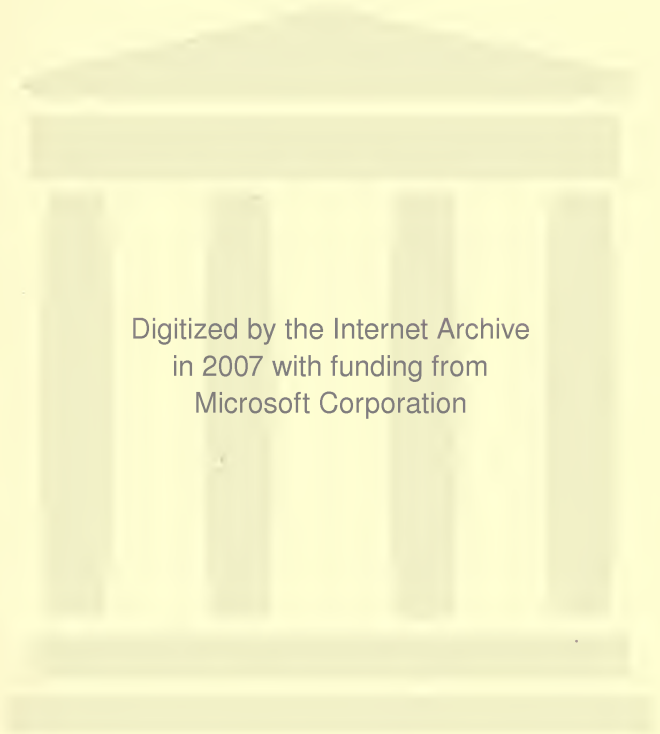

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History is past Politics and Politics present History—*Freeman*

EXTRA VOLUME
VII

THE

SUPREME COURT

OF THE

UNITED STATES

Its History and Influence in our Constitutional System

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THE SUPREME COURT OF THE UNITED STATES.

CHAPTER I.

Judiciaries in the Colonies and Under the Confederation.

The research of recent historians has served to set in proper light the origin of our political institutions, and the character of their antecedents. In America, as elsewhere, has been shown the truth of the maxim that institutions are the result of an evolution, and not of an invention; and that constitutions, whether written or unwritten, are but the results of the gradual recognition of those laws and methods which are the best suited for the government of a politically organized people. Nevertheless, the impression seems still to have obtained, to some extent at least, that our Supreme Court was, in its establishment, a partial exception to this political truth, and that it owes its origin very largely to the inventive genius of the members of the constitutional convention. We find Sir Henry Maine speaking of the Supreme Court as "a virtually unique creation of the founders of the Constitution," and Hannis Taylor, in his recent work, characterizing it as "the most original work accomplished by the framers of the Constitution," and in another place saying: "The Supreme Court has no prototype in history." To what extent are these views

correct? In what respects is our supreme judicial tribunal the result of an historical development, and in what respects is it the product of the creative genius of the members of the federal convention?

England's colonists in America brought with them her system of common law, and, together with British-born subjects, claimed all the rights and privileges enjoyed at home. The colonies, though settled at various times, under widely different circumstances, and by men differing in religion, instincts, and manners of thinking and living, all owed a common and like allegiance to England. They enjoyed, as we know, local self-government, guaranteed them by charters and grants of power. The laws of their representative legislatures were required to be not repugnant to, but, so far as possible, in conformity with the statutes of England. The legislative power was, however, limited by the charter or royal grant of power, under which the colonial government was established. The field of colonial legislation, thus marked out, could not be departed from without the liability of annulment. That this limitation received a very liberal interpretation, we know, but that the principle always existed as a well recognized fact, cannot be contested. That this form of control should naturally exist is seen when we consider the nature of the companies first settling the colonies. They were speculative commercial organizations, and their instruments of government were commercial charters. In all times a governmental control over corporations has of necessity been retained in order to guard against abuse of their corporate privileges. The charter of London, for example, was several times taken away by the Plantagenets for various reasons, real or pretended. As an example of the exercise of this royal authority as applied to the American colonies may be cited the case of *Winthrop* v. *Lechemere* in Connecticut, where, upon appeal to England, a colonial statute was declared void as contrary to the charter and English law. Practically speaking, however, it seems to have been left to the judiciaries of the colonies to

decide what parts of common law applied to the colonies, and as actually administered in the different colonies, there was in no two of them an identity of interpretation.[1]

During the colonial period of our history the judiciaries consisted of courts erected, and judges appointed by the crown, or by its representatives, the governors;[2] but, once appointed, the judges were independent, as they held office during good behavior. The change of their tenure of office to the king's pleasure was one of the offensive acts of England in the period just preceding the Revolutionary War. This measure was of course remonstrated against by the colonies. Chief Justice Pratt, of New York, received his commission to continue only "at the king's pleasure." Upon appeal to the Board of Trade, the reply was given: "Your good behavior is a pernicious proposition." New York thereupon refused to grant any salary to the chief justice; but the board was able to provide such salary by a grant to be paid out of the royal quit-rents of the province.[3]

In almost all cases appeals lay from colonial courts to the Assemblies,[4] and from thence to the King in Council. In the majority of the charters, this right of appeal from the highest colonial tribunal to the crown, was secured by express reservation. Notwithstanding, however, the clearness with which this appellate jurisdiction was asserted, it was at first denied by several of the colonies, notably Massachusetts, Rhode Island, and Connecticut, and was considered an infringement upon their rights. Later, the exercise of this appeal became assured, and at the time of the American Revolution was in full force, and was then considered as a protection rather than as a grievance.[5]

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[1] Blackstone, I, 384, 231.

[2] Except in Conn., where the judges were appointed by the legislature.

[3] 1761–2.

[4] For this reason the Assembly was called in several colonies the General Court.

[5] Story, I, p. 163.

With the severance of political connection of the colonies with England, the judicial, with the other powers of government, were thrown into the hands of the several colonies, but the only change in the administration of the judicial functions arising from this circumstance, was that the highest court of each state became the court of final resort, instead of the Privy Council.

The Declaration of Independence left the colonies politically and governmentally separate states. During almost the entire course of the war there existed no constitutional[1] federal government.

By the Articles of Confederation finally adopted in 1781, the colonies erected for themselves a federal governing body, a Congress of States, to which was given not only legislative and executive powers, but also judicial functions of a certain order, namely, to decide "all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction, or any cause whatever." This authority was, however, always to be exercised by the selection of commissioners or judges from each of the States. The Articles of Confederation proving a failure, a better and more perfect union was obtained in 1787, when was framed the instrument which forms our present fundamental law.

The constitutional convention, which met in May, 1787, was composed of the best men of the country; with scarcely an exception able, keen, farsighted statesmen. They had been schooled in the arts of politics and government in the discussions preceding, attending, and following the Revolution. They had had the experience of executive tyranny under England; of individual self-government under the States; and of weak, inefficient federal government under the Articles. In addition to this, the writings and speeches of the leaders there, show them to have been careful students of ancient history, and of the then existing forms of government

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[1] The second Continental Congress was essentially a revolutionary body, acting without any properly delegated powers. *Vide* Curtis' Const. Hist.

in Europe.[1] Among Washington's papers, for instance, is found an abstract of the general principles of ancient and modern confederacies, the Lycian, Amphictyonic, Achaean, Helvetic, Belgic, and Germanic Confederations.[2] From such a body of men would naturally be expected an adequate yet conservative instrument of government; one that would be "preservative rather than creative."

It is the purpose of the next few pages to show the extent to which the judiciary then established was the recognition of already existing courts and powers of adjudication, rather than the creation of a new tribunal with novel powers.

Professor J. F. Jameson has rendered the service of emphasizing the fact that in addition to the federal judicial functions exercised by the old congress, there existed a federal tribunal styled the "Court of Appeals." From his valuable paper the facts concerning this court are largely taken.[3] The outbreak of hostilities with England occasioned a great increase in privateering, which, in turn, gave rise to many prize cases of dispute. The old vice-admiralty courts having been destroyed, the Revolutionary Congress alone remained able to decide these cases. In Congress, these disputes were decided at first by means of special committees appointed for each case. This method was later improved upon, by the creation of a standing committee. Washington was the first to ask for the establishment of a court, separate from the legislature, to which appeals in prize cases could go for adjudication. Congress, as usual, delayed action, and it was not until five years after Washington's first suggestion, and only after repeated petitions, that an act was obtained in 1779, by which a court of three judges, styled "The Court of Appeal in Cases of Capture" was created. The court was directed to proceed in

[1] Federalist, No. 20, 14 and 19.

[2] Works of, IX, p. 521. *Cf.* Madison's Writings.

[3] Papers of American Historical Association for 1889. See also the pamphlet by J. C. Bancroft Davis, on "The Committee of the Continental Congress, chosen to Hear and Determine Appeals from Courts of Admiralty, and the Court of Appeals in Cases of Capture."

accordance with the usage of nations, and not by trial by jury, and it was provided that the States should execute its decrees. At the end of the war, cases requiring its jurisdiction became less and less numerous, until in 1784, the judges were able to report to Congress that there was no business to be transacted. Its final adjournment was in 1787. One hundred and eighteen cases in all were decided by Congress and by this Court.

The exact relation of this federal court to our present supreme tribunal, cannot be exactly drawn. Says Professor Jameson: "It could hardly be that one hundred and eighteen cases, though all in one restricted branch of judicature, should be brought by appeal from state courts to a federal tribunal without familiarizing the public mind with the complete idea of a superior judicature in federal matters, exercised by federal courts. The 'Court of Appeals in Cases of Capture' may therefore be justly regarded, not simply as the predecessor, but as one of the origins of the Supreme Court of the United States." That the influence of this court in educating the people to the idea of our present federal court with its additional powers and widened field of jurisdiction, must have been great, is indisputable; but that this court was not simply the predecessor, but one of the origins of the Supreme Court, in the sense that from it the latter court was evolved is open to question. A little thought shows these courts to have been of such extremely different character, that to say that one was the origin, or even one of the origins of the other, is too strong. The old Federal Court of Appeals in Cases of Capture was purely a creation of the Congress. It had the interpretation of no federal laws, but of the laws of nations. It had no powers of interpretation of the acts of either the federal or state legislatures. Our Supreme Court was the creation of a written constitution, and its authorized interpreter, and coördinate in power with the legislative and executive branches of government. In the debates attending the creation of our present federal courts, the old Federal Court of Appeals, was not, so far as I am aware, once referred to. The only resemblance between the two courts was in their federal nature.

CHAPTER II.

The Judiciary in the Convention.

In forming the constitution, the framers of our government were controlled by the principle that the powers which belong to all governments can most safely and satisfactorily be exercised by dividing them, according to their nature, among three separate branches—the executive, the legislative and the judicial. Under the Articles of Confederation this maxim had been disregarded. The old confederate congress, had had, under that plan, not only legislative powers, but also those executive and judicial powers which the States had allowed the central government. "The lack of a separate judiciary had been one of the vital defects of the Confederation."[1]

Before we consider the treatment that the judiciary received in the constituent assembly, it will be well to particularize some of the circumstances which demanded the erection of a supreme tribunal, and thus to gain an adequate idea of the work a Supreme Court was intended to do, and has done, and what are the benefits that have followed from its creation.

A supreme judiciary was necessary; first, that there might be some power which could give an interpretation to the national laws and treaties that would be uniform throughout the land, and which would, as far as possible, be removed from all danger of political bias and local prejudices. The homogeneity of all law that is supreme is necessary for the existence of a nation. A sovereign act must be valid every-

[1] Story.

where. The establishment of an interpreter follows as a corollary upon the adoption of a written constitution. This was especially true under the new constitution, for the reason that the government provided for under that instrument was to operate, not upon the States, as had been the case under the Articles of Confederation and which had been the inherent defect of that government, but was to act upon individuals.

A second function, for the performance of which a Supreme Court was needed, was the limitation of the federal power to its legitimate field of operation. This function as a check upon the legislature, undoubtedly the most important and interesting power possessed by the court, will receive special consideration under the head, "The Supreme Court and Congress."

A third reason, demanding the establishment of a supreme judiciary, arose from the very nature of our government, being a government of government, and in which, consequently, there were to be different grades of laws, between which frequent and unavoidable conflicts would inevitably arise.

The undue expansion of federal powers moreover is not the only danger to be met with in a federal republic; the aggressiveness of state legislatures must also be opposed, and for this purpose an impartial tribunal was needed to determine the constitutionality of any act of a state legislature, whenever the question should be raised. "It goes almost without saying that restrictions upon the authority of state legislatures, without some constitutional mode of enforcing an observance of them would be of no avail. The power had to be either a direct negative on the state laws by the federal government, or an authority in the federal courts to annul such as were in manifest contravention to the constitution."[1] The courts were to be the "bulwarks of a limited constitution against legislative encroachments."

Still another function to be exercised by a Supreme Court, and one so obviously necessary as to need no comment, was the

[1] Federalist, 78.

settlement of disputes arising between citizens of different States; between States and citizens of different States, and between the States themselves. Such a court was needed also, that there might be a proper tribunal to which foreigners might resort. This tribunal was needed, not only for the interpretation of federal statutes, but the construction and application of treaties. The central government, under the Articles of Confederation, had found it useless to depend upon state courts and executives for the enforcement of treaty stipulations. The United States was at that time suffering severely, as we know, from the lack of some power to correctly interpret treaties, and designate infractions of them. Largely from this fact was due the unsatisfactory condition of the United States' treaty relations, at that time.

In view of these reasons for the establishment of a powerful national judiciary, and in the light of these inconveniences suffered by the federal government from the lack of such an institution, let us see what was the treatment received by the judiciary in the constitutional convention; and to what an extent the members were agreed as to what its proper powers should be.

The convention met May 14, 1787. On May 29, Randolph, of Virginia, presented his fifteen propositions embodying that plan of federal government which has since been called the Large State or National Plan. The ninth proposition read:

"*Resolved:* That a national judiciary be established—to hold their offices during good behavior, and to receive punctually at stated times a fixed compensation for their services, in which no increase or diminution shall be made so as to effect the persons actually in office at the time of such increase or diminution. That the jurisdiction of the inferior shall be to hear and determine in the first instance, and of the supreme tribunal to hear and determine in the *dernier ressort* all piracies and felonies on the high seas; captures from an enemy; cases in which foreigners or citizens of other states, applying to such

jurisdictions may be interested, or which respect to the collection of the national revenue; impeachments of any national officer; and questions which involve the national peace or harmony."

In Charles Pinckney's draft of a federal government, presented the same day as that of Randolph, a federal judiciary was provided as follows:

"The Legislature of the United States shall have the power and it shall be their duty, to establish such courts of law, equity and admiralty as shall be necessary. The judges of the courts shall hold their offices during good behavior, and receive a compensation which shall not be increased or diminished during their continuance in office. One of these courts shall be termed the Supreme Court, whose jurisdiction shall extend to all cases arising under the Laws of the United States or affecting ambassadors, other public ministers and consuls, to the trial of impeachments of officers of the United States, to all cases of admiralty and maritime jurisdiction. In cases affecting ambassadors and other public ministers, this jurisdiction shall be original, and in all other cases appellate."

On May 30, the convention resolved itself into a committee of the whole house for the consideration of Randolph's plan.

On June 15, Paterson, on behalf of the State of New Jersey, submitted eleven propositions embodying the plan of government desired by the smaller States. The judiciary clause of this scheme was very similar to that of Randolph, the principal differences being that the judges should be appointed by the executive, and that none of the judicial officers should, during their term of office, hold any other office or appointment. The field of jurisdiction was thus defined:

"That the judiciary thus established shall have authority to hear and determine in the first instance, on all impeachments of federal officers; and by way of appeal, in the *dernier ressort*, in all cases touching the rights and privileges of ambassadors; in all cases of capture from an enemy; in all cases of piracies and felonies on the high seas; in all cases in which

foreigners may be interested; in the construction of any treaty or treaties, or which may arise in any act or ordinance of Congress for the regulation of trade or the collection of federal revenue."

By the plan presented by Hamilton, June 18, a judiciary was thus provided for.

"The supreme judiciary of the United States is to be vested in — judges, to hold office during good behavior, with adequate and permanent salaries. This court to have original jurisdiction in all cases of capture, and an appellate jurisdiction in all cases in which the revenues of the general government, or the citizens of foreign nations are concerned."

A comparison of these four judiciary clauses, prepared by men holding in other respects widely divergent political beliefs, shows that, upon this subject at least, there was considerable unanimity of opinion. The main points which remained to be settled were: first, as to the method of appointment of the judges; second, the power of the judiciary over legislative acts of a State; and third, the proper power of the national judiciary over acts of the national legislature. There were, of course, also minor points of jurisdiction to be settled, but the debates concerning them are comparatively uninteresting.[1]

The question where should lie the power of negativing legislative acts came up for debate on July 17, upon the motion made to give to the national legislature the power "to negative all laws passed by the several States contravening in the opinion of the national legislature the articles of union or any treaty subsisting under the authority of the Union." Gover-

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[1] The power of the judiciary, as regards the impeachment of national officers, was stricken out July 18. The appointment of the judges, as reported by the Committee of Detail, was given into the hands of the second branch of the legislature. This was changed at a later day, so as to give to the President this power, limited of course by the consent of the Senate.

neur Morris opposed the granting of this power as likely to be "terrible" to the States. Luther Martin considered the power as improper and inadmissible. "Shall all the laws of the States be sent up to the general legislature," he said, "before they shall be permitted to operate?" Madison considered the negative on the laws of the States as essential to the efficacy and security of the general government. He said: "The necessity of a general government proceeds from the propensity of the States to pursue their particular interests in opposition to the general interest. This propensity will continue to disturb the system unless effectually controlled. Nothing short of a negative on their laws will control it. They will pass laws which will accomplish their injurious objects before they can be repealed by the general legislature, or set aside by national tribunals. Confidence cannot be put in the state tribunals as guardians of the national authority and interest. In all states these are more or less dependent on the legislatures. In Georgia they are appointed annually by the legislature. In Rhode Island the judges who refused to execute an unconstitutional law were displaced and others substituted by the legislature who would be the willing instruments of the wicked and arbitrary plans of their masters.[1] A power of negativing the improper laws of the States is at once the most mild and certain means of preserving the harmony of the system. Its utility is sufficiently displayed in the British system. Nothing could maintain the harmony and subordination of the various parts of the empire but the prerogative by which the crown stifles in the birth every act of every part tending to discord or encroachment. It is true that the prerogative is sometimes misapplied through ignorance or partiality to one particular part of the empire, but we have not the same reason to fear such misapplication in our system. As to sending all laws up to the national legislature, that might be rendered

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[1] *Trevitt* v. *Weeden*, 1786.

unnecessary by some emanation of the power into the States, so far at least as to give a temporary effect to laws of immediate necessity."

Unpersuaded by these arguments, Morris saw the inconvenience and crudity of this method of revision of the state laws, as compared with revision by the national judiciary, and it is surprising that Madison did not himself see at this time the faults of the plan. Said Morris, "a law that ought to be negatived will be set aside in the judiciary department, and if that should fail, may be repealed by a national law."

Sherman also pointed out the defect that the vesting of such a power with the national legislature involved a wrong principle, namely, that a law of a State contrary to the articles of union would, if not negatived, be valid and operative.

The motion was lost. The result was, as Morris indicated, to leave the power of negativing such laws as were unconstitutional with the judiciary.

On June 4, Randolph's eighth proposition, that the national executive and a convenient number of the national judiciary, should compose a council of revision, for the examination of acts of the national legislature, and the negation of such as should in its estimation be declared unconstitutional; was amended so as to give to the national executive alone that power, unless overruled by two-thirds of each branch of the legislature. The motion to associate the judiciary with the president in the exercise of this function, was again brought up July 21, but again voted down.

As reported by the committee on detail, August 6, the judiciary was thus provided for:

"ARTICLE IX, *Section* 1. The senate shall have power . . . to appoint . . . judges of the Supreme Court.

"ARTICLE XI, *Section* 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as shall, when necessary, from time to time, be constituted by the legislature of the United States.

