The Power of Federal Courts to Declare Acts of Congress Unconstitutional

John H. Hatcher
West Virginia Supreme Court of Appeals

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Constitutional Law Commons, and the Courts Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol42/iss2/3

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact researchrepository@mail.wvu.edu.
THE POWER OF FEDERAL COURTS TO DECLARE ACTS OF CONGRESS UNCONSTITUTIONAL*

JOHN H. HATCHER**

The rulings of the Supreme Court of the United States on the NRA and the AAA have been followed by blustering challenges of the authority of the Court to declare an Act of Congress unconstitutional. This has occurred each time the Court has so ruled since 1803. The present challengers make the same time-worn charges as their predecessors, which are: (1) That because we derived our legal procedure from England, and the English courts claimed no power to review Acts of Parliament, it was unprecedented for the Federal courts to review Acts of Congress; (2) that this jurisdiction was "unknown" to the Fathers of the American Constitution; (3) that this jurisdiction was "unintended" by the Fathers; (4) that Chief Justice John Marshall originated the idea, and "put it over" in the case of Marbury v. Madison in 1803; and (5) that "There is not a line in the Federal Constitution . . . . to authorize the assumption of such power by the Courts; they have secured the power only by usurpation."

These charges ignore facts as well as logical sequence. Yet they were made in the last Congress without contradiction. They have been reiterated in occasional editorials without detailed refutation. Since the people ordinarily believe what they read, errors of fact on a subject so vital in our scheme of government should not go unexposed. Therefore, let us set these charges (as enumerated) against the historical background and the contemporary foreground of the Constitution.

First. It is quite true that English courts prior to 1787 (the date of the National Constitutional Convention) recognized the absolute supremacy of an Act of Parliament. That recognition, however, was not due to a conception of legislative immunity from judicial review, but to the fact that Parliament acted in a dual capacity — as both legislature and court. Parliament was a court (curia regis) before it ever assumed legislative powers; and it was and always had been from its inception the highest court of England. An Act of Parliament was both supremely legislative and

---

* An address delivered before the Bar Association of the City of Charleston, West Virginia, on January 25, 1936.
** President of the Supreme Court of Appeals of West Virginia.
1 1 Cranch 137, 2 L. Ed. 60 (U. S. 1803).
Moreover, in the words of Viscount Bryce, one of England's greatest writers on constitutional law, "Parliament is not a body with delegated or limited authority. The whole fullness of popular power dwells in it. The whole nation is supposed to be present within its walls." Magna Charta and the other bulwarks of English liberty restrain only the kingly power. Parliament itself is subject to no constitutional restraint. Parliament is "omnipotent." Congress has no judicial power (except in relation to its own members and to impeachments) and even its legislative powers are enumerated and limited by the Constitution. Consequently there is no ground whatever for judges to rank an Act of Congress as they would an Act of Parliament.

The few jurists who have controverted the judicial right to review congressional legislation have based their arguments largely on the common law esteem of Acts of Parliament. Each of those jurists overlooked the fundamental differences between Parliament and Congress; each overlooked the designation of Parliament in the Declaration of Independence as "a jurisdiction . . . unacknowledged by our laws;" each overlooked the patent fact that the common law is not a part of the supreme law of the land as defined by the Constitution; and each overlooked the historical fact that the American idea of judicial review is not an off-shoot of the common law but is a development of colonial practice, as I shall now demonstrate.

Second. The colonial governments in America were the issue of specific grants from the King and were thus "connected to England through the Crown and not through Parliament or any other governmental division of the kingdom." Those grants authorized the establishment of a limited form of self-government, and were usually called charters, although the ones to New Hampshire, New Jersey and North Carolina were styled constitutions. The comprehensive nature of those instruments is demonstrated by the fact that when the colonies renounced the rule of England, three states — Massachusetts, Connecticut and Rhode Island — adopted their several charters as their state constitutions with no change except the substitution of allegiance to the State for that

