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THE SUPREME COURT AND UNCONSTITUTIONAL ACTS OF CONGRESS

THE power of the Supreme Court of the United States to supervise Congressional legislation has been so generally assumed in the recent discussions, both in and out of Congress, of the proposed Rate Bill, and is indeed so apparently settled today that it becomes of interest to inquire into the intention of the Constitutional Fathers in this matter. Did the Fathers intend that the federal judiciary should have the right to declare an act of Congress of no effect because transgressing constitutional limits? It does not detract from the interest of this question that two recent authorities who attempt to answer it—without, however, going into the subject at any length—express opposing opinions. Thus Mr. Cotton, the editor of the *Constitutional Decisions of John Marshall,*[1] says with reference to Marshall's decision in *Marbury* v. *Madison*—decided in 1803:—"That opinion is the beginning of the American system of constitutional law. In it Marshall announced the right of the Supreme Court to review the constitutionality of the acts of the national legislature and the executive, the coördinate branches of the government. * * * Common as this conception of our courts now is, it is hard to comprehend the amazing quality of it then. No court in England had such a power, there was no express warrant for it in the words of the Constitution; the existence of it was denied by every other branch of the government and by the dominant majority of the country. Moreover, no such power had been clearly anticipated by the framers of the Constitution, nor was it a necessary implication from the scheme of government they had established." On the other hand, Professor McLaughlin in his *Confederation and the Constitution,*[2] though he concedes that "it is hard to speak with absolute assurance," deduces the power in question with considerable confidence from that clause of the Constitution which extends the judicial power of the United States to all cases "arising under this Constitution." "Certainly," he says, "the Constitution was by this clause recognized and proclaimed as law and we may at least assert that by force of logic, if not because of the conscious purpose of the members of the convention, this power was bestowed,—the power to declare of no effect an act of Congress contrary to the law of the land."

[1] *The Constitutional Decisions of John Marshall:* Edited by Joseph P. Cotton of the New York Bar. 2 vs. Putnam's Sons, 1905. Cit. I, Intro: pp. xii-xiii.

[2] *The Confederation and the Constitution:* Vol. X of the *American Nation.* Harper & Brothers, 1905. Cit. p. 250.

It is evident that the issue thus presented may be clarified by analysis. Our authors are really at variance at three distinct points: 1—Did the framers of the Constitution bestow in terms the power in question upon the federal judiciary? 2—If they did not, did they yet believe that the judiciary would have the power, simply by virtue of its position in relation to the other departments of government, and particularly in relation to a rigid Constitution? 3—Was there more than one way of conceiving the federal judiciary's position in these relations? Let us consider these questions in the order in which they are propounded.

As mentioned above, Professor McLaughlin ventures the opinion that power to supervise federal legislation and to nullify it when inconsistent with the Constitution was expressly bestowed upon the federal judiciary by the clause, "Cases * * * arising under this Constitution," of Art. III, Sec. 2, of that instrument. In this connection he cites Brinton Coxe's *Judicial Power and Unconstitutional Legislation*,[3] a work highly polemical in tone and written with the avowed purpose of proving that "the framers of the Constitution actually intended * * * that the United States Supreme Court should be competent in all litigations before it to decide upon the questioned constitutionality of United States laws, and to hold the same void when unconstitutional"; that this power rests, not upon mere "inference or implication," but upon "express texts" of the Constitution. But one "express text" is adduced: viz., the one quoted by Professor McLaughlin. Coxe's argument in behalf of his contention is as follows: "On August 6th that committee [of five] reported the draft of a Constitution. The beginning of the 2nd section of its 11th Article reads: 'The jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the legislature of the United States.' On August 27th, when the 11th Article of the draft Constitution was under consideration, and the above text was reached, the following proceedings took place, as reported by Madison: 'Dr. Johnson moved to insert the words "this Constitution and" before the word "laws." Mr. Madison doubted whether this was not going too far, to extend the jurisdiction of the court *generally to cases arising under the Constitution* [Coxe's italics], and whether it ought not to be limited to cases of a judiciary nature. *The right of expounding the Constitution, in cases not of this nature, ought not to be given to that department.* The motion of Dr. Johnson was agreed *nem. con., it being generally supposed that the jurisdiction given was constructively limited to cases of a judicial nature.*' "

[3] "Especially Pt. IV," i. e., pp. 294 ff: the work appeared in Phila.: 1893.

