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The Establishment of Judicial Review II

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THE ESTABLISHMENT OF JUDICIAL REVIEW.

II.

IN tracing the establishment of judicial review subsequently to the inauguration of the national government it will be important to bear in mind that there are two distinct kinds of judicial review, namely, federal judicial review, or the power of the federal courts to review acts of the State legislatures under the United States Constitution, and judicial review proper, or the power of the courts to pass upon the constitutionality of acts of the coordinate legislatures.

That the Judiciary Act of 1789 contemplated, in the mind of its author, Ellsworth, the exercise of the power of review by the national courts of acts of Congress can be scarcely doubted, but how far others accepted this view of the matter it is impossible even to conjecture, so entirely silent upon this point are the brief records of the debate.[1] Perhaps the first congressional reference to such a power occurs in the House debate of February 21st, 1791, upon the bill to establish a national bank. Jackson of Georgia offered the argument that Congress ought not to adopt a measure which ran the risk of being "defeated by the judiciary of the United States, who might adjudge it to be contrary to the Constitution and therefore void." an objection which however Boudinot of New Jersey and Smith of South Carolina were prompt to convert into an argument for the measure. Said the former, far from controverting this right in the judiciary "it was his boast and his confidence. It led him to greater decision on all subjects of a constitutional nature, when he reflected that if, from inattention, want of precision or any other defect, he should do wrong, that there was a power in the government which

[1] Annals of Congress, 1st Cong., 1st session. See index. For the Senate debate see Maclay's Journal, passim.

could constitutionally prevent the operation of such a measure from affecting his constituents."[2] There can be, I think, not the least doubt that a steadily developing feeling of unworthiness on the part of legislatures and a growing disposition to abdicate all final responsibility to the judiciary has been at once a cause and a consequence of the advancing power of the courts among us. It is therefore rather suggestive to come upon this point of view at so early a date.

But would the courts accept such responsibility? If we are to judge from the slow and tentative steps by which the Supreme Court of the United States advanced to occupy the region of power to which legislative emissaries were inviting it, they were reluctant to do so. On the other hand, the cause of judicial review was appreciably advanced at this time by a confusion that these same tentative steps show to have been existing, probably from the outset, but never so manifestly as now, in the minds of the judges between their official capacity as judges and their capacity as individuals. In March 1792 Congress passed a statute for the settlement of certain pension claims against the United States, which directed the United States Courts to pass upon such claims, subject to review by the Secretary of War and by Congress. But immediately the most serious objections were raised to this statute by the judges themselves. The act in question, it was urged, either enlarged the power of the circuit courts beyond constitutional limits by conferring upon them non-judicial powers, or it diminished them unconstitutionally by providing appeals from their determinations to one of the political branches of the government. As a statement of fact, there is of course no controverting this criticism, but was the fact stated one of which the judges had power to take cognizance? The judges had sworn to support the Constitution, it is true, but then *what* was the Constitution? *where* was it to be found? *whose* reading of it was to prevail? Congress also had sworn to support the Constitution; must it not therefore be deemed alone responsible for its acts? The judges as individuals felt with good reason that Congress had, either intentionally or unintentionally, transcended its powers; but did they know this as judges? It is with such questions as these that, without much conjecture, we can see the circuit judges plying themselves on this "painful occasion;" it is such questions as these that "excited feelings" which they hoped "never to experience again." The course finally taken varied somewhat in the different circuits. In the New York circuit the judges, headed by Chief Justice Jay, decided to execute the law, acting as commissioners. In the North Carolina circuit Iredell and

[2] See Annals, 2nd Cong., 1st session, pp. 325-9.

his associates doubted their power to take this course but were not called upon to decide the point. In the Pennsylvania circuit Wilson and his associates flatly declined to proceed under the act in any capacity. Eventually the constitutional question reached the Supreme Court upon the petition of one Hayburn for a writ of mandamus to compel the circuit court of Pennsylvania to enroll the petitioner as a pensioner. Randolph, the Attorney General, admitted the power of the court "to refuse to execute, but the unfitness of this occasion," thus suggesting a power in the court to weigh expediency against unconstitutionality. "The court observed," records the reporter, "that they would hold the matter under advisement until next term; but no decision was ever pronounced as the legislature, at an interim session, provided in another way for the relief of the pensioners."[3]

In the years following the *Hayburn* case, the Supreme Court seems to have been pretty well agreed as to its duty to refuse enforcement to an unconstitutional act of Congress, and indeed as to its power to pronounce such an act void. Yet one sceptic there still remained, Justice Samuel Chase, who became associate justice in 1796. That same year the court was asked to pronounce a congressional tax upon carriages a direct tax, and since it was not apportioned in accordance with the constitutional rule for direct taxes, unconstitutional and void. In his opinion, which was at one with the rest of the court upon the immediate issue, Chase touched upon the larger constitutional question thus: "As I do not think the tax on carriages is a direct tax, it is unnecessary at this time for me to determine whether this court *constitutionally* possesses the power to declare an act of congress *void* on the ground of its being contrary to * * * 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*."[4] A short time afterward Chase reiterates the same sentiment with reference to a treaty of the United States,[5] and two years later is evidently still of the same view. Finally in 1800 in his opinion in *Cooper* v. *Telfair*[6] he reluctantly capitulates "to the general sentiment" of bench and bar. His statement is notable particularly as attributing the power to review acts of Congress not to the federal judiciary generally, but only to the Supreme Court. Three years

[3] 2 Dall. 409. For the circuit court's disposition of the matter see the note to the case in the L. Ed. of the Reports, Bk. I, 436, note 2.

[4] Hylton v. United States, 3 Dall. 171.

[5] Ware v. Hylton, 3 Dall. 199; Calder v. Bull, 3 Dall. 386.

[6] 4 Dall. 14.

later, in *Marbury* v. *Madison*,[7] the Supreme Court for the first time pronounced a congressional enactment unconstitutional and void. The court had at last given authoritative form to its pretensions. So far as lay within its power it had established its right to pass upon the constitutionality of acts of Congress,—by assuming that right. The question was now, would Congress acquiesce in its pretensions?

The election of 1800 gave the Jeffersonian Republicans possession of the political branches of the general government, but the judiciary with its life tenure remained Federalist. And what was still more exasperating, one of the last acts of the late administration had been to put through a law which, while it reduced the number of judges of the Supreme Court to the existing number of Federalist incumbents, enlarged the number of national district courts from seven to twenty-three, grouped into six circuits, which courts were of course promptly filled up with Federalists also.[8] How distasteful this measure was to the incoming administration is easily conceivable. "They have retired into the Judiciary as a stronghold," wrote Jefferson to Dickinson, in December, 1801. "There the remains of federalism are to be preserved and fed from the Treasury, and from that battery all the works of republicanism are to be beaten down and destroyed."[9] In his message of the same month, Jefferson conveyed the hint for the repeal of the obnoxious measure, and a month later Breckenridge of Kentucky introduced the necessary resolution in the Senate.[10] The debate following, which consumed a month's time in each House, underwent an interesting evolution. At the outset the necessity of the new courts furnished the principal topic of discussion; more and more, however, the constitutional question came to the fore, until at the close the assertion of certain constitutional principles furnished, in certain quarters at least, a leading purpose of the repeal finally voted.[11]

The Constitution provides that "the judicial power of the United States *shall* be vested in one supreme court and in such inferior courts as the congress may from time to time ordain and establish; it authorizes Congress "to constitute tribunals inferior to the Supreme Court;" it provides that "the judges both of the supreme and inferior courts shall hold their offices during good behavior."[12] From these clauses of the Constitution it is that the debate on the consti-

[7] Cranch 137.
[8] Henry Adams, History of the United States, I, 274.
[9] Same, p. 257.
[10] Annals, 7th Cong., 1st ses., pp. 15-6, 23.
[11] Same, pp. 25-185, 510-985.
[12] Art. III, sec. 1; Art. I, sec. 8, par. 9.

tutional question set out. On the one hand, the Federalists contended that, since Congress cannot remove a judge save by the process of impeachment, it could not take his office away from him, since to do so was to effect by indirection what cannot be done directly. The Republicans admitted the premises of this argument, but they denied the conclusion. Undoubtedly, they said, a judge is irremovable so long as his office continues, but when the office is abolished the judge ceases being judge by that fact. Can Congress then abolish the inferior federal courts? No, said the Federalists, for once an inferior court is created, it is established by the Constitution and is brought under the aegis of the Constitution as truly as the Supreme Court itself; becomes, in other words, part and parcel of the judicial department in which the judicial power of the United States "*shall* be vested." This argument the Republicans contradicted flatly: the inferior courts are established by acts of Congress and Congress may repeal an act establishing inferior courts as freely as it may repeal any other act, for example, an act establishing an executive bureau. The trend of the discussion soon became evident. What you are asking for, said the Republicans to their opponents, is a degree of independence for the judiciary such as is not to be found even in the British Constitution, upon which our Constitution is at this point modelled. The Federalists admitted the charge. The judiciary, they asserted, is in no way subject or subordinate to the legislative department save such subordination, as for example, in the matter of appeals to the Supreme Court, be explicitly stipulated in the Constitution. The spirit of the Constitution is totally contrary to such subordination, and for this reason: the Constitution contemplates the existence in the Federal judiciary of the power to keep Congress within its constitutional limits, for the exercise of which power, there must be predicated of the judicial department the completest equality in all its branches with Congress.[13]