2 Pope, The Fundamental Law and the Power of the Courts (1913) 27 Harv. L. Rev. 45; Haines, American Doctrine of Judicial Supremacy (1914) 8 et seq.
3 Bryce, American Commonwealth (1898) 246.
4 Long, Genesis of the Constitution.
to the King. The colonial charters were in fact all constitutions, and were generalized in the Declaration of Independence as "our constitution." The charters differed much in the specific powers granted or denied; but they had this common provision, that local legislation should not be contrary to the laws of England. That provision was adapted from the Constitution of the Island of Jersey. The chronicle quaintly recites that "Jersey, Guernsey and their fellows (Channel Islands) are simply that part of the Norman Ducty which clave to its dukes when the rest fell away." And because Jersey clave to the line of Duke William, the Norman, after he conquered England in the eleventh century, Jersey became an English province. But it retained the right of self-government, under a constitution of its own, subject only to the power of the English King, acting through his Privy Council or other representative, to disapprove its local laws. That same power was expressly asserted in some of the colonial charters, but whether mentioned or not it was one Jersey practice which was common to all colonies. Pursuant to that practice, the colonial laws were constantly tested by their charters and by the laws of England. The extent of that practice is shown by the fact that nearly four hundred acts of colonial assemblies were annulled by the Privy Council (or a body acting under it) because they did not pass that test. A noted instance was in the case of Winthrop v. Lechmere, where the Privy Council held a Connecticut provincial Act of nearly thirty years standing to be invalid as "contrary to the law of the realm" and "against the tenor of their charter." The invalidation of a colonial Act was read at least once in every court, once in every church, and once at the military musters throughout the colony. Thus the colonists became familiar with that practice. The provincial laws, says Professor Dickerson in his careful work, were constantly submitted to "a kind of constitutional test" and in this way the colonists grew accustomed "to a limitation upon their local legislatures." He further says: "The

5 Bryce, op. cit. supra n. 3, at 413.
7 6 Larned, History for Ready Reference (1901) 4337.
8 Russell, American Colonial Legislation (1915) 221; Thayer, Legal Essays (1908) 199-200; 5 McMaster, History of the United States (1913) 394; Dicey, Constitution (1902) 160; Fowler, A Theory of Sovereignty Under the Federal Constitution (1887) 21 Am. L. Rev. 399, 405 et seq.
parallel between British colonial practice and present day United States practice is clear in the case of laws from chartered colonies, as the charter was a written constitution. The local legislature was limited by the terms of the grant (charter); if a power had not been granted, it could not be exercised legally.”11 How thoroughly charter-minded the colonists became is illustrated by a decision of the judges of the Hustings' Court of Northampton County, Virginia, shortly before the Revolution, holding that a certain Act of Parliament was not binding on the inhabitants of Virginia “inasmuch as they conceived said Act to be unconstitutional.”12

Following the colonial period, some of the state legislatures, Parliament-like, attempted to assume absolute powers, but such assumptions met with general disapproval. The right of the courts to test legislation under the State Constitutions was quickly asserted in eight of the thirteen new states.13 One J. H. Ralston of Washington, D. C., has published a survey of this period which would show that prior to 1787 judicial review of state legislation had been sporadic and unpopular. His publication is now cited as authority by the critics of the Supreme Court. His remarks should be accepted with caution. For example, he not only mis-called a leading Virginia decision “dicta,” but further mis-described it as follows: “In 1782, in Virginia, in the case of Commonwealth v. Caton, two judges asserted the right of the court to resist the unconstitutional act of the legislature, and the third was doubtful.”14 The Virginia Court of Appeals, which decided that case, consisted of eleven judges instead of three. One judge was not doubtful of his right to pass on the constitutionality of the Act in question, but was of opinion that it was unnecessary to do so. “The rest of the judges were of opinion,” in the words of the decision itself, “that the court had power to declare any resolution or act of the legislature . . . . to be unconstitutional and void,” and they did declare the act “inoperative,” because not