The above argument is open to disparagement at several points. In the first place, the Johnson amendment was carried *nem. con.*, and almost without discussion, a rather suspicious circumstance in connection with a proposition of so great importance as Mr. Coxe would fain make it. In the second place, it is difficult to see what Mr. Coxe adds to the clause, "cases under the Constitution," by laboriously drawing it from Madison's *Notes*, instead of going directly to the Constitution for it. For, in the third place, the clause itself needs elucidation, and until that need is met, there is a plain step of the flimsiest kind of conjecture between the fact that such a clause was incorporated in the Constitution and the *contention* which Mr. Coxe makes that, the federal judiciary was thereby vested with the right to veto unconstitutional acts of Congress. What then does the phrase, "cases * * * arising under the Constitution" mean?

Fortunately Madison expounded this very phrase in the Virginia Convention.[4] "It may be a misfortune," said he, "that in organizing any government, the explication of its authority should be left to any of its coördinate branches. There is no example in any country where it is otherwise. There is a new policy in submitting it to the judiciary of the United States. That cases of a federal nature will arise, will be obvious to every gentleman, who will recollect that the states are laid under restrictions; and that rights of the Union are secured by these restrictions; they may involve equitable as well as legal controversies. With respect to the laws of the Union, it is so necessary and expedient, that the judicial power should correspond with the legislative, that it has not been objected to. With respect to treaties, there is a peculiar propriety in the judiciary expounding them." A careful inspection of the order in which Madison develops his thought in the above quotation will reveal that his idea of "cases under the Constitution" was that they were "cases of a federal nature," arising because of unwarranted acts not of Congress but of the states. This analysis, moreover, is conclusively confirmed by Hamilton's words in *Federalist No. LXXX.*[5] "It has been asked," he writes, "what is meant by 'cases arising under the Constitution,' in contradistinction from those 'arising under the laws of the United States'? The difference has already been explained. All restrictions upon the authority of the state legislatures furnish examples of it. They are not, for instance, to emit paper money; but the interdiction results from the Constitution and will have no connection with any law of the United States." In a word, what

[4] *Writings* (Hunt) V., pp. 217-18.

[5] Dawson's Edition.

was effected by the incorporation of the clause in question, in the Constitution, was the bestowal upon the federal government of a veto, to be unobtrusively[6] exercised through its judicial department, upon certain categories of state legislation. How vastly different this veto of the central government upon the legislation of the local law-making bodies is—even though it is exercised by the judicial organ of the central government—from a veto upon the acts of any legislature, whether central or local, by a merely coördinate judiciary—it is hardly necessary to dwell upon at length. Only imagine the judicial committee of the British Privy Council, which vetoes a number of acts of colonial legislatures every year, interposing its veto upon an act of Parliament! Moreover, the distinction I am pointing must have been present to the minds of the framers of the Constitution, who as colonists had seen many of their legislative projects fall before the veto of the home government, but were only too painfully aware of Parliament's claims to supremacy.

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It is significant, with reference to the discussion just closed, that those who expressed themselves in the Constitutional Convention, as of the opinion that the federal courts would have the right to declare unconstitutional acts of Congress null and void, all did so before the Johnson amendment was ever framed. On June 4[7] a proposition was brought forward in the Convention that, the judges of the Supreme Court, acting with the executive, should comprise a council of revision of Congressional legislation. In speaking to this proposition, Gerry of Massachusetts, Wilson of Pennsylvania, Mason of Virginia, and Luther Martin of Maryland all asserted at various times and with various qualifications, the power of the Supreme Court to sit in judgment upon the constitutionality of Congressional legislation. Gerry, instancing a similar power in state judges with reference to state legislation, saw in this attribute of the courts a "check against encroachments on their own department." Wilson "thought there was weight in this observation." Martin and Mason used the broadest terms. Said the former: "As to the constitutionality of laws, that point will come before the judges in their proper character. In this character they have a negative on the laws." Said the latter: "They [the judges] could declare an unconstitutional law void."