The gauntlet was down: would the Republicans take it up? Breckenridge soon showed that they would. "I did not expect," he began, "to find the doctrine of the power of the courts to annul the laws of Congress as unconstitutional so seriously insisted on. I presume I shall not be out of order in replying to it. It is said that the different departments of government are to be checks on each other and that the courts are to check the legislature. If this be true, I would ask where they got that power and who checks the courts when they violate the Constitution? Would they not by this doctrine

[13] The principal exponents of the Republican point of view were Breckenridge of Va. and Baldwin of Ga. in the Senate and Giles and Randolph of Va. in the House. The leading Federalist debaters were Ross of Pa. in the Senate and Bayard of Delaware in the House.

have the absolute direction of the government? * * * I deny the power which is so pretended. If it is derived from the Constitution, I ask gentlemen to point out the clause which grants it. * * * Is it not truly astonishing that the Constitution, in its abundant care to define the powers of each department should have omitted so important a power as that of the courts to nullify all acts of Congress which, in their opinion, were contrary to the Constitution. * * * To make the Constitution a practical system this pretended power * * * cannot possibly exist. My idea * * * is that the Constitution intended a separation of the powers vested in the three departments, giving to each exclusive authority on the subjects committed to it; that these departments are coordinate and revolve each within the sphere of its own orbit, without being responsible for its own motion, and are not to direct or control the course of others; that those who make the laws are presumed to have an equal attachment to, and interest in, the Constitution, and are equally bound by oath to support it; and have an equal right to give a construction to it; that the construction of one department of the powers vested in it, is of higher authority than the construction of any other department; and that, in fact, it is competent to that department to which powers are confided exclusively to decide upon the proper exercise of those powers; that therefore the legislature have the exclusive right to interpret the Constitution in what regards the law making power, and the judges are bound to execute the laws they make. * * * Although therefore the courts may take upon them to give decisions which impeach the constitutionality of a law and thereby, for a time, obstruct its operation, yet I contend that such a law is not the less obligatory because the organ through which it is to be executed has refused its aid. A pertinacious adherence of both departments to their opinions would soon bring the question to issue, in whom the sovereign power of legislation resided, and whose constructions of the law-making power should prevail. * * * I ask, * * * if gentlemen are prepared to admit, and in case the courts were to declare your revenue, impost, and appropriation laws unconstitutional, that they would thereby be blotted out of your statute book, and the operations of government be arrested? It is making, in my mind, a mockery of the high powers of legislation. I feel humbled by the doctrine and enter my protest against it.[14]

No sooner had Breckenridge finished than Gouverneur Morris was on his feet. "I arise to congratulate this house and all America," he exclaimed melo-dramatically, "that we have at length got our ad-

[14] Annals, pp. 178-80.

versaries upon the ground where we can fairly meet. They have now, though late, reached the point to which their arguments tended from the beginning. Here I knew they must arrive, and now I ask, if gentlemen are prepared to establish one consolidated government over this country? Sir, if the doctrine they advance prevail, if it be the true doctrine, there is no longer any legislature in America but that of the Union. * * * The honorable member tells us the legislature have the supreme and exclusive right to interpret the Constitution so far as regards the making of laws, which being made, the judges are bound to execute. And he asks where the judges got their pretended power of deciding on the constitutionality of laws? * * * I answer, they derived power from authority higher than the Constitution. They derive it from the constitution of man, from the nature of things, from the necessary progress of human affairs. When you have enacted a law, when process thereon has been issued, and suit brought, it becomes eventually necessary that the judges decide on the case before them, and declare what the law is. * * * This, sir, is the principle and the source of the right for which we contend. But it is denied; and the supremacy of the legislature insisted upon. Mark then, I pray, the results. The Constitution says, no bill of attainder or ex post facto law shall be passed. * * * Suppose that, notwithstanding these prohibitions, a majority of the two Houses should, with the President, pass such laws. * * * The courts dependent on the will and pleasure of the legislature, are compelled to enforce (them). * * * Examine then the state to which we are brought. If this doctrine be sustained * * * what possible mode is there to avoid the conclusion that the moment the legislature of the Union declare themselves supreme, they become so? The analogies so often assumed to the British Parliament will then be complete. The sovereignty of America will no longer reside in the people, but in Congress. And the Constitution is whatever they choose to make it." And with what result? "While I was far distant from my country, I felt pain at some things which looked like a wish to wind up the general government beyond its natural tone; for I knew, *that if America should be brought under one consolidated government, it could not continue to be a republic.* I am attached to republican government, because it appears to me favorable to dignity of sentiment and character. * * * But if a consolidated government be established, it cannot long be republican. We have not the materials to construct even a mild monarchy. If therefore the States be destroyed, we must become the subjects of despotism."[15]

[15] Same, pp. 180-82.

In the debate that followed upon this rather paradoxical colloquy, between a States-rights Republican urging the sovereignty of the national legislature and a Federalist advocating the necessity of judicial review in the interest of States Rights, a certain few facts stand forth prominently. In the first place, it is evident that even among Republicans, the power of the Supreme Court was regarded very often as an established fact, while Federalists characterized the opposing doctrine as "monstrous and unheard of." Also it is evident that the necessity of judicial review was by no means an exclusively Federalist persuasion. The French Revolution was still of too recent memory not to make it seem possible even to those whose political creed was trust in the people that the time might come, when to have the judges in a position to "save society from itself" would be rather desirable.[16] Finally, to many of both parties, the doctrine of a legislature sovereign within the Constitution was a sealed book. This was revealed particularly by the treatment that Randolph's argument on the constitutionality of the resolution received. With rare candor, Randolph admitted that if the object of the repeal was to get rid of the judges rather than the courts, it was unconstitutional; that the whole question was, with what intention was the repeal being made, —an argument which was received by his opponents with scorn and by his friends with coldness.[17] In short, the idea of a sovereign legislature setting limits to its own action in accordance with the moral duty of its members was too abstruse. Much easier, much more obvious, was the idea of somebody standing outside the legislature with power to censure its acts. The final outcome of the debate was two-fold. On the one hand, the act of repeal was passed by the full Republican majority and the dependence of the courts, in the last analysis, upon congressional opinion was proved beyond contradiction. On the other hand, congressional opinion was shown to be, substantially, even overwhelmingly, on the side of the notion of judicial review, and it was morally assured that any overt attack upon the judiciary would find some of the staunchest supporters of the administration in opposition.

Nevertheless, the judiciary was not yet out of peril. Indeed all the outward signs of victory lay with the enemy. Nor was that enemy sated, nor even satisfied, with his triumph. Sixteen circuit courts had been swept away, but the very citadel of judicial pretensions, the Supreme Court, still remained essentially intact. In com-

[16] Same, p. 529, Henderson of N. C. speaking: Baldwin of Ga. and Bacon of Mass. are good examples of Republicans who accepted judicial review: see latter's remarks on page 982.

[17] Same, p. 658.

mand of this citadel, moreover, was John Marshall, the eternal enemy of Thomas Jefferson, and within its walls was to be found, who could doubt, the exact quintessence of that poisonous Federalism to supply the antidote of which to a suffering people was the mission of the Republican party.[18] How then was the Supreme Court to be dealt with? The easiest course obviously would have been to deal with it as the inferior courts had been dealt with, but that was out of the question, since it was admitted on all hands that the Supreme Court was the creation of the Constitution itself. Still the size of the Supreme Court is not specified by the Constitution and so is always subject to congressional determination, with the one exception that an incumbent shall not be displaced. Thus the Court had been established originally with six justices, but by the Act of 1801, with a vacancy existing, had been cut down to a membership of five. Why might it not therefore at this time be indefinitely enlarged and its Federalist membership swamped? The proposition seems a simple one but two obstacles stood in the way of its adoption. The more serious one I have already indicated, in the sentiment entertained by many Republicans regarding the place and power of the judiciary in our constitutional system; and the second obstacle supported the first: for if economy did indeed require the curtailing of the inferior judiciary, did not the same consideration oppose any undue enlargement of the supreme tribunal? By the Act of 1802, the Supreme Court was increased to seven members but the increase was for sufficient reason and was in no wise dictated by partisan considerations. But one method of attack then remained available, namely, impeachment, and even here difficulties were not lacking. The Constitution provides that civil officers of the United States may be impeached for "high crimes and misdemeanors."[19] But what are "high crimes and misdemeanors?" Are indictable offences alone comprised within this description? Or do acts to the political distaste of the impeaching body, the House of Representatives in this case, fall within the category? Persuasive of the first view is the legal significance of the terms themselves, but fortifying the second view there is, in the first place, the history of impeachment as it comes from England, and in the second place, the fact that by the Constitution the judicial tenure is during "good behaviour," which would seem to require of judges a somewhat higher degree of propriety of conduct than abstention merely from acts of crime.