---

12 5 McMaster, op. cit. supra n. 8, at 354-5.
13 Meigs, The Relation of the Judiciary to the Constitution (1885) 19 Am. L. Rev. 175 et seq.; Haines, op. cit. supra n. 2, ch. 5; Fowler, op. cit. supra n. 6, at 721-2.
14 Ralston, Judicial Control over Legislatures as to Constitutional Questions (1920) 54 Am. L. Rev. 1.
passed in manner provided by the Virginia Constitution. The sentiment of that period towards the legislative assumption of judicial powers is well reflected in a request by the Continental Congress, made in April, 1787, to several state legislatures which had assumed the right to construe the recent treaty with England. The legislatures were requested to turn over all matters affecting the treaty "to its proper department, viz., the judicial." Several state judges who had taken part in the decisions on constitutional questions were members of the Federal Constitutional Convention. Much newspaper publicity was given the decisions, particularly in Philadelphia at the time the Convention was in session. Any question whatever as to the information of the Convention on this subject is removed by the notes of delegate James Madison. They show that within a few days after a quorum of delegates had assembled, Elbridge Gerry of Massachusetts said to the Convention: "In some states the judges had actually set aside laws as being against the Constitution." He further added: "This was done, too, with general approbation." So, instead of judicial power to determine the validity of legislation under a written constitution being an innovation in 1787, it had been exercised in America under colonial and state governments successively for a hundred years prior to the Convention.

Third. The opponents of the judicial review of legislation say that such review could not possibly have been intended by the founders, because the right was refused four times at the National Convention. The opponents refer to the rejection of a so-called council of revision. Here are the unvarnished facts. The Virginia delegates proposed to the Convention a council on which the judiciary should share with the chief executive the power to veto Congressional legislation. Advocates of the council admitted frankly that in exercising the veto power, the judges would pass on the policy as well as the validity of laws. The same two arguments were advanced against the council each time it was presented to the Convention. One argument was that the policy of the law was a legislative and not a judicial matter. The other argument, as expressed by delegate Luther Martin, was that "The constitutionality of laws . . . will come before the judges in their official character. In this character they have a negative on the laws." Thus the facts demonstrate, first, that it was the veto

---

15 Commonwealth v. Caton, 4 Call 5 (Va. 1782).
power, as such, which was denied the judiciary, and second, that a major reason for the denial was the understanding of Martin and his associates (the majority) that the Constitution they were framing would confer on the judiciary the right to review Congressional legislation. Of the fifty-five delegates who attended the Convention, only three — Bedford, Mercer and Dickinson — clearly expressed themselves against judicial review, and they did not press their views. Their failure to do so is not specifically explained. It does appear, however, that after the Convention was assured "that the jurisdiction given (the federal courts) was constructively limited to cases of a judiciary nature," the amendments which phrased the jurisdiction in its final form (Article III of the Constitution) were passed "nem. con." the classical slang of Madison for no one against. 16

Dean Trickett of the Dickinson School of Law fancied himself brilliantly sarcastic when he referred to the Supreme Court as "pretending to have marconigrams from the defunct men of 1787 and 1788 concerning their meaning when they adopted this or that phrase of the Constitution."17 Instead of being sarcastic, the Dean was simply amusing. There is no need of marconigrams from the men of 1787-8 on the meaning of Article III. They left their construction in writing too plain to be misunderstood. Under the title "Genuine Information," Luther Martin reported to the legislature of his state (Maryland) in November, 1787, the proceedings of the Convention and explained in detail the meaning of the several provisions of the Constitution. With reference to the power vested in the Federal Courts by Article III, he wrote: "These courts, and these only, will have a right to decide upon the laws of the United States, and all questions arising upon their construction . . . . Whether, therefore, any laws or regulations of the Congress, or any acts of its President or other officers, are contrary to, or not warranted by, the Constitution, rests only with the judges . . . . to determine." In publications (The Federalist) explaining the Constitution to the people of the State of New York, Alexander Hamilton, also a member of the National Convention, placed the same construction on Article III as that of Martin. In the debates before the several State Conventions which ratified the Constitution, James Wilson of Pennsylvania, Oliver Ells-