These assertions, however, did not go unchallenged. Bedford of Delaware declared himself "opposed to every check on the legislature, even the council of revision. * * * The representatives of

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[6] Vd. Madison to Jefferson: October 24, 1787.

[7] Vd. Madison: *Writings* (Hunt), Vols. III and IV (Index in Vol. IV).

the people were the best judges of what was for their interest, and ought to be under no external control whatever. The two branches would produce a sufficient control within the legislature itself." Equally positive was Mercer of Maryland's declaration August 15, when the matter of a council of revision came up for final consideration: "He disapproved of the doctrine that the judges as expositors of the Constitution should have the authority to declare a law void. He thought laws ought to be well and cautiously made and then be uncontrolable." "Mr. Dickinson [of Delaware] was strongly impressed with the remark of Mr. Mercer as to the power of the judges to set aside the law. He thought no such power ought to exist. He was at the same time at a loss what expedient to substitute." Apparently the exact trend of Dickinson's words is uncertain. On the other hand, Gerry, in the utterance above quoted, limited the supervisory power of the federal judiciary to a self-defensive veto against Congressional encroachment; while the tone of Wilson, in accepting even this restricted suggestion, is that of a man weighing a novel idea.

In a word, the debates of the convention reveal a diversity of opinion on the question under review. The same is true of the discussions of the Constitution that succeeded the convention.[8] On the one hand, Wilson—now no longer in doubt—in the Pennsylvania convention, Marshall in the Virginia convention, Ellsworth in the Connecticut convention, and Hamilton in the New York convention, as well as in *Federalist No. LXXVIII,* argue at length for the right of the Supreme Court to nullify unconstitutional acts of Congress. On the other hand, they *do argue,* and Hamilton in particular, in the above mentioned number of the *Federalist,* expounds the theory of judicial paramountcy—for such we may fairly designate it—with a degree of elaboration that is at least significant. Moreover, the weighty authority of Madison is, I think, demonstrably on the other side. Thus in the Virginia convention, confronted with the question as to what remedy would be available in case the federal government should make a treaty in excess of constitutional warrant, he responded that the remedy would be the impeachment of those who negotiated the treaty and the retirement of those who ratified it.[9] Likewise, when in *Federalist No. XLV* he discussed the possibility of the federal government's embarking upon "unwarrantable measures," he again suggests a purely political remedy—one which, by the way, is a plain hint of his famous Virginia Resolutions of 1798. "The disquietude of the people," he says, "their

[8] Vd.: principally Elliot's Debates Vols. II-IV.

[9] *Writings* (Hunt) V. p. 215.

repugnance and, perhaps, their refusal to coöperate with the officers of the Union; the frowns of the executive magistracy of the state; the embarrassments created by legislative devices * * * would oppose * * * difficulties not to be despised." Moreover, "ambitious encroachments of the federal government * * * would be signals of general alarm. Every government would espouse the common cause. A correspondence would be opened. Plans of resistance would be concerted." This idea of state "interposition" to oppose unwarrantable acts of the federal government seems, therefore, to have been a favorite notion of Madison's from the outset, and apparently connotes a quite different idea of the judiciary from that which sustains the paramountcy of the courts. Indeed, when, eleven years later, Madison again came forward with the notion of "interposition," the sole answer returned to his suggestion by several of the Northern legislatures[10] was to assert the power of the Supreme Court to overturn unconstitutional acts of Congress. But this is anticipating. To return to the period of the adoption of the Constitution, we have the following piece of evidence from Madison's pen, in October, 1788:[11] "In the state constitutions," he says, in a letter to John Brown of Kentucky, "and indeed in the federal one also, no provision is made for the case of a disagreement in expounding them; and as the courts are generally the last in making the decision it results to them, by refusing or not refusing to execute a law, to stamp it with its final character. This makes the judicial department paramount in fact to the legislature, which was never intended and can never be proper." Whatever weight may be accorded Madison's testimony regarding "the intention" of—presumably—the framers of the state and federal constitutions, the above quoted passage certainly makes plain his own position, as also it does, once more, the lack of unanimity among the framers of the Constitution as to the scope of judicial power in dealing with legislation.

