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THE SUPREME COURT—USURPER OR GRANTEE?[1]

DID the framers of the federal Constitution intend that the Supreme Court should pass upon the constitutionality of acts of Congress? The emphatic negative recently given to this question by legal writers of respectable authority[2] has put the sanction of the guild on the popular notion that the nullification of statutes by the federal judiciary is warranted neither by the letter nor by the spirit of the supreme law of the land and is, therefore, rank usurpation. Thus the color of legality, so highly prized by revolutionaries as well as by apostles of law and order, is given to a movement designed to strip the courts of their great political function. While the desirability of judicial control over legislation may be considered by practical men entirely apart from its historical origins, the attitude of those who drafted the Constitution surely cannot be regarded as a matter solely of antiquarian interest. Indeed, the eagerness with which the "views of the Fathers" have been marshalled in support of the attack upon judicial control proves

[1] The author desires to acknowledge his indebtedness to Mr. Birl E. Shultz, a graduate student in the School of Political Science of Columbia University, for preparing a bibliographical note on the writings of members of the Convention and for special researches in the papers of Roger Sherman and of John Dickinson.

[2] *Cf.* Chief Justice Walter Clark, of North Carolina, Address before the Law Department of the University of Pennsylvania, April 27, 1906; reprinted in *Congressional Record*, July 31, 1911. Dean William Trickett, of the Dickinson Law School, "Judicial Dispensation from Congressional Statutes," *American Law Review*, vol. xli, pp. 65 *et seq.* L. B. Boudin, of the New York Bar, "Government by Judiciary," POLITICAL SCIENCE QUARTERLY, vol. xxvi (1911), pp. 238 *et seq.* Gilbert Roe, of the New York Bar, "Our Judicial Oligarchy" (second article), *La Follette's Weekly Magazine*, vol. iii, no. 25, pp. 7-9, June 24, 1911.

that they continue to exercise some moral weight, even if they are not binding upon the public conscience.

The arguments advanced to show that the framers of the Constitution did not intend to grant to the federal judiciary any control over federal legislation may be summarized as follows. Not only is the power in question not expressly granted, but it could not have seemed to the framers to be granted by implication. The power to refuse application to an unconstitutional law was not generally regarded as proper to the judiciary. In a few cases only had state courts attempted to exercise such a power, and these few attempts had been sharply rebuked by the people. Of the members of the Convention of 1787 not more than five or six are known to have regarded this power as a part of the general judicial power; and Spaight and three or four others are known to have held the contrary opinion. It cannot be assumed that the other forty-odd members of the Convention were divided on the question in the same proportion. If any conclusion is to be drawn from their silence, it is rather that they did not believe that any such unprecedented judicial power could be read into the Constitution. This conclusion is fortified by the fact that a proposition to confer upon the federal judges revisory power over federal legislation was four times made in the Convention and defeated.

A careful examination of the articles cited fails to reveal that the writers have made any detailed analysis of the sources from which we derive our knowledge of the proceedings of the Convention and of the views held by its members. They certainly do not produce sufficient evidence to support their sweeping generalizations. In the interest of historical accuracy, therefore, it is well to inquire whether the evidence available on the point is sufficient to convict the Supreme Court of usurping an authority which the framers of the Constitution did not conceive to be within the judicial province. If the opinions of the majority of the Convention cannot be definitely ascertained, any categorical answer to the question proposed must rest upon the "argument of silence," which, as Fustel de Coulanges warned the Germans long ago, is a dangerous argument.

Now at the outset of this inquiry one important fact should be noted.

No proposition to confer directly upon the judiciary the power of passing upon the constitutionality of acts of Congress was submitted to the Convention. On this point a statement made in Chief Justice Clark's address, cited above, is misleading. The proposition to which he refers, and which formed a part of the Randolph plan, was to associate a certain number of the judges with the executive in the exercise of revisionary power over laws passed by Congress. This was obviously a different proposition. Indeed, some members of the Convention who favored judicial control opposed the creation of such a council of revision.[1] The question of judicial control, accordingly, did not come squarely before the Convention, in such form that a vote could be taken.

How are we to know what was the intention of the framers of the Constitution in this matter? The only method is to make an exhaustive search in the documents of the Convention and in the writings, speeches, papers and recorded activities of its members. It is obviously impossible to assert that any such inquiry is complete, for new material, printed or in manuscript, may be produced at any moment. This paper therefore makes no claim to completeness or to finality. It is designed to throw light on the subject and to suggest ways in which more light may be obtained.

In view of the fact that no vote was taken on this issue, we are compelled to examine the notes of the debates on every part of the Constitution and to search the letters, papers and documents of the members of the Convention to find out how many of them put themselves on record, in one way or another.

I

There were in all fifty-five members of the Convention who were present at some of its meetings. Of these at least one-third took little or no part in the proceedings or were of little weight or were extensively absent. Among these may be included: Blount, Brearley, Broom, Clymer, Fitzsimons, Gilman, W. C. Houston, William Houstoun, Ingersoll, Lansing, Living-

[1] *Cf. infra*, pp. 6, 8, 11.

ston, McClurg, Alexander Martin, Mifflin, Pierce and Yates. It is of course difficult to estimate the influence of the several members of the Convention, and between the extremes there are a few regarding whom there may reasonably be a difference of opinion. The preceding list is doubtless open to criticism, but it may be safely asserted that a large majority of the men included in it were without any considerable influence in the framing of the Constitution.

Of the remaining members there were (say) twenty-five whose character, ability, diligence and regularity of attendance, separately or in combination, made them the dominant element in the Convention. These men were:

Blair	Franklin	*King*	*Morris, R.*	Rutledge
Butler	*Gerry*	*Madison*	*Paterson*	Sherman
Dayton	Gorham	*Martin, L.*	Pinckney, Charles	*Washington*
Dickinson	*Hamilton*	*Mason*	Pinckney, C. C.	*Williamson*
Ellsworth	*Johnson*	*Morris, G.*	*Randolph*	*Wilson*

This list, like the one given above, is tentative; and it is fair to say that, among those whose judgment is entitled to respect, there is no little difference of opinion about the weight of some of the men here enumerated. It cannot be doubted, however, that the list includes the decided majority of the men who were most influential in giving the Constitution its form and its spirit. Among these men were the leaders, of whose words and activities we have the fullest records.

Of these men, the seventeen whose names are italicized declared, directly or indirectly, for judicial control. Without intending to imply that the less influential members were divided on the question in the same ratio as these twenty-five, or that due respect should not be paid to the principle of simple majority rule, it is illuminating to discover how many of this dominant group are found on record in favor of the proposition that the judiciary would in the natural course of things pass upon the constitutionality of acts of Congress. The evidence of each man's attitude is here submitted, the names being arranged, as above, in their alphabetical order.