16 Incidentally, it also appears that Dickinson later favored judicial review.
17 Cf. Trickett, Judicial Dispensation from Congressional Statutes (1907) 41 Am. L. Rev. 65.
worth of Connecticut, later a Chief Justice of the Supreme Court of the United States, W. R. Davie of North Carolina, and George Mason of Virginia, all members of the National Convention, and delegates Samuel Adams in Massachusetts, and Patrick Henry, Edmund Pendleton, John Marshall, George Nicholas and William Grayson, in Virginia, each construed Article III like Martin.18 The reports of the proceedings in the other State Conventions are fragmentary or incomplete; but there is no record of a single explicit dissent to that construction in any of the Conventions. Newspapers published in 1788-9, in every state from North Carolina to Massachusetts, inclusive, whether friend or foe of the Constitution, uniformly construed Article III to empower the Federal Judiciary to pass on the constitutionality of Congressional legislation.19 That construction was even reflected in a London newspaper of that era in an article written by a New York correspondent.

A prominent eastern newspaper recently disparaged judicial review not only as usurpative, but as “abhorrent to our American system of government.” No precedent for that aspersion can be found in the records of the early sessions of Congress. The first Congress met in 1789. That Congress is accredited with ninety members, of whom eighteen had been delegates to the National Convention, and thirty-one had been delegates to the State Conventions which had ratified the Constitution. Thus the Constitution makers dominated that Congress. The right of judicial review was not only treated by those Congressmen as a matter of course, but was extolled by some, Elias Boudinot — the friend and counsellor of Washington — saying that this right “was his boast and his confidence.” I could find that right questioned by only one member, James Madison, who, while doing so, inconsistently admitted that “in the ordinary course of government, the exposition of the laws and constitution devolves upon the judiciary.” The Federal Judiciary Act passed by that Congress explicitly recognized the right of the Supreme Court on appeal from state courts, to review Acts of Congress. That recognition has continued unto this very day and may be found in the present Federal Code.20 Had those Congressmen who recently

18 That very construction was used by some as the basis for attacking the Constitution.
19 WARREN, CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT (1925) 65-6; FORD, PAMPHLETS ON THE CONSTITUTION (1888); FORD, ESSAYS ON THE CONSTITUTION (1892).
spoke so contemptuously of judicial review given thoughtful consideration to the Federal Judiciary Act, they might have been freed, in the words of Burns, from many a blunder and foolish notion. The right of judicial review was repeatedly declared in succeeding sessions of Congress without any concerted opposition until 1802. Those early Congressmen were overwhelmingly in accord with the construction given to Article III by the members of the National and the State Conventions, respectively. After reviewing with great care the utterances of the Congressmen on this subject from 1789 to 1802, Warren in his book, *Congress, the Constitution, and the Supreme Court*, observes: "Hence it is an especially striking fact that Members of Congress, of both parties, (Federalist and Anti-Federalist) should have been united in one sentiment at least, that under the Constitution it was the Judiciary which was finally to determine the validity of an Act of Congress."  

In 1802, for the first time in the history of Congress, John Breckenridge of Kentucky, the Jeffersonian leader in the Senate, attempted the organization of a movement to establish the exclusive right of Congress "to interpret the Constitution in what regards the law-making power." Opponents of judicial review quote with much unction the rhetorical denunciation thereof by Senator Breckenridge; but they do not quote the replies to Breckenridge or say what happened to his attempt. Notwithstanding his prestige, he made small progress with his doctrine, being supported only by a few associates from Virginia, Kentucky, Georgia and North Carolina, a hopeless minority. Breckenridge had taken before the Kentucky Legislature in 1798, the exact reverse of the position he advanced in Congress in 1802. His sincerity has been further impugned by some writers. The motives for his attack on judicial review, however, have nothing to do with the right of such review. That right must be determined from the Constitution itself, irradiated by contemporary thought. The speech of Breckenridge before the Senate presenting his position fails in that respect. He did not attempt to analyze the language of the Constitution, or to elucidate its meaning from the expressions of the Constitution makers, or from the sentiment of the Constitution making period. After some declamatory questions

