Judicial Review in the United States of America

Lester Harris
JUDICIAL REVIEW IN THE UNITED STATES OF AMERICA

By

LESTER HARRIS*

The authority of the Supreme Court of the United States to invalidate acts of Congress nowhere appears in the Constitution. Nevertheless, the Court wields the power. The purpose of this article is to prove that the power was expressly denied the Court by the delegates to the Constitutional Convention.

Prior to the adoption of the Constitution, the government of the United States operated under the "Articles of Confederation and Perpetual Union." The "Articles" were agreed to by Congress November 15, 1777. The states completed ratification March 1, 1781. The Articles of Confederation governed the existing Confederacy until March 4, 1789, the date fixed for commencing the operation of government under the Constitution.¹

Under the "Articles of Confederation and Perpetual Union," Congress discovered that it was without the power needed to function as a sovereign government. James Madison, in his paper entitled "Vices of the Political System of the United States," gives the following reasons for the need for the "call" for a Constitutional Convention:

1. Failure of the states to comply with Federal requisitions.
2. Encroachment of the states upon Federal Authority.
3. Some states were entering into treaties with other states to the detriment of the rest of the Union.
4. Some of the states were violating international law by refusing to comply with the Federal treaties existing between the United States, Britain, France and Holland.
5. The coast states were restricting the use of their ports against interior states.
6. Some states were issuing paper money, and thereby violating the principles of "sound money and contracts."
7. The states refused to act together on matters of common concern, such as interstate commerce, naturalization, and bankruptcy.
8. Some states refused to recognize the decisions and mandates of the courts of other states.
9. There was no protection against internal violence.
10. The inability of the Federal Government to coerce recalcitrant states.

---

*B.S., Bucknell, 1911; LL.B., Stetson, 1928; City Attorney, Winter Garden, Florida; Contributor to Dickinson Law Review, Florida Bar Journal and University of Miami Law Quarterly.

11. Some of the states ratified the Articles of Confederation in their constitutions. Others ratified the Articles through legislative enactments. This resulted in evasion of duties.

12. The injustice and instability of various state laws.

13. The absence of a truly national feeling. George Washington claimed that this "hindered the attainment of that dignity and credit which necessarily forms the basis of amicable relations with the rest of the world."2

Congress decided that a firm national government must be brought into being, or the Confederation would dissolve. Accordingly, Congress issued a "call," reading as follows:

"Whereas there is provision in the 'Articles of Confederation and Perpetual Union' for making alterations therein by the assent of the Congress of the United States and of the legislatures of the several states in the present Confederation, as a means to remedy which several of the states, and particularly the State of New York, by express instruction to their delegates in Congress have suggested a convention for the purposes expressed in the following resolution, and such convention appearing the most probable means of establishing in these states a firm national government."8

"RESOLVED THAT IN THE OPINION OF CONGRESS IT IS EXPEDIENT THAT ON THE SECOND MONDAY IN MAY NEXT A CONVENTION OF DELEGATES WHO SHALL HAVE BEEN APPOINTED BY THE SEVERAL STATES BE HELD AT PHILADELPHIA FOR THE SOLE AND EXPRESS PURPOSE OF REVISIGN THE 'ARTICLES OF CONFEDERATION AND REPORTING TO CONGRESS AND THE SEVERAL LEGISLATURES SUCH ALTERATIONS AND PROVISIONS THEREIN AS SHALL WHEN AGREED TO IN CONGRESS AND CONFIRMED BY THE STATES RENDER THE FEDERAL CONSTITUTION ADEQUATE TO THE EXIGENCIES OF GOVERNMENT AND THE PRESERVATION OF THE UNION.'"4

It will be seen that the "call" did not mention the lack of power of the judiciary under the "Articles of Confederation." It was not mentioned by Madison in his article entitled "Vices of the Political System of the United States." At this time, under the "Articles," federal questions were determined by arbitration.6 In the states, the judiciary operated as adjuncts of the several state legislatures, following the practice in England then and now.