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This exhausts all evidence that bears directly upon our second main topic, but it ought to result in a farther illumination of the view entertained in 1787 of the rôle of the judiciary as such, to attend briefly to Madison's and Gerry's testimony as to the growing disposition of state courts to set themselves up as the chosen guardians of the state constitutions, against legislative encroachments. Already, at the time of the federal convention, the courts—and in most cases the Supreme Courts—of five states had set up a claim of

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[10] Vd.: particularly the Resolutions of Rhode Island's Legislature.

[11] *Letters and Writings*, etc.: 1865: Vol. I, p. 195.

right to pass upon the validity of state legislation: that of Virginia in the case of *Commonwealth* v. *Caton et al.*, 1782; that of New York in *Rutgers* v. *Waddington*, in 1784; that of New Jersey in *Holmes* v. *Walton*, in 1785; that of Rhode Island in *Trevett* v. *Weeden*, in 1786; and that of North Carolina in *Bayard* v. *Singleton*, in 1787, shortly after the adjournment of the Constitutional Convention. Only in the last two cases, however, were state laws actually nullified on the ground of their incompatability with the state constitution; for though a law was overturned by the decision in *Rutgers* v. *Waddington*, it was on the ground of its violation of natural reason and natural rights. But though no law was overturned, the entire ground upon which the theory of judicial paramountcy rests, under a rigid constitution, seems to have been canvassed by the court in the very first of these decisions.[12] "If the whole legislature * * * should attempt to overleap the bounds prescribed to them by the people," said JUSTICE WYTHE, "I * * * will meet the united powers at my seat in this tribunal and, pointing to the Constitution, will say to them, here is the limit of your authority; and hither shall you go, but no further."

So much for the initial statement of this doctrine and its development at the hands of the state judiciary up to the time of the federal convention. It did not go unchallenged in the states any more than it did in the Convention itself. Thus Pendleton, the president of the Virginia court, designated the issue raised by his confréres, "a tremendous question, the decision of which might involve consequences to which gentlemen may not have extended their ideas." The Rhode Island legislature removed the judges for their presumption in *Trevett* v. *Weeden*. Iredell's elaborate argument[13] in justification of *Bayard* v. *Singleton* were called forth by a general protest that the decision made the state subject, not to the representatives of the people but to three individuals; and among the protestants were not only Iredell's associates on the bench but also Richard Dobbs Spaight, one of North Carolina's delegates to the Constitutional Convention. Finally, each of these decisions was succeeded by a formal repeal of the law that had been visited with the judicial condemnation; and in 1788, the Virginia court, while still holding to its language of six years earlier, contented itself with recommending, in the *Case of the Judges*,[14] the repeal of the obnoxious statute. It cannot be said that the doctrine of judicial paramountcy was yet established in 1789: a relatively novel doctrine,

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[12] 4 Call (Va.) 5.

[13] McRee: *Life and Correspondence of James Iredell:* II: pp. 145 ff and 168 ff (1858).

[14] 4 Call (Va.) 135.

it was still charged with the burden of proof. On the other hand, it was shouldering the burden with apparent success and was making rapid progress toward general acceptance by at least the juristically minded portion of the American people.

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We come now to the third phase of our subject: an examination of the argument framed in justification of allowing the courts to pass upon the validity of the acts of a coördinate legislature. The essence of Hamilton's argument in *Federalist No. LXXVIII,* and likewise of Marshall's in *Marbury* v. *Madison,* except for the fact that Marshall cites rather incidentally the clause, "cases * * * arising under the Constitution," is as follows: The court, like the other coördinate departments, is sworn to uphold the Constitution; it is also sworn to enforce the laws made under the authority of that Constitution; but, perchance, that authority has been transcended by the legislature; there is then a discrepancy between the Constitution and the law made to its derogation; but the Constitution is the act of the people and designed by them to be fundamental, the law is merely the act of the legislature, the people's representatives; obviously the latter must yield to the former, if the power to amend the Constitution, which the people have reserved to themselves, is not to be transferred to the legislature, and the Constitution thus put on a level with ordinary enactment.