---

21 *Warren, op. cit. supra* n. 19, at 99.
22 *Id.* at 215.
23 *Id.* at 219.
about the Constitution, he merely summarized what he called his "idea on the subject" without giving a substantial basis for that idea. None of his supporters were more convincing. Conceding proper motives, the personal ideas of the Breckenridge coterie on the science of government, unaccompanied by argument, are of little weight on what the Constitution was intended to mean, what it was contemporaneously construed to mean, and what its phrases fairly defined do mean. Many of the Fathers of the Constitution were still alive in 1802. Some were members of that Congress. It was close enough in point of time to 1787 for the Congressmen to be thoroughly familiar with the thoughts of the Fathers on Article III. Those thoughts are manifested in the summary manner Congress spurned the Breckenridge doctrine. It was referred to by Representative Henderson of North Carolina in these words: "The monstrous and unheard of doctrine which has been lately advanced;" and by Senator Ross of Pennsylvania in these: "By this horrid doctrine, Congress erects itself into a complete tyranny." Democrats united with Federalists in repudiating the Breckenridge doctrine. The stalwart Northern Democrat, Bacon of Massachusetts, voiced the sentiments of most of his associates when he asserted on the floor of the House that it was not only the right of the Federal judges but it was "their indispensable duty . . . to judge for themselves on the constitutionality of every statute on which they are called to act."

Immediately following the organization of the Federal Court by Congress in 1789, the Federal judges commenced to assert their right to review legislation. One of those early jurists was Associate Justice William Patterson, who had been a member of the National Convention. A more positive pronouncement of this right was never made than one by him in 1795:24 "I take it to be a clear position; that if a legislative act oppugns a constitutional principle, the former must give way and be rejected on the score of repugnance. I hold it to be a position equally clear and sound, that, in such case, it will be the duty of the Court to adhere to the Constitution, and to declare the act null and void." It will be remarked that this pronouncement was made six years before John Marshall's appointment to the Supréme Court, which did not occur until 1801. I am mindful that Associate Justice Chase approached that construction hesitantly in 1796;25 but in 1800 after

24 Vanhorn v. Dorrance, 2 Dall. 304, 309, 1 L. Ed. 391 (U. S. 1795).
25 Hylton v. U. S., 3 Dall. 171, 175, 1 L. Ed. 556 (U. S. 1796).
he had "deliberately considered the subject" (his words) he asserted the doctrine of judicial review just as strongly as had Justice Patterson, refusing even to hear argument to the contrary by Attorney General Wirt of Virginia.  

It would seem that the uniform construction placed on Article III by the delegates who phrased it, by the contemporary publications, by the State Conventions which ratified the Constitution, by the early sessions of Congress, and by the early Federal judges would have established that construction beyond peradventure.

Fourth. However, in 1803, John Marshall, Chief Justice of the Supreme Court, wrote the opinion in the case of *Marbury v. Madison,* which was destined to become the controversial case on this subject. The facts in that case are of no consequence here; it became controversial not because of its facts, but because Thomas Jefferson took umbrage at what he termed an "obiter dissertation" in the opinion, pronouncing the right of the court to review Acts of Congress. The critics of the Supreme Court have placed such emphasis on Jefferson's opposition to judicial review that some comment thereon seems pertinent. He was fundamentally a states' rights man. The expansion of National power under the Federal Government had been particularly odious to him. He had attempted to check that expansion through the celebrated Virginia and Kentucky Resolutions of 1798, wherein the respective legislatures of those two states protested to the other states that certain Acts of Congress were infractions of the Constitution, and that the states had the inherent right to say so. North Carolina, South Carolina and Georgia did not either formally approve or disapprove the Resolutions. Delaware and Connecticut disapproved the Resolutions in strong terms. Rhode Island, Massachusetts, New York, New Hampshire, Vermont and Pennsylvania not only disapproved the Resolutions, but expressly stated that the authority to declare Acts of Congress unconstitutional was vested exclusively by the Constitution in the Federal courts. The reply of Rhode Island to Virginia (in February, 1799) illustrates the position taken by the six states last mentioned, to-wit: "In the opinion of this legislature the second section of third article of the Constitution of the United States, in these words, to-wit, 'The