John Blair, of Virginia, was a member of the Virginia court

of appeals which decided the case of Commonwealth *v.* Caton,[1] in 1782, and he agreed with the rest of the judges "that the court had power to declare any resolution or act of the legislature, or of either branch of it, to be unconstitutional and void."[2] Ten years later he was one of the three judges of the federal circuit court for the district of Pennsylvania who claimed that they could not perform certain duties imposed upon them by a law of Congress, because the duties were not judicial in nature and because under the law their acts would be subject to legislative or executive control. These judges—Blair, Wilson[3] and Peters—joined in a respectful letter of protest to President Washington, April 18, 1792, in which they declared that they held it to be their duty to disregard the directions of Congress rather than to act contrary to a constitutional principle.[4] It may also be noted that, as a member of the federal Senate, Blair supported the Judiciary Act of 1789, which accorded to the Supreme Court the power to review and reverse or affirm the decisions of state courts denying the validity of federal statutes.[5]

John Dickinson, of Delaware, is usually placed among the members of the Convention who did not recognize the power of the courts to pass upon the constitutionality of statutes; for in the debate on August 15, just after Mercer[6] declared against judicial control, Dickinson said that "he was strongly impressed with the remark of Mr. Mercer as to the power of the Judges to set aside the law. He thought no such power ought to exist. He was at the same time at a loss what expedient to substitute."[7] Later, however, he accepted the principle of judicial control, either because he thought it sound or because

[1] Thayer's Cases in Constitutional Law, vol. i, p. 55.

[2] That the decision could have been reached without invoking this power, as Mr. Boudin argues, *loc. cit.*, p. 245, note 1, does not affect the value of the decision as evidence of Blair's belief in the existence of the power.

[3] Wilson, as we shall see later, had taken a strong stand, both in the constituent Convention and in the ratifying Pennsylvania convention, in favor of judicial control of legislation. *Cf. infra*, pp. 14, 26.

[4] Hayburn's Case, 2 Dallas, 409.

[5] *Cf. infra*, p. 15.

[6] *Cf. infra*, p. 20.

[7] Farrand, vol. ii, p. 299.

he could find no satisfactory substitute. In one of his "Fabius" letters, written in advocacy of the Constitution in 1788, he says:

In the senate the sovereignties of the several states will be equally represented; in the house of representatives the people of the whole union will be equally represented; and in the president and the federal independent judges, so much concerned in the execution of the laws and in the determination of their constitutionality, the sovereignties of the several states and the people of the whole union may be considered as conjointly represented.[1]

Whatever his personal preference may have been, he evidently understood that the new instrument implicitly empowered the federal judiciary to determine the constitutionality of laws; and he presents this implication to the public as a commendable feature of the Constitution.

Oliver Ellsworth, of Connecticut, held that the federal judiciary, in the discharge of its normal functions, would declare acts of Congress contrary to the federal Constitution null and void. In the Connecticut convention, called to ratify the federal Constitution, he was careful to explain this clearly to the assembled delegates.[2] Later, he was chairman of the Senate committee which prepared the Judiciary Act of 1789 and took a leading part in the drafting of that measure.[3]

Elbridge Gerry, of Massachusetts. When, on June 4, the proposition relative to a council of revision was taken into consideration by the Convention, Gerry expressed doubts

whether the Judiciary ought to form a part of it, as they will have a sufficient check against encroachments on their own department by their exposition of the laws, which involved a power of deciding on their constitutionality. In some States the Judges had actually set aside laws as being against the Constitution. This was done, too, with general approbation. It was quite foreign from the nature of the office to make them judges of the policy of public measures.[4]

During the debate in the first Congress on the question

[1] Ford, Pamphlets on the Constitution of the United States, p. 184.

[2] *Cf. infra*, p. 27.

[3] *Cf. infra*, p. 15.

[4] Farrand, vol. i, p. 97.

whether the president had the constitutional right to remove federal officers without the consent of the Senate, Gerry more than once urged that the judiciary was the proper body to decide the issue finally. On June 16, 1789, he said:

Are we afraid that the President and Senate are not sufficiently informed to know their respective duties? . . . . If the fact is, as we seem to suspect, that they do not understand the Constitution, let it go before the proper tribunal; the judges are the constitutional umpires on such questions.[1]

Speaking on the same subject again, he said:

If the power of making declaratory acts really vests in Congress and the judges are bound by our decisions, we may alter that part of the Constitution which is secured from being amended by the fifth article; we may say that the ninth section of the Constitution, respecting the migration or importation of persons, does not extend to negroes; that the word persons means only white men and women. We then proceed to lay a duty of twenty or thirty dollars per head on the importation of negroes. The merchant does not construe the Constitution in the manner that we have done. He therefore institutes a suit and brings it before the supreme judicature of the United States for trial. The judges, who are bound by oath to support the Constitution, declare against this law; they would therefore give judgment in favor of the merchant.[2]

Alexander Hamilton, of New York. In *The Federalist*, written in defence of the Constitution, and designed to make that instrument acceptable to the electorate, Hamilton said:

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be, regarded by the judges as a fundamental law. It must, therefore, belong to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred, or in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.[3]

[1] Annals of Congress, vol. i, p. 491. See also p. 596.

[2] Elliot's Debates, vol. iv, p. 393.

[3] The Federalist, no. 78.

Rufus King, of Massachusetts. In the discussion of the proposed council of revision which took place in the Convention on June 4, King took the same position as Gerry, observing "that the judges ought to be able to expound the law as it should come before them free from the bias of having participated in its formation.[1]" According to Pierce's notes he said that he

was of opinion that the judicial ought not to join in the negative of a law because the judges will have the expounding of those laws when they come before them; and they will no doubt stop the operation of such as shall appear repugnant to the constitution.[2]

James Madison, of Virginia. That Madison believed in judicial control over legislation is unquestionable, but as to the exact nature and extent of that control he was in no little confusion. His fear of the legislature is expressed repeatedly in his writings, and he was foremost among the men who sought to establish a revisionary council of which the judges should form a a part. In the Convention he said:

Experience in all the states had evinced a powerful tendency in the legislature to absorb all power into its vortex. This was the real source of danger to the American constitutions; and suggested the necessity of giving every defensive authority to the other departments that was consistent with republican principles.[3]

The association of the judges with the executive, he contended, "would be useful to the judiciary department by giving it an additional opportunity of defending itself against legislative encroachments."[4] He was evidently greatly disappointed by the refusal of the Convention to establish a revisionary council; for, in after years, he said that "such a control, restricted to constitutional points, besides giving greater stability and system to the rules of expounding the instrument would have precluded the question of a judiciary annulment of legislative acts.[5]

From the first, however he accepted judicial control only with limitations; and complete judicial paramountcy over the other

[1] Farrand, vol. i, p. 98.
[2] *Ibid.*, p. 109.
[3] *Ibid.*, vol. ii, p. 74.
[4] *Ibid.*
[5] Writings of James Madison, vol. viii, p. 406.

branches of the federal government he certainly deprecated. When it was proposed to extend the jurisdiction of the Supreme Court to cases arising under the Constitution as well as under the laws of the United States, he

> doubted whether it was not going too far to extend the jurisdiction of the court generally to cases arising under the Constitution and whether it ought not to be limited to cases of a judiciary nature. The right of expounding the constitution in cases not of this nature ought not to be given to that department.[1]

The refusal of the Convention to establish a council of revision, in his opinion, left the judiciary paramount, which was in itself undesirable and not intended by the framers of the Constitution. In a comment on the proposed Virginia constitution of 1788, he wrote, in that year:

> In the state constitutions and indeed in the federal one also, no provision is made for the case of a disagreement in expounding them [the laws], 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 Judiciary Department paramount in fact to the Legislature, which was never intended and can never be proper.[2]

The right of the courts to pass upon constitutional questions in cases of a judicial nature he fully acknowledged; but this did not, in his mind, preclude the other departments from declaring their sentiments on points of constitutionality and from marking out the limits of their own powers. This view he expressed in the House of Representatives (first Congress) when the question of the president's removing power was under debate:

> The great objection . . . is that the legislature itself has no right to expound the Constitution; that wherever its meaning is doubtful, you must leave it to take its course, until the judiciary is called upon to declare its meaning. I acknowledge, in the ordinary course of government, that the exposition of the laws and Constitution devolves upon the judicial; but I beg to know upon what principle it can be contended

[1] Farrand, vol. ii, p. 430.