"*Section* 2. The judges of the Supreme Court and of the inferior courts, shall hold their offices during good behavior. They shall at stated times receive for their services a compensation, which shall not be diminished during their continuance in office.

"*Section* 3. The jurisdiction of the Supreme Court shall extend to all cases arising under the laws passed by the legislature of the United States; to all cases affecting ambassadors, other public ministers and consuls; to the trial of impeachment of officers of the United States; to all cases of admiralty and maritime jurisdiction; to controversies between two or more States, except such as shall regard territory or jurisdiction;[1] between a State and citizens of another State; between citizens of different States; and between a State or the citizens thereof, and foreign States, citizens or subjects.

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, this jurisdiction shall be original. In all other cases before mentioned it shall be appellate, with such exceptions and under such regulations as the legislature shall make. The legislature may assign any part of the jurisdiction above-mentioned (except the trial of the President of the United States), in the manner and under the limitations which it shall think proper, to such inferior courts as it shall constitute from time to time."[2]

As reported by the Committee on Detail, the plan for the judicial power contained several defects, which were subsequently remedied by the convention. The words, "both as to law and fact," were added to the description of the appellate power in order to be more explicit. Another defect was remedied by declaring the judicial power to extend to "all

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[1] The settlement of these classes of cases of interstate dispute was given into the hands of the Senate, to be exercised in much the same manner, as was provided in the Articles of Confederation for adjustment of prize cases. In the final revision this power was transferred to the judiciary.

[2] Madison's Papers, Vol. II, p. 1238.

cases in law and equity,"[3] and not as worded in the committee's report merely "to all cases." The distinction was thus made between these two classes of cases, a distinction so familiar to all people of the United States. This was an important change, for, as Curtis says, "This distinction which extends, not only to the forms of pleading, but to the principles of decision, the mode of trial and the nature of the remedy, had been brought by the settlers of most of the colonies from England and had been perpetuated in their judicial institutions. It existed in most of the States at the time of the formation of the national constitution, and it was, in fact, a characteristic feature of the only system of judicature which the American people had known, except in their courts of admiralty. . . . . If the appellate jurisdiction of the national tribunal was to be exercised over any class of controversies originating in the state courts, it was extremely important that the constitution should expressly ascertain whether suits at law, or suits in equity, or both, were to be embraced within that appellate power."

A third and almost vital defect in the report of the Committee on Detail, was the failure to embrace under the judicial power of the United States, cases arising under the constitution and under treaties. It was only by the subsequent grant of this power that the convention raised the Supreme Court to its proper place as one of the coördinate powers of the central government, and made it an efficient check on both federal and state legislatures.

On September 8, all the articles, as amended and agreed to, were referred to a committee on style for revision. The report was made on the twelfth, and on the seventeenth the constitution was engrossed and signed, and the convention adjourned.

As adopted, the constitution thus provides for our judiciary:

"ARTICLE III, *Section* 1. The judicial power of the United States shall be vested in one Supreme Court, and in such

[3] Elliot, 483.

inferior courts as the congress may from time to time ordain and establish.

"The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

"*Section* 2. The judicial power shall extend to all cases, in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State;[1] between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State or the citizens thereof, and foreign states, citizens or subjects.

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

By this article we see finally created what has proved probably the best working branch of our government. In the establishment of this court was taken the longest step towards the solution of the problem of drafting a new scheme of government, so constructed as to satisfy State jealousies and to preserve their proper rights of government, and yet to afford a strong central government capable of commanding respect abroad and deserving confidence at home; which could harmonize States' rights with federal strength. The difficulties which had been overcome in the creation of a proper national

[1]Altered by XIth Amendment.

judiciary we have partially seen. They are thus stated by Judge Curtis in his work on the "Federal Courts:" "To construct a judicial power within the federal government, and to clothe it with attributes which would enable it to secure the supremacy of the general constitution and of all its provisions, to give to it exact authority that would maintain the dividing line between the powers of the Nation and the States, and to give to it no more; and to add to these a faculty of dispensing justice to foreigners, to citizens of different States, and among the sovereign States themselves, with a more assured certainty of the great ends of justice than any state power can furnish, these were objects not readily or easily to be obtained, and yet they were obtained with wonderful success."

CHAPTER III.

The Judiciary in the State Conventions.

After adoption by the constitutional convention, the constitution was submitted for ratification to the various state conventions. In these, the judiciary, though several times attacked, received no serious assaults.

Mr. Wilson, of Pennsylvania, to whom we are just beginning to give the tardy recognition of being one of the clearest thinkers and soundest reasoners of his time, taking up Article III, clause by clause, gave, in the convention of his State a full and clear account of the benefits sure to follow from the establishment of an adequate national judiciary.

In the Virginia convention, the judiciary was strongly attacked by Grayson, Mason, and Patrick Henry. The great point maintained by these was, that by the operation of the federal supreme and inferior courts, the state judiciaries would be interfered with in their jurisdictions; that the jurisdiction of the national courts was not marked out with sufficient definiteness. Said Mr. Mason,[1] "What is there left the State courts?—The inferior courts are to be as numerous as congress may think proper. They are to be of whatever nature they please,—I am greatly mistaken if there be any limitation whatsoever, with respect to the nature or jurisdiction of these courts. When we consider the nature of these courts, we must conclude that their effect and operation will

[1] Elliot's Debates, III, 521.

be to utterly destroy the state governments, for they will be judges how far their laws will operate. I think it will destroy the state government, whatever may have been the intention."

Patrick Henry, evidently thoroughly convinced that the federal government was but a scheme gotten up for the express purpose of oppression and subversion of the state governments, and that if established it would necessarily be administered by unscrupulous and extreme nationalists; expressed much the same objections as did Mason and Grayson. "I consider," said he, "the Virginia judiciary as one of the best barriers against strides of power. So small are the barriers against the encroachments and usurpations of Congress, that when I see this last barrier—the independency of the judges—impaired, I am persuaded I see the prostration of all our rights. If by this system we lose our judiciary, and and they cannot help us, we must sit down quietly and be oppressed!"[1] Henry also animadverted upon the implied power of the Supreme Court to bring before its bar a State as a defendant against an individual.

Madison made an elaborate defense of the judiciary as provided for in the constitution. He denied that the constitution would warrant the exercise by the Supreme Court of any power to summon an unwilling State as defendant against an individual.[2] It is curious to note that this power which was afterwards actually exercised, was also denied as existing, by Hamilton and Marshall.

Marshall in his State convention, defended with extreme ability the judiciary against the objection that the state courts would be seriously interfered with in their fields of jurisdiction, and showed how overwrought were Henry's and Grayson's fears. Governor Randolph closed the Virginia debate on the judiciary with a calm and fair, and upon the whole, favorable summing up of the merits and demerits of the judiciary as provided for.

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[1] Elliot's Debates, III, 539. [2] Elliot's Debates, III, 533.

In the convention of North Carolina was discussed the same objection that had been raised in the other conventions, that the clause "The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority was of too general and vague a character.[1] Mr. Dane in reply, made what appears to me, one of the best general defenses of the judiciary made in any of the conventions.[2] Striking, at the very start, at the heart of the subject, he said: "For my own part I know but two ways in which the laws can be executed by any government. If there be any other it is unknown to me. The first mode is coercion by military force, and the second is coercion through the judiciary. With respect to coercion by force, I shall suppose that it is so extremely repugnant to the principles of justice, and the feelings of a free people, that no man will support it. It must, in the end, terminate in the destruction of the liberty of the people. I take it, therefore, that there is no rational way of enforcing the laws but by the instrumentality of the judiciary. From these premises we are left only to consider how far the jurisdiction of the judiciary ought to extend. It appears to me that the judiciary ought to be competent to the decision of any question arising out of the constitution itself. . . . Every member who has read the constitution with attention must observe that there are certain fundamental principles in it, both of a positive and negative nature, which, being intended for the general advantage of the community, ought not to be violated by any future legislation of the particular States. Every member will agree that the positive regulations ought to be carried into execution, and that the negative restrictions ought not to be disregarded or violated. Without a judiciary the injunctions of the constitution may be disobeyed, and the positive regulations neglected and contravened."

A complete review of the debates in the State conventions regarding the federal judicial powers, shows that the main

[1] Elliot's Debates, IV, 136. [2] Elliot's Debates, IV, 155.

objections raised against it were but these two: First, that the state judiciaries would be oppressed and interfered with; an objection which a century's experience has shown to have been unfounded. Second, that States, considering themselves as practically sovereign, would be liable to suit by an individual; an objection shown to have been correctly held, as decided in the case of *Chisholm* vs. *Georgia*,[1] and which had to be remedied by amendment to the constitution.[2]

In several instances amendments were offered by the States at the time of their ratification of the constitution, changing more or less the nature and powers of the federal judiciary, none of which were adopted.

[1] 2 Dallas, 417.

[2] XIth Amendment.

CHAPTER IV.

Establishment and Jurisdiction of the Federal Courts.

The ninth State ratified the constitution June 21, 1788, and on April 30, 1789, the wheels of our present governmental machinery began slowly to move. The first congress, in pursuance of the legislative power given to constitute a federal judiciary, passed in 1789, what has been known as the Judiciary Act; a piece of legislation, in its perfect adaptation to the political needs, and in its accuracy of expression, second to none in our long list of congressional enactments. The act was drafted by a committee composed of Patterson, Johnson and Ellsworth, but was the work almost entirely of Ellsworth. In the Senate it passed with a slight alteration by a vote of fourteen to six. In the House it was attacked by Livermore, of New Hampshire, Jackson, of Georgia and Burke, of South Carolina; but its passage was not seriously threatened. Livermore, however, was especially vehement in his opposition. "For my part," he exclaimed, "I contemplate with horror the effects of the plan. I think I see a foundation laid for discord, civil war and all its concomitants. To avert these evils I hope the House will reject the proposed system."[1] Many political predictions have failed of fulfilment, but few have been proved so strikingly unfounded as this one of Livermore.

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[1] Debates of Congress, Vol. I, p. 814.

The first section of the Judiciary Act reads: "That the Supreme Court of the United States shall consist of one Chief Justice and five Associate Justices." The act further proceeds to establish the inferior courts and to define their fields of jurisdiction as follows: Three grades of federal courts were provided for. The United States was first divided into judicial districts, and to each of these districts was given a district court and a judge, appointed, of course, by the President. These courts formed the lowest grade of courts. As provided for in the Act, each State was made a district, as were the Territories of Maine and Kentucky. At present, owing to increased density of population, many of the States are divided into two, and some into three districts.

By the grouping together of these districts, circuits were formed, and to each of these a circuit court was given. These formed the grade of courts next higher than the district courts. The number of circuits has differed at different times. By the act of 1789 three were provided for; since 1869 there have been nine. Until 1869 (excepting a short period in 1801) there were no circuit judges, circuit work being done by the supreme court justices. By the act of 1869 a circuit judge was to be appointed by the President for each circuit. One of the justices of the Supreme Court is, however, still allotted to each of the circuits, who, after the expiration of the term of the Supreme Court, visits his circuit, and tries the more important cases which may have arisen there. The circuit court may be held by the circuit judge, by the Supreme Court justice or by the district judge of that district in which the court is sitting; or by any two of them, or by all three of them sitting together.

Last, and highest of the federal courts, is the Supreme Court at Washington, at present consisting of a Chief Justice and eight Associate Justices.

The jurisdictional relations between the different grades of

the federal courts is simple. Their jurisdiction[1] is over federal questions, that is over those cases mentioned in the constitution and covered by Acts of Congress in pursuance thereof, to which the judicial power of the United States has been extended. To the circuit courts come all appeals from their district courts, which is allowed in all cases involving sums of five hundred dollars and over. The Supreme Court is the court of last resort, and to it come appeals from the circuit courts in cases involving five thousand[2] dollars and over.

In addition to making these regulations concerning appeals from a lower to a higher federal court, the judiciary act gives to the Supreme Court the revision of certain classes of cases decided in the highest state courts. The twenty-fifth section of the act provides that this may be done in the following three classes of cases: "First, 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. Second, where is drawn in question the validity of a statute of, or an authority exercised under the laws of a State on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of their validity. Third, where any right, privilege, or immunity is claimed under the constitution, or any treaty, or statute of, or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up, or claimed by either party under such constitution, statute, commission or authority." No minimum amount to be involved in order to admit of an appeal to the Supreme Court was imposed in these classes

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[1] Congress did not see fit to at once extend the jurisdiction of the inferior federal courts over all cases permitted by the constitution. But a small portion of this was at first granted, and this jurisdiction has been widened from time to time.

[2] At first $2,000. See Act of 1789.

of cases, for it was seen that in a case involving but a slight pecuniary amount, a federal question might be involved, the settlement of which would be of great importance to the whole people.

This authority of the Supreme Court to revise certain decisions of the state courts was not directly granted by the constitution, but implied in that clause which says that "the judicial power shall be vested in a '*Supreme* Court,'" and in Article VI, which further provides that "the constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." The significance of this clause in this connection had probably not been fully recognized at the time of the ratification of the constitution and the correctness of this application of the clause was, for a considerable time, denied by Jefferson and his school. This portion of the power of the Supreme Court will receive a fuller consideration in a following chapter, which treats of the national judiciary in its relations to the state governments.

To recapitulate then. The cases decided by the Supreme Court are of two classes. First, those of original jurisdiction, as specified in the constitution; and second, those of appellate jurisdiction. Of this latter class there are two kinds, those coming to the Supreme Courts by way of appeal from the lower federal courts, and those coming thither by way of appeal from the highest state courts.

Besides the courts which have been mentioned there are a few other federal courts. The District of Columbia being under the direct control of the United States, its courts are federal tribunals, and cases in them admit of an appeal to the Supreme Court. The same is true of territorial courts established by federal authority.

Though a sovereign nation, and therefore not liable to suit, the United States permits parties having claims against it, to sue for the amount, and for this purpose has established at Washington a Court of Claims, held by five judges. From this court appeals lie, in some cases to the Supreme Court, and in other cases they are referred to Congress for final adjudication.[1]

[1] NOTE.—Provision was made in the Act of 1789 by which certain specified cases begun in state courts, but which, by their nature permitted of trial in federal courts, might be transferred thither. This power of removal has been subsequently widened, especially by the Act of 1875, until now *any* cases may be thus removed which might have been originally brought in a federal court. *Vide post.*

CHAPTER V.

The Supreme Court and Congress.

The elevation of the judiciary into a branch of government not only separate from the executive and legislative branches, but coördinate with them in power, has undoubtedly been one of the great successes of our political system. That function which has raised the Supreme Court to a level with the executive and legislature, and which has made its influence such a potent factor in our history, has been its right, as interpreter of the constitution, to review the acts of the legislature, and to declare not law, such acts, as in its estimation are not in harmony with the instrument of which it is the guardian. It is the possession of this power that causes Sir Henry Maine to say that it is a "virtually unique creation of the convention;" and Mr. Taylor to characterize it as "an institution without a prototype in history."

The question whether, in the establishment of our Supreme Court in 1787 we see the establishment of an original judiciary with unique powers, turns, as on a pivotal point, upon the originality of the method of restraining legislative action by a separate judicial tribunal.

A study of European governments of that time shows that in this particular the convention followed no European example. In Europe, now, as then, there cannot be found a legislature that is not the judge of its own powers. There the highest courts have, in most cases, developed or rather differentiated out of the legislative body, and have remained to a

considerable extent parts of their parents. The English Parliament, the legislature with which the colonists were, of course the most familiar, is omnipotent. As De Lolme said, "It is a fundamental principle with the English lawyers that parliament can do everything except making a woman a man, or a man a woman." Even to-day, after the immense constitutional changes which this century has seen, the continent affords no parallel to our Supreme Court. In Switzerland the legislature is itself the authorized interpreter of the federal constitution. The only semblance of a federal court possessed by the German Empire is the Imperial Court, at Leipzig, which has no power to declare a law unconstitutional. Neither France nor Spain possesses such a court. The non-sovereign legislatures of those English colonies that enjoy representative institutions, are kept within their legitimate limits, not by judges, but in the last resort by the Imperial Parliament. In the Federal government of Canada, the Governor in council can, within a year from its receipt, disallow any act of a provincial legislature, and this power of disallowance can be exercised even with respect to an act clearly within the constitutional jurisdiction of the provincial legislature. Acts of the Dominion Parliament of Canada at variance with the interests of the Empire can be disallowed by the Imperial Government.[1]

If, then, we are to find courts possessing prior to 1787, this power of which we are speaking, it is to America we must look. It will be my effort to show that decided evidences of the exercise of this power by colonial courts prior to the assembling of the constitutional convention may be found, and that though we cannot, therefore, claim for the framers of our constitution the honor of entire originality in this case, we can claim it for the American people.

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[1] Federal Government in Canada. J. G. Bourinot. J. H. U. Studies, Seventh Series.

To the Anglo-Saxon race in America belongs the honor of having developed government by written constitutions. The idea of a written constitution, as sanctioned by and emanating from the people, though early hinted at and partially developed by such writers as Sidney, Vane, and Locke was an untried experiment, until adopted by the American colonies. Now, with the establishment of a written constitution, the existence of safeguards against unconstitutional legislation is necessary. There are two methods which may be employed.[1] Unconstitutional legislation may be opposed; first, by the force of public opinion and moral sanction or sentiment; or, second, by the erection of courts with power to decide as to the constitutionality of such laws as may be brought into question. In the organization of our government we chose the latter method, but in doing so followed numerous precedents set us by the colonial courts in the construction of their several constitutions.

As early as 1780 Chief Justice Brearley, of the Supreme Court of New Jersey, is cited as giving it as the opinion of himself and his associates, that the judiciary had the right to pronounce upon the constitutionality of laws. In Virginia, in 1776[2] an act was passed taking from the governor the power of pardoning, and conferring it on the legislature. In 1782 a case under this law was carried to the courts, and it was there argued that the act of the Assembly was contrary to the intention of the constitution and therefore void.[3] Edmund Randolph, then Attorney-General of his State, maintained that whether contrary or not to the constitution, the courts had no other choice than to apply it. In reply, the Chief Justice made this remarkable answer: "If the whole legislature (an act to be deprecated) should attempt to over-

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[1] *Cf.* Dicey, Law of the Constitution, p. 119.

[2] In the preparation of the following paragraph I have been much assisted by an article in "The Advocate," for May 18, 1889, entitled "The Highest Power of the American Judiciary."

[3] *Commonwealth* v. *Caton*, 4 Call. (Va.), 5.

leap the bounds prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers in 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.'" Though not deciding the point, the court said: "The power of the court to declare the nullity of a law passed in its form by the legislative power, without exercising the powers of that branch, contrary to the plain terms of the constitution, is undoubtedly, a deep, important, and I may add, tremendous question, the decision of which might involve consequences to which gentlemen may not have extended their ideas." The report of the case adds, that "Chancellor Blair, with the rest of the judges, was of the opinion that the court had power to declare any resolution of the legislature or of either branch of it unconstitutional and void." In a remonstrance which the court of appeals prepared and sent to the Virginia legislature, the following language was used: "But in the progress of their discussion, they (the Remonstrants) have found it unavoidable to consider more important questions, viz: Whether the principles of this case do not violate those of the constitution or form of government, which the people in 1776, when the former bands of their society were dissolved, established as the foundation of that government, which they judged necessary for the preservation of their persons and their property? and, if such violation were apparent, whether they had power, and it was their duty to declare that the act must yield to the constitution? On this view of the subject, the following alternatives presented themselves to the court; either to decide those questions or resign their offices. They judged that a resignation would subject them to the reproach of deserting their stations—and on that ground found themselves obliged to decide—and in that decision to declare that the constitution and the act are in opposition, and cannot exist together; and that the former must control the latter. If this opinion, declaring the supremacy of the constitution needed

any support, it may be found in the opinion of the legislature themselves, who have in several instances considered the constitution as prescribing limits to their powers."

The case of *Rutgers* v. *Waddington*,[1] decided in 1784, in the mayor's court of New York, in which Hamilton distinguished himself, is often cited as a case of this class of which we are speaking. Its decision seems, however, to have been grounded upon opposition to natural rights and justice, rather than upon conflict with written constitutional right.