27 Supra n. 1.
28 Haines, op. cit. supra n. 2, at 190-1.
judicial power shall extend to all cases arising under the laws of the United States' vests in the Federal courts exclusively, and in the Supreme Court of the United States, ultimately, the authority of deciding on the constitutionality of any act or law of the Congress of the United States.” And mind you — this was also done before John Marshall wrote Marbury v. Madison. The attitude of the other states towards the Virginia and Kentucky Resolutions was a keen disappointment to Jefferson. Upon his election as president, shortly afterwards, he then contemplated checking federal expansion through the federal court. To that end, he planned to make his adherent, Spencer Roane of Virginia, Chief Justice of the Supreme Court. Jefferson was frustrated in this through the last-minute appointment of Marshall to that office by the retiring President Adams. It is now accepted that two bitterer political enemies never lived within the bounds of the Old Dominion than Jefferson and Marshall. “From the day of Marshall’s appointment,” says Haines, “Jefferson planned for his removal and aimed to curb the powers of his court.” Jefferson’s partisanship must have been at least a factor in his opposition to judicial review. For, in his Notes on Virginia, written in 1781, he had strongly criticized the very theory of government later proposed by his lieutenant, Breckenridge, in Congress, saying that the assumption of judicial and executive powers by the Virginia legislature was “precisely the definition of despotic government.” Furthermore, Jefferson was in France while the Constitutional Convention was in session and had no part whatever in phrasing Article III. Now who should be preferred on the construction thereof, the Fathers or Jefferson?

That same Mr. Ralston, heretofore referred to, says that Marshall in 1796 as counsel in Ware v. Hylton advocated precisely the opposite view to that expressed in Marbury v. Madison. Again, I find that Mr. Ralston is in error. In Ware v. Hylton, Marshall was discussing a Virginia Act under the Virginia Constitution (which has no provision similar to Article III of the Federal Constitution) and he did not even mention the powers of the Federal Courts under the Federal Constitution.

29 Elliott, Debates on the Federal Constitution (1836) 528 et seq.
31 Haines, op. cit. supra n. 2, at 241.
33 3 Dall. 199, 232, 1 L. Ed. 568 (U. S. 1796).
34 Supra n. 1.
Five associate justices sat with Marshall in 1803. Three of his associates — Patterson, Chase and Cushing — had prior thereto unequivocally declared in favor of the right of judicial review. A fourth associate — Bushrod Washington — had been a member of the Virginia Convention which ratified the Constitution, and there had heard it unanimously construed to grant that right. The statement that Marshall coerced or even influenced the Court to concur in Marbury v. Madison is purely arbitrary. In that opinion, he merely restated the sentiment previously declared not only by three of his associate justices and by six sovereign states, but, in the words of Senator Beveridge, "by hundreds of men." The arguments in that opinion are simply repetitions of the arguments made in the Congressional debates in 1802 (particularly those of Representatives Hemphill, Stanley, Dana and Bacon). Instead of that opinion being the root, it was the flower of a growth rooted in America a century before. That opinion, however, caused the embers kindled by Breckenridge in 1802 to flare again. The animosity of the Jeffersonian group against Marshall led its extremists either to forget or to overlook the history and precedents supporting the right of judicial review, and (after a few years) to characterize the opinion in Marbury v. Madison as an original and dangerous usurpation of power. And from that time to this, those who oppose the right of judicial review, ordinarily ignore its genealogy and continue to signalize Marbury v. Madison in the same manner as the Jeffersonian extremists. A recent Congressional Record quotes a Representative from West Virginia as stigmatizing Marbury v. Madison as "the most brazen judicial announcement ever made." According to the Record, he attributed to justices of the peace the power, under that opinion, to nullify Acts of Congress, and he then proceeded to "stand aghast" and "to shudder and wonder what the outcome will be." How unfortunate for this patriot to have suffered in that manner, when his tremors could have been averted by even a casual acquaintance with the facts.