It would be useless to deny, even if it were desirable to do so, that this is a very convincing piece of legal dialectic. Yet, if we can put ourselves back to a time when the doctrine in defense of which it was formulated had not behind it a long lapse of years and many precedents, it is probable that we shall find that, like most abstract argumentation, it abounds in assumptions and dilemmas, which we either approve or ignore in our present attitude toward it. To begin with, why should a constitution—more particularly a state constitution—be regarded as more fundamental than a law? Of course, it is answered that the former is the act of the people themselves, the latter of their representatives. But the fact of the matter is, that but two of the thirteen state constitutions in existence in 1789 had ever been referred to the people for their approval. Nor has the practice of allowing constitutional conventions to promulgate the result of their labors without referendum obsolete today. Why then should the enactment of the people's representatives of say three decades ago have greater validity than the enactment of the people's representatives of today? Why should a constitutional convention, as transient a body as any electoral college, as responsive, without doubt, to the whims of its little day, be so much more

authoritative a body than the state legislature, the continual embodiment of the state's residual sovereignty? Or granting the feature of referendum as a necessary item in the establishment of a state constitution, why should a constitution thus established be of greater authority than a law enacted by the legislature and likewise submitted to popular referendum? I am arguing against the rigid constitution, you suggest. That, however, is not the object of my questions. I wish to show that, to instance the fundamental character of a constitution—of a state constitution, particularly—in arguing for judicial paramountcy, is to argue in a circle, since, *prima facie,* the principal mark of the Constitution's fundamental character is its defense by the paramount judiciary.

But turn now more particularly to the relation of the federal judiciary to the federal Constitution. As we saw above, it seems fairly certain that the framers of the Constitution did not expressly confer upon the federal courts the power to question the validity of federal legislation; the power is therefore alleged to flow from the nature of the judicial office itself. But is it a judicial power? If the President's power of veto makes him a branch of the legisture, as is generally admitted—and such indeed is the historical character of the veto—why does not *its* power of veto make the Supreme Court a branch of the legislature too? But, whereas the President's legislative function is expressly bestowed upon him by the Constitution, that of the Supreme Court is derived only by implication—and that, moreover, in the face of the theory of a government of delegated powers and of the other theory of separation of powers. Suppose the President had secured his veto power in the same way that the Supreme Court did its similar power! Suppose the Supreme Court, whose power to nullify unconstitutional acts of Congress rests upon a process of ratiocination, should nullify an act of Congress the alleged unconstitutionality of which also rests entirely upon argumentation! Yet what was the significance of the divided bench in the *Dred Scott* decision, in *Hepburn* v. *Griswold,* in the *Income Tax Case?*

This brings us finally to what is perhaps the most basic assumption of the argument for judicial paramountcy: the assumption of the impersonality of the courts. "The question may be asked," says a critic[15] of the Supreme Court's decision in the *Income Tax Case,* "what power is there to prevent Congress from passing an unconstitutional act, if the Supreme Court has a right to prevent it? This question may be answered, Yankee fashion, by asking another. If the Supreme Court should make an unconstitutional decision, what

[15] Sylvester Pennoyer: *Am. Law Review;* XXIX, p. 553.