[18] See a letter from Jefferson to Dickinson, Dec. 19, 1801, Works (Washington) IV, 424, cited in Adams, I, 257: see also W. E. Dodd, Chief Justice Marshall and Virginia, the Am. Hist'l Rev., XII, 756, flg.

[19] Art. II, sec. 4.

Furthermore as it happened, the advocates of the broad view of impeachment were able, on the very threshold of the struggle for which they were girding themselves, to create what formally at least was a precedent. Pickering of the federal district of New Hampshire was insane, but by our system, the only way to dismiss him was by impeachment, which was carried through successfully early in 1803.[20] But if an insane man, incapable of defending himself, could thus be disposed of, if offence in other words was determined by the public exigency, rather than private delinquency, to what further use might not impeachment be put? The question was soon to be answered.

Marshall handed down the decision in *Marbury* v. *Madison,* (supra), February 24, 1803. Marbury had been nominated for Justice of the Peace of the District of Columbia by the President, his nomination had been ratified by the Senate and his commission had been made out, signed, countersigned, and sealed, all in the closing hours of Adams' administration. One thing only there had not remained time to do, namely, to hand over the commission to the appointee, and this the new President now ordered should not be done. Marbury thereupon instituted mandamus proceedings against Secretary of State Madison in the Supreme Court. The question of jurisdiction having been raised, it was incumbent on the court to dispose of that first; since, however, Marshall foresaw that he would have to decide against his jurisdiction, he determined to pass first upon the merits of the case. The delivery of the commission was, he held, a purely ministerial act plainly required by the law, wherefore mandamus could issue against the Secretary of State to compel it. The suit, however, ought to have been instituted in a lower court, since by the Constitution the original jurisdiction of the Supreme Court is confined to controversies to which ambassadors and States are parties. True, the suit had been brought in accordance with an act of Congress, but that act, being in palpable contradiction of the Constitution, was void. The case must accordingly be dismissed for want of jurisdiction. Regarded merely as a judicial decision, the decision of *Marbury* v. *Madison* must be considered as most extraordinary, but regarded as a political pamphlet designed to irritate an enemy to the very limit of endurance, it must be considered a huge success. Nor was Jefferson's justifiable anger diminished by his recognition of the fact that the circumspection of his antagonist had withheld from him all pretext for an open declaration of war.[21]

The peace, however, was not long to be kept. Little more than

[20] Adams II, 143, 153-8.
[21] Same volume, p. 147.

two months after Marshall's fling at the President, his associate, Chase, addressed a grand jury at Baltimore with a violent tirade against Republicanism. Animadverting particularly to the recent judiciary act, Chase declared the independence of the national judiciary to be already "shaken to its foundations," and the Constitution about to "sink into a mobocracy," all of which "mighty mischief" was due, he asserted, "to the modern doctrines by our late reformers, that all men in a state of society are entitled to enjoy equal liberty and equal rights." The date of Chase's outburst was May 2nd. Eleven days later Jefferson wrote Nicholson, Member of Congress from Maryland, suggesting that "this seditious and official attack upon the principles of our Constitution * * *" ought not to go unpunished. Meantime Pickering's impeachment was dragging, not to be finally disposed of till March 12th, 1804. The same day the House of Representatives, without debate, voted by a solid party vote, 73 to 32, that Chase should be impeached. But again there was a delay of nearly a year. Finally, however, on February 9th, 1805, the trial began. From the first things went badly with the project; but what was particularly calamitous, was the hopeless muddle its promoters were in as to their theory of impeachment: was it an inquest of office or an indictment of crime? Randolph took the one view, Nicholson the other. On March 1st the Senate was ready to vote. The impeachers were beaten horse and foot: on one article the verdict of "not guilty" was unanimous, on others nearly so; even on the most promising article, the one touching the Baltimore charge, the Northern Republicans and Gaillard of South Carolina held with the Federalists,—thus demonstrating once more, that on the judiciary question, the Virginia school represented only a section of the party. It can hardly be said that Chase's acquittal established any theory of impeachment in our constitutional law, but "it proved impeachment to be an impracticable thing for partisan purposes," a "mere scare-crow" in fact; it proved that "Chief Justice Marshall was at length safe," that "he might henceforward at his leisure fix the principles of constitutional law;" it proved finally that the Supreme Court might pass upon the constitutionality of acts of Congress, not merely with impunity, but indeed with the acquiescence and applause of Congress itself.[22] The moment of Chase's acquittal Randolph, "hurrying from the Senate Chamber to the House," offered a resolution for submitting a constitutional amendment, making all national judges removable by the President upon the joint address of both Houses. It was referred to the committee

[22] Same volume, ch. X.

of the whole, reintroduced next year, received some discussion, and was finally voted down. Between the years 1809 and 1812 nine resolutions of similar purport, though of varying terms, met simila fates; as did another in 1816, and another in 1822.[23]

Thus was judicial review established in the general government because of the acquiescence of the department to be restrained in what it considered to be the constitutional order of things. But meantime it was seen that judicial review is a two-edged sword: it restrains national power but it also sanctions it. Accordingly the question now arose of the position of the Supreme Court in the federal system. The source of the difficulty in this connection is fortunately easily uncovered: it lay in the elusive idea of State sovereignty. In the convention, in the State conventions, and in the Federalist, the States are spoken of as remaining sovereign under the new system, though it is recognized that they have parted with essential portions of their sovereignty to the national government.[24] The question that now presented itself therefore was, what practically was signified by the term "sovereign" as thus applied to the States. In the case of *Chisholm* v. *Georgia*[25] the question at issue was whether the United States Supreme Court could take jurisdiction of a suit instituted by a citizen of South Carolina against the State of Georgia. The language of the Constitution was perfectly explicit in favor of the jurisdiction,[26] but the attorneys of the defendant State contended that this language must be construed in the light of the principle that a sovereign can be sued only in its own courts and at its own consent,—a line of argument in support of which they were able to quote Hamilton in the Federalist and Marshall in the Virginia Convention.[27] In other words State sovereignty was set up as a sort of interpretative principle limiting the operation of the Constitution. Not only did the Court overrule the plea by a vote of four to one, but in the opinions of Chief Justice Jay and of Justice Wilson the applicability of the term "sovereign" to the governments of the States was flatly denied. Only to the people of the United States, who ordained the Constitution, was the term "sovereign," Wilson argued, to be fittingly applied; at least "as to the purposes of the Union" the States

[23] Herman V. Ames, Amendments to the Constitution, pp. 149-51 and App. 366, 371, 380-83, 385, 389, 398, 402, 405, 456, 508a. (Am. Hist'l Assoc. An. Rep. 1896, Vol. II).

[24] For references to the sovereignty of the States in the Convention, see Madison's notes, under dates of June 9, 11, 16, 18, 19, (particularly King's speech), 31, 25, 27, 30, and July 2. For same in Federalist, see Nos. 39, 62, 81. For same in the State conventions, see particularly Elliot IV, 125.

[25] 2 Dall. 435.

[26] Art. III, sec. 2, the fifth cl.

[27] Federalist 81; Eliot III, 551, ffg.

are not sovereign. Justice Iredell laid down contrary doctrine: "The United States are sovereign as to all the powers of government actually surrendered. Each State in the Union is sovereign as to all the powers reserved." In other words, sovereignty in the federal system is divided or dual.

The decision in *Chisholm* v. *Georgia* (supra), was shortly followed by the adoption of the Eleventh Amendment, but this fact, far from impairing the logic of that decision, seems rather to confirm it. Likewise it did not obtrude at the time any difficulties to the steady extension of Federal control over State legislation. Thus in the years immediately following the Eleventh Amendment the Supreme Court not only passed on the validity of State laws under the National Constitution, laws and treaties, without having its right to do so challenged,[28] but also in 1795, in *Van Horne's Lessee* v. *Dorrance*,[29] the Federal courts began to claim for themselves, in cases falling to their jurisdiction because of diverse citizenship, the right to pass as well upon the constitutionality of State laws under the constitution of the enacting State. This is done upon the principle that in such cases the national judiciary stands in place of the State judiciary. In *Calder* v. *Bull*, Justice Chase is disposed to deny the existence of this power, his argument being that the Constitution delegates no "constructive powers" to the United States. Two years later, however, in *Cooper* v. *Telfair* Justice Cushing announces the doctrine explicitly, "that this Court has the same power that a court of the State of Georgia would possess, to declare the law in question void." The power thus claimed and since exercised has played, as we shall see in a later chapter, a most important part in the development of constitutional law.