[2] Writings, vol. v, pp. 293, 294.

that any one department draws from the Constitution greater powers than another, in marking out the limits of the powers of the several departments. The Constitution is the charter of the people in the government; it specifies certain great powers as absolutely granted, and marks out the departments to exercise them. If the constitutional boundary of either be brought into question I do not see that any one of these independent departments has more right than another to declare their sentiments on that point.

Perhaps this is an admitted case. There is not one government on the face of the earth, so far as I recollect—there is not one in the United States—in which provision is made for a particular authority to determine the limits of the constitutional division of power between the branches of the government. In all systems, there are points which must be adjusted by the departments themselves, to which no one of them is competent. If it cannot be determined in this way, there is no resource left but the will of the community, to be collected in some mode to be provided by the Constitution, or one dictated by the necessity of the case. It is, therefore, a fair question, whether this great point may not as well be decided, at least by the whole legislature, as by part—by us, as well as by the executive or the judicial. As I think it will be equally constitutional, I cannot imagine it will be less safe, that the exposition should issue from the legislative authority, than any other; and the more so, because it involves in the decision the opinions of both of those departments whose powers are supposed to be affected by it. Besides, I do not see in what way this question could come before the judges to obtain a fair and solemn decision; but even if it were the case that it could, I should suppose, at least while the government is not lead by passion, disturbed by faction, or deceived by any discolored medium of sight, but while there is a desire in all to see and be guided by the benignant ray of truth, that the decision may be made with the most advantage by the legislature itself.[1]

Madison's views on the point may be summed up as follows: In cases of a political nature involving controversies between departments, each department enjoys a power of interpretation for itself (a doctrine which Marshall would not have denied); in controversies of a judicial nature arising under the Constitution, the Supreme Court is the tribunal of last resort; in cases of federal statutes which are held to be invalid by nullifying

[1] Elliott's Debates, vol. iv, pp. 382, 383.

states, the Supreme Court possesses the power to pass finally upon constitutionality.[1]

Luther Martin, of Maryland, although he opposed the proposition to form a revisionary council by associating judges with the executive, was nevertheless strongly convinced that unconstitutional laws would be set aside by the judiciary. During the debate on July 21, he said:

A knowledge of mankind, and of Legislative affairs cannot be presumed to belong in a higher degree to the Judges than to the Legislature. And as to the Constitutionality of laws, that point will come before the Judges in their proper official character. In this character they have a negative on the laws. Join them with the Executive in the Revision and they will have a double negative. It is necessary that the Supreme Judiciary should have the confidence of the people. This will soon be lost, if they are employed in the task of remonstrating against popular measures of the Legislature.[2]

George Mason, of Virginia, favored associating the judges with the executive in revising laws. He recognized that the judges would have the power to declare unconstitutional statutes void, but he regarded this control as insufficient. He said:

Notwithstanding the precautions taken in the constitution of the Legislature, it would so much resemble that of the individual states, that it must be expected frequently to pass unjust and pernicious laws. This restraining power was therefore essentially necessary. It would have the effect not only of hindering the final passage of such laws, but would discourage demagogues from attempting to get them passed. It had been said (by Mr. L. Martin) that if the Judges were joined in this check on the laws, they would have a double negative, since in their expository capacity of Judges they would have one negative. He would reply that in this capacity they could impede in one case only, the operation of laws. They could declare an unconstitutional law void. But with regard to every law, however unjust, oppressive or pernicious, which did not come plainly under this description, they would be under the necessity as Judges to give it a free course. He

[1] *Cf.* Madison's letter of August, 1830, to Everett; Writings, vol. ix, p. 383.

[2] Farrand, vol. ii, p. 76. For further evidence of Martin's attitude, *cf. infra*, p. 26.

wished the further use to be made of the Judges, of giving aid in preventing every improper law. Their aid will be the more valuable as they are in the habit and practice of considering laws in their true principles, and in all their consequences.[1]

Gouverneur Morris, of Pennsylvania, declared, in the debate on July 21, that some check on the legislature was necessary; and he "concurred in thinking the public liberty in greater danger from legislative usurpations than from any other source."[2] He was apprehensive lest the addition of the judiciary to the executive in the council of revision would not be enough to hold the legislature in check. Later, when Dickinson questioned the right of the judiciary to set aside laws, Morris said:

He could not agree that the judiciary, which was a part of the executive, should be bound to say that a direct violation of the Constitution was law. A control over the legislature might have its inconveniences. But view the danger on the other side. . . . Encroachments of the popular branch of the government ought to be guarded against.[3]

This view he later confirmed in the debate on the repeal of the Judiciary Act of 1801, when he said:

It has been said, and truly too, that governments are made to provide against the follies and vices of men. . . . Hence checks are required in the distribution of the power among those who are to exercise it for the benefit of the people. Did the people of America vest all power in the Legislature? No; they had vested in the judges a check intended to be efficient—a check of the first necessity, to prevent an invasion of the Constitution by unconstitutional laws—a check which might prevent any faction from intimidating or annihilating the tribunals themselves.[4]

Edmund Randolph, of Virginia, does not seem to have expressed himself in the Convention on the subject of judicial control over congressional legislation. In the plan which he presented, however, provision was made for establishing a council of revision, composed of the executive and a conveni-

[1] Farrand, vol. ii, p. 78. [2] *Ibid.* pp. 75 *et seq.* [3] *Ibid.* p. 299.
[4] Benton, Abridgement of Debates in Congress, vol. ii, p. 550.

ent number of the judiciary, "with authority to examine every act of the National Legislature before it shall operate." He must, therefore, have been convinced of the desirability of some efficient control over the legislative department. Subsequently, as attorney-general, when it became his duty to represent the government in Hayburn's case[1] and he was moving for a *mandamus* to compel the circuit court for the district of Pennsylvania to execute a law under which the judges had declined to act on the ground of its unconstitutionality, Randolph accepted the view of the judges that they were not constitutionally bound to enforce a law which they deemed beyond the powers of Congress. The meager abstract of his argument before the Supreme Court in Dallas's *Reports* gives no hint of its precise character; but in a letter to Madison, dated August 12, 1792, Randolph said: "The sum of my argument was an admission of the power to refuse to execute, but the unfitness of the occasion."[2] That he approved the provision of the Judiciary Act of 1789, giving the Supreme Court appellate jurisdiction to review and reverse or affirm a decision of a state court denying the constitutionality of a federal statute, is apparent from his report to Congress on the judicial system in 1790. After enumerating the instances in which cases might be carried up to the Supreme Court from the state courts, he says: "That the avenue to the federal courts ought, in these instances, to be unobstructed, is manifest." The only question with which he was concerned was: "In what stage and by what form shall their interposition be prayed?"[3]

Hugh Williamson, of North Carolina, certainly believed in judicial control over federal legislation; for in the debate on the proposition to insert a clause forbidding Congress to pass *ex post facto* laws, he said: "Such a prohibitory clause is in the constitution of North Carolina, and though it has been violated, it has done good there and may do good here, because the judges can take hold of it."[4] It is obvious that the only way

[1] 2 Dallas, 409.