is there to prevent that?" The first of these queries proceeds on the supposition that the Supreme Court knows and speaks the unvarying language of an immutable Constitution; the second insinuates that that tribunal is not quite so aloof from the here and now. In the light of history, the Supreme Court stands forth as nearly immaculate as any similar human institution ever did, and we need not trouble ourselves for a moment with crude considerations of that sort. On the other hand, it is perfectly obvious that the impersonality of the Supreme Court is merely fictional and tautological. It always speaks the language of the Constitution, merely because its opinion of the Constitution *is* the Constitution. But would any one assert that the Constitution has not been extended and amended by the Supreme Court? Such an assertion would deprive that body of one of its chief claims to fame. Yet once grant this, and the question at once arises: what is the real basis of such judicial legislation—or rather judicial amendment of the Constitution? The truth is that the major premise of most of the great decisions of the Supreme Court is a concealed bias of some sort—a highly laudable bias perhaps, yet a bias. For example, the question at issue in *McCullough* v. *Maryland* was the meaning of the phrase "necessary and proper": did it mean "absolutely necessary" or "convenient"? Marshall said it meant "convenient." But why, except because he was a nationalist? Now, however, suppose he had decided that the phrase in question had borne the other meaning. His particularlistic bias would have resulted in the overthrow of the will of the federal legislature. Or to put the whole matter in a sentence: the real question at issue when the validity of an act of Congress is challenged before the Supreme Court is *not* whether the fundamental Constitution shall give way to an act of Congress, but whether Congress' interpretation of the fundamental Constitution shall prevail or whether it shall yield to that of another human, and therefore presumably falible, institution,—a bench of judges. The existence of a rigid Constitution, therefore, does by no means inevitably depend upon its final interpretation by the judiciary. Throughout the period between the formation of the government and the outbreak of the Civil War the discussion of the constitutionality of proposed measures was the predominant characteristic of congressional debates, and in that entire period but two decisions of the Supreme Court determined the constitutional merits of congressional acts adversely: One, *Marbury* v. *Madison,* the decision by which the right of the court to take such a step was determined; the other, the *Dred Scott* case. Lastly, it should be remembered that the rigid constitutions of France, Belgium, and Switzerland are finally con-

strued by the legislatures of those countries, in the ordinary course of legislation.

But now if most constitutional decisions rest actually upon a concealed premise, and if the right of the Supreme Court to pass upon the validity of Congressional legislation must be referred to such a decision, upon what concealed premise does that decision rest? The answer is: a certain theory of government, embodied in the Constitution itself. The constitutional fathers and the Federalist party were thorough-going individualists of the school of John Locke. They believed that individual rights, and particularly property rights, took their origin in natural law and antedated the formation of government and even of society, and that the sole function of government was to afford protection to those rights. They believed that whenever government, even the "supreme legislature," transcended its trusteeship to the derogation of any of these rights, the right of revolution resulted. On the other hand, indications were not wanting at the moment of the assembling of the Constitutional Convention that notions of popular sovereignty were leavening and democratizing the masses. Accordingly, the federal convention presents a very interesting paradox. Brought together for the purpose of creating a government competent to repress popular disorders, the men of 1787 expended no small fraction of their united ingenuity in devising an elaborate system of checks and balances, with the view of holding the government of their creation—particularly the popular organ thereof, the legislature—in permanent leash, against the day when the people should come into their own. The very populace to curb whom new governmental machinery was being erected might some day capture the whole fortress and turn its guns upon its erstwhile defenders. Those guns must be spiked in advance, and the more completely the better. The Constitutional Fathers seized with avidity upon Montesquieu's picture of a constitution,[16] whose well devised checks kept the organs of government most normally in a "state of repose or inaction." The federal government was balanced against the states and these against the government; each portion of a triple-branched legislature was set against the others; the people were made a curb upon their representatives, and they upon the people. It was then but a step farther, and a very rational one, to set the judiciary against the legislature. The courts were at once the authors and interpreters of the common law, the most usual source of individual rights; they had often, in both England and the Colonies, intervened in the defense of individual rights against administrative usurpation; they were the

[16] Spirit of the Laws: Bk. XI, Ch. 6: The British Constitution is referred to.

ancient defenders of the Rule of Law against prerogative; and if the common law sometimes fell short of expectations, the courts were occasionally willing to invoke Natural Law, as was done in *Rutgers* v. *Waddington,* and in other cases.[17] Finally Natural Rights were rapidly being reduced to writing and introduced into the state constitutions in the form of Bills of Rights. Indeed, this practice, the efficacy of which Madison, consistently enough, was very sceptical of, may be looked upon as a very distinct contribution to the cause of judicial paramountcy; as the addition of the first ten amendments to the federal Constitution in 1791 may be looked upon as a distinct step forward the adoption of that doctrine into the federal government twelve years later. The real logic upon which the right of the federal Supreme Court to question the validity of acts of Congress rests, is the logic of a certain way of looking at the relation of the individual to government.