Meantime, however, the conflict between the notion of State sovereignty and the pretensions of the national judiciary had developed a new phase. In the Federalist, as I have already mentioned, Madison had accepted the notion that the decision in controversies respecting the boundary line between State and national power would devolve upon the Supreme Court, whose power he described as *ultimate*, and that, moreover, in a paragraph in which he speaks of the States as possessing "a residuary and inviolable sovereignty."[30] The same twelve-month, however, in which Madison wrote the passage above referred to, he had begun to see new light upon the subject of judicial review; and largely, probably, in consequence of

[28] Ware v. Hylton, above; Calder v. Bull, above; see note 5.
[29] 2 Dall. 304.
[30] Federalist, No. 39.

the rather overdone jealousy recently manifested by the Virginia court of appeals for what it pretended to consider its constitutional position,[31] he wrote in October 1788 as follows, to a correspondent in Kentucky: "In the State constitutions, as 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."[32] Throughout the ensuing decade Madison came more and more under the influence both of Jefferson's democracy and of his State Sovereignty ideas, with the result that in 1798 he was ready to pen the famous protest of that year against the alien and sedition laws which are known as the Virginia Resolutions.[33] The essential doctrine of these resolutions is to be found in the third one, which reads as follows: "Resolved * * * that this assembly doth explicitly and peremptorily declare that it views the powers of the federal government as resulting from the compact to which the States are parties * * * that in case of a deliberate, palpable, and dangerous exercise of other powers not granted by the said compact, the States who are parties thereto, have the right and are in duty bound to interpose for arresting the progress of the evil and for maintaining within their respective limits the authorities, rights, and liberties appertaining to them." Years later Madison was at great pains to insist that the purport of this language was ambiguous,[34] but the word "respectively" taken with the context, indicates, if language means anything, that the original intention was to assert a constitutional prerogative on the part of the individual States to judge for themselves of the scope of the national powers. And indeed it was so understood at the time. Being communicated to the sister States, the resolutions, together with resolutions of an even more radical stamp from Kentucky,[35] the work largely of Jefferson, drew forth from the Northern legislatures responses which were always condemnatory in tone and which usually asserted the position of the national judiciary as the final interpreter of the national Constitution in the most confident terms.[36] On the other hand, it is true that as

[31] See the Case of the Judges, 4 Call (Va.) 135.

[32] Letters and other writings (1865) I, 195.

[33] For the Va. and Ky. Resolutions, see MacDonald, Select Documents, 148-60; or Elliot, IV, 528-32, 540-45.

[34] Writings IX, 444-7, 489-92, 495-98.

[35] See note 33, above.

[36] Herman V. Ames, State Documents on Federal Relations, Nos. 7-15; Elliot IV, 532-9.

early as 1800 Madison and his following had begun to reconsider the extreme position taken in the resolutions of 1798 and to seek retreat from it. In his Report to the Virginia legislature in 1800,[37] Madison begins by reiterating the view set forth in the resolutions: the States are sovereign, any decision of the federal judiciary, therefore, while possibly ultimate in relation to the authorities of the other departments of the Federal Government, can not possibly be so "in relation to the rights of the parties to the constitutional compact, from which the judicial as well as the other departments hold their delegated trusts." Fifty pages farther along, however, Madison's audacity has oozed entirely away. "It has been said," he writes, restating the issue, "that it belongs to the judiciary of the United States, and not the State Legislatures, to declare the meaning of the Federal Constitution. But," he urges, in a far different tone to the one with which he set out, "a declaration that proceedings of the Federal Government are not warranted by the Constitution is a novelty neither among the citizens nor among the Legislatures of the States * * * nor can the declarations of either, whether affirming or denying the constitutionality of measures of the Federal Government, * * * be deemed, in any point of view, an assumption of the office of the judge. The declarations in such cases are expressions of opinion, unaccompanied with any other effect than what they may produce on opinion by exciting reflection. The expositions of the judiciary, on the other hand, are carried into immediate effect by force." There can therefore have been no impropriety in the conduct of the Virginia legislature, particularly since it was foreseen at the time of the adoption of the Constitution that the State legislatures, constituents as they were to be of one branch of the Federal Government, would often "descry the first symptoms of usurpation" and "sound the alarm to the public." Madison's reference is plainly to his own contributions to the *Federalist*,[37a] where he sets forth the sheer matter of fact that the State legislatures would frequently be able, by virtue of their normal powers, to obstruct or even indirectly to transform federal policy, but with not the slightest hint in the world that among such powers would be that of intervening between the Federal Government and the people, its getting rid of the necessity for which, in fact, he repeatedly asserts, was the leading merit of the new system.

In the years following 1800 therefore, the Virginia school dismisses the notion that "interposition" had any peculiarly authorita-

[37] Writings (Hunt) VI, 341-406.

[37a] See Federalist 44.

tive quality attaching to it because the organ of it was the state legislature. Furthermore, it was quite necessary that they should do so if they were to cleave to the notion of dual sovereignty in the Federal System, a notion which also finds implicit but inconsistent reiteration in both the resolutions of 1798 and the Report. I say "inconsistent" for this reason: dual sovereignty means dual autonomy,—the right of each of the sovereignties to judge of its own powers, and to control, within the limits which it thus sets itself, the allegiance and obedience of its own citizenship. But if this be admitted, on what possible basis can one of the sovereignties, the state, presume to insert the shield of its sovereignty between the other sovereignty, the Federal Government, and a portion of the citizenship of the latter, even though the citizenship in question belong also, in another aspect of the case, to the intermeddling State? Nor do these reflections appear to have failed the Virginia statesmen, although when we first find them giving utterance to them, it is in a quite different connection and with a quite different purpose. In 1809, the United States Supreme Court decided the case of the *United States* v. *Peters*,[38] wherein, under the tenth section of the Judiciary Act of 1789, it reviewed, and traversed an earlier decision of the same issues by the Supreme Court of Pennsylvania. The Pennsylvania legislature immediately uttered vehement protest against this decision. Upon the general ground that, since Pennsylvania was an independent sovereignty, the decisions of its courts, in the matters coming before them, were final. In short, it applied the doctrine of dual sovereignty to the denial essentially of the constitutionality of the whole system of removals and appeals from state to federal courts established by the Act of 1789. Madison was now President, but casting consistency to the winds, he warned the Governor of Pennsylvania in the most solemn way possible, of the deplorable consequences that must ensue from any attempt on Pennsylvania's part to resist a decision of the Federal Supreme Court. The Virginia legislature also was strenuously on the side of the national jurisdiction,[39] in fact using stronger language than that of any of the northern legislatures ten years before. But Virginia's vacillations were not yet over: five years later she had once more changed position; and in *Hunter* v. *Martin*,[40] the Virginia court of appeals pronounced the 25th section of the Judiciary Act unconstitutional, on the basis of an argument in which the

[38] 5 Cranch 136.
[39] Ames, No. 24.
[40] 4 Munf. (Va.) 1.

most rigorous and precise application is made of the notion of a dual sovereignty in the federal system. What we see in the federal system, says Judge Cabell in his opinion in this case, is "two governments * * * possessing each its portion of the divided sovereignty, * * * embracing the same territory and operating on the same persons, and frequently on the same subjects," but "nevertheless separate from and independent of each other. From this position * * * it necessarily results that each government must act by its own organs: from no other can it expect, command or enforce obedience, even as to objects coming within the range of its powers." Accordingly, while the judicial power of the general government indubitably extends to cases arising under the Constitution, the acts of Congress and national treaties, that government must provide its own courts to exercise such power. Nor is it to be denied that by "cases arising under" the Constitution of the United States, its laws and treaties, is meant simply cases in which these are drawn in question, and that consequently cases arising under State enactments may from another point of view be such cases. What, then, is the course of procedure in a contingency of this sort: in which court is the action to be brought, that of the State or that of the general government? The question is readily answered: where the action is brought will depend entirely upon the election of the parties. If however the action is once brought into a State court, if the parties elect the State jurisdiction, the decision of that State court which has highest jurisdiction in the matter is final. Nor does Article VI. of the Constitution obtrude any difficulties to this view. For while the judges of the State courts are by that article bound to give the Constitution, and laws and treaties of the United States, precedence over conflicting State constitutions and laws, "what that constitution is, what those laws and treaties are, must, in cases coming before the State courts, be decided by the State judges according to their own judgments and upon their own responsibility. To the opinions of the federal courts they will always pay the respect which is due to the opinions of other learned and upright judges * * * but it is respect only and not the acknowledgment of conclusive authority."