In New York, several years before this, in the case of *Holmes* v. *Walton*, it was decided that the law providing for trial by a jury of six was unconstitutional.

In 1787 the courts of North Carolina declared an act of the legislature void as unconstitutional.[2]

Bancroft, in his History of the Constitution, quotes a letter from J. B. Cutting to Jefferson, dated in 1788, which states that the Supreme Court of Massachusetts had, some years before, declared a legislative act unconstitutional.[3]

The case of *Trevitt* v. *Weeden*,[4] decided in Rhode Island in 1786, is cited by both Judge Cooley and Professor McMaster as deciding a law unconstitutional. The author of the article in *The Advocate*, already referred to, says that he is unable to find any basis for such an opinion, and clearly proves his point. The facts of the case were these. The Rhode Island legislature had passed a legal tender law to force the people to take the paper of the State at its face value. Upon being contested and brought into court, the court declined to enforce the law on the ground that they had no jurisdiction. The question of the constitutionality of the law had been raised, though the court did not rest its decision upon that ground. However, the legislature, mistaking the plea for the judgment, summoned

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[1] Quoted by McMaster, I, 219.

[2] *Bayard* v. *Singleton*, 1 Martin, 42. [3] Vol. II, pp. 472–3.

[4] Cited by Cooley, Constitutional Limitations, p. 160, note 3.

its judges before its bar, and made an unsuccessful attempt to impeach them.

In the light of these cases, which have been cited, I think it can be maintained that the idea of control of the legislature by judicial authority had been developed before the assembling of the convention of 1787. It had been specifically asserted in at least as many as five colonies, and had been the subject of considerable popular discussion. When the American republics solved for the world the problem of federal union, the supreme judiciary, which they erected, was taken from their own state governments, powers being given it commensurate with its new and enlarged duties. Everywhere but in America its powers were unique.

Leaving now the historical treatment of the genesis of the Supreme Court, and of its powers, we turn to a more critical consideration of the relation that the national judiciary bears to the legislature—examining the subject from both a constitutional and administrative standpoint.

Our constitution, as adopted in 1787, formed but the outline for a scheme of government—an outline to be filled out by subsequent legislation. It was a scheme, which, in order to endure, was made elastic and capable of a growth that should be adequate to meet the exigencies of a developing nation. The regulation of this growth by legislation was one of the main duties which a permanent supreme tribunal was expected to perform.

The constitution was to be the supreme law of the land. The federal legislature was to be a body with limited powers, considering only those subjects allowed it by the constitution. No legislative act contrary to any provision of the constitution could therefore be valid. But the legislative sphere was not, and wisely not, fixed by definite hard and fast lines. There were the implied powers of passing such laws as would facilitate the operation and execution of the powers specifically granted to Congress. By means of these powers could the development of the government be carried on by legislative

enactments; but this development had to be in strict conformity with the principles and provisions of the constitution.

In forming a scheme for central government, our fathers were restrained, not only by the fear lest a national government should be established so strong as to threaten the autonomy of the States, but were fearful lest, like Frankenstein, they should create a being which, when life were once breathed into it, would be beyond their control, and which, though originally with proper powers, would in time, by its own strength, draw to itself increasing powers and become a tyrant. To avert this evil, the members of the convention made the three branches of government coördinate in power. As a necessary consequence upon the adoption of this theory of making the departments of government separate, and in a sense independent of each other in their workings, was the creation of an elaborate system of cheeks and balances between the departments so divided. In a letter written to John Taylor, John Adams[1] enumerates eight distinct checks existing in our government intended to operate as balances between the central and state governments, the departments of the central government, between the branches of the legislature, and between the people and their representatives. "Here," says he, "is a complicated refinement of balances, which, for anything I recollect, is an invention of our own and peculiar to us."

The most powerful of these checks in retaining, not only the proper relations between the state and federal power, but between the departments of the federal government, has undoubtedly been the Supreme Court. It has been the balance wheel of the republic. The constitution as supreme over all these powers, has set to them a limit—the Supreme Court, as interpreter of the constitution, has been the instrument for rendering operative these limitations.

That branch of our government, as indeed in all representative governments, most needing a check to curb its ambition

[1] Works, Vol. II, p. 467.

for aggrandizement of power, is the legislature. In the *Federalist*, No. 48, Madison writes: "In a government, where numerous and extensive prerogatives are placed in the hands of an hereditary monarch, the executive is very justly regarded as the source of danger, and watched with all the jealousy which a zeal for liberty ought to inspire—but in a representative republic, where the magistracy is carefully limited both in the extent and the duration of its power, and where the legislative power is exercised by an assembly which is inspired by a supposed influence over the people, with an intrepid confidence in its own strength, which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions by all the means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions. Its constitutional powers being at once more extensive and less susceptible of precise limits, it can, with greater facility, mask under complicated and indirect measures, the encroachments that it makes on the coördinate departments." In this wholesome fear Madison stood supported by the whole people. As Von Holst says:[1] "The people lived in the honest conviction that no matter how little power might be given to Congress, it should be the first care of all patriots and friends of liberty to keep a watchful eye upon it, and to sound the alarm at the first attempt it should make to exceed its powers." The supreme value of an independent judiciary was to be its service as a check upon this power. By the creation of this tribunal the architects of our government hoped, in escaping from the Scylla of executive despotism, to avoid falling into the Charybdis of legislative tyranny.

To render the Supreme Court capable of performing this high function expected of it, it was necessary to endow it with two attributes; first, independence of the legislature; and

[1] Vol. I, p. 33.

second, power to hold, in suits between parties, legislative acts unconstitutional, and therefore void. The granting of this power was not left to the mere caprice of its creators, but was forced upon them by the very nature of our government. The establishment of a sovereign legislature is inconsistent with the very aim of federalism, namely, the maintenance of a division of powers between the national and state governments. To have made Congress the authorized interpreter of its own acts, would evidently have left unobstructed the road to rapid absorption of state duties in national governmental activity.

The theory, then, of our sovereignty is this: "In every sovereign state there resides an absolute and uncontrolled power of legislation. In Great Britain this complete power resides in the parliament, in the United States it resides in the people themselves as an organized body politic. But the people, by creating the constitution of the United States have delegated this power as to certain subjects, and under certain restrictions to the Congress of the Union; that portion they cannot resume except as it may be done through amendment to the constitution." [1]

In the United States there are four grades of law. First, and highest, the federal constitution, next in power the federal laws, statutes and treaties, next lower the state constitutions, and lowest the bodies of state law. In case of claimed conflict between the first and second, or between the first or second and the two lower grades of law, the only question to be decided by the Supreme Court is as to the existence of that conflict. If, from its interpretation of the law, the Supreme Court decides such conflict to exist its work is done. The higher law governs the lower. There is no contest, no struggle between the grades of law. It has already been settled which grade of law is the higher, and therefore to govern. There is no dispute between the court and the legislature.

[1] Cooley: Constitutional Limitations.

"It is natural to say," says Dicey,[1] "that the Supreme Court pronounces acts of Congress invalid, but in fact this is not so. The court never pronounces any opinion whatever, upon an act of Congress. What the court does is simply to determine that in a given case, A is, or is not, entitled to recover judgment against X; but in determining that case, the court may decide that an act of Congress is not to be taken into account, since it is an act beyond the constitutional power of Congress."

Every act of the legislature is presumably valid. Its constitutionality can be tested only when brought before the court in a specific case. The court never goes to meet a law, nor anticipates its execution by an opinion as to its constitutionality. The court is brought into the political arena, independently of its own will. It judges the law only because it is obliged to judge the case. In 1795, Washington, upon the advice of his cabinet, asked the justices of the Supreme Court for an opinion as to the proper construction of certain clauses of the treaty with France. But they declined to give it, holding that it would not be proper to give an opinion upon any question not brought before the court in regular form, in some particular suit.

Several years may thus elapse after the enactment of a law, before a case, involving its validity comes before the court. The Missouri Compromise was not declared unconstitutional until thirty-five years after its enactment. In 1798 the Federalists passed the obviously unconstitutional Alien and Sedition Acts, yet they never came before the Supreme Court for a decision as to their constitutionality. At first blush this might appear as a defect in our system, and that, so far at least as this one point is concerned, a "council of revision," as several times suggested in the convention would have been better. A further reflection shows us however, that upon the whole this is a beneficial rather than detrimental feature. In the first place time is given for calm deliberation and careful

[1] Law of the Constitution, p. 150.

consideration of the measure; and also opportunity to see how the act really works, and whether it is so interpreted by the the people as to stand in opposition to any of the principles of the constitution. And, in the second place, were the power of nullifying a law given into the hands of a revisionary council, the laws would be judged from abstract theoretical principles, and not upon concrete grounds, as is the case in the Supreme Court, when they are brought into question in particular cases.[1]

If an act is held void it is because it is contrary to the constitution, and not because the court claims any control over the legislature. The will of the people as expressed in its fundamental law, is considered as more direct and authoritative, than their will as expressed through their representives in congressional enactment. This is the one ground upon which the court can declare an act null and void. The court makes no investigation into what were the motives of the legislature in enacting a law, and takes no consideration of what will be the probable political or economic results of the measure. "It is not the province of the court to decide upon the justice or injustice, the policy or impolicy of the laws. The decision of that belongs to the political or law-making power; to those who framed the constitution. The duty of the court is to interpret the instrument they have passed." This was the ground taken by Taney in his decision in the famous Dred Scott case. In other words, the intentions of the framers of the constitution must govern, be they good or bad. "Give up this principle," said Taney, "and the Supreme Court will become a mere instrument to reflect the current popular opinion and passion of the day." If the will of the people as expressed in the constitution, no longer represents the present will of the people, the evil can be remedied by that one means of obtaining a direct opinion of the people, amendment to the constitution.

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[1] *Cf.* De Tocqueville, pp. 105–6.

Every statute is considered valid as long as there is any reasonable interpretation by which it may be held so. The legislature is presumed to have acted within its powers, and only the strongest proofs to the contrary are sufficient to nullify its act. Congress must wantonly go very far outside the plain meaning of the constitution, before the court will interfere to prevent the operation of the law. In the case of *Fletcher* v. *Peck*,[1] Marshall stated this preponderance of proof which shall be necessary to justify the court in ignoring an act of the legislature. He said, "The question, whether a law be void for its repugnancy to the constitution, is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligations which that station implies. But it is not on slight implication or vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." In the second legal tender case, Justice Strong emphasized the point still more strongly. He said: "A decent respect for a co-ordinate branch of the government demands that the judiciary should presume, until the contrary is clearly shown that there has been no transgression of powers by Congress, all the members of which, act under the obligation of an oath of fidelity to the constitution. . . It is incumbent, therefore, upon those who affirm the unconstitutionality of an act of Congress to show that it is in violation of the provisions of the constitution. It is not sufficient for them that they succeed in raising a doubt."[2] "If an act may be valid or not according to circumstances a court would be bound to presume that such circumstances existed as would render it valid."[3]

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[1] 6 Cranch, 87.

[2] *Knox* v. *Lee*, 12 Wall., 531.

[3] *Talbot* v. *Hudson*, 16 Gray, 417.

In addition to this proper hesitancy, the court has made it a rule not to render a decision invalidating a legislative act, unless it be concurred in by a majority, not of the judges sitting, as is the usual rule, but of the entire bench. In the famous case of *Briscoe* v. *Bank of Commonwealth of Kentucky*,[1] for instance, when first tried before Marshall, a majority of the court sitting declared the issuing of bills of credit by the bank to have been unconstitutional. A majority of the entire bench, however, not concurring in this decision, a reargument was ordered, and coming before the court next year, then under Taney, Chief Justice, the previous decision was reversed.

Leaving the consideration of the attitude in which the Supreme Court stands towards the Congress when called upon to pass upon the validity of one of its acts, we turn now to the actual application of the power, and to the manner in which its exercise has been received by the people.

An act of Congress was first declared unconstitutional by the Supreme Court in 1803, in the case of *Marbury* v. *Madison*.[2] Before this, is 1791, in *Hayburn's*[3] case, an act of Congress which had assigned extra-judicial duties to the circuit justices, had been decided unconstitutional, but it was in 1803 that the principle was first definitely and clearly applied by the Supreme Court. The facts of the case were these: Marbury had been appointed a Justice of the Peace by President Adams for the District of Columbia. His commission had been signed, but not delivered, when Jefferson became President. Jefferson's Secretary of State, Madison, considering the commission not complete, not having been delivered, refused to hand it over to the person named in it. Marbury asked from the Supreme Court a mandamus to compel him to do so, the power to issue such a mandamus having been granted to the Supreme Court as a portion of its original jurisdiction by the Judiciary Act of 1789. The constitutionality of this part of the Judiciary Act was questioned by Madison. The

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[1] 11 Peters, 257. [2] 1 Cranch, 137. [3] 2 Dallas, 410.

court decided that this provision was not warranted by the terms of the constitution, and thus for the first time, the court became involved in a consideration of the fundamental question whether the constitution was to be regarded as an absolute limit to the legislative power, or whether, as in England, it was to be at the mercy of the legislature. Here the point was to be decided, if possible, once for all. With unanswerable logic, Marshall, in his opinion, concurred in by the whole court, proceeded to prove that the grant, not being made by the constitution, must necessarily be void and of no effect, and that the court had the power to so declare it. Said he: "The powers of the legislature are defined and limited. To what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained? . . . It is a proposition too plain to be contested that either the constitution controls any legislative act repugnant to it, or that the legislature may alter the constitution by an ordinary act. Between these two alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature is pleased to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts on the part of the people to limit a power, in its own nature illimitable." This power thus set forth has never been seriously questioned since.

An interesting point still to be considered in connection with the Supreme Court and the National Legislature, is the action of the court in connection with the assumption by Congress of the so-called "implied powers" of legislation, embraced in the clause of the constitution which reads: "[The Congress shall have power] To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or

officer thereof." As a rule this clause has been liberally interpreted, and this, for the reason, as has already been said, that the legislature is always eager to assume all power possible, and its acts are always presumed to be constitutional by the courts unless shown to be not so, by the strongest proofs.

In the all-important case of *McCulloch* v. *Maryland*,[1] decided in 1816 was brought into question the constitutional right of Congress to establish a national bank. The right to establish such an institution was claimed to be one of the implied powers of Congress, and in so deciding it, the court, in the course of its decision, rendered by Marshall, thus laid down what it conceived to be the correct rule in the interpretation of these implied powers. "The government, which has a right to do, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means. . . . It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate. This provision is made in a constitution intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs. To have prescribed the means by which the government should, in all future time, execute its powers, would have been to change entirely the character of that instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies, which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone, without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to

[1] 4 Wheat., 316.

exercise its reason, and to accommodate its legislation to circumstances. . . . We admit as all must admit, that the powers of government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high functions assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution are constitutional. . . . Should Congress in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress under pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake to inquire here into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power." Of all the decisions of Marshall, none serves better than this to show his attitude and that of the court towards the constitution during the greater part of his term as Chief Justice. This has been the excuse for quoting his opinion at such length. In this decision William Pinckney is said to have remarked he saw "a pledge of immortality of the union."

Other interesting references to this point of implied powers can be found in the cases of *United States* v. *Fisher*[1] and *Gibbons* v. *Ogden*.[2]

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[1] 2 Cranch, 358.

[2] 9 Wheat., 187.

CHAPTER VI.

The Supreme Court and the State Legislatures and Judiciaries.

A treatment of the relations between the Federal judiciary and the legislatures and judiciaries of the States composing the union, leads us into an investigation of the relations between the national and state governments, that is to say, of the real nature of our Union. As will be remembered, that which has been the inherent defect of the old confederate government was, that its laws operated upon States and not upon individuals; and that it lacked the power to enforce obedience of the States to its statutes. Under this regime the States were decidedly superior to the Central Government; in fact they were almost everything and the general government almost nothing.

By the new constitution framed in 1789, the general government, in its proper field, was made supreme; but the supremacy thus conferred could be peacefully maintained, only by clothing the federal government with judicial and executive power, adequate to interpret and carry into execution its commands. The federal law had to receive an interpretation uniform and free from local prejudices. "It was essential, therefore, to its very existence as a government that it should have the power of establishing courts of justice, altogether independent of state power, to carry into effect its own laws; and that a tribunal should be established in which all cases which might arise under the constitution and laws

and treaties of the United States, whether in a state court or court of the United States, should be finally and conclusively decided."[1] For these reasons a Supreme Court was provided, Congress given the power to establish other inferior courts, and the judicial power of the United States made to extend "to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made under its authority." Not only this, but jurisdiction was given over all cases in which a State, as a State, was in any way interested, or in which citizens of different States were contesting. Added to this was the second clause of Article VI which provided that the laws of the United States should be the supreme law of the land; and judges in every State to be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

The double purpose to be subserved by the erection of a federal judiciary was to be, the preservation of the States in their rights of government, as well as the protection of the general government against legislative encroachments on the part of the state legislatures.

"The judicial power was justly regarded as indispensable, not only to maintain the supremacy of the laws of the United States, but also to guard the States from any encroachment upon their reserved rights by the general government. . . . This tribunal, therefore was erected, and the powers of which we have spoken, conferred upon it, not by the federal government, but by the people of the States, who favored and adopted the government, and conferred upon it all the powers, legislative, executive and judicial, which it now possesses."[2]

The Supreme Court has found it necessary in several cases to discuss the nature of our Union, and before considering the attitude which the Supreme Court has maintained towards

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[1] *Ableman* v. *Booth*, 21 Howard, 506.

[2] *Ableman* v. *Booth*, 21 Howard.

the States, it will be well to consider several of these judicial interpretations of the theory of our sovereignty.

In the early case of *Chisolm* v. *Georgia*,[1] Chief Justice Jay stated from the federalist point of view, the nature of our Union. He said, "Then it was the present constitution produced a new order of things. It derives its origin *immediately*[2] from the people, and the people individually are, under certain limitations, subject to the legislative, executive and judicial authorities thereby established. The States are, in fact, assemblages of these individuals who are liable to process." The facts of this case of *Chisolm* v. *Georgia*, and its importance, will receive attention in another portion of this paper.

In the case of *McCulloch* v. *Maryland*,[3] we find stated the opinion of Marshall upon the nature of our government. In beginning, he said: "The conflicting powers of the government of the Union and of its members as marked in that constitution, are to be discussed; and an opinion given, which may eventually influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. . . . The convention which promulgated the constitution was indeed elected by the state legislatures, but the instrument when it came from their hands, was a mere proposal, without obligation or pretentions to it. It was reported to the then existing Congress of the United States, with a request that it might "be submitted to a convention of delegates chosen in each State by the people thereof, under recommendation of its legislature for their assent and ratification. This mode of proceeding was adopted; and by the conventions, by Congress, and by the state legislatures, the instrument was submitted to the people. They acted upon it in the only way in which they can act safely, effectually, and

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[1] 2 Dallas, 419. [2] Italics my own. [3] 4 Dallas, 316.

wisely, on such a subject, by assenting in convention. It is true they assembled in their several States, and where could they have assembled? . . . From these conventions the constitution derives its whole authority. The government proceeds directly from the people, is "ordained and established" in the name of the people; it is declared to be ordained "in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity." The assent of the States in their sovereign capacity, is implied in calling the convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it, and their decision was final. It required not the affirmance of, and could not be negatived by the state governments. The constitution when adopted was of complete obligation, and bound the state sovereignties. . . . The government of the union then,—is emphatically and truly a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."

In the decisions of Chief Justice Taney, as we should expect, we find the theory of our government looked at from a more States' rights point of view, as for example in such cases as those of *Briscoe* v. *Bank of Kentucky*, *Scott* v. *Sanford* and in *Ableman* v. *Booth*. For instance, see the quotation taken from his opinion in *Ableman* v. *Booth*, cited in the early portion of this chapter, in which he says of the Supreme Court: "This tribunal, therefore, was erected, and the powers of which we have spoken, conferred upon it, not by the federal government, but by the *people of the States*."[1] Taney, in his analysis of our government, never got further back than the State. If we are to accept the reasoning found in Taney's opinions, it was the people *of the States*, and never the people in their own

[1] Italics my own.

sovereign capacity who acted throughout the period of constitution making from 1765 to 1789.