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The extension of the doctrine of judicial paramountcy subsequently to the foundation of the federal government[18] may be traced along two lines: its acceptance by the judiciary, state and federal, and the attitude taken toward it by political leaders. By 1805, the doctrine had been thrice judicialy asserted in South Carolina; twice in Pennsylvania; twice in New Jersey; once in Maryland; and twice in North Carolina. The Courts of the new states to the west also took up with the notion very promptly. It secured admission in Kentucky in 1801, in Ohio in 1806, in Tennessee in 1807, in Vermont in 1814, in Louisiana in 1813,[19] etc. On the other hand, there was a severe contest over the doctrine in the New Jersey court in 1804, in the case of *State* v. *Parkhurst;* and as late as 1825, JUSTICE GIBSON of the Supreme Court of Pennsylvania, in deciding *Eakin* v. *Raub*,[20] overrode and denounced the doctrine, which he declared was held, "as a professional dogma * * * rather as a matter of faith than of reason." Yet twenty years later, even this last heretic renounced his error, because of his "experience of the necessity of the case."

But of course we are primarily interested in the adoption of the doctrine by the federal Supreme Court. The steps toward this consummation in *Marbury* v. *Madison* were very gradual. By the 25th section of the Judiciary Act of 1789, the Supreme Court was vested with the power to review and either to affirm or reverse, any decision

[17] E. g., Bowman v. Middleton, 1 Bay (S. C.) 252.

[18] Vd.: An excellent article by Wm. M. Meigs: *The Relation of the Judiciary to the Constitution: Am. Law Review:* Vol. XIX: pp. 174-203.

[19] Vd.: Loc. cit., pp. 185-188.

[20] Thayer: *Cases on Const. Law;* I, p. 133 ff.

of the highest court of a state, denying the validity of a law, treaty, commission or other authority of the United States. The fact that Ellsworth, a believer, it will be remembered, in the doctrine by judicial paramountcy, was chiefly instrumental in framing this measure, has given color to the notion that its enactment represents the deliberate acceptance by Congress of the same doctrine. The debates in the House of Representatives[21] do not favor such a conjecture. Gerry alone, of all the speakers, asserted that the Supreme Court would have a veto upon acts of Congress, and even he, as previously, in the Constitutional Convention, limited the applicability of that veto to acts encroaching upon the constitutional rights of the judiciary. That, to his mind, was the meaning of coördinate departments. On the other hand, the other speakers who referred to the 25th section regarded it simply as securing the federal government against the possible bad faith of state judges. Of course, it may be insisted that the Supreme Court is given the power to affirm as well as reverse adverse decisions, but this right may have been confined in the contemplation of the authors of the act to cases involving "commissions," and "authorities,"—presumably of an administrative character.

The first case[22] in which the Supreme Court was called upon to declare an act of Congress void was the *Hayburn Case* in 1792. No decision was rendered. The second case was that of *Hylton* v. *Ware*, in which the constitutionality of an excise on carriages was challenged. The contention was overruled by JUSTICE CHASE, in the following language: "As I do not think the tax upon carriages is a direct tax, it is unnecessary for me at this time to determine whether this court constitutionally possesses the power to declare an act of Congress void, on the ground of its being made contrary to and in violation of the Constitution; but if the court have such power, I am free to declare that I will never exercise it, but in a very clear case." In *Ware* v. *Hylton et al*,[23] JUSTICE CHASE, again delivering the opinion of the court, made the same declaration with reference to treaties. But four years afterward, in his opinion in *Cooper* v. *Felfair*,[24] CHASE offers conclusive testimony of the imminent adoption into the federal government of the doctrine of judicial paramountcy: "It is * * * a general opinion, it is expressly admitted by all this bar, and some of the judges have, individually in the circuits decided, that the Supreme Court can declare an act of

[21] Annals I; pp. 826-66.

[22] A summary of these first cases will be found in Judson S. Landon's *Constitutional History of the U. S.*, pp. 257-59 (1889).

[23] 3 Dallas 199-285.

[24] 4 Dallas 19.