As regards logical self-consistency, this argument is of undeniable force, but its merit upon this score simply serves to bring into sharper outline the historical falsity of its conclusions. For in point of historical fact, as we know, the constitutional fathers intended that appeals should lie from State courts to the United States Supreme Court, and accordingly their vague description of the States as "sov-

ereign" must give place to that fact.[41] True, for the time being, owing to Madison's steady refusal to publish his notes,[42] the direct testimony of the constitutional fathers, save such as was embodied in the Federalist, was inaccessible, while on the other hand the Virginia and Kentucky Resolutions still bore their spurious reputation as a contemporary exposition of the Constitution. Nevertheless, as Story soon demonstrated in his powerful opinion in *Martin* v. *Hunter's Lessee*,[43] the historical argument was by no means entirely unavailable to the defenders of the national jurisdiction. The controlling reason for the appellate power of the United States Supreme Court over State decisions, Story points out, is furnished by "the necessity of uniformity of decisions throughout the whole United States upon all subjects within the purview of the constitution. Judges of equal learning and integrity, in different States, might differently interpret a statute or a treaty of the United States, or even the Constitution itself. If there were no revising authority to control these jarring and discordant judgments, and to harmonize them into uniformity, the laws, the treaties, and the Constitution of the United States would be different in different States, and might perhaps never have precisely the same construction, obligation, or efficacy in any two States. The public mischiefs which would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the Constitution." Thus Story turns his argument from consequences to historical account. It was all very well for the Virginia judges to exclaim, "Let justice be done though heaven fall," but was it conceivable that the constitutional fathers had taken so light an attitude toward the very evils which they were met together to remedy? Moreover, the opponents of national appeal, in order to avoid too egregious results from their system, had at the end to abandon their own darling logic. For instead of attacking as Pennsylvania had done, those portions of the Judiciary Act which provide for removals in certain cases from the State to National courts, they urged that Congress would have power to utilize that method in conferring exclusive jurisdiction upon the national courts in the kinds of cases in which, by the 25th section, appeal was resorted to. But, said Story, "this power of removal is not to be found in express terms in any part of the Constitution; if it be given it is only

[41] See Part I of this study, in this Review, IX, 122-5.

[42] J. C. Hamilton, History of the Republic of the United States, VII, 286; Cf. same VI, 383; showing Madison's inconsistent opinions as to the standard of interpretation for the Constitution.

[43] 1 Wheat. 304.

given by implication, as a power necessary and proper to carry into effect some express power. * * * It presupposes an exercise of original jurisdiction to have attached elsewhere * * * If then the right of removal be included in the appellate jurisdiction, it is only because it is one mode of exercising that power, and as Congress is not limited by the Constitution to any particular mode or time of exercising it, it may authorize a removal either before or after judgment * * * and if the appellate power by the Constitution does not include cases pending in State courts, the right of removal * * * cannot be applied to them." In short, if the right of removal from State to Federal courts, as is conceded, is allowable by the Constitution, by the same token the right of appeal from State courts to the federal courts is similarly allowable; and each moreover, trenches "equally upon the jurisdiction and independence of the State tribunals."

Story's argument, backed up as it was by the great authority of the Federalist, should have disposed at once and forever of the issue it dealt with, and probably it would have, had it had the backing also of Madison's notes. Those however were not published till 1840, with the result that *Martin* v. *Hunter's Lessee,* (supra), turned out to be but the preliminary round of a conflict that was to endure till the very end of Marshall's Chief Justiceship. In *Cohens* v. *Virginia,*[41] in which plaintiff in error had been indicted, tried and penalized for selling tickets for a lottery established by Congress in the District of Columbia, owing to the circumstance that a State itself was a party to the record, the defenders of State immunity pressed their contentions with confidence and vigor. Admitting, they said, that this was a case arising "under the Constitution," and admitting too for the nonce, though this was subsequently denied in the course of the argument, that the United States Supreme Court has appellate jurisdiction from State courts in such cases, yet an exception must be made of controversies to which a State is a party, such an exception being contemplated by the original constitution and particularly by the Eleventh Amendment, which was claimed to be declaratory of an intention pervading the entire Constitution, and therefore formulative of a binding rule of construction. Ultimately Marshall dismissed the writ of error on the ground that the charter of the lottery company was not intended by Congress to run outside the District of Columbia and that therefore no law of the United States had been violated by the judgment of the Virginia court; but before he did this, improving upon his method in *Marbury* v. *Madison,* he examined and refuted with principles as sweeping as their own every

[41] 6 Wheat. 264.

argument that had been advanced by counsel for Virginia upon the constitutional question. In particular does Marshall oppose to the doctrine of State sovereignty, the principle of the paramountcy of the national power, on the basis of Article VI of the Constitution, which he treats as inculcating a rule of construction not only for the State judges but necessarily also for Federal judges. Quoting that article, he then proceeds: "This is the authoritative language of the American people, and if gentlemen please, of the American States, it marks with lines too strong to be mistaken, the characteristic distinction between the government of the union and those of the States. The general government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the Constitution; and if there be any who deny its necessity, none can deny its authority." Nor, he continues, has the Eleventh Amendment altered the Constitution in this fundamental respect. The motive of that amendment "was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the Nation. * * * It does not comprehend controversies between two or more States or between a State and a foreign state. The jurisdiction of the court still extends to those cases, and in those a State may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of the State." Nor is there any difficulty in finding the cause. "Those who were inhibited from commencing a suit against a State, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors." Furthermore, the suit in progress was not a *suit against the State of Virginia, but a prosecution by the State* to which a defence was set up on the basis of an act of Congress. The writ of error in the case therefore merely removed "the record into the supervising tribunal" in accordance with the provision made in the Judiciary Act. Marshall concludes his opinion upon the constitutional question with these words: "A constitution is framed for ages to come and is designed to approach immortality as nearly as human institutions can approach it. * * * The people made the Constitution and the people can unmake it * * * but the supreme and irresistible power to make or unmake resides only in the whole body of the people, not in any subdivision of it. The attempt of any of the parts to exercise it is usurpation and ought to be repelled by those to whom the people have delegated the power of repelling it." The pertinency of this passage is supplied by the fact, which Marshall had had the insight to detect from the beginning, that, in the doctrine of State immunity from the national jurisdiction, we have the doctrine

of State interposition or, to use the term of the Kentucky resolutions, of "nullification" over again, rid indeed of its self contradiction, but all the more destructive on that account of the fabric of national power.

"Our opinion in the bank c[illegible]e," Marshall wrote Story from Virginia March 24th, 1819, with reference to *McCulloch* v. *Maryland,* "has roused the sleeping spirit of Virginia, if indeed it ever sleeps."[45] But if this was the effect of that decision, it can be well imagined what the effect of *Cohens* v. *Virginia,* (supra), was two years later. Madison indeed was inclined to abide by his original viewpoint, to which, as we have seen, he had returned in 1809. "The Gordian knot of the Constitution," he wrote Judge Roane, "seems to lie in the probability of collision between the Federal and State powers, especially as eventually exercised by their respective tribunals." If that knot could not be "untied by the text of the Constitution," he wanted no "political Alexander" to attempt it. At the same time he had "always thought * * * that on the abstract question whether Federal or State decisions ought to prevail, the sounder policy would yield to the claims of the former."[46] Jefferson on the other hand, with increasing old age, was developing more of a monomania than ever in his antipathy for the Federal judiciary, which he described in his usual salacious vein as a "subtle corps of sappers and miners, constantly working underground to undermine the foundations of our confederated fabric," or again compared to "gravity, ever acting with noiseless step, and unalarming advance, gaining ground step by step and holding what it gains." But *Cohens* v. *Virginia,* (supra), he regarded as marking the very climax of John Marshall's usurpations; and now gave free vent to prophecies of some sort of resistance to the pretension of the Supreme Court, should three or four great States receive at its hands the inconsiderate treatment that had been meted out to Virginia.[47] The prophecy was fulfilled to the letter.

In *Osborn* v. *the Bank,*[48] which was decided in 1824 and in which the Eleventh Amendment was again brought forward, Marshall laid down the rule that a suit against a State officer claiming to act as such under an unconstitutional law, was not a suit against a State but against the officer himself, who was responsible individually; from which it followed that the Supreme Court might in determining the question of its jurisdiction pass upon the constitutionality

[45] Quoted by J. B. Thayer, John Marshall (Riverside Biographical Series), p. 86.
[46] Writings, IX, 65-6; see also same vol. pp. 55-63.
[47] Writings (Mem. Ed.), XV, 297-8, and 326; see also pp. 389, 421, and 444-52.
[48] 9 Wheat. 738.

of any law the authority of which was pleaded by such officer. The controversy of which this decision was an incident had already, two years earlier, added Ohio to the list of enemies of the Federal judiciary, while in the course of the years 1821 to 1823, Kentucky became similarly aligned, owing to the Supreme Court's adherence to its decision in *Green* v. *Biddle*, which was originally pronounced by three of the four judges sitting in the case, that is, by less than a majority of the court.[49] Finally in 1830, Chief Justice Marshall by his action in *Tassell's* case, brought the Supreme Court into controversy with Georgia.[50] The special protagonists of State sovereignty in these controversies were of course the legislatures of the several States affected, but as early as 1821 the quarrel had been carried to Congress as well. On December 12th of that year Richard M. Johnson, Senator from Kentucky, introduced a proposition of amendment to the Constitution of the United States, the essential purport of which was to substitute the Senate of the United States for the Supreme Court in all constitutional cases.[51] The proposition was read twice, considered in committee of the whole a number of times and finally tabled. Nine years later a bill to repeal the 25th section of the Act of 1789 was offered from the House Judiciary Committee. It was supported by a majority of the committee and sustained by an elaborate but highly disingenuous report. An equally elaborate report was presented by James Buchanan for the minority. The reports present no new arguments for the positions that they respectively sustained but confronting each other they throw into sharp contrast the points of view from which the two parties to this question regarded it. The opponents of the Supreme Court, jealous of local liberties, insist upon envisaging constitutional cases as controversies between the United States and the States, in their corporate capacities: the defenders of the Supreme Court on the other hand regard its power in the light of a defence of individual rights.[52] "And in the first place," the minority report proceeds, "it ought to be the chief object of all governments to protect individual rights. In almost every case, involving a question before a State court under this section of the Judiciary Act, the Constitution, laws, or treaties of the United States are interposed for the protection of individuals. * * * If this section were repealed, all these important individual rights would be forfeited." After a brief debate, the bill to repeal was rejected by a vote of 138 to 51. Of this 51, fifteen came from

[49] Ames, Documents, Nos. 45, and 48-51.
[50] Same, Nos. 58 60.
[51] Ames, Amendments, pp. 161-3.
[52] Register of Debates, 21 Cong. 2nd session, Ap. I xxxiii.