In the case of *Texas* v. *White*,[1] decided in 1868, Chief Justice Chase, the successor of Taney, in his decision, gives us the last full, and in some respects, the best view we have of our constitution. The facts of this case were these: In 1866, Texas, while still in process of reconstruction, brought suit against White to recover certain bonds held by him, and claimed by Texas. White in his answer claimed that there was no sufficient authority shown to prosecute the suit in the name of Texas; that Texas by her rebellious courses had so far changed her status as one of the United States, as to be disqualified from suing in a federal court. The question was thus brought directly into issue whether the State had ever constitutionally been out of the union; that is to say, had her ordinance of secession possessed any legal efficiency whatever. In deciding that a State could, by no power of its own, pass a law affecting its relation to the federal union, the court found it necessary to base its decision upon a theory of national sovereignty capable of supporting this view. Chief Justice Chase thus supported his opinion. "The union of the States," said he, "never was a purely artificial and arbitrary relation. It began among the colonies, and grew out of a common origin, mutual sympathies, kindred principles, similar interests and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form and character and sanction from the Articles of Confederation. By these the union was solemnly declared to 'be perpetual.' And when the articles were found to be inadequate to the exigencies of the country, the constitution was ordained 'to form a more perfect union.' It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be more indissoluble if a perpetual union, made more per-

[1] 7 Wallace, 750.

fect, is not? But the perpetuity and indissolubility of the union, by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Under the Articles of Confederation, each State retained its sovereignty, and every power, jurisdiction and right, not expressly delegated to the United States. Under the constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people. As we have already had occasion to remark at this time, that the people of each State compose a State having its own government, and endowed with all the function essential to separate and independent existence, and that, without the States in Union, there could be no such political body as the United States. Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the constitution, but it may be not unreasonably said that the preservation of the States and the maintenance of their governments are as much within the design and care of the constitution as the preservation of the Union and the maintenance of the National government. The constitution in all its provisions, looks to an indestructible union, composed of indestructible States."

It is very interesting to thus place side by side the views held by the different Chief Justices concerning the nature of our constitution. Marshall took the simple Federalist view, that the constitution was formed and adopted by the "people" solely, and hence derives its authority from them; that the assent of the state government was not required, nor asked, nor given, except impliedly. Chase, in the last decision quoted, went back of this, and upon historical grounds, placed the origin of our nationality before the adoption of the constitution. That our national life began with the first attempts of the colonies to engage in united action. "That the national idea springing out of their common origin, interests and necessities, found its first open expression in their resistance to

Great Britain, it was strengthened by the war, it was triumphant in the Declaration of Independence, it was incorporated in the Articles of Confederation, and it was finally perfected by the constitution."[1] In Taney's decisions we find the States described as originally sovereign and independent, and the constitution as primarily the work of their hands, by which they surrendered a part of their sovereignty. For example, in the case of *Scott* v. *Sandford*,[2] he described the States as independent and sovereign even after the adoption of the Articles of Confederation. He said, "But it must be remembered that at that time there was no government of the United States in existence, with enumerated and limited powers; what was then called the United States were *thirteen separate, sovereign independent States*,[3] which had entered into a league or confederation for their mutual protection and advantage, and the congress of the United States was composed of the representatives of these separate sovereignties, meeting together as equals, to discuss and decide on certain measures, which the States, by the Articles of Confederation, had agreed to submit to their decision. But this confederacy had none of the attributes of sovereignty in legislative, executive or judicial power." To speak thus of a governing body that had power to ratify general treaties, and to control armies and navies is certainly rather strong. But Taney, while holding a strict construction of our constitution, so as to limit as much as possible the field of operations of the national government, did not in any way seek to lessen the supremacy of the federal government in those powers which he conceived to have been actually granted to it. In one of the ablest and strongest opinions of the court, he is emphatic in the maintenance of the supremacy of federal law, and his opinion is worthy of quotation at some length. This opinion was rendered in the case

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[1] *Nation*, 12, 445. [2] 19 Howard. [3] Italics my own.

of *Ableman* v. *Booth*,[1] and the facts of the case were these: Booth had been tried by a United States district court for a violation of the Fugitive Slave Law of 1850, and had been found guilty and sentenced to imprisonment. The Supreme Court of the State of Wisconsin, however, claimed jurisdiction over the district court, set aside the judgment, and discharged the prisoner. Not only this, but the state court determined that its decision was final and conclusive upon all the courts of the United States. As Taney said, this was indeed a new proposition that the state courts had a supremacy over the courts of the United States in cases arising under the constitution and laws of the United States. After giving a careful exposition of the both necessary and evident supremacy of the federal judicial power over state judiciaries, in cases arising under federal law, Taney continued: "No State, judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them. And, if the authority of the State, in form of judicial process or otherwise should attempt to control the Marshal or other authorized officer or agent of the United States, in any respect, in the custody of his prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference. No judicial process, whatever form it may assume, can have any lawful authority outside the limits of the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it beyond these boundaries, is nothing less than lawless violence. Nor is there anything in this supremacy of the General Government, or the jurisdiction of its judicial tribunals, to awaken the jealousy, or offend the

[1] 21 Howard, 506. In considering Taney's attitude in this case we may possibly be warranted in remembering that in this particular instance the federal law he was upholding was one passed in the interest of the slave-holding party, with which his sympathies lay.

natural and just pride of the state sovereignty. Neither this government, nor the powers of which we are speaking were forced upon the States. The constitution of the United States, with all the powers conferred by it on the General Government, and surrendered by the States, was the voluntary act of the people of the several States, deliberately done for their own protection and safety against injustice from one another. . . . Now it certainly can be no humiliation to the citizen of a republic to yield a ready obedience to the laws as administered by the constituted authorities. On the contrary, it is among his first and highest duties as a citizen, because free government cannot exist without it. Nor can it be inconsistent with the dignity of a sovereign State, to observe faithfully and in the spirit of sincerity and truth the compact into which it voluntarily entered when it became a State of this Union. On the contrary no faith could be more deliberately and solemnly pledged, than that which every State has plighted to the other States, to support the constitution as it is, in all its provisions, until they shall be altered in the manner which the constitution itself prescribes. In the emphatic language of the pledge required, it is to support this constitution. And no power is more clearly conferred by the constitution and laws of the United States, than the power of this court to decide ultimately and finally, all cases arising under such constitution and laws; and for that purpose to bring here for revision, by writ of error the judgment of a state court where such questions have arisen, and the right claimed under them denied by the highest judicial tribunal in the State."

After the ratification of the constitution had been assured, the opponents of its adoption shifted their ground, and turned their attention to the restriction into as narrow compass as possible the activity of the National Government, the inauguration of which they had been unable to prevent; and during the first few years of our federal existence, the national judi-

ciary was subjected to repeated and deliberate assaults by the state legislatures.

In 1793 the States' rights men received a very severe check by the decision in the case of *Chisholm* v. *Georgia*,[1] in which it was held with but one dissentient voice,[2] that, under the clause granting judicial power to the federal courts, a State was liable to suit on the part of a private citizen. The objection raised to this decision was that the States were still sovereign, and as such, were not liable to suit; and also that this point had been expressly disclaimed by such federalists as Hamilton, Marshall, and Madison in their state conventions. At this time nearly every State of the Union was heavily burdened with debts, and against some, suits had been brought similar to that brought by Chisholm; and, favored by this decision, many others of this character would undoubtedly be immediately instituted. The legislature of Georgia refused submission to this decision, and passed a statute imposing the penalty of death upon the one who should attempt to enforce the collection of the judgment. Before an attempt at collection was made, however, public opinion had been so aroused, as to enable the XIth Amendment to the constitution to be ratified, by which it was provided that "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or citizens or subjects of any foreign State."[3]

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[1] 2 Dallas. [2] Iredell of S. Car.

[3] NOTE.—In 1798 in the case of *Hollingsworth* v. *Virginia* (3 Dal., 378, 382), the Supreme Court declared the XIth Amendment to have been constitutionally adopted.

In recent years, the question of the suability of a state, except by its express consent, was again brought up. Certain creditors of Louisiana, being deterred by the XIth Amendment from prosecutiug their claims, transferred their evidences of indebtedness, some to the State of New Hampshire and some to the State of New York, and these States, as creditors and plaintiffs, brought suit against Louisiana to recover. (*N. Hamp.* v. *La. and N. Y.* v. *La.*, 108 *U. S.*, 76.) The court decided that the XIth Amend-

In *Osborn* v. *Bank of the United States*,[1] the proper interpretation of the XIth Amendment came up, and it was decided that the test to determine whether a suit is against a State, and thus prohibited, is whether the State is a party to the record.

The XIth Amendment does not apply to appellate cases.

The importance of the case of *Chisholm* v. *Georgia*, is not to be measured merely by its direct results, for the judgment was never collected, and by the XIth Amendment it made impossible to prosecute similar suits in the future. It is important on account of the principle of national sovereignty first therein expressed. "It is remarkable," said Chief Justice Jay, in his decision, "that, in establishing it (the constitution) the people exercised their own proper sovereignty, and conscious of the plenitude of it, they declared with becoming dignity: *We, the people of the United States, do ordain and establish this constitution.* Here we see the people acting as sovereigns of the whole country, and in the language of sovereignty establishing a constitution by which it was their will the States should be bound, and to which the state constitutions should

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ment could not be thus evaded. Also within the last few years the Virginia coupon cases have been decided, which involved the principle of the suability of a State. The Virginia legislature, some years ago, passed an act making the interest coupons on her bonded indebtedness receivable for state taxes. Since then she has endeavored to evade the execution of this law, by various hindering acts. Varying decisions have been given in these cases, the last of which is against Virginia.

Also in connection with this point: "the Amendment simply provides that no suit shall be commenced or drosecuted against a State. The State cannot be made a defendant to a suit brought by an individual. But it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one State against citizens of a different State where a State is not *necessarily* a defendant." (*U. S.* v. *Peters*, 5 Cranch, 136.)

Also: "When a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen." (*Bank of U. S.* v. *Planter's Bank of Ga.*, 9 Wheat., 904.

[1] 9 Wheat., 852.

be made to conform." In quoting this Cooley adds: "And the deduction was irresistible; the sovereignty of the people was in the people of the nation, and the residuary sovereignty of each State in the people of each State." [1]

There as yet existed no authoritative interpretation by the Supreme Court of its power to declare an act of a state legislature void for repugnance to the constitution of the United States. The power so to control the national legislature had been declared by a circuit court as early as 1792, and by the Supreme Court in 1803. In *Calder* v. *Bull*,[2] in 1798, a state law was contested in the Supreme Court, but was held[3] constitutional and thus the question was not put to a direct test.

The first case, in the decision of which the Supreme Court found itself called upon to annul the legislative act of a State, was that of *United States* v. *Peters*,[4] decided in 1809, a litigation raising out of an old prize case of the Confederacy. In this case the district court of Pennsylvania had given judgment to one Olmstead. The legislature of Pennsylvania, however, passed an act denying the jurisdiction of the court, and consequently the validity of the judgment, and authorizing the Governor to resist its collection. The case was brought before the Supreme Court by the Attorney-General, and the act of Pennsylvania declared void, and the district court ordered to serve the execution. Upon attempting to do so the sheriff found himself confronted by a brigade of Pennsylvania State militia, and was forced to summon a *posse comitatus*. The

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[1] Constitutional History as Seen in the Development of Its Law, p. 48.

[2] 3 Dallas, 386.

[3] NOTE.—In this decision Justice Chase stated what has since been the invariable principle of the court in regard to the repugnance of a state law to the state constitution. He said: "Without giving an opinion at this time, whether this court has jurisdiction to decide that any law made by Congress contrary to the constitution of the United States, 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."

[4] 5 Cranch, 136.

Pennsylvania legislature now gave way, and actual conflict was averted. In his opinion, the Chief Justice was emphatic in his condemnation of the attitude taken by Pennsylvania in this case. Said he: "If the legislatures of the several States may, at will, annul the judgments of the United States, and destroy the rights acquired under these judgments, the constitution itself becomes a solemn mockery; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals."

During the early years of our constitutional government, none of the States were so persistent in their opposition to the federal government, and especially towards the federal judiciary, as was the State of Virginia. The first assault had been made by Pennsylvania in her resistance to execution in the prize case of which we have spoken; but Virginia took up the contest in a more legal, yet more serious way. It will be remembered that the twenty-fifth clause of the judiciary act of 1789 provided that in three classes of cases an appeal might lie from the highest courts of the States to the Supreme Court; and that the constitutional grounds for the grant of this power to the federal judiciary rested upon implication and not direct donation. The constitutionality of this section did not remain unchallenged by the States, jealous of the independence of their powers.

In 1813 the Court of Appeals of the State of Virginia unanimously denied this appellate jurisdiction of the Supreme Court of the United States, and declined to obey the mandate of that court in the case of *Martin* v. *Hunter's Lessee*.[1] The following is the opinion rendered by the Virginia court: "The court is unanimously of the opinion that the appellate power of the Supreme Court of the United States does not extend to this court under a sound construction of the United States; that so much of the 25th section of the act of Congress, to establish the judicial courts of the United States, as extends

[1] 1 Wheat., 303.

the appellate jurisdiction of the Supreme Court of the United States to this court, is not in pursuance of the constitution of the United States."

This was certainly a serious assault, and one to be met with the firmest resistance, if the federal judiciary was to be sustained in the exercise of a power so essential to the maintenance of the integrity of its strength. In one of the most weighty decisions in the history of the court, Justice Story proceeded to vindicate the Supreme Court in the exercise of this appellate power. "Perhaps it is not too much to affirm," said Story, "that upon their right decision rest some of the most solid principles which have hitherto been supposed to sustain and protect the constitution itself." Then followed an elaborate argument showing that though not expressly given by the constitution, this appellate power of the Supreme Court was certainly and necessarily contemplated by the framers of our government, as shown in Article III, and Article VI already cited: and demonstrating how futile would be the attempt to maintain the supremacy and homogeneity of federal law, without this power.

One would think that the firmness and explicitness of this decision would have deterred parties from a further resistance to this jurisdiction; but in 1821 the point was again contested, and by the same State, Virginia, in the case of *Cohens* v. *Virginia*.[1]

In this case there were raised, however, certain other points of such constitutional importance, and we can profit by a consideration of the opinion of Marshall, who delivered the decision of the court. In this case, the Cohens were indicted by a state court for selling lottery tickets. Their defense was, that the lottery had been established by federal law, and as a consequence, the State of Virginia had no control over the case. Upon appeal to the Supreme Court of the United States, the counsel for Virginia in his motion to dismiss made

[1] 6 Wheat., 264.

the following points: First, that the State was a defendant; second, that no writ of error lies from the Supreme Court to a state court; and third, that the judiciary act did not grant this jurisdiction. The conclusion from Virginia's argument was, then, that there could be cases of violation of federal law in which the federal government had not the power to apply a corrective. As Marshall said: "They maintain that the nation does not possess a department capable of restraining peacefully, and by authority of law, any attempts which may be made, by a part against the legitimate powers of the whole; and that the government is reduced to the alternative of submitting to such attempts, or of resisting them by force." In his answer to such a doctrine as this, Marshall gives us an opinion of such clear logic, and matchless argument, that it would be scarcely amiss to insert it here in full, and let it stand as one of the best, if not the best interpretation the relation between the powers of the nation and its constituent States, has received at the hands of a federal tribunal. Space demands that only selections shall be given.

First, in answer to the point that the jurisdiction of the court is excluded by the character of the parties, one of them being a State and the other a citizen of that State. Said Marshall: "The jurisdiction of the court, then, being extended by the letter of the constitution to all cases arising under it, or under the laws of the United States, it follows that those who would withdraw any case of this description from that jurisdiction must sustain the exemption they claim on the spirit and true meaning of the constitution, which spirit and true meaning of the constitution must be so apparent as to overrule the words which its framers have employed. . . . From this general grant of jurisdiction no exception is made of those cases in which a State may be a party. When we consider the situation of the government of the Union, and of a State, in relation to each other; the nature of our constitution; the subordination of the state governments to that constitution; the great purpose for which jurisdiction over all cases arising

under the constitution and laws of the United States, is confided to the judicial department; are we at liberty to insert in this general grant, an exception to those cases in which a State may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. We think a case arising under the constitution or laws of the United States, is cognizable in the courts of the Union, whoever may be parties to that case." Continuing, he showed the XIth Amendment to be inapplicable to the case. He said: "It is then the opinion of the court, that the defendant who removes a judgment rendered against him by a state court into this court for the purpose of reëxamining the question, whether that judgment be in violation to the constitution or laws of the United States, does not commence or prosecute a suit against a State. . . . It is then not within the amendment, but is governed entirely by the constitution as originally framed, and we have already seen, that in its origin, the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties."

Bearing upon the second point made by Virginia, that the appellate jurisdiction of the court could not be exercised over the judgment of a State court, Marshall said: "We think that in a government acknowledged supreme with respect to objects of vital interest to the nation, there is nothing inconsistent with sound reason, nothing incompatible with the nature of government, in making all its departments supreme, so far as respects those objects, and so far as is necessary to their attainment. The exercise of the appellate power of those judgments of the state tribunals which may contravene the constitution or laws of the United States, is, we believe, essential to the attainment of those objects." Before this he had said: "There is certainly nothing in the circumstances under which our constitution was formed; nothing in the history of the times, which would justify the opinion that the confidence reposed in the States was so implicit as to leave in

them and their tribunals the power of resisting or defeating in the form of law, the legitimate measures of the Union. The requisitions of Congress, under the Confederation, were as constitutionally obligatory as the laws enacted by the present Congress. That they were habitually disregarded, is a fact of universal notoriety. With the knowledge of this fact, and under its full pressure, a convention was assembled to change the system." Further, Chief Justice Marshall quoted from the Federalist at length, in which he was unequivocally sustained on this point.

To the point that had been raised by Virginia, that such a power, if sustained, would result in an ultimate complete consolidation of the States, Marshall in a few words showed its improbability, if not its absurdity. "A complete consolidation of the States, so far as respects the judicial power," said he, "would authorize the legislature to confer on the federal courts appellate jurisdiction from the state courts in all cases whatsoever. The distinction between such a power, and that of giving appellate jurisdiction in a few specified cases, in the decision of which the nation takes an interest, is too obvious not to be perceived by all."

The cases of *Ableman* v. *Booth*[1] and *McCulloch* v. *Maryland* are other cases important in connection with the account of the efforts made by the States to interfere with and hinder federal action. Both of these cases have been previously referred to, and the circumstances of first one described. The case of *McCulloch* v. *Maryland*[2] arose from the attempt on the part of Maryland to prevent the operation, within her borders, of the federal institution, the Second United States Bank. This she endeavored to do, by taxing out of existence the branch bank which had been located on her territory.

We turn now to a consideration of other decisions of the Supreme Court regulating other points of contact between the National and State governments.

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[1] 21 Howard, 506.

[2] 4 Wheat., 316.

The restriction laid upon States regarding the violation of contracts, has given rise to important cases, the decisions in which, while of the gravest importance in constitutional law, and in their economic bearings, need not detain us long, as in them there were determined no novel points of especial importance bearing upon the proper relations to be maintained by the States towards the Union. The decisions have turned almost entirely upon the question of what constitutes a contract. In *Fletcher* v. *Peck*[1] decided in 1810, a case arising in connection with the "Yazoo Frauds," a state law was first "broken," for being a violation of the sanctity of contracts. The case is also important as being the second instance in which a state law was voided by the Supreme Court. The proper meaning of the word contract was next discussed in *New York* v. *Wilson*, and again in *Territ* v. *Taylor*.[2] That case, however, which is best known in connection with this subject, is that of *Dartmouth College* v. *Woodward*.[3] It derives its importance, however, more from the prominence of the parties involved, and the thoroughness with which the question was discussed, than from the settlement of any really new points of controversy. The decision turned entirely upon the proper interpretation of the word contract.[4]

In *Gibbons* v. *Ogden*,[5] it was decided that the State of New York, had, though probably unintentionally, entered a field of jurisdiction already exclusively entered by the federal government; namely, the regulation of inter-state commerce. The decision of this case involved a construction of that clause of the constitution which gives to Congress the power "to

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[1] 6 Cranch, 128. [2] 9 Cranch. [3] 4 Wheat., 518.