[2] Moncure Conway, Edmund Randolph, p. 145.

[3] American State Papers, Class X, Miscellaneous, vol. i, p. 23.

[4] Farrand, vol. ii, p. 376.

in which the judges can "take hold of" *ex post facto* laws is by declaring them void.

James Wilson, of Pennsylvania, expressed himself in favor of judicial control in the course of the debate on July 21, when the proposition to associate the national judiciary with the executive in the revisionary power was again being considered. He declared:

> The Judiciary ought to have an opportunity of remonstrating against projected encroachments on the people as well as on themselves. It had been said that the Judges as expositors of the Laws would have an opportunity of defending their constitutional rights. There was weight in this observation; but this power of the Judges did not go far enough. Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect. Let them have a share in the Revisionary power, and they will have an opportunity of taking notice of these characters of a law, and of counteracting, by the weight of their opinions, the improper views of the Legislature.[1]

Speaking again, on August 23, in favor of giving the national legislature a negative over state legislation, he said that he

> considered this as the key-stone wanted to complete the wide arch of Government we are raising. The power of self-defence had been urged as necessary for the State Governments. It was equally necessary for the General Government. The firmness of Judges is not of itself sufficient. Something further is requisite. It will be better to prevent the passage of an improper law than to declare it void when passed.[2]

The rejection of the plan to establish a revisionary council did not lead Wilson to infer that thereby the right of the court to pass upon the constitutionality of statutes was denied. On the contrary, in the debates in the Pennsylvania ratifying convention, he declared that the proposed Constitution empowered the judges to declare unconstitutional enactments of Congress null and void.[3]

[1] Farrand, vol. ii, p. 73.

[2] *Ibid.* p. 391.

[3] *Cf. infra*, p. 26.

Examination of the speeches, papers and documents of the influential members of the Convention enumerated above fails to disclose any further direct declarations in favor of the principle of judicial review of legislation. However, there is reasonably satisfactory evidence that four other members of this group understood and indorsed the doctrine.

William Johnson, of Connecticut, *Robert Morris*, of Pennsylvania, *William Paterson*, of New Jersey, and *George Washington*. The evidence of their opinions is their approval of the Judiciary Act of 1789. Section 25 of that act provided:

> A final judgment or decree in any suit, in the highest court of law or equity of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; . . . or where is drawn in question the construction of any clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission,—may be reëxamined and reversed or affirmed in the Supreme Court of the United States upon a writ of error.

In other words: the Supreme Court may review and affirm a decision of a state court holding unconstitutional a statute of the United States. It surely is not unreasonable to assume that the men who established this rule believed that the Supreme Court could declare acts of Congress unconstitutional independently of decisions in lower state courts. Indeed, it would seem absurd to assume that an act of Congress might be annulled by a state court with the approval of the Supreme Court, but not by the Supreme Court directly.

William Johnson, Robert Morris and William Paterson[1] were members of the first Senate and voted in favor of the Judiciary Act[2]; and Washington, as president, approved the measure.

In addition to these eminent members of the Convention who directly or indirectly supported the doctrine of judicial control

[1] Annals of Congress, vol. i, p. 51.

[2] For further evidence in the case of Paterson *cf. infra*, p. 33.

over legislation there were several members of minor influence who seem to have understood and approved it. There is direct or indirect evidence in the following cases.

Abraham Baldwin, of Georgia, had no extensive faith in the probity of a legislature based on a widely extended suffrage. In speaking on the composition of the Senate, on June 29, he said: "He thought the second branch ought to be the representation of property, and that in forming it, therefore, some reference ought to be had to the relative wealth of their constituents and to the principles on which the Senate of Massachusetts was constituted."[1] Baldwin does not seem to have spoken on the subject of the judicial control in the Convention; but two years later, on June 19, 1789, he participated in the discussion of the bill constituting the Department of Foreign Affairs. The point at issue was whether the president could remove alone or only with the consent of the Senate; and some members of the House of Representatives held that this was a judicial question. To this Baldwin replied:

> Gentlemen say it properly belongs to the Judiciary to decide this question. Be it so. It is their province to decide upon our laws and if they find this clause to be unconstitutional, they will not hesitate to declare it so; and it seems to be a very difficult point to bring before them in any other way. Let gentlemen consider themselves in the tribunal of justice called upon to decide this question on a *mandamus*. What a situation! almost too great for human nature to bear, they would feel great relief in having had the question decided by the representatives of the people. Hence, I conclude, they also will receive our opinion kindly.[2]

Here is a direct statement that it is the duty of the judges to pass upon the constitutionality of statutes; and the statute in question was not one involving an encroachment upon the sphere of the judiciary but one touching the respective powers of the president and Senate. Baldwin here seems to think, however, that the court would, and ought to, receive with gratitude the expressed opinion of the House of Representatives.

[1] Farrand, vol. i, p. 469.

[2] Annals of Congress, vol. i. p. 582.

Such an opinion, he apparently thought, would aid the judges in reaching a decision but would not be binding upon them. In his later years, however, after the struggle between the Federalists and the Jeffersonians for the control of the national government had begun, Baldwin seems to have retracted his earlier view; for in a debate in the Senate concerning the powers of the presidential electors, in January, 1800, he said:

> Suppose either of the other branches of the government, the Executive or the Judiciary or even Congress, should be guilty of taking steps which are unconstitutional, to whom is it submitted or who has control over it, except by impeachment? The Constitution seems to have equal confidence in all the branches on their own proper ground, and for either to arrogate superiority, or a claim to greater confidence, shows them in particular to be unworthy of it, as it is in itself directly unconstitutional.[1]

It is small wonder that Baldwin thought the powers of the judiciary one of the questions that the Convention had left unsettled;[2] but his clear statement on June 19, 1789, may reasonably be taken to represent his understanding of the power conferred on the judiciary by the Constitution. At that time, at least, he believed it a function of the judiciary to pass upon the constitutionality of the statutes.

Richard Bassett, of Delaware, was a member of the Senate committee which introduced the Judiciary Act of 1789, and he voted for the measure.[3] Bassett was also one of Adams's Federalist judges, appointed under the act of February 13, 1801; and when the Jeffersonians repealed the law he joined several of his colleagues in a protest against the repeal, on the ground that it was an impairment of the rights secured to them as judicial officers under the Constitution. In a memorial to Congress the deposed judges declared that they were

> compelled to represent it as their opinion that the rights secured to them by the Constitution, as members of the judicial department, have been impaired. . . . The right of the undersigned to their compensa-

[1] Farrand, vol. iii, p. 383.

[2] *Ibid.* p. 370. *Cf. infra*, pp. 23, 24.

[3] Annals of Congress, vol. i, pp. 18, 51.

tion. . . involving a personal interest, will cheerfully be submitted to judicial examination and decision, in such manner as the wisdom and impartiality of Congress may prescribe.[1]

The memorialists proposed that their rights should be decided by the judicial department; and such a decision would have involved an inquiry regarding the constitutionality of the repeal of the Judiciary Act of 1801.[2] That Bassett believed the repeal unconstitutional, as to his deprivation of judicial functions and salary, and held the judiciary to be the proper authority for deciding the point, is quite evident.