Virginia, eight from Kentucky, seven from South Carolina, and five from Georgia, while the remainder were about equally distributed between North and South. Of the same fifty-one, a majority were born in Virginia, and bred Democrats, upon the States Rights doctrines of Thomas Jefferson.[53] In 1832, Marshall rendered his decision in *Worcester* v. *Georgia,* reasserting the principles of *Cohens* v. *Virginia,* though the inexcusable attitude of Jackson made it mere *brutum fulmen.*[54] Four years later Taney became Chief Justice. He was a States Rights Democrat who subscribed to the whole creed of the dual sovereignty of the States and the United States, but who managed to reconcile with this creed the most thoroughgoing adherence to the precedents established by Marshall in respect to the constitutional position of the Federal judiciary. In *Prigg* v. *Pennsylvania,*[55] though the various members of the court diverged considerably in their reasoning with reference to some of the issues raised, the Court was unanimous in following the precedent of *Cohens* v. *Virginia,* (supra), in dealing with the State statute involved, which was held to be unconstitutional. In *Ableman* v. *Booth,*[56] Taney turned the doctrine of dual sovereignty against the doctrine of State sovereignty and asserted the jurisdiction of the United States Supreme Court under the 25th section of the Act of 1789 with vigor and success. In the *Dred Scott Case,*[57] he declared a congressional statute unconstitutional. By all these decisions moreover he commended the national judicial power to that section of the country from which most of the opposition to it had hitherto come, as by the last one he rendered it temporarily odious to the other section.

We turn back finally to the subject of judicial review within the States themselves. We discover at once, however, that in the interval between the Constitutional Convention and the election of 1800, the question of the power of the courts to review the acts of the coordinate legislatures under the State constitutions, has come to involve another question of even greater importance, namely, the question of the legitimate scope of that power.

I have already indicated the view originally held of the written constitution. It was regarded as a species of social compact, the act of a society in a state of revolution or state of nature. It derived accordingly its admittedly fundamental character not from its source but rather from its content. Like Cromwell's instrument of govern-

[53] I gather these facts from Poore's Political Register (1878).
[54] W. G. Sumner, Andrew Jackson (Am. Statesmen Series), pp. 226-7.
[55] 16 Pet. 539.
[56] 21 How. 506.
[57] 19 How. 393.

ment, it contained "somewhat fundamental:" and particularly fundamental was any enumeration of individual rights, which gained nothing in the quality of authoritativeness by being so enumerated, though something, it was hoped, of security. Rights, in other words, were not fundamental because they found mention in the Bill of Rights, but they found mention in such Bill of Rights because they were of their own nature fundamental. But now suppose such enumeration were but partial and incomplete, as must indeed be the case almost inevitably, was that fact to derogate from such rights as were not enumerated? Amendment IX to the United States Constitution indicates the contemporary view as to such a contingency. But now observe what character this view imparts to the written constitution: it contains "somewhat fundamental," true; but not all that is fundamental. In other words, a constitution is a nucleus, a core, so to say, of a much wider region of scattered rights, which though lacking definite formulation rest nevertheless, like all rights, upon the law of nature.[58] Suppose now one of these unformulated rights be violated by the state, the purpose of which is to preserve rights: must not the remedy be the same as if a formulated right had been violated? The answer seems obvious, and would have been, but for the entrance at this point of another consideration, namely, the doctrine of legislative sovereignty. Judicial review originally rested upon the basis of common right and reason and natural law,—that I have amply shown. The greatest obstacle to the establishment of judicial review, however, was this same doctrine of legislaitve sovereignty, the basis of which is the assumption that the legislature not merely *represents* but *is* the people. Yet the persuasion grew that judicial review must be retained: how then was it to be reconciled with legislative sovereignty? The riddle was solved by locating "the people" in the constitution-making body, with the result, on the one hand, of giving to the Constitution the quality of positive enactment the authoritative character of which ensues no longer from its content but from its source, and, on the other hand, by reducing the ordinary legislature to a position of subordination to the constitution-making body. Judicial review is thus transferred from its original foundation upon the law of nature to the basis of the written constitution, and so is transformed from an obstacle to the realization of popular sovereignty, to the one indispensable instrument for that realization. But was this transference and transformation complete? This is the question before us.

[58] Examine in this connection Justice Patterson's opinion in VanHorne's Lessee v. Dorrance, cited above.

One of the earliest cases of judicial review following the adoption of the national constitution was that of *Bowman* v. *Middleton*,[59] in which the Supreme Court of South Carolina overturned a colonial enactment of 1712, transferring a freehold from the heir at law to another, on the ground that it was "against common right as well as against Magna Carta to take the freehold of one man and vest it in another * * * without any compensation, or even a trial by jury of the county to determine the right in question." The enactment "was therefore *ispo facto* void and no length of time could give it validity, being originally founded on erroneous principles." Commenting upon this decision in his *Cases on Constitutional Law*, Professor Thayer has endeavored to bring it into harmony with the professed theory of modern constitutional law, by interpreting it as a recognition on the part of the court of the paramount authority, while South Carolina was still a royal province, of Parliament and so of "the statute of Magna Carta."[60] But, I submit, this is not at all the point of view revealed in the language just quoted, which is that of deference not to the source of Magna Carta and "common right," but to its content. The fact of the matter is that Professor Thayer is here illustrating what Professor Maitland has called the "professional fallacy of the law," namely, "the antedating of the emergence of modern ideas." When a court today ventures to assert too overtly principles of "common right," "natural justice," etc. as a possible basis for judicial decision in constitutional cases it exposes itself at once to the criticism of exceeding its constitutional function. But such criticism is from the standpoint of a recognition of the principle of legislative sovereignty. It is quite possible however that in the year 1792, the notion of legislative sovereignty was not very sharply before the judges who decided *Bowman* v. *Middleton*, (supra), but that, on the contrary, their juristic horizon comprised so to speak the older notion of fundamental law. Consequently the South Carolina court probably felt, not that it was acting extraordinarily at all in basing a decision upon "common rights," but rather that it was acting very modestly, a point of view which at that date it would by no means have been alone in holding.[61]

The old and new views of a constitution, together with the attendant views of the basis and scope of judicial review were first confronted in 1798, in *Calder* v. *Bull*,[62] in which a Connecticut statute

[59] 1 Bay (S. C.) 282.

[60] Thayer I, 53n.

[61] See McRee, Iredell II, p. 172, where Iredell evidently regards judicial review on the Cokian basis as less extraordinary than on the basis of the written constitution; see also Works of James Wilson (J. D. Andrews) I, 415.

[62] See note 5, above.

setting aside a decree of a probate court and granting a right of appeal in a particular case where none had existed by the general law, had been challenged on the ground that it violated the prohibition in the United States Constitution of *ex post facto* laws. The court upheld the statute upon the basis of a definition of the prohibition in question that confined its operation to penal legislation. In the course of his opinion however, Justice Chase took occasion to declare that he could not "subscribe to the omnipotence of a State legislature, or that it is absolute and without control, although its authority should not be expressly restrained by the constitution or a fundamental law of the State." He then proceeded to specify some acts that no legislature could pass without exceeding its authority: an act punishing a citizen for conduct "in violation of no existing law"; an act destroying or impairing "the lawful private contracts of citizens"; an act making a man a judge in his own cause; an act taking property from A and giving it to B, without A's consent. Such acts would be violative of the "vital principles" of republican government and "the social compact"; and the power to pass them "cannot be presumed" to have been given to the legislature: "the nature and ends of legislative power will limit the exercise of it." This view Chase's associate Iredell, though he had earlier stigmatized similarly the opposite view, pronounced that of "speculative jurists"; and he laid down the rule, upon the basis of Blackstone's description of the scope of Parliament's power, that "if a government, comprised of the legislative, executive, and judicial departments, were established by a constitution which imposed no limits on the legislative power, the consequence would inevitably be that whatever the legislative power chose to enact would be lawfully enacted, and the judicial power could never interpose to pronounce it void."