[4] NOTE.—Interesting in connection with this point, but for the further mention of which there is not space, are the cases: *Providence Bank* v. *Billings* (4 Pet., 514), *Sturges* v. *Crowninshield* (4 Wheat., 122), and the *Virginia Coupon Cases*.

[5] 9 Wheat., 1.

regulate commerce with foreign nations and among the several States, and with the Indian tribes." It was herein determined that "the power to regulate commerce includes the power to regulate navigation, and does not stop at the external boundaries of a State." "Moreover, the power of Congress to regulate commerce, either with foreign nations or among the States, does not stop at the jurisdictional lines of the State, but must necessarily be exercised within their territorial jurisdiction, and must include every case of commercial intercourse which is not a part of the purely internal commerce of a single State."

The recent Inter-State Commerce Act is the latest example of legislative activity based on the principles of this decision.

In 1886 in the case of *Wabash Railway Co.* v. *Illinois*,[1] Justice Miller said: "This clause giving to Congress the power to regulate commerce among the States, and with foreign matters, as this court has said before, was among the most important of the subjects which prompted the formation of the constitution. And it would be a very feeble and almost useless provision, if the States be allowed to impose any restrictive regulation interfering or seriously embarrassing this commerce." By this decision, an Illinois statute making a different rate for freight carried outside of the State from the rate charged for freight wholly within the State, was held an interference with inter-state commerce, and therefore unconstitutional. This principle, has this year received an application by the Supreme Court in the case of *Leisky & Co.*, v. *Hardin*, that is of considerable importance, and has created much comment. In this case it was held (Gray, Harlan and Brewer dissenting) that the law of Iowa which forbade the sale in the "original packages" of liquor imported from another State, was unconstitutional, being a restriction on inter-state commerce. The result of this decision will be, of course, to seriously injure the state prohibition cause. What

[1] 118 U. S. Reports, 557.

will be the full consequences of this decision it is as yet too soon to see.

An important question settled by the cases of the *Cherokee Nation* v. *Georgia*,[1] *Wooster* v. *Georgia*,[2] and *United States* v. *Kagoma*,[3] was the status of the Indian tribes in their relation to the States and to the United States. The result of the decisions in these cases was to prohibit the States from interference with the Indians as long as they maintained their tribal relations. The importance of the first two cases in politics, and in connection with the Executive will be adverted to, later on. As given in *United States* v. *Kagoma*, the status of the Indian within our State borders was, and remains thus defined: "While the government of the United States has recognized in the Indian tribes hithertofore a state of semi-independence and pupilage, it has the right and authority instead of controlling them by treaties, to govern them by acts of Congress, they being within the geographical limits of the United States, and being necessarily subject to the laws which Congress may enact for their protection and for the protection of the people with whom they come in contact. The States have no such power over them as long as they maintain their tribal relations."

The attitude of the Supreme Court towards the States in construction of the XIIIth and XIVth Amendments is worthy of note. In the proper application of the additional restrictions placed upon the States by these additions to the constitution, the services of the Supreme Court as a check, now not to undue State action, but as a protection to the States against too great federal interference, were conspicuous. As, in the early years of our constitutional history, the Supreme Court had been a potent factor in protecting the then weak Union against the more powerful and aggressive States, so now it saved the victorious Unionists from being hurried in their excitement and passion to a too great move-

[1] 5 Peters, 1. [2] 6 Peters, 315. [3] 118 U. S., 375.

ment in the opposite direction, towards centralization. As a conservative element in our constitutional development, the court showed itself as useful as a constructive power. Under that clause of the XIVth Amendment which provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," attempts were made to obtain such interpretations as would justify the federal government in interfering with the domestic concerns of the States. The decision rendered in 1873 in the *Slaughter House Cases*,[1] put an end to all attempts or hopes in this direction. The facts of these cases were these: The legislature of Louisiana passed an act regulating the slaughtering of animals in the City of New Orleans. The butchers considered this an infringement upon their rights and brought suit in the federal courts, claiming protection under the XIVth Amendment. In deciding the case in favor of the validity of the act of the Louisiana legislature, Justice Miller, who rendered the opinion of the court, said: "We do not see in these amendments any purpose to destroy the main features of the general government. Under the pressure of all the excited feelings growing out of the war our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights—the rights of person and property—was essential to the perfect workings of our complex form of government, though they have thought fit to confer additional limitations upon the States, and to confer additional power on that of the United States." Of the nine justices then upon the bench, four dissented from the opinion rendered by the other five. The decision, though subject to much adverse criticism at the time, has since been generally accepted as correct, and the

[1] 16 Wall., 37.

principle is now considered as well established, that, with the exception of the restrictions upon infringement of the rights of the colored race, no new limitations were laid upon the States by the last three Amendments.

The conditions under which appeals lie from the state courts to the Supreme Court of the United States, as provided for in the twenty-fifth section of the Judiciary Act, have received attention, but there still remains for consideration that class of cases in which the state and federal courts have concurrent jurisdiction.

In the case of *Martin* v. *Hunter's Lessee*,[1] Justice Story, in his opinion found it necessary to consider the subject of the distinction between those cases in which the United States courts have necessarily exclusive jurisdiction, and those in which the state courts may exercise concurrent jurisdiction. The points made in this decision were these. Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself. Congress cannot lawfully refuse to create a Supreme Court, and to vest in it the whole constitutional jurisdiction. Congress is also bound to create some inferior courts in which to vest all the jurisdiction, which under the constitution is exclusively vested in the United States, and of which the Supreme Court cannot take original jurisdiction. There is a distinction between the class of cases arising under the constitution, laws and treaties of the United States; cases affecting ambassadors, other public ministers and consuls, and cases of admiralty and maritime jurisdiction; and the class embracing all the other subjects of national cognizance. In respect to the first class, the constitution imperatively extends the judicial power, either in an original or appellate form, to all cases; and in the second class of controversies, it leaves it to Congress to qualify the jurisdiction, original or appellate, in such manner as public policy may dictate. The judicial power of the United States

[1] 1 Wheat., 304.

is unavoidably, in some cases, exclusive of all State authority; and in all others may be made so at the election of Congress. "It is not the mere existence of the national power, but its exercise, which is incompatible with the exercise of the same power by the States."[1] No part of the criminal jurisdiction of the United States can, consistently with the constitution, be delegated to state tribunals. The admiralty and maritime jurisdiction is of the same exclusive cognizance. It is only in those cases where, previous to the formation of the constitution, state tribunals possessed jurisdiction independent of national authority, that they can now constitutionally exercise a concurrent jurisdiction.

In the valuable essay by D. H. Chamberlain,[2] the topic we are now considering is treated, and it is with considerable guidance from his paper that I have written the last few pages of this chapter. After mentioning the points made in the case of *Martin* v. *Hunter's Lessee*, and in other cases, he thus sums up the result. "The point which has now been reached," he says, "enables us to make the general statement of the place of the state judiciary in the American political system: (1) The judicial power of the several States under our constitutional system, extends to all matters and cases whatsoever of judicial cognizance, which are not vested by the constitution in the United States, or prohibited by it to the States. (2) Of the matters and cases embraced in the grant by the constitution of judicial power to the United States, the judicial power of the State extends, concurrently with that of the United States, to all matters and cases which do not, by their nature, fall exclusively within the prescribed limits of the judicial power of the United States, and of which the state judiciary may take jurisdiction agreeably to its own constitution and powers under the state constitution and laws.

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[1] Quoted from *Sturges* v. *Crowninsfield*, 4 Wheat.

[2] Const. Hist. of U. S., as seen in the Development of Its Law, Chap. V. See Federalist, 82, as giving much the same view.

In a word, the jurisdiction of the state judiciary covers all matters which may be the subjects of judicial cognizance, except such as are by their nature, or by the express terms of the constitution, or of act of Congress, placed within the exclusive jurisdiction of the United States, or excluded from the jurisdiction of the state courts by the state constitution or laws."[1]

As we have already learned, this concurrent jurisdiction in the state courts was recognized in the Judiciary Act of 1789, and provision made by which certain suits might be removed by the defendant from state courts to courts of the United States. This power has since been widened until now it covers all cases which might originally have been brought in a federal court; and the privilege of such removal is allowed to the plaintiff as well as to the defendant.

In exercising their jurisdiction, the federal courts are frequently called upon, by the character of the parties involved, to adjudicate upon the same subject and legal points that the state courts have decided in cases of their own. In such cases the federal courts follow the statute law of the State, and the former decisions of the state courts. The Judiciary Act provided that "The laws of the several States, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." This subject is discussed at considerable length by Mr. D. H. Chamberlain, who, as a result of his examination, says: "The rule to be drawn from the cases now examined as well as from numerous other cases which have arisen in the Supreme Court of the United States, seems to be well settled and defined, and may be thus stated: (1) The statutes of a State and the construction put upon them by the highest court of a State are binding and conclusive upon the courts of the United States

[1] P. 254.

in all cases where such statutes so construed are not in conflict with the constitution of the United States, and where such decisions can be regarded as the settled, fixed, and received law of the State; (2) but that whenever, in the judgment of the United States courts, state statutes as construed by state courts are in conflict with the constitution of the United States, or, (3) whenever the decisions of the state courts are conflicting, so that any specified decision or decisions of the state courts cannot fairly be regarded as expressing the settled law of the State, the United States courts are not bound by such statutes or decisions. This rule with these limitations seems to be well settled, and to have been adhered to with somewhat unusual consistency by the Supreme Court of the United States."[1] It might be added also that no state law can be adjudged void for being in violation of the constitution of that State. The determination of that point belongs to the courts of the State itself.[2]

In conclusion. When one looks over our dual set of courts, whose mutual relationships and interdependencies it has been the purpose of this chapter to explain, he can scarcely be blamed for saying to himself "surely we have here invented for ourselves a complex machine for the adjustment of our disputes." Considered as a mere machine for the settlement of disputes, it is a complicated apparatus, yet if what has been written has at all served its purpose, we see the theory of their construction and working to be simple and clear. The theory of our judiciaries is in exact harmony with the theory of our whole federal union. The State is essential to the Union, and the Union is essential to the existence of the States. Each supplements and assists the other. Within their own bounds each is all powerful. It is just as much so with the judiciary, as it is with the other branches of the government. The field of activity is divided between state and federal courts upon broad and intelligible principles, and

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[1] P. 271.

[2] Calder *v.* Bull, 3 Dallas, 386.

each recognizes its own limitations. Excepting the first few years of our federal existence, when the federal machinery had not yet become well fixed and smooth running, there have been surprisingly few serious conflicts between the two systems of courts. It is the very delicacy of the machinery, and the political ability of Americans to appreciate these delicacies of constitutional adjustments, that make the judicial portion of our system work so smoothly, and make this feature of our government the object of wonder, as well as of admiration of foreigners.

CHAPTER VII.

The Supreme Court and the Executive.

We turn now to a consideration of the relation of the highest interpreter of our laws to that branch of our government to which is charged the duty of executing those laws.

The fundamental proposition usually maintained regarding our national government is, that each of its three branches is, in its action, separate from and independent of the other two. The extent to which this is actually and practically the case will, it is hoped, appear in the following discussion.

Complete independence of the three branches of a government nowhere exists, and necessarily cannot. No government can exist with complete independence of the executive, judicial, and legislative functions. They may be separate, so far as being vested in different hands is concerned, but in their operations they must depend for the efficiency of their actions upon the coöperation and aid of each other. What would be the result (especially in a government like ours, with limitations of power, and the different branches of government frequently in the hands of persons differing in political principles) if laws were made with no guarantee or certainty that they would be executed; or if courts rendered decisions with no assured prospect that they would be applied if they were displeasing to the executive; and finally, if Congress should continue to legislate without any reference to the interpretation which the constitution had received at the hands of the judiciary? It would be anarchy.

The main point upon which the maintenance of the proposition of the independence of the powers of our federal government rests, is in reference to the freedom of action of the executive. The problem resolves itself at once into the question: does the right of interpreting the constitution in a final and authoritative manner, rest with the whole United States as a body politic, that is with all the departments; or is this duty vested in the hands of one of them alone, that is to say, the judiciary?

For convenience this topic may be discussed under the following heads: (1) Has the President the right to veto an act of Congress merely because he believes it to be an unconstitutional measure? Or, to put it still stronger, has the President the right to exercise his veto upon this ground, even though a similar measure has previously obtained a construction at the hands of the supreme judiciary, and been declared constitutional?

(2) Has the President the right to refuse to execute a law, passed during the term of a predecessor, or over his veto, because he deems it unconstitutional?

(3) Has the President the right to decline to enforce a judgment of a federal court, because he believes such decision to be not in harmony with the principles of the constitution?

(1) Has the President the right to veto an act of Congress because he believes it to be an unconstitutional measure? He has. The only objection that has been raised to this affirmative answer is that in thus acting the President is arrogating to himself judicial functions; that it is the duty of the judiciary alone to pass upon the constitutionality of laws. The objection is not well made, however. In placing a veto upon a congressional enactment, the President is exercising, not a judicial, but a legislative function. His veto is of the nature of a powerful vote, and his decision as to the way his vote is to be cast must be formed from his own views and opinions. The constitution gives him the power and he has a right to use it; indeed, it is his duty so to use it. But has he the right to

use his veto upon the sole ground of unconstitutionality, when a measure of similar character has received previous interpretation by the Supreme Court, and has been sustained? I think that he has. I cannot see that his constitutional right or even duty of thus using his veto power has been at all impaired by the manner in which any previous act has been treated. In 1832 Jackson vetoed the bill providing for a recharter of the National Bank. This he did mainly on the ground of unconstitutionality, notwithstanding the fact that in the case of *McCulloch* v. *Maryland* this institution had been carefully examined by the Supreme Court and pronounced constitutional. In support of his action, Jackson, in his veto message said: "The Congress, the Executive, and the Court, must each for itself be guided by its own opinion of the constitution. Each public officer who takes an oath to support the constitution, swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President, to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval, as it is of the Supreme Court when it may be brought before them for a judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both." Jackson was no lover of the Supreme Court, and in this instance certainly stated the case strongly, but in his action he was undoubtedly correct.[1] Whether he acted wisely, or even with proper respect towards the other branches of the government is another question.

(2) Has the President the right to refuse to execute a law, passed during the term of a predecessor, or over his veto, because he deems it unconstitutional? Here we come to an entirely different question. In this case we are considering the attitude of the President, not towards a measure in process of

[1] Von Holst holds a contrary view. Constitutional History, I, 46.

enactment, as is the case when the veto is exercised, but towards a bill that has passed through all the constitutional forms of enactment, and become a law. The question we have propounded in this instance is not an easy one to answer, and contradictory opinions are held regarding it. A careful consideration of all the theoretical and practical points involved, leads me to the opinion that the executive has not this power of defeating the will of the people or of the legislature as embodied in law. The reasons for maintaining the contrary opinion, as usually stated are these: The constitution of the United States is the supreme law of the President as well as of the private citizen. It is his duty to "take care that the laws be faithfully executed," but he is also sworn to "preserve, protect and defend the constitution," and this he must do upon his own interpretation of the constitution, and not upon that of others. The constitution is but a law of high degree, and is therefore one of the very laws that he must take care are faithfully executed. Says one writer:[1] "If the President must execute all laws, he must execute an *ex post facto* law or any other law flying in the teeth of the constitution; a partisan statute passed over his veto can rob him of the right to be commander-in-chief, to nominate or remove from office, or of any other right expressly conferred upon him; and it is at once evident that in these cases Congress would be quite as plainly *taking away from the President the power which the constitution has expressly given.* A two-thirds majority could alter at will many important provisions of the constitution, and the members could only be called to account at a reëlection. That instrument in these cases would not be self-supporting, and would furnish none of those checks of which we have all heard so much. But if the contrary view is true, the check system comes into perfect play; for then the President's right to refuse his assistance to an unconstitutional law will check Congress, while the risk of impeachment

[1] American Law Review, 23, 375.

will check the President." This is the strongest statement of this side of the question that I have seen. What are the fallacies?

In the first place, the President does not stand upon the same footing as regards the constitution, as does the private citizen. The President is an agent selected by the people, for the express purpose of seeing that the laws of the land are executed. If upon his own judgment he refuse to execute a law and thus nullifies it, he is arrogating to himself legislative functions. If this right were allowed, then would laws have but an advisory, recommendatory character, depending for power upon the good-will of the President. That there would be danger that the legislature might by a chance majority, or through the influence of sudden great passion, legislate unwisely or unconstitutionally, was foreseen by those who framed our form of government, and the provision was made that the President might at his discretion use a veto, *but* (and here is the point), this was the entire extent to which he was allowed to go in the exercise of a check upon legislation. It was expressly provided that if after his veto, two-thirds of the legislature should again demand that the measure become a law, it should thus be, notwithstanding the objection of the Chief Executive. Surely there is here left no further constitutional right on the part of the President to hinder the operation of a law.

It is the duty or privilege of a private citizen to refuse obedience to a law, if, upon careful consideration and investigation he considers it to be unconstitutional, but he does so at his own risk, and if he is wrong his punishment will follow. Then too, only his particular interest is directly involved. But, says the objector, the President also refuses his obedience at his own risk, namely, the danger of impeachment and possible subsequent civil or criminal prosecution. The case is different. In the first place, a refusal on his part to execute the law nullifies it in all its applications for all people; and in the second place, impeachment is not a check. As an

instrument for checking unconstitutional action on the part of the President, impeachment has been found too cumbersome. If, in the case of the extreme opposition and contest between both Houses of Congress and President Johnson, an impeachment was not successful, we must admit that as a means of future restraint upon the Chief Executive it will not be greatly feared.

But is the President to execute patently unconstitutional laws, if passed by the legislature? Yes. As has been said, his discretion lies in the exercise of his veto power. If this is of no avail, then he has no further discretion but must obey. If the laws are patently unconstitutional, they will be soon contested by private individuals, and a decision obtained at the hands of the Supreme Court. After decision upon them by this high court the case will be changed. This leads us to the next question.

(3) Has the President, or here we make it more general; have any of the officers of the government, the right to refuse obedience to a judgment of the Supreme Court, because they believe such judgment to be based upon an incorrect interpretation of the constitution? Here we have the case of an enactment having necessarily not only the favoring view of the Congress, but the sanction and support of the highest judicial tribunal of the land. I can see no shadow of constitutional right on the part of a public official to refuse to execute a judgment of a federal court. This case is stronger than the former one by the additional support of the judiciary. To refuse now to execute the command of the court is to assume the judicial power of a court of appeals as well as legislative functions. Says Judge Cooley on this point: "It may become his duty as executive to assist in enforcing a judgment he believes erroneous, should enforcement by the ordinary process of the court, and by its own officers become impossible. Nevertheless it is conceivable that the Executive may refuse to obey either a statute or the judgment of a court. . . . It can be said of such cases only this, that the responsi-

bility of the President for a refusal to regard the judicial mandate, is on the one hand to the people, and on the other to the process of impeachment."[1]

When President Lincoln refused obedience to Taney's decision in the Merryman case, he acted in an unconstitutional manner. He may have thought himself, and possibly was, in the dilemma of either endangering the safety of the Union, or of refusing obedience to a judicial command, yet this did not make his action constitutional. The dilemma was the result of a form of government with limited powers.

This question of executive independence is historically interesting in connection with the impeachment trial of President Johnson. President Johnson, it will be remembered, resisted the operation of laws passed over his veto, which laws he thought impaired his constitutional powers as commander-in-chief of the army, and his powers of removal. According to the view which we have taken, Johnson was of course acting illegally and unconstitutionally, and his attempted impeachment was just.

