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THE SUPREME COURT'S DUTY TO DEFEND THE CONSTITUTION

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It is repeatedly claimed in high places that the action of the Supreme Court in declaring acts of Congress unconstitutional is a usurpation on the part of the judges. This assertion is sometimes made by college professors, sometimes by statesmen and sometimes even by lawyers. On the contrary, in exercising that power the Supreme Court merely declares that the will of the people of the several states in ratifying their federal compact shall remain supreme over attempted usurpation of power by their agents in the federal legislature. When John Marshall proclaimed that power in the famous case of *Marbury v. Madison*,[1] decided in February, 1803, it was not a new doctrine. Previous to that decision, the courts of Maryland, Virginia, North Carolina, Rhode Island, and New Jersey had recognized their duty to declare void, acts of the state legislatures which contravened the will of the people of those states expressed in their state constitutions.

In the cast of *Whittingham v. Polk*[2] decided in April, 1802, the General Court of Maryland by Jeremiah Townley Chase, Chief Justice, said:

"The legislature being the creation of the Constitution, and acting within a circumscribed sphere, is not omnipotent, and cannot rightly exercise any power but that which is derived from that instrument. The Constitution having set certain limits or land marks to the power of the legislature, whenever they exceed them they act without authority, and such acts are mere nullities, not being done in pursuance of the power delegated to them. Hence, the necessity of some power under the Constitution to restrict the acts of the legislature within the limits defined by the Constitution.

"The power of determining finally on the validity of the acts of the legislature cannot reside with the legislature, because such power would defeat and render nugatory all the limitations and restrictions on the authority of the legislature contained in the Bill of Rights and form of government, and they would become the judges of the validity of their own acts, which would establish

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[1]1 Cranch 137 (1803).

[2]1 Harris & Johnson 236 (Md., 1802). Luther Martin, the leader of the Maryland bar and a delegate to the Philadelphia convention was counsel for the plaintiff.

a despotism and subvert the great principle of the Constitution, which declares that the powers of making, judging, and executing the law shall be separate and distinct from each other.

"It is the office and province of the court to decide all questions of law which are judicially brought before them, according to the established mode of proceeding, and to determine whether an act of the legislature, which assumes the appearance of a law and is clothed with the garb of authority, is made pursuant to the power vested in the legislature; for if it is not the result or emanation of authority derived from the Constitution, it is not law and cannot influence the judgment of the court in the decision of the question before them . . . To do right and justice according to the law, the judge must determine what the law is, which necessarily involves in it the right of examining the Constitution (which is the supreme or paramount law and under which the legislatures derive the only authority they are invested with of making laws) and considering whether the act passed is made pursuant to the Constitution and that trust and authority which is delegated thereby to the legislative body."

The same doctrine was declared with equal emphasis by the Court of Appeals of Virginia.[3]

There Judge Wythe said: "If the whole legislature should attempt to overlap the bounds prescribed to them by the people, I, in administering the public justice of the country, will meet the united power at my seat in this tribunal, and pointing to the Constitution, will say to them 'here is the limit of your authority'."

In a New Jersey case decided in 1780,[4] the court held a law providing for a jury of six persons to be a violation of the New Jersey Constitution.

In a Rhode Island case decided in 1786,[5] the court upset a summary conviction for declining to receive paper money as a violation of the Charter of Rhode Island.

In defending the decision in *Bayard v. Singleton*,[6] decided in May Term, 1787, Judge Iredell said:

"An act of assembly cannot repeal the Constitution or any part of it . . . The judges therefore must take care at their peril that every act of the assembly they presume to enforce is warranted by the Constitution, since, if it is not, they act without lawful authority. This is not a usurped or a discretionary power, but one inevitably resulting from the constitution of their office, being

[3]Commonwealth v. Caton, 4 Call 5 (Va., 1782).
[4]Holmes v. Walton, referred to 9 N. J. Law (Appendix) 444.
[5]Trevitt v. Weedon, unreported.
[6]1 Martin 48 (N. C., 1787).

judges for the benefit of the whole people, not mere servants of the assembly.''[7]

In that case it was held that an act for quieting titles, providing that where the defendant makes affidavit that he holds the disputed property under a sale by a commissioner of forfeited estates, the court must dismiss the suit on motion, was void as illegally dispensing with the constitutional right to a jury trial. The court said:

''That by the Constitution every citizen had undoubtedly a right to a decision of his property by a trial by jury. For if the legislature could take away this right, and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken away without a trial by jury, and that he should stand condemned to die without the formality of any trial at all; that if the members of the General Assembly could do this, they might with equal authority not only render themselves the legislature of the state for life, without any further election of the people, but from thence transmit the dignity and authority for legislation to their heirs male forever. But that it was clear that no act they could pass could by any means repeal or alter the Constitution, because if they could do this they would at the same instant of time, destroy their own existence as a legislature and dissolve the government thereby established.''[8]

The debates in the Philadelphia convention and in the state conventions which ratified the Constitution are full of expressions by the delegates which plainly show they considered the Supreme Court possessed this power. Moreover, the words defining the judicial power as used in Subsection 1, Section 2, of Article III, ''arising under this Constitution'' doubtless were intended to refer to the power and duty of the courts to declare *ultra vires* acts unconstitutional. The specific enumeration of jurisdiction following expressly covers everything else. These words, therefore, unless they referred to such power were mere surplusage. The committee on style left few superfluous words in the Constitution. A perusal of the language used in the debates as quoted below strengthens that conclusion.

In the Philadelphia convention, when the judiciary article was under consideration, Dr. Johnson moved to insert the words ''this Constitution and the'' before the word ''laws.'' This made the provision under consideration read: ''The jurisdiction of the Supreme Court shall extend to all cases arising under this Con-

[7]The Life and Correspondence of James Iredell, by McRee, Vol. 2, p. 148.
[8]Bayard v. Singleton, 1 Martin 48 (N. C., 1787).

stitution and the laws passed by the legislature of the United States", etc. Mr. Madison 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.[9] The motion of Mr. Johnson was agreed to *nem. con.*, it being generally supposed that the jurisdiction given was constructively limited to cases of a judiciary nature. This indicates that Mr. Madison considered Dr. Johnson's amendment as affirmatively giving jurisdiction to pass upon the constitutionality of laws. Roger Sherman of Connecticut said: "The courts of the states would not consider as valid any law contravening the authority of the Union."[10] And Madison speaks of the state laws being "set aside by the national tribunals" and Gouverneur Morris of Pennsylvania said: "A law that ought to be negatived will be set aside in the judiciary department." Judge Wilson of Pennsylvania said: "The firmness of the judges is not in 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."[11] This was in the debate over the proposal to give Congress a negative on state laws, which proposition was defeated.

Luther Martin of Maryland, in opposing the proposition to give the Supreme Court a veto on the acts of Congress similar to that of the President, said: "As to the constitutionality of laws, that will come before the judges in their official character. In this character they will have a negative on laws. Join them with the executive in the revision and they will have a double negative."[12] Colonel Mason of Virginia, in answering Martin stated: "It has been said that if the judges were joined in this check on the laws they would have a double negative, since in their capacity as 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, and pernicious, that did not come plainly under this description, they would be under the necessity as judges to give it a free course."[13] Mr. Rutledge thought: "The judges of all men the most unfit to be

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[9] 5 ELLIOTT'S DEBATES 483.
[10] *Id.* at 321.
[11] *Id.* at 468.
[12] *Id.* at 346.
[13] *Id.* at 377.

concerned in the revisionary council. The judges ought never to give their opinion on a law until it comes before them."

In opposing the submission of the Constitution to the state legislatures for ratification, instead of to the people in their state conventions, Gouverneur Morris said: "Legislative alterations not conformable to the federal compact would clearly not be valid. The judges would consider them as null and void."[14] Madison said: "A law violating a constitution established by the people themselves would be considered by the judges as null and void."[15] In the Madison Papers,[16] in reporting the debate on a council of revision, it was stated: "Mr. Gerry 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 expositions 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."

References to this power in state ratification conventions are equally clear and explicit. Patrick Henry in the Virginia convention, while criticizing appeals on questions of fact, said: "Congress cannot by any act of theirs alter this jurisdiction as established. It appears to me that no law of Congress can alter or arrange it. It is subject to be regulated, but it is not subject to be abolished. If Congress alters this part, they will repeal the Constitution. Does it give them power to repeal itself? . . . When Congress, by virtue of this sweeping clause will organize these courts, they cannot depart from the Constitution, and their laws in opposition to the Constitution would be void. If Congress under the specious pretense of pursuing this clause altered it and prohibited appeals as to fact, the federal judges, if they spoke the sentiments of independent men, would declare their prohibition nugatory and void."[17]

Mr. Grayson in the same convention said: "If Congress cannot make a law against the Constitution, I apprehend they cannot make a law to abridge it. The judges are to defend it. They can neither abridge nor extend it."[18] John Marshall in the same convention said: "Has the government of the United States power to make laws on every subject? Does he (referring to Patrick Henry) understand it so? Can they make laws affecting the mode of transferring property or contracts or claims between

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[14] *Id.* at 355.
[15] *Id.* at 356.
[16] Vol. 2, p. 783.
[17] 3 ELLIOTT'S DEBATES 540.
[18] *Id.* at 567.