Congress to be unconstitutional, and, therefore invalid; but there is no adjudication of the Supreme Court itself on the point. I concur, however, in the general sentiment." This was in 1800. Three years later, *Marbury* v. *Madison* was decided. As far as the courts and the lawyers were concerned, "that point was settled."

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But now what of the attitude of the political branches of the government and of the political leaders? The debate on the Judiciary Act of 1802[25] drew forth a number of very long and elaborate arguments in behalf of judicial paramountcy. Breckenridge of Kentucky alone made explicit protest: "To make the Constitution a practical system," said he, "the power of the courts to annul the laws of Congress cannot possibly exist"; and further, since this is a government of equal departments, if the courts have such a power, Congress must needs have the correlative power to annul the decisions of the courts. Breckenridge—the author, by the way, of the Kentucky Resolutions of 1799—spoke the language of the new democracy making war with the old-time Federalism, driven already to its last ditch,—the courts themselves. Jefferson's battle with the federal—and federalist—judiciary, comprising defiances, attempts at impeachment, and, when these failed, efforts to secure an amendment of the Constitution to make judges removable upon the address of both Houses of Congress,[26] is too complicated a matter to decipher in these pages. The great Republican regarded the federal judiciary as "a subtle corps of sappers and miners constantly working to undermine the foundations of our confederated fabric. * * * An opinion is huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy and timid associates, by a crafty Chief Justice, who sophisticates the law to his mind by the turn of his own reasoning."

Yet I cannot find that Jefferson ever actually denied the right of the Supreme Court to judge of the validity of acts of Congress. His remarks on *Marbury* v. *Madison* are sometimes quoted as if they constitute such a denial, but without reason: they refer rather to the *obiter dictum* portion of that decision. Instead, he seems to have been inclined to make banal concession of the right in question, but by seizing upon the dogma of coördinate departments, which, as we have seen, is one of the main pegs of the argument justifying this very right in the courts, to have ridded the actual exercise of that right either of binding force upon the other departments or of the characteristics of legal precedent.[27] "Each department of the gov-

[25] Benton: *Abridgement* II, pp. 546 ff.
[26] Vd. Benton: *Abridgement* II, pp. 546 ff.
[27] Landon: loc. cit., p. 231.

ernment," he declared, "is truly independent of the others, and has an equal right to decide for itself what is the meaning of the Constitution and the laws submitted to its action." This was likewise Madison's position, and that of Jackson and Lincoln. Thus Madison wrote in 1810.:[28] "In a government whose vital principle is responsibility, it never will be allowed that the legislative and executive departments should be completely subjected to the judiciary, in which that characteristic feature is so faintly seen." Jackson's words in his famous Bank veto message are well known: "Each public officer who takes an oath to support the Constitution," he declared. "swears that he will support it as he understands it, and not as it is understood by others. * * * The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the executive when acting in their legislative capacities." And he might have added, "nor the latter in his executive capacity"; since this is the plain inference from his refusal to enforce the Supreme Court's decision in *Worcester* v. *George.*. Had he gone one step farther and insisted upon enforcing some law which the Supreme Court had declared unconstitutional, he would have succeeding in pressing the theory of coördinate departments to self-evident absurdity.

The right of the judiciary to pass upon the validity of legislation, tentatively broached in an insignificant commonwealth case, in 1782, by way of pure *obiter dictum*, became the foundation rule of American constitutional law and the characteristic function of American courts, whether state or national, in little more than two decades. This may have been a fortunate development, but it is also inevitable whether or not fortunate that aggressive popular statesmen should never willingly give over to juristic hands the entire keeping of the keys of constitutional truth. Said Lincoln, in his first inaugural, apropos the *Dred Scott* decision: "If the policy of the government, upon the vital questions affecting the whole people, is to be irrevocably fixed by the decisions of the Supreme Court the moment they are made, as in ordinary cases between parties in personal actions, the people will have ceased to be their own masters, having to that extent resigned their government into the hands of that eminent tribunal." One would like to know whether President Roosevelt, in defining the "sovereign." in his last message, as the government which represents the people as a whole," intended to include more than the political departments within his designation.

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[28] *Letters and Writings*, II, p. 479.