The issue between Chase and Iredell comes down to this point: what is the nature and purpose of a State constitution? By Chase's view obviously, a State constitution is a grant of powers, otherwise non-existent, to the limitation of rights, otherwise unlimited, from which it follows that "legislative power" is a particular kind of power, to be used in a particular way and to particular ends and no others. By Iredell's view, on the other hand, it is the purpose of a State constitution to organize and limit power otherwise omnipotent, from which it follows that "legislative power" is but another phrase for "sovereign power." For the moment, on the supreme bench at least, Iredell's view seems to have carried the day. In *Cooper* v. *Telfair*,[68] which came up from the circuit court and in which there-

[68] See note 6, above.

fore the United States Supreme Court was acting in lieu of the State judiciary, the question at issue was the validity under the State constitution of an act passed by the State of Georgia in 1782, declaring certain persons, including plaintiff in error, guilty of treason and confiscating his estates. The clauses of the State constitution principally relied upon by plaintiff were Article I, which declared that "the legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers belonging to the other," and Article VI, which declared trial by jury "inviolable forever." Notwithstanding these provisions the act in question was upheld upon the ground that the Constitution of Georgia did "not expressly interdict the passing of an act of attainder and confiscation by the authority of the legislature." With this judgment Justice Chase concurred, adding moreover that "the general principles in the constitution were not to be regarded as rules to fetter and control, but as matter merely declaratory and directory." "For," he proceeds, "even in the constitution itself we may trace repeated departures from the theoretical doctrine, that the legislative, executive, and judicial powers should be kept separate and distinct." At the same time Chase also adduces the fact, that the act under review was passed during the Revolution, and urges that some allowance must be made on that score. "Few of the Revolutionary acts," he declares, "would stand the rigorous tests now applied." This statement is significant, for it amounts to an admission that the court was not in this case applying the most rigorous standards that it regarded as possibly available to it.

But now what effect did the "Revolution of 1800" and the ideas upon which it was founded have upon judicial review in the States? Of course the diverse situations presented by the different States were almost, if not quite, as numerous as the States themselves. Some States succumbed to the democratic movement much more easily and completely than others: especially was this true of the frontier and agricultural States, as compared with the seaboard and mercantile States. In some States established precedents existed to fortify judicial review, and in some this was not the case when the democratic movement arose. In some States the judiciary was much more securely placed than in others; in some, conspicuously Connecticut and Rhode Island, the legislature itself was in 1800 and for long thereafter the highest court, so that judicial review would usually have been, as long as this condition obtained, sheer futility. In some States finally the constitutions contained bills of rights which gave both the doctrine of the separation of powers and the doctrine of natural rights the form of popular mandate, while in others the

constitutions did neither. In the face of such variety, obviously, one has to be rather specific.

Perhaps the first note of reaction against judicial review was sounded in Connecticut by Swift in his admirable work, entitled *The System of Laws of Connecticut,* which was published in 1795.[64] Swift rejected absolutely the doctrine of natural rights, though he retained some of its phraseology for, as he admitted, convenience's sake. "The position that when men enter into the social state," he writes, "they give up some portion of natural right to acquire security for the remainder, is manifestly erroneous. * * * To contrast the social state to the natural state, as though the former were artificial and the latter natural, is contrary to truth. No principle of human conduct is more perfectly natural than that which prompts mankind to associate together for mutual benefit." Thus Aristotle is set to refuting Locke. Next follow Hobbes and Bentham, his allies. There are, strictly speaking, Swift continues, no such things as natural rights: there are only civil rights. "For in the civil state, which is deemed the same as the social state, by the administration of the government, the members do acquire certain positive rights, which they can enjoy only in a civil state and which are therefore to be considered as the gift and the offspring of civil institutions. It is in virtue of his being a member of the society that a man is a proprietor and has a right to draw on the capital and not in virtue of any natural state." Form this doctrine flows inevitably Swift's notion of representative government, which implies, he insists, "that the representatives stand in the place of the people and are vested with all their power within the constitution. In the legislature, therefore, consisting of the representatives, is concentrated the majority of the people and the supremacy of the government. They are neither bound to obey the instructions nor consult the will of the people, but being in their place and vested with all their power, they have a right to adopt and pursue such measures as in their judgment are best calculated to promote the happiness and welfare of the community, in the same manner as the people themselves would act if it were possible for them to assemble and deliberate on their common concerns." But it is evident, is it not, what upon this basis, becomes of judicial review? "Previously to their passing any act," Swift proceeds to argue, "they (the legislature) must consider and determine whether it be compatible with the constitution. Being the supreme power, and bound to judge with respect to the question in the first

[64] Zephaniah Swift, The System, etc.; the passages quoted above are taken from pp. 16-7, 34-5, 52-3.

instance, their decision must be final and conclusive. It involves the most manifest absurdity and is degrading to the legislature, to admit the idea that the judiciary may rejudge the same question which they have decided; and if they are of a different opinion, reverse the law and pronounce it to be a nullity. It is an elevation of the judiciary over the heads of the legislature; it vests them with supreme power and enables them to repeal all the laws and defeat all the measures of the government. * * * The legislature will lose all regard and veneration in the eyes of the people, when the lowest tribunals of judicature are permitted to exercise the power of questioning the validity and deciding on the constitutionality of acts. A principle so dangerous to the rights of the people and so derogatory to the dignity of the legislature cannot be founded in truth and reason." Fortunately or unfortunately, Swift's warnings went unheeded even in Connecticut. In 1818 a new constitution was established in which the differentiation of legislative and judicial functions was far more pronounced than in the old colonial charter. In consequence, from that date forward, the Connecticut courts asserted without contradiction the right of judicial review, for which furthermore they steadily invoked not only the written constitution but the doctrine of natural rights, though, it must be admitted, they made very restricted use of this doctrine. Quite in contrast with Connecticut, its compeer of colonial days, Rhode Island retained her colonial charter until 1842, so that not till considerably more than half a century after *Trevett* v. *Weeden* was anything heard again of judicial review in that State.[65]

States with normal constitutions that underwent a reaction with respect to judicial review were New Jersey, Virginia, and Pennsylvania. In 1804 in *State* v. *Parkhurst*,[66] a New Jersey case, the attorneys at the bar, presumably scions of Blackstone, urged with some insistence that the power of judicial review could not possibly exist within the State constitution. The court appears however to have reiterated its pretensions, as certainly it did numerous times in the years following, having recourse indeed on occasion to the doctrine of natural rights. In 1809, in *Emerick* v. *Harris*,[67] the Pennsylvania Supreme Court was confronted with a similar argument, which Chief Justice Tilghman took some pains to meet upon the basis of Iredell's precept of legislative sovereignty within the written constitution. In subsequent cases however, notably that of *Eakin*

[65] For Conn., see Goshen v. Honington, 4 Conn. 224; and Welch v. Wadsworth, 30 Conn. 149; for Rhode Island, run through the reports anterior to 1842.

[66] 4 Halstead (N. J.) 427.

[67] 1 Binney (Pa.) 416.

v. *Raub*,[68] in 1825, Tilghman took broader ground, with the result that Justice Gibson in a famous dissent to the Chief Justice's decision, denied the doctrine of judicial review within the State constitution *in toto*. "In this country," Gibson argued, "the powers of the judiciary are divisible into those that are political and those that are purely civil." The political powers however are "extraordinary and adventitious," being derived for the most part from Article VI of the United States Constitution. Within the State constitution therefore the powers of the State judiciary are in great part civil and are to be reckoned as a branch of the executive power, while the "legislature is to be viewed as the depository of the whole sovereignty of the State." This being the case, upon what possible foundation can the pretended right of judicial review rest? There is certainly no specific grant of such power in the constitution of Pennsylvania. Of course it is said, that it is the business of the judiciary "to ascertain and pronounce what the law is; and that this necessarily involves a consideration of the constitution:" granted, but how far? "If the judiciary will inquire into anything besides the form of enactment, where shall it stop?" Furthermore, the advocates of judicial review themselves say that the power is "to be restricted to cases that are free from doubt or difficulty." But to say this "is to betray a doubt of the propriety of exercising it at all. Were the same caution used in judging of the existence of the power that is inculcated as to the exercise of it, the profession would perhaps arrive at a different conclusion." But again it is urged, that the judiciary is established by the constitution and is sworn to support it. But what difference does that make? "It cannot be said that the judiciary is coordinate merely because it is established by the constitution. If that were sufficient, sheriffs, registers of wills, and recorders of deeds, would be so too. Within the pale of their authority, the acts of these officers will have the power of the people for their support; but no one will pretend they are of equal dignity with the acts of the legislature. Inequality of rank arises not from the manner in which the organ has been constituted, but from its essence and the nature of its functions; and the legislative is superior to every other, inasmuch as the power to will and command is essentially superior to the power to act and obey." Then as to the oath, it was either designed "to secure the powers of each of the different branches from being usurped by any of the rest" and so "furnishes an argument equally plausible against the right of the judiciary," or it is a general oath of "allegiance to a particular form of government," which any citizen might take, but which would not hamper such citizen in agi-

