was created[57a]—one may fairly ask whether an independent Court is not essential to the protection of minority rights. Hamilton, writing in *The Federalist*, made a statement which is particularly apropos of this. He said:

"This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men or the influence of particular

[57] In discussing the bill, Senator Borah was of the opinion that the power of Congress to "regulate" the appellate jurisdiction of the Supreme Court was warrant enough for the bill. 64 Cong. Rec. 3959 (1923).

[57a] The Supreme Court, as originally created, consisted of six justices. Congress found it expedient, from time to time, to increase the membership of the Court, until, in 1863, the Court comprised ten justices. It is interesting to note that, in 1866, Congress provided: "That no vacancy in the office of associate justice of the supreme court shall be filled by appointment until the number of associate justices shall be reduced to six; and thereafter the said supreme court shall consist of a chief justice of the United States and six associate justices, any four of whom shall be a quorum." 14 Stat. L. 209 (1866). This act was a political measure designed to prevent President Johnson from filling any vacancies upon the supreme bench. When Johnson's term of office had expired, Congress increased the number of justices to nine (1869); since that time, the number has not been changed. 1 Stat. L. 73 (1789); 2 Stat. L. 421 (1807); 5 Stat. L. 176 (1837); 12 Stat. L. 794 (1863); 16 Stat. L. 44 (1869).

conjunctures sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government and serious oppressions of the minor party in the community."[58]

Other remarks of Hamilton are worth pondering. After referring to "that fundamental principle of republican government which admits the right of the people to alter or abolish the established Constitution whenever they find it inconsistent with their happiness," he continued:

"yet it is not to be inferred from this principle that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions in the existing Constitution, would on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape than when they had proceeded wholly from the cabals of the representative body. Until the people have by some solemn and authoritative act annulled or changed the established form, it is binding upon themselves collectively as well as individually; and no presumption, or even knowledge of their sentiments can warrant their representatives in a departure from it, prior to such an act. But it is easy to see that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community."[59]

In his message to Congress (Feb. 5), President Roosevelt employed many a well-turned figure of speech. His challenging statement that:

"Modern complexities call also for a constant infusion of new blood in the courts, just as it is needed in executive functions of the Government and in private business. A lowered mental or physical vigor leads men to avoid examination of complicated and changed conditions. Little by little, new facts become blurred through old glasses fitted, as it were, for the needs of another generation; older men, assuming that the scene is the same as it was in the past, cease to explore or inquire into the present or the future."[60]

[58] The Federalist, Ford ed., No. 78, p. 523 (c. 1898).
[59] See Note 58, *supra* pp. 523-524.
[60] The United States News, Feb. 8, 1937, p. 6.

is fairly breath-taking in its implications. At the risk of being thought presumptuous the writer would like to suggest that if the people, through a carefully-worded amendment, would write their will into the Constitution, it might aid materially in providing new glasses for old eyes to use. The amending process is not of necessity a dilatory one; the most recent amendment (Twenty-first) was ratified in less than ten months, while the Twentieth Amendment was adopted in less than a year.[61] While it is true that thirteen States can defeat a proposed amendment, and that consequently it is possible for a minority of the people to prevent the majority from working its will, it should be called to mind that our frame of government is Federal in part, and National in part. The small States (supporting the New Jersey Plan)[62] threatened to withdraw from the Constitutional Convention unless they were given an equal voice in the National Legislature. The result was a compromise giving the small States equal representation in the Senate, but allowing the large States to control the House. Likewise, the provision that an amendment be ratified by the States was a concession to the small States who feared domination by their more populous neighbors. Perhaps the time has come when we, as a people, should raze the Federal portion of our governmental structure and rebuild wholly along National lines. If so, let the change be orderly, and not by indirection.

If the President's proposal be read as an effort directed primarily toward the creation of a Court which will sustain New Deal legislation, then any discussion of a proper age for the retirement of the Justices is so much surplusage. The people have the right and the power to alter and interpret the rules of government. The writer concludes that a proper use of the amending process is preferable to a "packed" Court.

[61] U. S. C. A., Constitution, part 3, pp. 175-177 of Cumulative Annual Pocket Part (1936).

[62] The Records of the Federal Convention of 1787, Farrand ed., 242 (1911).