George Wythe, of Virginia, was a member of the Virginia court of appeals which decided the case of Commonwealth *v.* Caton[3] in 1782. Justice Wythe, in his opinion, referred to the practice of certain English chancellors, who had defended the rights of subjects against the rapacity of the crown, and exclaimed:

If the whole legislature, an event to be deprecated, should attempt to overleap the bounds prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers at my seat in this tribunal; and, pointing to the constitution, will say to them, here is the limit of your authority and hither shall you go but no further.

The duty of a court to declare unconstitutional laws void could hardly be more energetically asserted. Of course this is not direct evidence that Wythe held that the federal Constitution embodied the principle, but it is clear that he favored the doctrine.

William Few, of Georgia, *George Read*, of Delaware, and *Caleb Strong*, of Massachusetts, who were members of the first Senate under the new government, voted for the Judiciary Act[4] and may therefore, for the reasons indicated above, be regarded

[1] American State Papers, Class X, Miscellaneous, vol. i, p. 340.

[2] A proposition to make provision for submitting the case to judicial determination was defeated in the House on January 27, 1803. Annals of Congress, Second Session, 7th Congress, p. 439.

[3] Thayer's Cases, vol. i, p. 55. *Cf. supra*, p. 5.

[4] Annals of Congress, vol. i, p. 51. *Cf. supra*, p. 15.

as having accepted the principle of the judicial review of federal statutes.

Summing up the evidence: we may say that of the leading members of the Convention no less than thirteen believed that the judicial power included the right and duty of passing upon the constitutionality of acts of Congress. Satisfactory evidence is afforded by the vote on the Judiciary Act that four other leading members held to the same belief. Of the less prominent members, we find that three expressed themselves in favor of judicial control and three others approved it by their vote on the Judiciary Act. We are accordingly justified in asserting that twenty-three members of the Convention favored or at least accepted some form of judicial control. That they all had equal understanding of the implications of the doctrine, that they clearly foresaw the possible development of the judicial power, cannot, of course, be claimed. But it seems to be unquestionable that they all understood that refusal to recognize unconstitutional enactments was a part of the judicial function.

II

We may now turn to the evidence that judicial control was not regarded by the framers of the Constitution as a normal judicial function under the new Constitution. The researches of those who contend that the doctrine propounded in Marbury *v.* Madison is sheer usurpation have placed only four members of the Convention on record against judicial control; and one of these, John Dickinson, of Delaware, must be stricken from the list.[1] The evidence in the case of the remaining three members is as follows:

Gunning Bedford, of Delaware, speaking in the Convention on June 4 on the subject of the executive veto, expressed himself as

> opposed to every check on the legislative, even the council of revision first proposed. He thought it would be sufficient to mark out in the Constitution the boundaries to the legislative authority, which would give all the requisite security to the rights of the other departments.

[1] *Cf. supra*, pp. 5, 6.

The representatives of the people were the best judges of what was for their interest and ought to be under no external controul whatever. The two branches would produce a sufficient controul within the legislature itself.[1]

John F. Mercer, of Maryland. On August 15 Madison moved that all acts, before they became laws, should be submitted to both the executive and supreme judiciary departments and, upon being vetoed by either or both of these departments, be repassed only by extraordinary majorities. Mercer

heartily approved the motion. It is an axiom that the judiciary ought to be separate from the legislative; but equally so that it ought to be independent of that department. The true policy of the axiom is that legislative usurpation and oppression may be obviated. He disapproved of the doctrine that the judges as expositors of the Constitution should have authority to declare a law void. He thought laws ought to be well and cautiously made and then to be uncontroulable.

Mercer evidently feared "legislative oppression," and when the motion to have acts submitted to the judiciary before they should become laws was rejected, he may have changed his mind on the subject of judicial control. However that may be, he stands on record as distinctly disapproving the doctrine.

Richard Spaight, of North Carolina, was undoubtedly opposed to judicial control over legislation, although he does not appear to have said anything on the subject in the constitutional Convention. In the spring of 1787 the superior court of North Carolina, in the case of Bayard *v.* Singleton, declared an act of the legislature of that state null and void on the ground that it was not warranted by the constitution of the commonwealth. The decision aroused much popular opposition and Spaight joined in the protest against the action of the court. In a letter dated Philadelphia, August 12, 1787, and directed to Mr. Iredell, Spaight wrote:

I do not pretend to vindicate the law which has been the subject of controversy; it is immaterial what law they have declared void; it is their usurpation of the authority to do it that I complain of, as I do

[1] Farrand, vol. i, p. 100. [2] *Ibid.* vol. ii, p. 298.

most positively deny that they have any such power; nor can they find anything in the constitution, either directly or impliedly, that will support them, or give them any color of right to exercise that authority. Besides it would have been absurd, and contrary to the practice of all the world, had the constitution vested such power in them, as would have operated as an absolute negative on the proceedings of the legislature, which no judiciary ought ever to possess. . . .

He further declared that "many instances might be brought to show the absurdity and impropriety of such power being lodged in the judges." He was aware, he explained, of the desirability of a check on the legislature, but he thought an annual election the best that could be devised.[1]

Pierce Butler, of South Carolina, and *John Langdon*, of New Hampshire, were members of the first Senate of the new Union, and both voted against the Judiciary Act of 1789.[2] Their reasons for so voting are not apparent; and it may be questioned whether a vote cast against the act as a whole is evidence of opposition to the principle of judicial control of federal legislation recognized in the twenty-fifth section of the act. If, however, these two names be added, the list of opponents of judicial control contain five members of the Convention, and but one of the five, Butler, belonged to the influential group.

III

Mr. Boudin lays much stress on the silence of those who disliked judicial control of legislation. He says:

It is absurd to assume that the many avowed opponents of judicial control of legislation who sat in the convention would have agreed to the [judiciary] article without a murmur had they suspected that it contained even a part of the enormous power which our judiciary now exercises. Richard Spaight for one, whose fiery denunciation of this power I have quoted above, would have made the halls in which the Convention met ring to the echo with his emphatic protest, had he suspected any such implications.[3]

[1] Coxe, An Essay on Judicial Power, pp. 248 *et seq.* and 385.

[2] Annals of Congress, vol. i, p. 51.

[3] *Loc. cit.* pp. 248, 249.

The "avowed opponents" do not seem to have been "many"; but whether they and the unavowed opponents were many or few, they must have been fully aware that most of the leading members regarded the nullification of unconstitutional laws as a normal judicial function. The view was more than once clearly voiced in the Convention, and any delegate who was not aware of "such implications" must have been very remiss in the discharge of his duties. On June 4 King definitely stated that the judges in the exposition of the laws would no doubt stop the operation of such as appeared repugnant to the Constitution.[1] On that day there were present representatives from Massachusetts, Connecticut, New York, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia. In addition to members in the group of twenty-five enumerated above there were recorded as present on that occasion Bedford, McClurg, Pierce and Yates.[2] Several other members, including Spaight, were in Philadelphia at the time and were probably in attendance at that particular session, but as there was no preliminary roll call the list of those actually present must be made up from those who addressed the Convention or appeared in the roll on a divided vote. There was also a large attendance on July 21, when the doctrine of judicial control was again enunciated in even more emphatic tones. In view of these facts it cannot be assumed that the Convention was unaware that the judicial power might be held to embrace a very considerable control over legislation and that there was a high degree of probability (to say the least) that such control would be exercised in the ordinary course of events.

The accepted canons of historical criticism warrant the assumption that, when a legal proposition is before a law-making body and a considerable number of the supporters of that proposition definitely assert that it involves certain important and fundamental implications, and it is nevertheless approved by that body without any protests worthy of mention, these implications must be deemed part of that legal proposition when it becomes law; provided, of course, that they are consistent

[1] Farrand, vol. i, p. 109.