What is the rule as to the finality of a decision of the Supreme Court as governing the future action of Congress, and restraining individuals? When the Supreme Court has decided upon the constitutionality of an act, does the decision thus made bind Congress to refrain in the future from passing measures of a similar character, or make it the bounden duty of individuals henceforth to act in exact conformity with the principles thus laid down? Or is there a more temporary effect, only the particular dispute in question being settled, and a probable precedent established for the settlement of similar disputes in the future? The question does not admit of a categorical answer. The general, and undoubtedly the

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[1] Principles of Constitutional Law, p. 158.

NOTE.—"If one of the heads of the department commits any illegal act, under color of his office, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law." (*Marbury* v. *Madison.*)

best view is that a decision, though final so far as the particular case in hand is concerned, is not necessarily final as a constitutional interpretation. Although for the sake of uniformity and certainty it would certainly be better that such finality should extend to the constitutional principle, yet a court is always fallible, and therefore it would be dangerous to say that by the decision in a single case a constitutional principle of great importance should be settled for all time. Political predilections cannot be entirely changed by elevation to the bench. There always remains the possibility of an incorrect decision due to persistence of political bias in the members of the court, to insufficient consideration and investigation, or possibly to the justices wholly failing to realize the full significance of their decision.

President Lincoln in his inaugural address in 1861 expressed this opinion regarding the constitutional finality of the Dred Scott decision. He said: "I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decision must be binding in any case upon the parties to a suit, as to the object of that suit, while they are also entitled to a very high respect and consideration in all parallel cases by the other departments of the government; and while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time the candid citizen must confess that if the policy of the government upon the vital questions affecting the whole people is to be irrevocably fixed by the decisions of the Supreme Court the instant they are made as in ordinary litigation between parties in personal actions, the people will have ceased to be their own masters, having to that extent practically resigned their government into the hands of that eminent tribunal." Similar views to these were held and expressed by Presidents Jefferson,

Madison, Jackson, and Van Buren, and probably by others. I wish to quote also what Mr. Bancroft says upon this subject. He says: "To the decision of an underlying question of constitutional law no such finality attaches. To endure it must be right. If it is right it will approve itself to the universal sense of the impartial. . . . An act of the legislature at variance with the constitution is pronounced void: an opinion of the Supreme Court is equally so."

There have been several instances in which decisions involving constitutional questions have been reversed by subsequent decisions, notably among which were the legal tender decisions. The issue of irredeemable paper money by the general government held in the first case unconstitutional, was subsequently decided constitutional as a war measure, and later still, held to be a power possessed by the federal legislature capable of being exercised even in times of peace. Likewise in the Virginia Coupon cases, varying decisions were given at different times.

James Madison in a letter written in 1834 gives a view of the position and influence of the Supreme Court so far as the question we are now discussing is concerned. The opinion there expressed is so sound, clear and moderate, that I shall insert it in full.[1]

"DEAR SIR: Having referred to the Supreme Court of the United States as a constitutional resort in deciding questions of jurisdiction between the United States and the individual States, a few remarks may be proper, showing the sense and degree in which that character is more particularly ascribed to that department of the government.

"As the legislative, executive, and judicial departments of the United States are coördinate, and each equally bound to support the constitution, it follows that each must, in the exercise of its functions, be guided by the text of the constitution according to its own interpretation of it; and conse-

[1] Works, IV, 349.

quently, in the event of irreconcilable interpretations, the prevalence of the one or the other department must depend on the nature of the case, as receiving its final decision from one or the other, and passing from that decision into effect without involving the functions of any other. It is certainly due from the functionaries of the several departments to pay much respect to the opinion of the other; and as far as official independence and obligation will permit, to consult the means of adjusting the differences and avoiding practical embarrassments growing out of them, as must be done in like cases between the cöordinate branches of the legislative department. But notwithstanding this abstract view of the coördinate and independent right of the three departments to expound the constitution, the judicial department most familiarizes itself to the public attention as the expositor, by the order of its functions in relation to the other departments, and attracts most the public confidence by the composition of the tribunal.

It is the judicial department in which questions of constitutionality, as well as of legality, generally find their ultimate discussion; and the public deference to and confidence in the judgment of the body are peculiarly inspired by the qualities implied in its members; by the gravity and deliberation of their proceedings; and by the advantage their plurality gives them over the unity of the executive, and their fewness over the multitudinous composition of the legislative department. Without losing sight therefore, of the coördinate relation of the three departments to each other, it may always be expected that the judicial bench, when happily filled, will, for the reasons suggested, most engage the respect and reliance of the public as the surest expositor of the constitution, as well in questions within its cognizance concerning the boundaries between the several departments of the government as in those between the Union and its members."

A final point remains to be discussed concerning the relation of the judiciary to the executive.

In what class of cases may the judiciary interfere to command the performance of a duty on the part of an unwilling executive official?

The federal judiciary has never attempted to arrogate to itself the exercise of ministerial functions. From the date of the creation of the federal judiciary this has been the rule. In Hayburn's case, which came before a circuit court in 1791, an act of Congress was pronounced unconstitutional, which had assigned ministerial functions to the circuit courts; and Congress repealed the law.

Also the Supreme Court has never attempted to law down rules prescribing the manner in which any of the executive officials shall perform their duties. The court must wait until a particular action of an official has given rise to a cause giving it jurisdiction. It cannot, in the anticipation of the future execution of a law, endeavor by an opinion, or a writ, to enforce its execution in a particular manner, or to prohibit entirely the performance of such action. "Neither the executive nor the legislature can be restrained in its action by the judiciary, though the actions of both when performed are in proper cases subject to its cognizance."

It is only in certain cases that the court will consent to review the actions of one of the other departments; namely, in those of a strictly non-political character. We can state this principle in the words of the court, given in the case of *Marbury* v. *Madison*.[1]

"By the constitution of the United States the President is invested with certain important political powers in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties he is authorized to appoint certain officers, who act by his authority and in conformity to his orders. . . . Where the heads of the departments are the political and confidential

[1] 1 Cranch, 137.

agents of the Executive, namely, to execute the will of the President, or rather, to act in cases in which the Executive possesses a constitutional or legal discretion, nothing can be more clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy."

Upon this same point of the regulation of the executive acts by the judiciary, the court in *Kendall* v. *United States*,[1] said: "There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that Congress cannot impose upon an executive officer any duty they think proper, which is not repugnant to any rights secured and protected by the constitution, and in such cases, the duty and responsibility grow out of and are subject to the control of law, and not to the direction of the President. And this is emphatically the case where the duty required is of a mere ministerial character."

In regard to the power of the judiciary to restrain the executive from any duty specifically given by the constitution or by constitutional enactment, the Attorney-General advised the President in 1828 as follows:[2] "I am of the opinion that it is not in the power of the judicial branch of our government to enjoin the executive from any duty specially devolved on it by the legislative branch of the government, or by the constitution of the United States. If it were otherwise it would be in the power of the judicial branch of the government to arrest the whole action of the other two branches. My opinion is that the judiciary can no more arrest the executive in the execution of a constitutional law than they can arrest the legislature itself in passing a law."

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[1] 12 Peters, 524.

[2] Opinions Attorney General, I, p. 682.

The powers of the President are almost entirely of a political nature and consequently can rarely be brought within the scope of a judicial examination. His only responsibility is to the people; his only check liability to impeachment.

During reconstruction times, the State of Mississippi applied to the Supreme Court for an injunction forbidding President Johnson to execute the Reconstruction Act. The court declined to interfere. The question was one of a political nature.[1]

Not always has the Supreme Court been successful in obtaining an enforcement of its decisions, even when given in non-political cases. It compelled Postmaster-General Kendall and Secretary Schurz to the performance of ministerial acts, and during the progress of the Burr trial obtained papers from the unwilling President; but in 1803 Jefferson contemptuously ignored the opinion of the court that the commission rightfully should be given to Marbury; and before that, Georgia did not satisfy the judgment obtained against her by Chisholm. In 1832 the court found itself unable to compel obedience to its decision in the Cherokee case. And in 1861 the Chief Justice issued an attachment against an army officer for disregarding the writ of *habeas corpus*, which had been suspended, and when the writ was returned unsatisfied the Chief Justice was forced to abandon the proceedings.

There are no constitutional relations between the federal judiciary and the state executives. It is true that in the early

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[1] NOTE. Among other questions decided to be of a political nature and therefore not within the cognizance of the court are: *de facto* or rightful government of another country (*Gelston* v. *Hoyt*, 3 Wheat. 246); existence of war and restoration of peace (*U. S.* v. *Anderson* 9 Wall. 56); authority of foreign ambassadors and ministers (*Foster* v. *Neilson*, Pet. 253); admission of a state (*Luther* v. *Borden*, 7 How. I); restorations to constitutional relations of a State lately in rebellion (*Ga.* v. *Stanton*, 6 Wall. 50); extent of jurisdiction of a foreign power, (*Williams* v. *Suffolk Ins. Co.*, 13 Pet. 415); and right of Indians to recognition as a tribe, (*The Kansas Indians*, 5 Wall. 73, and *U. S.* v. *Holliday*, 3 Wall. 407.)

(Quoted from Cooley's Prin. of Const. Law.)

years of our history the courts of the United States did depend to a certain extent upon state officials for the execution of their decrees, but the compliance of the state officials was a matter of comity and good will, and not of necessity. Taney, in *Kentucky* v. *Dennison*,[1] in which was involved a consideration of the Fugitive Slave Law of 1793, stated the opinion of the court in regard to this question. He said: "The act of Congress declares that it shall be the duty of the executive authority of the State to cause the fugitive to be arrested and secured and delivered to the agent of the demanding State. But looking to the subject matter of this law, and the relations which the United States and the several States bear to each other, the court is of the opinion, the words 'it shall be the duty' were not used as mandatory and compulsory, but as declaratory of the moral duty which this compact created which Congress had provided the mode of carrying into execution. The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the Executive of the State, nor is there any clause or provision in the constitution which arms the government of the United States with this power. And we think it clear that the federal government, under the constitution has no power to impose on a state officer, as such, any duty whatever, and compel him to perform it. It is true that Congress may authorize a particular State officer to perform a particular duty, but if he declines to do so, it does not follow that he may be coerced or punished for his refusal."

[1] 24 Howard, 66.

CHAPTER VIII.

The Federal Judiciary in Politics.

Leaving the legal and somewhat technical points regarding the federal judiciary, we turn to a consideration of the part played by the nation's highest judicial tribunal in the field of partisan politics. We have learned of the degree of care and solicitude exercised by the constitutional convention in its endeavor to form a judiciary, which should, by its construction and composition, be wholly removed from political strifes and party differences, and thus be enabled to perform with firmness and impartiality its high functions as arbitrator between the Federal and State governments, and between the branches of the national government; and which should be in the highest and closest degree the exponent of the people's will as expressed in their self-constitued law. To secure its independence of the legislature, its justices were made appointees of the President and their salaries guaranteed them. To raise them above partisan bias, its justices were given life tenure, removable only by impeachment.

To what extent has the Supreme Court fulfilled the expectations of its founders, in respect to its non-partisanship? Happily, we may say, that in this respect, as well as in the other respects of which we have already treated, the court has well played its part.

With scarcely an exception, all of the Supreme Court Justices were, before their elevation to the bench, political partisans to a greater or less degree; but with their nomination to

the judiciary these political predilections have been as far as possible laid aside. That there should have remained however a certain amount of political sediment, which has caused the general tenor of the court decisions to vary from loose to strict construction, as the composition of its bench changed, is natural, and possibly not to be deprecated. The temper of the court has, however, changed slowly, vacancies occurring very seldom; and thus its composition has sometimes represented the general constitutional view of a past, rather than a contemporary political party.

After the adoption of the constitution, the organization of our government was in the hands of the Federalist party, and remained in their hands during the first three administrations. Washington, while endeavoring to quiet political strifes by selecting his appointees from among the ranks of the Anti-Federal party, as well as from his own, as was shown in the composition of his cabinet, was nevertheless careful to place the infant government in the hands of guardians who, though not all constitutional latitudinarians, would yet be friendly to it.

The first bench of the Supreme Court showed a representation of both parties, but at its head was placed John Jay, a man of a strong federalist type. Jay's attitude towards federal strength is expressed in one of his letters to Washington in which he said: "What power should be granted to the government so constituted, is a question that deserves much thought. I think the more the better: the States retaining only so much as may be necessary for domestic purposes, and all their principal officers, civil and military, being commissioned and removable by the National Government." His Associate Justices were William Cushing of Massachusetts, James Wilson of Pennsylvania, John Blair of Virginia, Robert A. Harrison of Maryland, and James Iredell of North Carolina.

The history of the first ten years of the Supreme Court, from 1789 to 1800, is not the most important period of its

existence. The work done by the court during these years was very small. At the first session there were no cases on the docket. From 1790 to 1800 only six cases were decided in which were involved questions of constitutional law. Marshall upon his elevation to the Supreme bench, found but ten cases awaiting adjudication. Few recognized at this time the powerful influence this tribunal was to have in shaping the development of the nation. A position on its bench was then considered not as important as many positions now ranking far below it. Such position was not even considered incompatible with the holding of another office at the same time. In 1794, Chief Justice Jay was commissioned as Minister to England, and accepted, but without vacating his seat on the Supreme bench. Upon his return to America in 1795, he was elected Governor of the State of New York, and resigned his position as Chief Justice. Service to a State, even to a Federalist, stood higher at that time than did service in the highest judicial capacity to the national government. Jay's Chief Justiceship is chiefly marked by the decision of the case of *Chisholm* v. *Georgia*, concerning the importance of which we have already spoken. Jay's service to the Union during these years is summed up by his most recent historian as follows: "Three great facts were determined once for all: the dignity of the court was vindicated from encroachment by the federal executive and legislative departments; its jurisdiction was established over the state governments; and incidentally, Jay announced and determined that foreign policy of the United States which has been accepted and followed from that day to this."[1]

John Rutledge, at one time Governor of South Carolina, and an Anti-Federalist, was appointed to succeed Jay. His nomination was not confirmed by the Senate, owing to pronounced political partisanship, expressed in a public speech after he had received notice of his appointment as Chief Jus-

[1] Pellen, in *American Statesmen Series*, p. 264.

tice, and therefore at a time when, as a member of the judiciary, he should have thrown aside, outwardly entirely, and inwardly, as far as possible, all political bias. Also by the time Congress met in the winter, it was evident that his mental faculties were suffering from disease.

William Cushing was Washington's next appointee. He was confirmed by a unanimous vote of the Senate, but retained his office but one week, resigning before holding a session of the court.

Oliver Ellsworth of Connecticut was then appointed. He belonged to the class of moderate Federalists, and had been a member of the Constitutional Convention, and was, when appointed, United States Senator. It was he who had drafted the Judiciary Act of 1789. In 1799, Ellsworth was sent by President Adams as Commissioner to France, and upon his return in 1801, he resigned his commission as Chief Justice.

The Federalists in the last days of their power were guilty of several unwise and impolitic acts. Among these was a law hurried through Congress in February, 1801, and after they had found themselves defeated in the November elections, which considerably modified the system of federal courts. By this act, the number of justices of the Supreme Court was reduced to five, the number of district courts was increased to twenty-three, and the districts arranged in six circuits, each circuit to have a bench of its own, composed of a chief justice and two associate justices; and the Supreme Court justices were to be relieved of all circuit duty. This act passed, the President filled up the offices thus created with staunch Federalists, and, more important than all, appointed and the Senate confirmed, as Chief Justice, John Marshall of Virginia, then Adams' Secretary of State.[1]

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[1] It is related that at midnight of March 3d, when the term of Adams expired, Marshall, the Secretary of State, was interrupted by the Attorney-General of the new President while making out commissions for these federal judgeships, and was obliged to leave a number of them unsigned. Concerning these "midnight appointments," see Parton's Jefferson.

The Republicans, upon their accession to power, were naturally incensed at this effort of their defeated opponents to continue their hold upon the judiciary. This political move on the part of the Federalists was of no inconsiderable importance to the party just coming into power. Jefferson, and Randolph, his leader in the House, could foresee that it was possible for Chief Justice Marshall, aided by the numerous circuit and district courts, seriously to interfere with what they conceived to be the proper development of the central government. An almost immediate agitation was begun for the repeal of the law of 1801. A repeal, even with a good working administrative majority in both Houses, was not, however, as simple a proceeding as it might appear. Federal judges are guaranteed by the constitution a fixed tenure and are removable only by impeachment. A repeal of the law, thus depriving the new judges of office, would therefore be of doubtful constitutionality, and the Republicans were strict constructionists. But consistency, however precious a jewel it may be, is seldom possessed by political parties, and the Republicans were able to stifle the expostulations of their consciences upon this point. The ground taken by the Federalists was, naturally, that the assumption of such power of repeal by Congress, would forever destroy the independence of the judiciary. Randolph defended the constitutionality of the repeal, and sustained himself upon the following rather weak reasoning.[1] Said he: "If you are precluded from passing this law lest depraved men might make it a precedent to destroy the independence of your judiciary, do you not concede that a desperate faction, finding themselves about to be dismissed from the confidence of their country, may pervert the power of erecting courts, to provide to an extent for their adherents and themselves? We assert that we are not clothed with the tremendous power of erecting, in defiance of the whole spirit and express letter of the Constitution, a vast judicial aristocracy

[1] *Cf.* Adams' Randolph, pp. 61–72.

over the heads of our fellow citizens, on whose labor it is to prey. It is not on account of the paltry expense of the new establishment that I wish to put it down. No, sir! It is to give the death blow to the pretension of rendering the judiciary an hospital for decayed politicians: to prevent the state courts from being engulfed by those of the Union; to destroy the monstrous ambition of arrogating to this House the right of evading all the prohibitions of the Constitution, and holding the Nation at bay." One would call this an argument against the constitutionality of the law of 1801, rather than a proof of the constitutionality of its repeal.

The repeal passed the House by a large majority. By this law it was provided that all acts or parts of acts relative to the organization of the judiciary in force before the passage of the act of February, 1801, should, on the first day of July, 1802, be revived. The positive gain by the Republicans from this repeal was not great. The inferior courts were lessened, but the Supreme Court was left untouched, and at its head was Chief Justice Marshall. As Henry Adams says in his life of John Randolph, "The repealing act was in fact not revolution but concession; overthrowing a mere outer line of defense, and left the citadel intact, and gave a tacit pledge that the federalist Supreme Court should not be disturbed, at least for the present. When it is considered that Chief Justice Marshall, in the course of his long judicial career rooted out Mr. Jefferson's system of polity more effectually than all the Presidents and all the Congresses that ever existed, and that the Supreme Court not only made war on States' rights, but supported with surprising unanimity every political and constitutional innovation on the part of Congress and the Executive, it can only be a matter of wonder that Mr. Jefferson's party, knowing well the danger, and aware that their lives and fortunes depended, or might probably depend, on their action at this point, should have let Chief Justice Marshall slip through their fingers. To remodel the whole bench might

have been revolution, but not to remodel it was to insure the failure of their aim."[1]

Marshall held the position of Chief Justice for thirty-four years, and his influence during all these years in fixing the federal law, in construing the Constitution, and in consolidating by his opinions the Union, and increasing the confidence in it, it will be impossible to overrate. Marshall was a genuine federalist, or rather nationalist, but not of the extreme Hamiltonian school. While defending with all his power the federal constitution, he freely recognized its limitations. He early declared that his rule of interpretation would be neither strict nor too liberal, but that the natural meaning of the words should govern. At the time of the appointment of Marshall, American federal jurisprudence was in its infancy, indeed had hardly been born. The constitution, formed in the midst of debate, remained as yet practically uninterpreted. So little had been done by the former chief justices, that Marshall had the very foundations to lay. But he did more than this. As one of his biographers states, he laid not only the foundations of constitutional law, but raised the superstructure. It is one of the happy events with which fate has favored us, that, at this time, when the constitution was as yet watched with extreme jealousy and suspicion by a large minority, possibly by a majority, of the whole people, our fundamental law obtained, and for so long a time, as its interpreter, the services of a man who, while not remarkable for his judicial learning, yet possessed a wonderful breadth of view of the philosophy of government and law, and of the principles of equity, and an appreciation of the fundamental principles underlying virtue and right; and added to these a sound discriminating judgment and powers of analysis, and a proper grasp upon our theory of nationality.