Fifth. When the Fathers strove so insistently to perfect a government different from the Parliamentary government of England, and to achieve the absolute independence of the judiciary, it is inconceivable that the Constitution produced by their care and thought should intend for the Federal Judiciary to be bound by the constitutional exposition of Congress — a non-judicial de-

35 3 BEVERIDGE, LIFE OF MARSHALL (1919) 118.
partment. One looks in vain in the Constitution for any reflection of such intention. Congress, being an artificial creation of the Constitution, can exercise only such powers as the Constitution confers. Article I, section 1, brings Congress into being with the fiat "All legislative powers herein granted shall be vested in a Congress of the United States." Mark the language: All legislative powers are not vested in Congress, but only such powers as are therein granted. Thus, Congressional legislative powers are special and limited. That limitation was not casual but deliberate. The delegates to the National Convention had noted "a powerful tendency in the legislature to absorb all power into its vortex" (according to Madison), also its tendency to heed popular clamor and selfish interests (according to Morris), and all agreed that a check on Congress was necessary (according to Gorham). The specific powers granted Congress are named in section 8 of Article I and include the power "to make all laws which shall be necessary and proper for carrying into execution" the powers vested "by this Constitution in the Government of the United States." There is not even a hint that Congress can exercise any judicial power (except in relation to its own members and to impeachments) such as confirming the legality of its own Acts. Section 8 fixes the absolute boundary of Congressional action in relation to laws. Judicial exposition of laws is beyond that boundary, and therefore beyond the range of Congress.

After conferring on Congress the right to determine its own membership and on the Senate "the whole power to try all impeachments," the Constitution vests "the judicial power" of the United States in the Federal courts. That phrase — "the judicial power" — must mean all the remaining judicial power, especially since there is no further blending whatever of judicial and legislative powers and no further delegation of any judicial power. (This was expressly conceded by Madison, in the House in 1789.) To make plain the extent of that investiture, the Article further provides that the judicial power "shall extend to all cases in law and equity, arising under . . . . the laws of the United States." What is judicial power? It is the power "to declare the law." What are the laws of the United States? They are the Constitution, the laws passed by Congress in pursuance of the Constitution, and all treaties made under the authority of the United States.\footnote{U. S. Const. art. 6.} Thus the Constitution does have a line authorizing the
Federal courts to declare the law in any case in law or equity arising under the Acts of Congress. And what a comprehensive line it is! Every case before those courts is either in law or in equity. A line conferring more absolute jurisdiction in cases which involve Acts of Congress cannot be conceived; for the power to declare the law necessarily comprises the right of determining what is the law and of rejecting what is not the law. Article VI further makes those three classes of laws “the supreme law of the land.” An Act of Congress “made in pursuance” of the Constitution, thereby becomes the lawful equal of the Constitution itself. But an Act repugnant to the Constitution is not made in pursuance thereof — is not “proper for carrying into execution” the powers vested thereby in the Government of the United States (as prescribed in Article I, section 8) — and is not the legal offspring of constitutional government. Such an Act has no place in that trinity which constitutes the supreme law of the land. In a case where a court must declare whether the Constitution or an unconstitutional Act is the law, it would be the duty of the court under the general conception of judicial duty to prefer the Constitution as paramount. The duty is made absolute by the judicial oath prescribed by the Constitution itself, which binds the judges, “to support this Constitution.” Under that oath, they cannot, Pilate-like, wash their hands when confronted with a patent violation of the very instrument they are sworn to support, merely because another department of government has failed in that support. The oath to support has no exception. It permits no evasion. It requires exposition of every such violation whereon the court is required to declare the law. And since that duty is imposed on judges by the Constitution, by amendment alone, so long as the Constitution shall endure, can that duty be revoked.37

37 The statements of what occurred in the Federal Convention and the State Conventions are taken for the most part from Elliott’s Debates on the Federal Constitution (1836), and Farrand’s Records of the Federal Convention (1913); and the statements of what occurred in Congress are taken from the Annals of Congress, first and seventh sessions.