[2] *Ibid.* pp. 96 *et seq.*

with the letter and spirit of the instrument. To go further than this—to say that the Convention must have passed definitely upon every inference that could logically be drawn from the language of the instrument that it adopted—would of course be an absurdity.

In balancing conflicting presumptions in order to reach a judgment in the case, it must be remembered that no little part of the work of drafting the Constitution was done by the Committee of Detail and the Committee of Style.

The former committee, appointed on July 24, consisted of Rutledge, Wilson, Ellsworth, Randolph and Gorham. Of these five men two, Ellsworth and Wilson, had expressly declared themselves in favor of judicial control, and Wilson seems to have been the "dominating mind of the committee." This committee had before it the resolutions referred to it by the Convention on July 23. It had also before it the Pinckney plan, or an outline of it, and the New Jersey plan. The members of the committee had been assiduous in their attendance upon the debates during the two months previous, and they prepared a draft of a constitution which they presented to the Convention on August 6. The article dealing with federal judicial power, as reported by the committee,[1] contained most of the provisions later embodied in the federal Constitution.

After lengthy debates on the draft submitted by the Committee of Detail, a committee of five was created to revise and arrange the style of the articles agreed to by the Convention; and Johnson, Hamilton, Gouverneur Morris, Madison and King were selected as members of this committee. Of these five men four, Hamilton, Morris, Madison and King, are on record as expressly favoring judicial control over legislation. There is some little dispute as to the share of glory to be assigned to single members of the committee, but undoubtedly Gouverneur Morris played a considerable part in giving to the Constitution its final form. Speaking of his work on the Constitution, Mr. Morris later wrote:

Having rejected redundant and equivocal terms, I believed it as clear

[1] Farrand, vol. ii, p. 186.

as our language would permit; excepting, nevertheless, a part of what relates to the judiciary. On that subject conflicting opinions had been maintained with so much professional astuteness that it became necessary to select phrases which expressing my own notions would not alarm others nor shock their self-love.[1]

That the Constitution was not designed to be perfectly explicit on all points and to embody definitely the opinions of a majority of the Convention is further evidenced by a speech made by Abraham Baldwin, a member of the Convention from Georgia, in the House of Representatives on March 14, 1796. In speaking of the clause of the Constitution which provides that treaties are to be the supreme law of the land, he said:

He would begin it by the assertion, that those few words in the Constitution on this subject were not those apt, precise, definite expressions, which irresistibly brought upon them the meaning which he had been above considering. He said it was not to disparage the instrument, to say that it had not definitely, and with precision, absolutely settled everything on which it had spoken. He had sufficient evidence to satisfy his own mind that it was not supposed by the makers of it at the time but that some subjects were left a little ambiguous and uncertain. It was a great thing to get so many difficult subjects definitely settled at once. If they could all be agreed in, it would compact the Government. The few that were left a little unsettled might, without any great risk, be settled by practice or by amendments in the progress of the Government. He believed this subject of the rival powers of legislation and treaty was one of them; the subject of the militia was another, and some question respecting the judiciary another. When he reflected on the immense difficulties and dangers of that trying occasion—the old Government prostrated, and a chance whether a new one could be agreed in—the recollection recalled to him nothing but the most joyful sensations that so many things had been so well settled, and that experience had shown there was very little difficulty or danger in settling the rest.[2]

IV

It is urged by the opponents of judicial control that, whatever may have been the purpose of the members of the Phila-

[1] Sparks, Life of Morris, vol. iii, p. 323.

[2] Farrand, vol. iii, p. 369.

delphia Convention, the ratifying conventions in the states gave the final legal sanction to the Constitution, and a sound rule of interpretation would compel us to ascertain the opinion of these bodies on the point at issue. This contention cannot be gainsaid; but a full examination of the materials on the state conventions, as any one can see, would require years of research into the lives and opinions of several hundred members. The author of this paper does not pretend to have made this research, and this essay is limited principally to a consideration of the purpose of the framers, not the enactors, of the Constitution. However, it is of interest to note what materials bearing on the purpose of the enactors with regard to this point are contained in Elliott's *Debates*.

If the members of the Virginia convention which ratified the federal Constitution were in the dark in this matter, or had any doubts as to the probable implications of the judicial article, they must have been enlightened by the clear and unmistakable language of John Marshall. In replying to objections which had been raised regarding the danger of an extension of federal jurisdiction at the cost of the states, he pointed out that the proposed federal government was one of enumerated and limited powers.

> Has the government of the United States power to make laws on every subject? . . . Can they make laws affecting the mode of transferring property, or contracts, or claims between citizens of the same state? Can they go beyond the delegated powers? If they were to make a law not warranted by any of the powers enumerated it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void.[1]

In the course of the discussion Mr. Grayson said: "If the Congress cannot make a law against the Constitution I apprehend they cannot make a law to abridge it. The judges are to defend it."[2] Mr. Pendleton declared: "The fair inference is that oppressive laws will not be warranted by the Constitution, nor attempted by our representatives, who are selected for their

[1] Elliot's Debates, vol. iii, p. 553.

[2] *Ibid.* p. 567.

ability and integrity, and that honest, independent judges will never admit an oppressive construction." [2]

The Maryland convention was by no means uninformed regarding the possible functions of the judiciary under the proposed Constitution. In his famous letter directed to the legislature of the state, Luther Martin said:

> Whether, therefore, any laws or regulations of the Congress or any act of its president or the officers are contrary to, or not warranted by, the Constitution, rests only with the judges who are appointed by Congress to determine; by whose determination every state must be bound.[3]

If the members of the Pennsylvania ratifying convention had any doubts regarding the probable exercise of judicial control over legislation under the new Constitution, these must have been removed by one of Mr. Wilson's speeches in defence of the judiciary. Some members of the convention expressed the apprehension that, inasmuch as the federal courts were to have jurisdiction in all cases in law and equity arising under the Constitution and the laws of the United States, the power enjoyed by the judges might be indefinitely extended if Congress saw fit to make laws not warranted by the Constitution. On this point Mr. Wilson said:

> I think the contrary inference true. If a law should be made inconsistent with those powers vested by this instrument in Congress, the judges, as a consequence of their independence, and the particular powers of government being defined, will declare such law to be null and void. For the power of the Constitution predominates. Anything therefore that shall be enacted by Congress contrary thereto will not have the force of law.[1]

In New York, the members of the Convention must have known the clear and cogent argument for judicial control made by Hamilton in *The Federalist.*

If the members of the Connecticut convention were unaware of the fact that under the provisions of the Constitution the judiciary would enjoy the power to pass upon the constitution-

[1] Elliot's Debates, vol. iii, p. 548. [2] *Ibid.* vol. i, p. 380.

[3] McMaster and Stone, Pennsylvania and the Federal Constitution, p. 354.

ality of federal and state statutes, it was their own fault; for, in his speech of January 7, 1788, on the power of Congress to lay taxes, Oliver Ellsworth carefully explained the new system. He said:

This constitution defines the extent of the powers of the general government. If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be made independent, will declare it to be void.[1]

It would be entirely misleading to conclude, from this fragmentary evidence, that the question of judicial control over acts of Congress was adequately considered in the state conventions. It was judicial control over state statutes that aroused the most serious apprehensions of critics of the new frame of government. That they thought much—or cared much—about what might happen to acts of Congress is not apparent.[2] Still it

[1] Elliot's Debates, vol. ii, p. 196. *Cf.* Farrand, vol. iii, p. 240.