In making his decisions, Marshall was ploughing in new ground, encompassed by no limiting or conflicting collections

[1] Pp. 4–5.

of previous decisions. "He was making law; he had only to be logical and consistent in the manufacture."

To show partially the amount of work done by Marshall during his term of office, I quote the following statistics.[1] During his term 1106 opinions of the court were filed, and in 519 of these Marshall delivered the opinion of the court, the remainder being unequally divided among the fifteen judges who were his associates during that entire period. During the same period dissenting opinions were filed by Marshall in eight cases in all. The most important, and the only one involving a constitutional question, was that of *Ogden* v. *Saunders*, decided in 1827. From the organization of the Court in 1790, until Marshall's appointment in 1801, six decisions were rendered involving questions of constitutional law. From 1801 to 1835, sixty-two of such decisions were given, in thirty-six of which the opinion of the court was written by Marshall; in the remaining twenty-six by some one of seven other justices. The decisions of the court, during this period fill the thirty volumes of reports from first Cranch to ninth Peters.

The decided tendency of the Supreme Court to strengthen and enlarge by its decisions the powers of the federal government was viewed with considerable alarm by the Republicans. Jefferson and his followers did not cease their attempts to weaken the judiciary with the repeal of the law of 1801. At the suggestion of Jefferson himself, in 1804, articles of impeachment were presented in the House against Samuel Chase, Associate Justice of the Supreme Court of the United States. There is little doubt that this attack was but a part of a systematic attempt to weaken, if not totally destroy the efficiency of the federal judiciary, by using the implement of impeachment. That this was the purpose is shown by sentiments expressed by Giles, who, together with Randolph, conducted the attack against Chase. "Giles labored with excessive

[1] Const. Hist. U. S. as seen in Devel. of its Laws, Chap. II.

earnestness," says Mr. Adams, "to convince Smith of certain principles, upon which not only Mr. Chase, but all the other judges of the Supreme Court, excepting the last appointed, must be impeached and removed, ... and if the judges of the Supreme Court should dare, as they had done, to declare an act of Congress unconstitutional, or to send a mandamus to the Secretary of State, as they had done, it was the undoubted right of the House of Representatives to impeach them for giving such opinions, however honest or sincere they may have been in entertaining them. Impeachment was not a criminal prosecution—and a removal by impeachment was nothing more than a declaration by Congress to this effect; you hold dangerous opinions, and if you are suffered to carry them into effect you will work the destruction of the Union. We want your offices for the purpose of giving them to men who will fill them better."[1] Again, in a former entry,[2] Mr. Adams says; and I quote him as a member of the Senate before whom the impeachment was tried, "the attack upon Mr. Chase was a systematic attempt upon the independence and powers of the judicial department, and at the same time an attempt to prostrate the authority of the National Government before those of the individual States. The principles first started in the case of John Pickering, at the last session, have on the present occasion, been widened and improved upon to an extent for which the spirit of the party itself was not prepared."

"The impeachment of Justice Chase is a landmark in American history, because it was here that the Jeffersonian Republicans fought their last aggressive battle, and, wavering under the shock of defeat, broke into factions which slowly abandoned the field and forgot their discipline."[3]

Judge Pickering, of one of the district courts, had been impeached in 1803–4 on account of drunkenness, and upon the very day of his conviction the impeachment of Chase was

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[1] J. Q. Adams' Diary, I, 322, (Dec. 21, 1804.)
[2] I, 371.
[3] Adams' Randolph, p. 131.

begun. The articles against Chase were based on his conduct while on circuit in the conduct of the trials of Fries and Callender indicted under the Sedition law, in 1800, and on an address delivered by him to the grand jury at Baltimore in 1803. The political light in which this trial is to be viewed has been pointed out, and it will not be necessary to go into details of the management, or rather mismanagement, of Randolph, and final failure of conviction.

The attempts of the States' Rights party to control the judiciary had failed. From now until the accession of Jackson, and the death of Marshall, the Jeffersonian Republicans had to stand by and see the Supreme Court, under the powerful influence of Marshall, and Joseph Story (who had been appointed associate in 1811), gradually extending and strengthening the federal government by its decisions. It was with honest fears that Jefferson saw affairs taking this course. "The judiciary of the United States," he wrote in 1820,[1] "is the subtle corps of sappers and miners constantly working underground to undermine the foundations of our confederate fabric. They are constantly construing our constitution from a coördination of a general and a special government, to a general and supreme one alone. They will lay all things at their feet, and they are too well versed in the English law to forget the maxim '*boni judicis est ampliare jurisdictionem.*'"

So vexed was Jefferson that the judicial branch should not be in complete harmony with his administration, that he even proposed that future appointments of judges should be for four or six years, and removable by the President and Senate, thus to bring their conduct at regular intervals under probation.[2]

The extreme Democracy came into power with the election of Andrew Jackson to the Presidency. During his administrations five vacancies occurred in the Supreme Court. McLean was appointed in 1829, Baldwin in 1830, Wayne in 1835, and Chief Justice Taney and Barbour, on the same day

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[1] Works, VIII, 192.

[2] Works, VIII, 256.

in 1836. The effect of these appointments upon the complexion of the court was immediate. In the case of *Briscoe* v. *Bank of the Commonwealth of Kentucky*,[1] heard in 1835, just before Marshall's death, as we have already mentioned, the bank was not sustained in its issues of bills of credit, upon the ground of unconstitutionality. Coming up for a re-hearing under Taney, the bank was sustained, and the previous decision reversed. This decision marked the beginning of a new era in the history of our constitutional law. The court, which up to this time, upon all occasions, had firmly upheld the federal government in the exercise of all its proper powers, now began to incline in the opposite direction. In Briscoe's case it broke from its previous principles, and for the first time rendered nugatory one of the provisions of the constitution. In this case the States' Rights party won their first victory in judicial interpretation.

The character of the Supreme Court was influenced at this time not only by the new appointments, but it had to contend against a hostile executive. Jackson's attitude towards the judiciary has been indicated in the quotation taken from his veto message on the Bank Bill.[2] In 1830 the court received a severe check from its failure to enforce its judgments given in the Cherokee Indian Cases. Jackson flatly refused to assist in the execution of these judgments, after the State had refused compliance. J. Q. Adams, writing at this time, said:[3] "By extending the laws of Georgia over the country and people of the Cherokees, the constitution, treaties and laws of the United States were *quod hoc* set aside. They were chaff before the wind. In pursuance of these laws of Georgia, a Cherokee Indian is prosecuted for the murder of another Indian before a State court of Georgia, tried by a jury of white men, and sentenced to death. He appeals to the Chief Justice of the Supreme Court of the United States, who issues an injunction to the governor and executive officers of Georgia, upon appeal

[1] II Peters, 257. [2] See page 9. [3] Diary, VIII, 262.

to the laws and treaties of the United States. The Governor of Georgia refuses obedience to this injunction, and the legislature pass resolutions that they will not appear to answer before the Supreme Court of the United States. The constitution, and the laws and treaties of the United States are prostrate, in the State of Georgia. Is there no remedy for this state of things? None. Because the executive of the United States is in league with the State of Georgia. . . . A majority of both Houses of Congress sustain him in this neglect and violation of his duty. . . . This example of the State of Georgia will be imitated by other States, and with regard to national interests. . . . The Union is in most imminent danger of dissolution, from the old inherent vice of confederacies, anarchy in the members."

Friends of the National Government now began to view this new treatment of the constitution with as much apprehension as had the Jeffersonian school the federalistic tendencies of the judiciary from 1810 to 1830. Said a writer in the *New York Review* of April, 1838: "In short, when we consider the revolution in opinion, in policy and in members that have recently the character of the Supreme Court, we can scarcely avoid being reduced nearly to a state of despair of the commonwealth." Chancellor Kent, in a letter to Story, wrote: "I have lost my confidence and hopes in the constitutional guardianship and protection of the Supreme Court."[1] Justice Story, who had been upon the supreme bench since 1811, complained of this new manner in which the constitution was being treated. In 1845 he wrote:[2] "I have been long convinced that the doctrines and opinions of the old court were daily losing ground, and especially those on great constitutional questions. New men and new opinions have succeeded. The doctrines of the constitution so vital to the country, which in former times received the support of the whole court, no longer maintain their ascendency."

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[1] 2 Story's Life and Letters, 270. [2] 2 Story's Story, 527.

There was one question which the court had now to meet, which had not troubled the court during Marshall's time. The question of Slavery, so long kept down by compromise, now again raised itself, and this time demanded settlement, not by the legislature, but by the judiciary.

From its influence on our history, undoubtedly the most important case decided by the Supreme Court, and the one for which Taney is chiefly remembered is that of *Scott* v. *Sanford*,[1] decided in 1857. The case had been heard the year previous, and a decision reached, but its publication had been withheld until after the presidential election of 1856 for fear of adding a dangerous excitement to the already existing excitement due to the Kansas-Nebraska troubles. The facts of the case are so well known as to scarcely need a repetition here. Dred Scott, a negro slave in Missouri, had been carried into the Territory of Minnesota, where, by the Missouri Compromise Act of 1820, slavery did not exist. Upon being carried back into Missouri by his master, Scott sued for freedom, upon the ground that he had been voluntarily carried by his owner into a Territory where slavery was not allowed. The Supreme Court in its decision declared that Scott was not a citizen of a State, and therefore could not sue in a United States Court, and furthermore Congress had never had the right to forbid slave-owners from settling in the Territories, and still retaining control of their slaves. The Missouri Compromise Act had hence been unconstitutional.

The effect of this decision upon a country already in the throes of political struggle over the organization of the territorial governments of Kansas and Nebraska, was prodigious. The country immediately divided; the South accepting, and the North refusing to accept the decree. Lincoln, at Springfield, on June 26, 1857, made one of his great speeches, the substance of which amounted to a repudiation of the Dred Scott decision. The result of the decision was undoubtedly a

[1] 19 Howard, 393.

drawing closer together in sentiment and consequent increase in power, of the Anti-slavery party, enabling them to elect their president in 1861, thus precipitating the catastrophe of civil war.

If it were generally admitted, that in making this decision invalidating the Missouri Compromise, and thus furnishing such strong support to the Slavocracy, the Supreme Court had this question legitimately before it demanding a decision ; and if it were not believed by many that appointments to the Supreme Court had for some time been so managed as to obtain a bench which would render such a decision as this, we would not have to dwell further on this case. But these being the facts, we must stop to consider them.

Von Holst in his last volume on the Constitutional History of the United States, is the first prominent historian to take the emphatic ground that for years it had been the systematic and conscious aim of the South to make the Supreme Court the citadel of Slavocracy, and that the Dred Scott decision was a witness of the success of their efforts. Relative to this Von Holst says : "The slavocracy had opened their eyes to the fact that the condition precedent to the continuance of slavery was its supremacy over the Union. Of how great importance, therefore, a preponderant position in the Supreme Court of the United States was, could not escape the keen eyes of the leaders,[1] and the little interest public opinion had in questions

[1] Whether authoritative proof can be produced of J. M. Ashley's assertion that Calhoun was the father of the idea, (says Von Holst) I do not know; that the assumption seems probable to me I need not say, in view of my opinion on the towering position of Calhoun among all the leaders of slavocracy. The passage in Ashley's speech of May 29, 1860, from which the facts adduced in the text are chiefly taken, is as follows: "Failing, however, to secure the open indorsement by the Democratic party of that day of the favorite theory of the slave power, Mr. Calhoun hit upon the plan of getting possession of the Supreme Court, because it is a power the furthest removed from the people, is held in great esteem by them, and such acts of aggression as Mr. Calhoun contemplated, if committed by the Supreme Court, he knew would be so quietly done as to excite no alarm and pass almost unnoticed." Congr. Globe, I Sess. 36th Cong. App., p. 366.

relating to the organization of the judiciary as well as the little understanding it had of them, made the realization of their wishes in that direction easy. By the law of March 3, 1837, the number of associate justices of the Supreme Court was increased to eight, and that of the circuit courts to nine. Kentucky and Tennessee were separated from Ohio, and henceforth, together with Indiana, Illinois and Michigan, constituted the seventh circuit. The two new circuits were made up of Kentucky, Tennessee and Missouri; and of Alabama, Louisiana, Mississippi and Arkansas, respectively. The free States with a population (according to the census of 1840) of 9,654,865, had, therefore, four circuit courts, while the slave States, with a white population of only 4,573,930, had five. In consequence of the rapid increase in population in the free States, this unequal apportionment became more inequitable and more unreasonable as the years rolled by. It at last came to such a pass that the judge of the seventh circuit had more to do than the five judges of the southern circuits together, while the new free States admitted into the Union were allowed no representation in the Supreme Court of the United States, and were neither assigned a place in the existing circuits nor constituted circuits themselves, although the amount of judicial business in them in 1860, of which such courts would have had jurisdiction, was, according to Ashley, equal to at least one-third of that of all the fifteen slave States.

"Great as was the advantage which the slavocracy acquired by the law of 1837, they did not consider themselves sufficiently secured by it. Only after they had succeeded in making sure of a permanent majority in the judiciary committee of the Senate, did they feel entirely certain that a majority of the justices of the Supreme Court would profess the doctrines relative to slavery, which were agreeable to the slave interest, whenever a legal question bearing on slavery arose. The proposals of the judiciary committee of the Senate controlled, as a rule, the position of the Senate on the nominations of the President to the Supreme Court, and, beginning

with Tyler's administration, the committee had, on every occasion, criticized the nominations in such a way as to make it a moral certainty that the opinions of the nominees on the slavery question would be of great weight in, if not decisive of, the question of their confirmation.[1]

"At last even Southerners of tried probity and great consideration found no favor in their eyes, when, on the slavery question they professed constitutional convictions,—convictions which were condemned by the radical slavocrats, during the development of the struggle, as dangerous heresies, with an intensity to which time only added strength."[2]

The entire substance then of this quotation that we have made from Von Holst, is, as he admits, taken from a speech delivered by Mr. J. M. Ashley of Ohio, before the House of Representatives, May 29th, 1860. Also, it is in this recently published volume, that he for the first time makes mention of this speech, or of the facts to which it refers; and also to Calhoun's connection with this plan of controlling the federal judiciary, although he some years ago prepared a life of Calhoun for the American Statesmen Series. It is impossible to produce documentary proofs of these allegations, as the nomi-

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[1] The proofs which Mr. Ashley gives of this is as follows:

"Sir, I expect to show that no man whose nomination has for years been submitted to the Senate for confirmation has been rejected for his want of learning, or character as a citizen, or ability as a lawyer; but that they have been rejected solely on the ground of their known or supposed unsoundness on the question of slavery. . . . Under this (Pierce's) administration, the judiciary committee was composed of Butler of South Carolina, chairman, Downs of Louisiana, Bradbury of Maine, Geyer of Missouri, and Badger of North Carolina: all from slave States with one exception, and he a supporter of the administration. . . . The following are some of the names which I remember, although there are doubtless more, of the persons who have been nominated for places on the supreme bench, and either rejected or their names withdrawn: Jno. C. Spencer of N. Y., Reuben Walworth of N. Y., Edward Key, Geo. W. Woodward, Jno. M. Read of Pa., E. A. Bradford and Wm. C. Micau of La., Geo. E. Badger of N. C., and others whose names I cannot now recall."

[2] Const. Hist. U. S., 1856–8.

nations were all considered in secret sessions. I have been unable to investigate the assertions any further than Dr. Von Holst has done, and therefore leave these statements to have the weight that they may deserve from the authority of Mr. Ashley, and the sanction of Dr. Von Holst.

"Spite of the absence of documentary evidence, it would be ridiculous to deny," says Von Holst, "that orthodoxy on the slavery question had come to be a qualification for a seat on the supreme bench; but it does not, therefore, follow that the judges were unscrupulous partisans, ready, consciously, to surrender their constitutional convictions at the command of the slave-holding interest."

That the judiciary committee was, for some years, influenced in its action regarding nominations to the Supreme Court by the views of the nominees regarding slavery is extremely probable. That a court was obtained which did render a decision in favor of the slavocracy is certain. To what an extent this result was directly due to the conscious efforts of the committee in this direction we shall never know. That, however, the justices acted in accordance with their conscientious interpretation of the constitution, a study of the character of the justices, of the history of the cases, and of the several decisions rendered, must, I think, convince the impartial.

That point upon which the judicial action of the court has been especially impeached by many, is the unnecessary extension of the decision rendered in the Dred Scott Case so as to cover the constitutionality of the Missouri Compromise Act. This, it is claimed, was done expressly for political purposes, the court thus acting in direct opposition to all its previous precedents. This opinion is strengthened by two facts. In the first place, it was originally determined to confine the decision of the court to the facts of the case actually before the court, and Justice Nelson was intrusted with the preparation of the opinion, and in this opinion the constitutionality of the Compromise Act of 1820 was not touched. Later, it was decided to cover in the decision, all the points in

the record, because, as Justice Wayne said, the public were expecting that this would be done. Chief Justice Taney was selected to prepare the opinion. In the second place, grounds for suspicion have been found from the fact that certain remarks in the inaugural address of President Buchanan delivered before the rendition of the decision, would possibly indicate a knowledge upon his part of what was to be the decision of the court.

The points bearing upon the political significance of the action of the Supreme Court in this case can obviously not be discussed at length *pro* and *con* here, but for a fuller consideration of these questions than can be here given, reference must be had to the various authorities where this has been done, and to the press of that day.

Taney served as Chief Justice twenty-eight years, his death occurring in 1864. During his long term, many important cases were decided, but they do not need such specific treatment as Marshall's decisions have received, for they bore to the development of the constitution a different relation from those of Marshall, and, for the purposes of this paper, are of less importance. When Taney was appointed to preside, the Supreme Court was nearly half a century old, and its powers and jurisdiction were well fixed, and American constitutional jurisprudence had been, to a large extent, developed. From a doubtful experiment, as it was in 1800, our constitutional system had become, by 1835, an undoubted success, and a developed scheme of government. It did not fall to the lot of Taney to make law, as Marshall had done.

Upon the death of Taney, in 1864, President Lincoln appointed as his successor Salmon P. Chase, who had been his competitor for presidential honors in 1860, and was, at that time, his Secretary of State. The death of Chase occurred in 1873. His place was filled by Morrison R. Waite, who held the position until his death last year. The present incumbent is Mr. Melville Fuller, an appointee of President Cleveland.

The period since the Civil War has been one of great importance in the history of the Supreme Court. Vital necessity caused new and extraordinary assumptions of power by the legislature and the executive. Irredeemable paper money was issued, the writ of habeas corpus suspended, emancipation proclaimed, and blockade and other military powers exercised. After the suppression of the rebellion, three amendments to the constitution were adopted, provisionary governments were erected in the States which had been in insurrection; and conditions were imposed upon their reëntrance into the Union. The exercise of all these powers was claimed, of course, to rest upon constitutional authority, and in connection with them arose constitutional questions which had to be settled by the Supreme Court. The general result of the action of the court during this period has been to sustain the President in the enormous powers he exercised during these critical years, the ground being that the exercise of such powers was necessary to the preservation of the Union, and that they were adjuncts to the authority given him as Commander-in-Chief; and also to stand as a barrier against the tide of opinion which threatened to set too strongly towards centralization. This latter service of the Supreme Court has been already referred to.[1]

The legal status of those States, which, having been in rebellion against Union, were undergoing reconstruction prior to their return into full Statehood, and the constitutional nature of the provisionary governments that had been erected in them, were points not easily determined, and there was for a time considerable anxiety on the part of the administration as to how the question would be treated by the Supreme Court.