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 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 . . . To what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the judiciary?"[19] George Nicholas said: "But, says he, who is to determine the extent of such powers? I say, the same power which in all well regulated communities determines the extent of legislative powers. If they exceed these powers the judiciary will declare it void, or else the people will have a right to declare it void."[20]

Judge Wilson in the Pennsylvania state convention said: "I say, under this Constitution, the legislature may be restrained and kept within its prescribed bounds by the interposition of the judicial department . . . I had occasion on a former day to state that the power of the Constitution was paramount to the power of the legislature acting under that Constitution; for it is possible that the legislature, when acting in that capacity, may transgress the bounds assigned to it, and an act may pass in the usual mode notwithstanding that transgression; but when it comes to be discussed before the judges—when they consider its principles and find it to be incompatible with the superior power of the Constitution—it is their duty to pronounce it void. And judges independent and not obliged to look to every session for a continuance of their salaries, will behave with intrepidity and refuse to the act the sanction of judicial authority."[21]

Samuel Adams in the Massachusetts convention said: "Your Excellency's first proposition is 'that it be explicitly declared that all powers not expressly delegated to Congress are reserved to the several states to be by them exercised.' This appears to my mind to be a summary of a bill of rights which gentlemen are anxious to obtain. It removes a doubt which may have been entertained respecting the matter, and gives assurance that, if any law made by the federal government shall be extended beyond the power granted by the proposed Constitution and inconsistent with the constitution of this state, it will be an error and adjudged by the courts of law to be void."[22]

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[19] *Id.* at 553, 554.
[20] *i. e.*, by constitutional amendment. 3 ELLIOTT'S DEBATES 443.
[21] 2 ELLIOTT'S DEBATES 445.
[22] *Id.* at 131.

Alexander Hamilton said in The Federalist, article 75,[23] "Some perplexity respecting the right of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power . . . There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal, that the servant is above his master, that the representative of the people are superior to the people themselves, that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid . . . The Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents . . . Nor does the conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in oppositoin to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental . . . Whenever a particular statute contravenes the Constitution, it will be the duty of the judiciary tribunals to adhere to the latter and disregard the former."

It was impossible for Marshall in deciding *Marbury v. Madison* to cite the debates in the Philadelphia convention, because they had been kept secret and were not published till long afterwards. He did not cite prior state decisions, doubtless because he considered the principle needed no authority to support it. Some of these state decisions may not have been published at that time in the court reports so as to be accessible to him for easy reference. His previous assertion in the Virginia ratification convention of the existence of this power in the Unted States courts had not been denied or disputed by any member of that convention.

Thus we see included among those who asserted, without contradiction, the duty of the courts to declare all acts of Congress void which are in conflict with the organic law, many of the leading spirits of the national convention which proposed, and the state conventions which ratified, our federal compact. Among them were the extreme nationalists—Alexander Hamilton of New

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[23] WARNER EDITION 1818, p. 421.

York, Judge Wilson and Gouverneur Morris of Pennsylvania; such true federalists as John Marshall and James Madison; such firm defenders of state rights as Roger Sherman of Connecticut, Judge Iredell of North Carolina, and Samuel Adams of Massachusetts, and also those earnest patriots, Luther Martin of Maryland, Patrick Henry, Mason, and Grayson of Virginia, who opposed the adoption of the Constitution without a bill of rights previously incorporated therein.

This should forever set at rest the claim now so frequently advanced that in declaring the duty of the courts to defend the Constitution John Marshall asserted a new doctrine and set up a judicial usurpation.

In view of the above recited history it seems strange that some individual members of Congress still continue to deny the power and the duty of the courts to declare void acts of Congress not authorized by the Constitution. Those same congressmen are earnest supporters of the guarantees in the Bill of Rights, freedom of speech, freedom of assembly, freedom of the press, freedom of religion, right to a jury trial in criminal cases, etc.

It should be realized by all that without power in the courts to enforce its protections and guarantees the whole Constitution becomes a scrap of paper, which can be brushed aside by Congress at will, not only the provisions they do not like, such as the 10th Amendment, guaranteeing local self-government and the division of powers, etc., but the provisions which contain the so-called bill of rights, as well.

The courts can either enforce the whole of the Constitution or none of it against usurpations of power. It must stand or fall as a whole.