[2] It is interesting to note that when, ten years later, the Kentucky and Virginia Resolutions raised the question of judicial control, and the other states had occasion to express a direct opinion on this point, none of them seems to have approved the doctrine expressed in the Resolutions. *Cf.* Ames, State Documents on Federal Relations, p. 16. The Massachusetts legislature replied to Virginia, on February 9, 1799: "This legislature are persuaded that the decision of all cases in law and equity arising under the Constitution of the United States and the construction of all laws made in pursuance thereof are exclusively vested by the people in the judicial courts of the United States." *Ibid.* pp. 18 *et seq.* The Rhode Island assembly declared that "the words, to wit, 'The judicial power shall extend to all cases arising under the laws of the United States,' vest in the federal courts exclusively, and in the Supreme Court of the United States ultimately, the authority of deciding on the constitutionality of any act or law of the Congress of the United States." *Ibid.* p. 17. The New Hampshire legislature resolved: "That the state legislatures are not the proper tribunals to determine the constitutionality of the laws of the general government; that the duty of such decision is properly and exclusively confided to the judicial department." Elliot's Debates, vol. iv, p. 539 (ed. 1861). The Vermont legislature asserted: "It belongs not to state legislatures to decide on the constitutionality of laws made by the general government, this power being exclusively vested in the judiciary courts of the Union." *Ibid.* The House of Representatives of Pennsylvania replied to Kentucky that the people of the United States "have committed to the supreme judiciary of the nation the high authority of ultimately and

cannot be said that they were kept in the dark in this respect, or that they could not easily have learned, if the matter had interested them, what the framers of the Constitution intended and expected. And it may pertinently be asked what our constitutional position would be today, if it were recognized that each branch of the federal government, in addition to the clearly expressed powers conferred upon it, possesses those additional powers only which were understood, by the ratifying conventions of the states, to have been impliedly conferred!

V

Those who hold that it was not the intention of the framers of the Constitution to establish judicial control of legislation make much of the opposition aroused by the sporadic attempts of a few state courts to exercise such a control prior to 1787. Dean Trickett cites the cases and exclaims: "These then are the precedents!" Mr. Boudin cites them and also exclaims: "Such were the state 'precedents,' and such was the temper of the people at the time the Philadelphia Convention met to frame the Constitution of the United States." The only trouble with this line of argument is that it leaves out of account the sharp political division existing in the United States in 1787 and the following years.

The men who framed the federal Constitution were not among the paper-money advocates and stay-law makers whose operations in state legislatures and attacks upon the courts were chiefly responsible, Madison informs us, for the calling of the Convention. The framers of the Constitution were not among those who favored the assaults on vested rights which legislative majorities were making throughout the Union. On the contrary, they were, almost without exception, bitter opponents of such enterprises; and they regarded it as their chief duty, in drafting the new Constitution, to find a way of preventing the renewal of what they deemed "legislative tyranny." Examine

conclusively deciding upon the constitutionality of all legislative acts." Ames, *op. cit.* p. 20. The Senate of New York replied to Virginia and Kentucky that the decision of all cases in law and equity was confided to the federal judiciary and that the states were excluded from interference. *Ibid.* p. 23.

the rolls of the state conventions that ratified the Constitution after it came from the Philadelphia Convention, and compare them with the rolls of the legislatures that had been assailing the rights of property. It was largely because the framers of the Constitution knew the temper and class bias of the state legislatures that they arranged that the new Constitution should be ratified by conventions. The framers and enactors of the federal Constitution represented the solid, conservative, commercial and financial interests of the country—not the interests which denounced and proscribed judges in Rhode Island, New Jersey and North Carolina, and stoned their houses in New York. The conservative interests, made desperate by the imbecilities of the Confederation and harried by state legislatures, roused themselves from their lethargy, drew together in a mighty effort to establish a government that would be strong enough to pay the national debt, regulate interstate and foreign commerce, provide for national defence, prevent fluctuations in the currency created by paper emissions and control the propensities of legislative majorities to attack private rights.

It is in the light of the political situation that existed in 1787 that we must inquire whether the principle of judicial control is out of harmony with the general purpose of the federal Constitution. It is an ancient and honorable rule of construction, laid down by Blackstone, that any instrument should be interpreted, "by considering the reason and spirit of it; or the cause which moved the legislator to enact it. . . . From this method of interpreting laws, by the reason of them, arises what we call equity." It may be, therefore, that the issue of judicial control is a case in equity. The direct intention of the framers and enactors not being clearly expressed on this point, we may have recourse to the "reason and spirit" of the Constitution.

Now the essence of the doctrine of judicial control is that the judiciary, rather than the legislative or executive department, is best fitted to pronounce the final word of interpretation on the Constitution in cases involving private rights. Assuredly it is best fitted to secure the purposes which the framers had in mind —the construction of a government strong enough to carry out certain great national functions and at the same time firm

enough to secure the rights of persons and of property against popular majorities, no matter how great.[1]

No historical fact is more clearly established than the fact that the framers of the Constitution distrusted democracy and feared the rule of mere numbers. Almost every page of Madison's record bears witness to the fact that the Convention was anxiously seeking to solve the problem of establishing property rights on so firm a basis that they would be forever secure against the assaults of legislative majorities. If any reader needs a documented demonstration of this fact, he will do well to turn to the *Records of the Convention*, so admirably compiled by Professor Farrand. Let him go through the proceedings of the Convention and see how many of the members expressed concern at the dangers of democracy and were casting about for some method of restraining the popular branch of the government. The very system of checks and balances, which is undeniably the essential element of the Constitution, is built upon the doctrine that the popular branch of the government cannot be allowed full sway, and least of all in the enactment of laws touching the rights of property. The exclusion of the direct popular vote in the election of the president; the creation, again by indirect election, of a Senate which the framers hoped would represent the wealth and conservative interests of the country; and the establishment of an independent judiciary appointed by the president with the concurrence of the Senate—all these devices bear witness to the fact that the underlying purpose of the Constitution was not the establishment of popular government by means of parliamentary majorities.

Page after page of *The Federalist* is directed to that portion of the electorate which was disgusted with the "mutability of the public councils." Writing on the presidential veto Hamilton says:

> The propensity of the legislative department to intrude upon the rights, and absorb the powers, of the other departments has already been suggested and repeated. . . . It may perhaps be said that the power of preventing bad laws included the power of preventing good ones; and

[1] The Federalist, no. 10.

may be used to the one purpose as well as the other. But this objection will have little weight with those who can properly estimate the mischiefs of that inconstancy and mutability in the laws which form the greatest blemish in the character and genius of our governments. They will consider every institution calculated to restrain the excess of law-making and to keep things in the same state in which they happen to be at any given period, as more likely to do good than harm; because it is favorable to greater stability in the system of legislation. The injury which may be possibly done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones.[1]

In the face of the evidence above adduced, in the face of the political doctrines enunciated time and again on divers occasions by the leaders in the Convention, it certainly is incumbent upon those who say that judicial control was not within the purpose of the men who framed and enacted the federal Constitution to bring forward positive evidence, not arguments resting upon silence. It is incumbent upon them to show that the American federal system was not designed primarily to commit the established rights of property to the guardianship of a judiciary removed from direct contact with popular electorates.[2] Whether this system is outworn, whether it has unduly exalted property rights, is a legitimate matter for debate; but those who hold the affirmative cannot rest their case on the intent of the eighteenth-century statesmen who framed the Constitution.