A man named McArdle, of Mississippi, obtained a writ of habeas corpus from a circuit judge to the military commission trying him. Failing of release, he appealed to the Supreme Court of the United States. The case, however, did

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[1] P. 9.

not reach decision, for Congress, fearing the action of the Court upon the reconstruction governments, the constitutionality of which, was involved in the case, passed a law taking away the right of appeal in cases of this nature. In 1868, a bill was passed by the House of Representatives providing that six judges should be necessary to constitute a quorum of the Supreme Court, and that the concurrence of two-thirds of the members of the whole court should be necessary to pronounce a decision in any case pending before it against the validity of any act of Congress. The proximate cause of this act was the report that five of the justices of the supreme bench at that time believed the Reconstruction Acts to be unconstitutional. The bill failed, however, in the Senate. The anxiety of Congress was allayed when, in 1868, in the case of *Texas* v. *White*[1] the Reconstruction Acts were considered, and practically sustained, though, from the nature of the points involved, we cannot say that their constitutionality has been fully decided.

Since 1865 the Supreme Court has shown a return to a somewhat looser construction of the constitution than obtained during the preceding thirty years. Vacancies occurring, Lincoln appointed a new Chief Justice and four Associate Justices. Grant added three new Associates. This infusion of Republican blood had the result upon the general tenor of the decisions of the court that might have been expected.

Broadly speaking, then, the history of the Supreme Court may be divided into three periods. The first, one of loose construction, lasting nearly half a century ; the second, a period of nearly twenty-five years, during which there was a stricter interpretation of the federal law ; and third, a period of rather looser interpretation, lasting from the outbreak of the Civil War to the present day.

These changes in the tenor of the court's decisions have flowed naturally from the changes in the composition of its

[1] 7 Wallace, 700.

bench, and in no case is it strongly maintained that the justices have decided in any other but a conscientious manner. It is only when we look over a volume of reports that we can distinguish the general tendency of the court. Judges have not hesitated, in specific cases, to decide otherwise than would have been expected from a knowledge of their previous political beliefs. Take, for instance, one of the Virginia Coupon Cases. When the question of the right of the holders of the Virginia coupons to pay them in for taxes, and to compel the State to receive them as such, was brought before the Supreme Court, the eight Republican judges divided evenly on the point whether the State was, or was not, protected by the XIth Amendment, and it was Justice Field, the Democratic justice, who threw the casting vote against the States' right doctrine.

The only weak point in the constitution of the federal judiciary, rendering it liable to political tamperings from the legislature, has been the power possessed by Congress to regulate the number of justices, a power that it has several times exercised. The Federalists, in 1801, changed the number of federal judges for political reasons. In 1866, Congress reduced the number of Supreme Court justices from ten to seven in order to deprive President Johnson of the opportunity of making appointments. After all fears of Johnson's reconstruction policy was over, the act of 1869 was passed, by which the number of justices was raised to nine. The influence the appointment of the two new justices under this last act had upon the legal tender decisions, gave rise to the suspicion that the two new justices, Strong and Bradley, received their appointments because of their known or suspected opinions regarding the constitutionality of a legal tender issue.

Once in the history of the court its Chief Justice has been called upon to preside at an impeachment trial—that of President Johnson.

In 1877, five of the court were called upon to act in conjunction with five senators and five representatives, on an electoral commission, to decide regarding the result of the

previous presidential election in several of the Southern States. While serving in this capacity the justices were acting in an extraordinary capacity. The commission was a political creation, and its duty was the decision of a political question.

The investigation of the part the Supreme Court has played in politics gives us few, if any, very disagreeable results, but tends rather to heighten our admiration and reverence for this institution. We find that in addition to having been eminently wise it has been, upon the whole, extremely impartial. With surprising consistency the court has refused to consider questions of a political nature. What direct influence the politics of the day have had upon it, has resulted from tamperings from the outside, and not from corruption in its members. "Throughout the whole history of the court," says Alexander Johnston, "there has never been the faintest suspicion upon the integrity of the Supreme Court justices."[1] Yielding not to the passions of the day, nor to partisan influence, the Supreme Court has nevertheless, by gradual changes, kept in touch with the people. Only once in its long history has its decision failed to impress the people, as a whole, as correct. Like a glacier it is (to use the characterization of Von Holst) "stiff and firm, and yet moving forward, and, as it slides down, always adapting itself to the bed on which it lies."[2]

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[1] Lalor's Ency. Pol. Sci., Art. Judiciary.
[2] Const. Hist. U. S., III, 157.

CHAPTER IX.

Present Condition and Needs of the Supreme Court.

The number of Justices of the Supreme Court has been changed several times. The Judiciary Act provided for a chief justice and five associate justices. At present there are nine justices, and the incumbents are: Melville Fuller, Chief Justice; Miller, Field, Bradley, Harlan, Gray, Blatchford, Lamar and Brewer, Associate Justices.

Until 1869, with the exception of a few months in 1801, the Supreme Court Justices had circuit duty to perform. By the act of that year, a judge for each circuit was provided for, and the Supreme Court Justices relieved from much of their circuit work. The Supreme Court Justices still go upon circuit, but only to try the more important cases. Another provision of the act of 1869, was one permitting a justice to retire with full pay, when seventy years of age, and after ten years of service.

The Chief Justice now receives a salary of $10,500 per annum, and his Associates $10,000 each.

The Supreme Court holds annual terms, beginning the second Monday of October, and lasting till May. Daily sessions, with the exception of Saturdays and Sundays, are held, beginning at 12 M. The Court sits in the Capitol building at Washington, in the room which was formerly the Senate Chamber. The opening of the Court is announced by the crier: "Oyez! Oyez! Oyez! All persons having business before the Honorable Supreme Court of the United States are

admonished to draw near and give their attention, for the court is now sitting. God save the United States and this honorable Court!"

The Supreme Court works with exceedingly little friction. Quietness, solemnity, dignity, and rapidity, characterize its proceedings. Arguments are made in a low ordinary tone of voice, are short, and offer no opportunity for display of oratory or brilliant rhetoric.

The cost of carrying a case through the Supreme Court is comparatively slight. The court fees are very small; the main expenses are for counsel fees and printing the record.

Every Saturday morning the justices meet in consultation and decide cases argued during the week. In hearing a case, six of the nine justices constitute a quorum, and decisions are governed by a majority vote. One justice from the majority in each case is selected to prepare a written opinion. Dissenting opinions are also freqently prepared and read. Decisions are announced on Monday mornings.

All decisions by the Supreme Court are, of course, final. No mode is provided by which any superior tribunal can reëxamine what the Supreme Court has decided. The case is not only settled, but the principles of the decision remain as precedents for the settlement of cases of similar nature, which may arise in the future. These precedents are sometimes, though very seldom, disregarded. Until the end of the session, any case decided during that session is considered as being still "in the bosom of the Court," and upon sufficient cause being shown, a re-hearing is sometimes allowed. The Supreme Court cannot again hear a case decided by it during a previous session, though a new case, involving the same questions may be heard, and, despite precedent, obtain a contrary decision.

In cases at law brought by writ of error to the Supreme Court only the bill of exceptions is reviewed, and, if material errors in the ruling of the lower court are discovered, the case is remanded for a new trial; if no such errors are proven, the

decision is affirmed. In appellate cases in equity, the whole record of the case is submitted, and the cause finally decided. When a State is summoned to respond to a complaint, a subpoena is issued on the Governor and Attorney-General of the State. The Attorney-General then appears and answers.

During the early years of the history of this Court, the amount of business transacted was very small. In 1801, at the accession of Chief Justice Marshall, there were only ten[1] cases awaiting a hearing. The next five years the entire number of cases decided was 120. From 1820 to 1830 the aggregate number was 259, an average of 58 a year. From 1830 to 1850 there was a gradual increase. From 1845 to 1850 the average number of cases heard per year was 71. Since 1850 the increase has been rapid. From 1875 to 1880, 1,955 cases were heard and decided.

The last report of the Attorney General (1889) showed that the total number of cases on the docket at the beginning of the October term of 1888, was 2,571. Of this number, only 423 were disposed of.

But 423 cases were decided by the Supreme Court during the last year (1888–89), and the Court is therefore so far behind-hand in its work that it takes from three to four years for a case to come up for trial, after having been entered upon the docket. The large majority of its cases are those brought thither by appeal from the lower federal courts. Those cases requiring its original jurisdiction are now very few in number.

The causes that have given rise to this increase of the Court's business are numerous. First, there has been the growth of our territory, wealth, and population. Also, there is the wonderful growth of our railroads and telegraphs, most of them crossing State lines, which yearly give rise to a large number of cases. Then, also, there has been the large number of claim cases since the establishment of the Court of Claims.

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[1] The following figures are taken from an article by Associate Justice William Strong. N. Am. Review, May, 1881.

Cases involving patents and copyrights form a considerable portion of the business of the Court, and these are classes of cases which have of late greatly increased, and will continue to increase. But in addition to these, Congress, since 1850, by numerous acts, especially by that of 1875, has not only greatly enlarged the jurisdiction of the lower federal courts, but has widened the class of cases that may be removed from state to national courts. All of these causes, together with other minor ones, have operated to increase the business of the Supreme Court, until now it is nearly overwhelmed with accumulated work, and this, notwithstanding the fact that our Supreme Court Justices are among the hardest worked of our public officials. During seven months, instead of three, as formerly, they are in continuous session; and in addition to this, they have circuit duty to perform.

It is folly and injustice to continue yearly to pile upon this Court a much larger amount of business than it can by any possibility perform. Relief cannot come from the Court itself, nor can we expect a diminution of the appeals from the lower courts. Narrowing the jurisdiction of the lower federal courts is not possible nor desirable. Relief must come from Congress.

Various plans have been suggested. One is for a division of the Court into sections, with or without an increase in the number of justices; each section hearing particular classes of cases. Of this character was a bill introduced by Mr. Manning, of Mississippi, in the House of Representatives, June 26, 1880. By this bill there was to be a triple division of the Court, giving equity cases to the first division, common law cases to the second, and revenue and admiralty cases to the third division; the general Court to hear all cases requiring a construction of the constitution or treaties. The objection to this plan is that it is of doubtful constitutionality. The constitution provides for the establishment of a single Supreme Court, and it may properly be questioned whether such a plan as this would not be in contravention to that provision.

There is also this objection to the plan. Anything that will tend to lessen the people's regard and confidence in the Supreme Court is to be deprecated, and it is extremely probable that a division of the Court, whereby suitors would obtain the benefit of the learning of only a part of the Justices, would have this result.

A second mode of relief that has been suggested, is simply the raising of the limit of the pecuniary amount that must be involved in order that cases may be appealed to the Supreme Court from the inferior federal courts. The strongest objection to this is, that it amounts to a denial of the benefit of the judgment of the Supreme Court to all suitors claiming sums less than the minimum. The limit is now $5,000, instead of $2,000, as at first, and it is already claimed, for this reason, that the Supreme Court is provided only for the rich people.

A third plan, and one which seems to meet with the most favor from lawyers, is the establishment of courts of appeal in each of the circuits, intermediate between the Supreme and circuit courts; these courts to have final jurisdiction in all cases of a specified character.

It now seems, happily, that the Supreme Court is soon to obtain relief by a plan of this character. A bill by which radical relief is to be afforded the Supreme Court, as well as the circuit courts, whose dockets are also sadly overcrowded, passed the House in April, 1890, and is now in the Senate, and it is generally believed will obtain the assent of that body also. Those provisions of the bill, which are important to us, are as follows:

The district courts are hereafter to exercise, in addition to the jurisdiction conferred upon them by existing law, all the original jurisdiction now vested by law in the circuit courts.

In each circuit except the second, there are to be appointed by the President two additional circuit judges, and for the second circuit one additional judge; and the circuit court in each circuit is to consist of the three judges thereof. To the circuit courts will come, as formerly, all appeals from cases in

the district courts. Cases removable from a state court into a circuit court of the United States, under existing provisions of law, are to be removed under this act into the district courts. The judgments and decrees of the circuit courts, in all cases in which jurisdiction is acquired by the district court by citizenship of the parties only, and in which no question arises under the constitution, laws, or treaties of the United States, are to be *final and conclusive*, unless the circuit court, or two judges thereof, certify to the Supreme Court that the question involved is of such novelty, difficulty, or importance, as to require a decision by the Supreme Court. All questions that have been differently decided in different circuit courts are to be thus certified to the Supreme Court.

Appeal to the Supreme Court is to be allowed from any decree of a circuit court not made final by the provisions of this act.

No writ of error from, or appeal to, the Supreme Court is to be allowed in any case decided by the Supreme Court of the District of Columbia except in cases where the United States, or some officer thereof, is a party, or where is involved a construction of the constitution, treaties or laws of the United States.

CHAPTER X.

Conclusion.

The causes determined by the Supreme Court of the United States may be placed under two heads: those in which the court acquires jurisdiction by reason of the character of the parties, independently of the subject of controversy; and those over which the authority of the court extends solely on account of the nature of the subject involved. It has been in the adjudication of suits of the second class, that the court has exercised its highest and most characteristic powers, and in which have been settled the great questions of constitutional and general interest. It will be noticed that in the plan for relief of the Supreme Court outlined in the last chapter, and for the congressional enactment of which there is the strongest probability, the full action of the court in this latter class of cases was not in any way limited.

The power of the Supreme Court to disregard, in its decisions, any act of Congress considered by them a contravention of the constitution, has been the ground for the claim by many that the federal judicial department possesses dangerous powers; that it is thus, as it were, raised above the two other branches, and made the dictator to them, of the extent to which they shall exercise their powers. That this claim is unfounded is apparent to anyone acquainted with our system of government. The judiciary, from the very nature of its functions, is the department to be the least feared, lest it should assume unwar-

ranted powers, or, having assumed them, be able to carry them into operation. The constitution, by its separation of powers, necessarily withdraws from the judicial branch all powers except those of a strictly judicial nature. Hamilton argued in the Federalist: "It may truly be said to have neither force nor will, but merely judgment, and must ultimately depend upon the aid of the executive arm for the efficacious exercise even of this faculty." How true this is was strikingly shown in the failure of the court to obtain its will in the Cherokee cases, the chief executive refusing his assistance. The very form of the Supreme Court, and all of its appellate jurisdiction rests upon legislative enactments. With no executive force at its back, and without the means of extending its influence either by patronage or command of the public revenues, it relies, for the execution of its decrees, upon the legal spirit, and reverence for law of the people, and upon their confidence in its justice, and their faith in its wisdom.

This, then, is the check upon the Supreme Court. Relying for strength, as it does, upon the good will of the people, the court is obliged to use every means possible to deserve and keep this confidence, by declining to give judgments of a political nature, and in other ways using every means possible to exclude from its bench all taint of partisan bias. It must sustain its reputation for wisdom by careful and thorough investigation and consideration of all doubtful points. It must be strong, stable, conservative—protecting itself against the attacks of the other departments of government, and resisting impulses and passions of the moment.

"Federalism means legalism,—the predominance of the judiciary in the constitution," says Dicey. A federal government can endure only among a people thoroughly imbued with a reverence for law. To the fact that more than any other nation in the world, the people of the United States possess this law-abiding spirit, do we owe the unequalled success

of our federal republic. Obedience to the rule of law is characteristic of all Teutonic folk.

To that spirit of extreme and blind laudation of the constitution, which, beginning so suddenly at the adoption of that instrument, lasted so long, has of late years succeeded a spirit of more impartial, searching, and even adverse criticism. Looking through the glasses of a century's experience, we now admit that the form of government provided by the convention though probably the best outline of government then attainable under the circumstances of that time, has not been in all respects entirely successful. Some provisions of the constitution have never operated as intended, and have been tacitly changed, and others have been modified by constitutional process.

The Chief Executive exercises to-day a far different influence in our constitutional system from that he was expected to wield, and did wield during the first years of our history. Compare the president of our day, with his time almost completely occupied with the dispensation of his official patronage, and with his recommendations to Congress, scarcely noticed if that body happens to be of a different political complexion from his own; with our first Presidents, Washington, Adams and Jefferson, who stamped the entire administration, domestic and foreign, with the imprint of their own individual opinions and will.

Congress, too, with its committee method of legislation, is being subjected to severe criticism by a certain school of writers, and the opinion is expressed by many that it is not proving itself able to deal satisfactorily with the increased demands made upon it by a growing country.

In the midst of criticism, almost hostile in its intent, the federal judiciary has remained unattacked. Mr. Curtis, in the recent edition of his Constitutional History of the United States, does not find it necessary to qualify the statement that "the judicial power of the United States, considered with

reference to its adaptation to the purposes of its creation, is one of the most admirable and felicitous structures that human governments have exhibited."[1] Professor Woodrow Wilson in his critical analysis of the working of our government,[2] subjects the executive and Congress to most severe criticism, and find much that might be bettered. Concerning the judiciary, however, he does not find it necessary to animadvert.

The Supreme Court is one hundred years old, and during this time, but one change in the field of its jurisdiction, and none in the nature of its powers has been found necessary. Its very form has remained without substantial change since its creation by the Judiciary Act of 1789. For a century this court has performed with exactness all the duties required of it. Since its inception, it has been the firm supporter of that instrument which created it. Scarcely ever has it been out of touch with the people. Its bar has numbered among its members men of the highest intellect: Webster, Marshall, Pinkney, Wirt. Its justices have been men whose greatness the world has recognized, and whom the United States has been proud to call her own. To-day the Supreme Court stands the highest judicial tribunal in the world's history. "It is a court," says Justice Miller, "which, whether we take the character of the suitors that are brought before it, or the importance of the subjects of litigation over which it has final jurisdiction, may well be considered one of the highest that the world has ever seen. It has the power to bring States before it, States which some of our politicians have been in the habit of considering sovereign, not only when they come voluntarily but by judicial process they are subjected in certain cases to the judgment of the court. Whatever these States may have been at the time of the formation of the constitution, they now number their inhabitants by millions, and in wealth and

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[1] P. 585.

[2] Congressional Government.

civilization are equal to many of the independent sovereignties of Europe. The subject-matter of which the court has jurisdiction is the construction and exposition of the constitution of the United States, which controls the affairs of sixty millions of people." [1]

That which should be a matter of especial congratulation to us in reviewing the history of the federal judiciary, is that of all our great institutions, the Supreme Court is most distinctly the product of American genius, and that its success is a direct testimony to the high political ability of our American people.

"God save the United States, and this Honorable Court."

[1] Address before the Alumni of the Law Dept. of the Univ. of Mich., June 29, 1887.

KEY TO U. S. SUPREME COURT REPORTS.

The reports of decisions in cases tried before the Supreme Court are contained in one hundred and thirty-three volumes. In important cases the briefs of counsel as well as opinions of the justices are given. Until 1875 these volumes were known by the names of the reporter. Since then they have been designated simply as United States Reports. The following is a list of the reporters, abbreviations, number of volumes, and periods covered:

Reporters.	*Abbreviations.*	*Vols.*	*Period Covered.*
Dallas*	Dall.	4	1790–1800
Cranch	Cranch	9	1801–1815
Wheaton	Wheat.	12	1816–1827
Peters	Pet.	16	1828–1842
Howard	How.	24	1843–1860
Black	Black	2	1861–1862
Wallace	Wall.	23	1863–1874
United States Reports	91–133 U. S.	43	1875–1890

* The first volume of Dallas contains only decisions of Pennsylvania Courts, 1754–1789.

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BIOGRAPHICAL NOTE.

I was born in Alexandria City, Virginia, July 20, 1867. In 1885 I graduated from the Washington, D. C., High School, and in the fall of the same year entered the Johns Hopkins University. In June, 1888, I received the degree of Bachelor of Arts, having pursued the regular studies of Course VI. During the winter of 1889 I held the position of Principal of the Weightman School Building in Washington, D. C. During the last two years I have attended the Johns Hopkins University. My major subject has been History, with Political Economy and Administration as first and second minors respectively. During my attendance at the Johns Hopkins University, I have held the following honors: Honorary Hopkins Scholarship, 1885–86, 1886–87, and 1887–88; Graduate Scholarship, 1889–90, and Fellowship, 1890–91. My thesis, prepared in part fulfilment of the requirements for obtaining the Doctor's degree, is entitled "The Supreme Court of the United States: Its History and Influence in our Constitutional System."

WESTEL WOODBURY WILLOUGHBY.