[68] 12 S. & R. 330.

tating a total change in the constitution, or it is simply an official oath "relating only to the official conduct of the officer" and conferring no right or duty upon him "to stray from the path of his ordinary business to search for violations of duty in the business of others," who are individually responsible for their own delinquencies. But finally what constitutional power has the judiciary to make its pretended right good? "For instance, let it be supposed that the power to declare a law unconstitutional has been exercised. What is to be done? The legislature must acquiesce, although it may think the construction of the judiciary wrong. But why must it acquiesce? Only because it is bound to pay that respect to every other department of government which it has a right to exact from each in turn. This is the argument." But by the same token, the legislature which has "at least an equal right with the judiciary to put a construction on the constitution," has an equal right to have the judiciary acquiesce in its construction, which however would mean the end of judicial review. Judicial review within the State constitution is therefore, Justice GIBSON opines, but a "professional dogma," a "matter of faith" rather "than of reason." Subsequently as Chief Justice, he changed his opinion "from experience of the necessity of the case,"[69] but to the end he defined the scope of judicial review, generally speaking, from the standpoint of the theory of legislative sovereignty, and held moreover that the function of review was only for the highest State courts and not to be attempted by inferior tribunals.[70] In Virginia the reaction was still more notable, doubtless on account of the logical connection between the notion of State sovereignty within the federal system and legislative sovereignty within the State. From 1793, the date of *Kamper* v. *Hawkins,* (supra), to the outbreak of the Civil War, the Virginia court of appeals, while canvassing the constitutionality of legislative enactments in more than a score of cases, pronounced but one such enactment to have been unconstitutional and that one had been repealed some years previous to the decision.[71] In Maryland and South Carolina on the other hand, the doctrine of state sovereignty did not operate nearly so promptly to check judicial review, but to a comparatively late date the courts of both these States defined their constitutional functions from the standpoint of the theory of natural rights.[72]

Turning now to some of the younger communities, as the country

[69] Norris v. Clymer, 2 Barr. 277.

[70] Menges v. Wertman, 1 Pa. St. 218.

[71] Att'y-Gen'l v. Broadus, 6 Munf. 116; see also Turpin v. Locket, 6 Call 113.

[72] See Regents v. Williams, 6 Gill and J. (Md.) 365; also Mayor of Balt. v. State St., 15 Md. 376; also St. v. Hayward, 3 Rich. (S. C.) 389.

stood at the time of the adoption of the constitution, we find judicial review delayed in Vermont till 1814,[73] and in Georgia till 1815 and even then producing a remonstrance from the legislature.[74] In the new States to the West on the other hand, judicial review usually followed soon after the setting up of the State constitution, a phenomenon which is to be accounted for by the fact that these were in no sense "original States," but that their sages brought with them the stock of political and legal ideas which they had acquired in the States of their nativity to the East. Thus judicial review was in force in Kentucky as early as 1801,[75] in Tennessee in 1807,[76] and in Ohio either in 1806 or 1807. The most interesting of these cases is the Ohio one. The legislature had in 1805 passed an act defining the duties of justices of the peace. The judge of the third Ohio circuit pronounced portions of this act unconstitutional under both the State constitution and the United States Constitution, his reference to the latter being certain provisions of the first eight amendments, which at that time seem to have been widely regarded as binding upon the States as well as upon the United States. The decision being sustained by the Supreme Court the House of Representatives, in the session of 1808-09, voted resolutions of impeachment against two of the judges concerned, who however were eventually acquitted.[77] More than a decade later a similar contest, and the last one of the sort, occurred in Kentucky. This was the period when the Kentucky legislature was up in arms against the United States Supreme Court on account of its decision in *Green* v. *Biddle*, (supra). From denouncing the federal court, it was both natural and logical for the legislature to turn its attention to the similar pretensions of the coordinate judiciary. Accordingly, after formally pronouncing certain statutes that the State court of appeals had recently overturned to be "constitutional and valid acts," it next endeavored to vote an address to the Governor asking for the removal of the judges, and when the resolution failed to secure the required two-thirds vote, proceeded first to abolish the office and then to recreate it with four new judges. Two political parties now sprang into existence, one the "old court party" and the other the "new court party." Eventually in 1826, the former triumphed and things were put back essentially upon their original footing.[78]

From the standpoint however of the history of American consti-

[73] Chipman's (Vt.) Reports, Introduction, an instructive document.
[74] Simeon Baldwin, The American Judiciary, p. 112.
[75] See Kentucky Decisions, 64.
[76] See 1 Overton (Tenn.) 243.
[77] Cooley, Constitutional Limitations, p. 160, note 3.
[78] Baldwin, pp. 112-15.

tutional law, the history of judicial review in the States, before the Civil War, is, speaking broadly, the history of judicial review in four States alone, New Hampshire, Massachusetts, New York, and North Carolina, and especially in the last three. The contribution of New Hampshire's court consists in its dogmatic insistence upon the doctrine of the separation of powers, New Hampshire's constitution of 1783 being one of those in which that doctrine finds formal statement.[79] Massachusetts' brand of constitutional law in turn receives its peculiar stamp from the judicial emphasis put upon the words of Chapter I, article 4 of the State constitution, which reads in part as follows: "And further full power and authority are hereby given and granted to the said general court, from time to time, to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances * * * either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth." The important word in this passage is the word "reasonable," a term which the Massachusetts supreme court has always felt itself more or less free to construe as a limitation upon the legislative power.[80] In New York judicial review was established by Kent upon the broadest possible basis. Immediately following Kent's retirement from the bench however, the doctrine of legislative sovereignty within the written constitution began making rapid headway in New York. How was the tide to be stemmed? The New York courts met the situation temporarily by professing to reject the doctrine of natural rights while at the same time retaining the doctrine of limitations inherent to legislative power, which left them the right to construe the phrase "legislative power."[81] But the most notable contribution of all came from North Carolina, where also the doctrine of legislative sovereignty early presented the courts with a difficult problem. The story of the North Carolina doctrine however is the story of the first beginnings of our present day constitutional law, and is obviously a theme for another chapter.[82]

[79] See particularly the important case of Merrill v. Sherburne, 1 N. H. 204; also the Opinions of the Judges, 4 N. H. 572

[80] See particularly James v. Holden, 11 Mass. 397; Foster v. Essex Bank, 16 Mass. 245; Baker v. Boston, 12 Pick. (Mass.) 184; Austin v. Murray, 16 Pick. 126.

[81] See Dash v. Van Kleeck, 7 Johns. (N. Y.) 498, comparing Kent's opinion with that of Spencer; compare J. Nelson in People v. Morris, 13 Wend. (N. Y.) 331, and Senator Verplanck in Cochran v. Van Surley, 20 Wend. 381-3; see also Benson v. Mayor of Albany, 24 Barb. 252 ffg.; also Wynehamen v. People, 13 N. Y. 391ffg. passim.; also Sill v. Corning, 15 N. Y. 303; also People v. Draper, 15 N. Y. 547.

[82] See Univ. of N. C. v. Foy, 2 Hayw. (N. C.) 310; also Hoke v. Henderson, 4 Dev. 1.

To conclude: judicial review arose upon the basis of the doctrine of *fundamental law* and, as we shall appreciate better in the sequel, it has always continued to rest upon that basis when it has proved really effective as a check upon legislative power. Till the opening of the seventeenth century powers of government were regarded in England as legally limited. They were moreover *fused* powers, comprising, as in the Roman Republic, a fund of power which was, in a general way, available to all the principal organs of state, Parliament, the judges, the royal ministers; at least, the functions of government were but very imperfectly differentiated and very incompletely assigned to what today we regard as their proper organs. It is only since that date that this differentiation has been in process of self-conscious effectuation. It has proceeded however, among the two chief branches of the English-speaking race, along two quite different lines. In Great Britain it has taken place under the direction of the principle of legislative sovereignty and has been carried out therefore by Parliament, with the consequence that constitutional law in Great Britain is statutory or rests upon a statutory foundation, and is entirely within the keeping of the state itself. In America, on the other hand, through the establishment of judicial review upon the basis of the doctrine of a fundamental law known only to the judges, the differentiation of the functions of government has fallen to the courts, wherefore the keeping of the constitution in the United States falls in the first instance to private persons, the parties to "lawsuits," and constitutional law has for its primary purpose not the convenience of the state but the preservation of individual rights.

FINIS.

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Note.—Since writing Part I of this study, I have come to the conclusion that the decision in Trevett v. Weeden (R. I. 1786) was based, not upon the matter of jurisdiction, but upon the alleged self-contradictory character of the language of the statute involved. The importance of this fact, which is considerable, I shall demonstrate elsewhere. See Coxe, pp. 243-244.