VI

The great justice who made the theory of judicial control operative had better opportunities than any student of history or law today to discover the intention of the framers of the federal Constitution. Marshall, to be sure, did not have before him Elliot's *Debates*, but he was of the generation that made the Constitution. He had been a soldier in the Revolutionary War. He had been a member of the Virginia convention that ratified the Constitution; and he must have remembered stating

[1] The Federalist, no. 73.

[2] See the article on this point by President Arthur T. Hadley, of Yale University. *The Independent*, April 16, 1908.

in that convention the doctrine of judicial control,[1] apparently without arousing any protest. He was on intimate, if not always friendly, relations with the great men of his state who were instrumental in framing the Constitution. Washington once offered him the attorney-generalship. He was an envoy to France with two members of the Convention, Charles Cotesworth Pinckney and Elbridge Gerry. He was a member of Congress for part of one term in Adams's administration; he was secretary of state under Adams; and he was everywhere regarded as a tower of strength to the Federalists. It was, therefore, no closet philosopher, ignorant of the conditions under which the Constitution was established and unlearned in the reason and spirit of that instrument, who first enunciated from the supreme bench in unmistakable language the doctrine that judicial control over legislation was implied in the provisions of the federal Constitution.[2]

Those who hold that the framers of the Constitution did not intend to establish judicial control over federal legislation sometimes assert that Marshall made the doctrine out of whole cloth and had no precedents or authority to guide him. This is misleading. It is true that it was Marshall who first formally declared an act of Congress unconstitutional; but the fact should

[1] *Cf. supra*, p. 25. In Marshall's argument in the case of Ware *v.* Hylton before the Supreme Court in 1796, Marshall said: "The legislative authority of any country can only be restrained by its own municipal constitution. This is a principle that springs from the very nature of society; and the judicial authority can have no right to question the validity of a law unless such a jurisdiction is expressly given by the Constitution." 3 Dallas, 211. Here, however, Marshall was arguing as counsel, not stating his own personal views.

[2] It has not escaped close observers, that the law which Marshall declared unconstitutional in Marbury *v.* Madison was a part of the Judiciary Act of 1789, which had been drafted and carried through by men who had served in the Convention. An analysis of the decision shows, however, that the section set aside was at most badly drawn and was not in direct conflict with the Constitution. Had Marshall been so inclined he might have construed the language of the act in such a manner as to have escaped the necessity of declaring it unconstitutional. *The Nation*, vol. lxxii, p. 104. The opportunity for asserting the doctrine, however, was too good to be lost, and Marshall was astute enough to take advantage of it. In view of the recent Jeffersonian triumph, he might very well have felt the need of having the great precedent firmly set.

not be overlooked that in the case of Hylton *v.* The United States[1] the Supreme Court, with Ellsworth [2] as chief justice and Paterson as associate (both members of the Convention), exercised the right to pass upon the constitutionality of an act of Congress imposing a duty on carriages. On behalf of the appellant in this case it was argued that the law was unconstitutional and void in so far as it imposed a direct tax without apportionment among the states. The court sustained the statute. If it was not understood that the court had the power to hold acts of Congress void on constitutional grounds, why was the case carried before it? If the court believed that it did not have the power to declare the act void as well as the power to sustain it, why did it assume jurisdiction at all or take the trouble to consider and render an opinion on the constitutionality of the tax?

The doctrine of judicial control was a familiar one in legal circles throughout the period between the formation of the Constitution and the year 1803, when Marshall decided the Marbury case. In Hayburn's case, already cited, the federal judges had refused to execute a statute which they held to be unconstitutional. This was in 1792. In 1794, in the case of Glass *v.* The Sloop Betsey,[3] the Supreme Court heard the doctrine of judicial control laid down by the counsel of the appellants:

> The well-being of the whole depends upon keeping each department within its limits. In the state governments several instances have occurred where a legislative act has been rendered inoperative by a judicial decision that it was unconstitutional; and even under the federal government the judges, for the same reason, have refused to execute an act of Congress. . . . To the judicial and not to the executive department, the citizen or subject naturally looks for determinations upon his property; and that agreeably to known rules and settled forms, to which no other security is equal.

In the case of Calder *v.* Bull,[4] decided in 1798, the counsel for the plaintiffs in error argued "that any law of the federal

[1] 3 Dallas, 171 (1796).

[2] Ellsworth did not take part in the decision, for he had just been sworn into office.

[3] 3 Dallas, 13.

[4] 3 Dallas, 386.

government or of any of the state governments contrary to the Constitution of the United States is void; and that this court possesses the power to declare such law void." Justice Chase however refused to pass upon the general principle, because it was not necessary to the decision of the case before him. He said:

> Without giving an opinion at this time whether this court has jurisdiction to decide that any law made by Congress is void, I am fully satisfied that this court has no jurisdiction to determine that any law of any state legislature contrary to the constitution of such state is void.[1]

In the same case Justice Iredell said:

> If any act of Congress or of the legislature of a state violates those constitutional provisions, it is unquestionably void; though I admit, that as the authority to declare it void is of a delicate and awful nature, the court will never resort to that authority but in a clear and urgent case.

In view of the principles entertained by the leading members of the Convention with whom Marshall was acquainted, in view of the doctrine so clearly laid down in number 78 of *The Federalist*, in view of the arguments made more than once by eminent counsel before the Supreme Court, in view of Hayburn's case and Hylton *v.* The United States, in view of the judicial opinions several times expressed, in view of the purpose and spirit of the federal Constitution, it is difficult to understand the temerity of those who speak of the power asserted by Marshall in Marbury *v.* Madison as "usurpation."

CHARLES A. BEARD.

[1] Of course, as everybody knows, Chase adhered stoutly to the doctrine of federal judicial control.

Note on the views of Thomas Jefferson

The great authority of Jefferson is often used by the opponents of judicial control; and it is true that, after his party was in control of the legislative and executive branches of the government, he frequently attacked judicial "usurpation" with great vehemence. The Federalists were in possession of the Supreme Court for some time after his inauguration. Jefferson was not a member of the Convention that drafted the Constitution nor of the Virginia convention that ratified it. There is, however, absolutely no question that at the time the Constitution was formed he favored some kind of direct judicial control. In a letter to Madison, dated Paris, December 20, 1787, he said: "I like the organization of the government into Legislative, Judiciary and Executive. . . . And I like the negative given to the Executive with a third of either house, though I should have liked it better had the judiciary been associated for that purpose, or invested with a similar and separate power."[1] He had before him, of course, only a copy of the new instrument and the explanatory letters from his friends. In another letter from Paris, to F. Hopkinson, he approved the idea of a council of revision and added "What I disapproved from the first moment also was the want of a bill of rights to guard liberty against the legislative as well as executive branches of the government ["by" stricken out in the manuscript—it would be interesting to know whether he had in mind "the judiciary"], that is to say, to secure freedom in religion, freedom of the press, freedom from monopolies, *etc.*"[2] Jefferson favored a bill of rights because of "the legal check which it puts into the hands of the judiciary."[3]

[1] Documentary History of the Constitution, part i, p. 412.

[2] *Ibid.* vol. v, p. 159.

[3] *Ibid.* vol. v, p. 161.