---

6 Art. 9, Articles of Confederation.
On a number of occasions, before the Constitution was adopted, courts of
certain states attempted to hold laws unconstitutional. The legislatures invariably
forced the courts to abide by the laws as written.

The High Court of Rhode Island, in 1786 and 1787, refused jurisdiction of a
"Legal Tender Act" passed by the legislature of the state. The Legislature respond-
ed by dismissing four of the five judges from office.6

The above case was known to the Delegates of the Constitutional Conven-
tion and was debated under the "Resolution to Negative the Laws of the States." The discussion, as set forth by Madison, follows:

"Tuesday, July 17th, in convention.

"To negative all laws passed by the several states contravening in the opinion
of the National Legislature the Articles of Union or any treaties subsisting under the
authority of ye Union.

"Mr. Randolph: 'This is a formidable idea indeed. It involves the power
of violating all the constitutions and laws of the states and of intermeddling with
their police!'

"Morris, Sherman and Luther Martin protested the resolution.

"Mr. Madison considered the negative of the laws of the states as essential
to the efficiency and security of the general government. In Rhode Island the
judges who refused to execute an unconstitutional law were displayed, and others
substituted by the Legislature who would be willing instruments of the wicked
and arbitrary plans of their masters.7

"Morris and Sherman protested the resolution and Pinkney urged its
necessity.

"On the Question for Agreeing to the Power of Negativing the Laws of
the States, etc., it passed in the negative. Resolution lost by 6 states to 3."

During the period of the Constitutional Convention, the High Court of
North Carolina advised a jury to return to a British loyalist property confiscated
under the act of the Legislature of that state. The jury refused the advice and held
in favor of the American claimant. The Court threatened to hold the act of con-
fiscation invalid, but decided later to abide by the verdict of the jury.8 The at-
titude of the Court came to the attention of Richard Spaight, then a delegate
to the Constitutional Convention, representing North Carolina therein, and he wrote:

8 Bayard v. Singleton, discussed in Boudin, "Government by the Judiciary." Vol. 1, at pp. 63 and
76, and Vol. 2, at p. 357.
"I do not pretend to vindicate the law which has been the subject of controversy; it is immaterial what law they have declared void; it is their usurpation of the authority to do it that I complain of, as I do positively deny that they have any such power. It would have been absurd and contrary to the practice of all the world, had the Constitution invested all the power in them, as would have operated as an absolute negative to the proceedings which no judiciary ought ever to possess and the state, instead of being governed by the representatives in general assembly, would be subject to the will of three individuals who united in their own persons the legislative and judicial powers which no monarch in Europe enjoys, and which would be more despotic than the Roman decemvirate, and equally insufferable."

THE ACTION OF THE RHODE ISLAND LEGISLATURE WAS UPHELD BY THE CONSTITUTIONAL CONVENTION BY A VOTE OF 6 STATES TO 3.9

Part II

The Constitution of the United States is based in part upon a set of resolutions presented to the Convention by John Randolph, of Virginia.

"On the question whether the Committee should rise, and Mr. Randolph's propositions be re-reported without alteration, which was in fact whether Mr. Randolph's should be adhered to as preferable to those of Mr. Patterson's:" Mr. Randolph's Resolutions were preferred by a vote of seven states to three states; Maryland divided.10

Mr. Patterson, of New Jersey, presented to the Convention the "New Jersey Plan." This plan, however, did not provide for a negative on acts of Congress by the Federal Judiciary.

Resolution six of the "New Jersey Plan" provided: "That all Acts of the United States in Congress, made by virtue and in pursuance of the powers hereby and by the Articles of Confederation vested in them and all Treaties made and ratified under the authority of United States shall be the supreme law."11

Alexander Hamilton of New York, presented what is known as the "Hamilton Plan." This plan placed the "Power to negative all laws about to be passed in the Executive."12

Article seven of the "Hamilton Plan" provided for a "Supreme Judicial Authority" vested in—judges. "This Court to have original jurisdiction in all causes of capture and an appellate jurisdiction in which the revenues of the general government or the citizens of foreign nations are concerned."13

10 Ibid. at 161, 796 M and 796 N.
11 Ibid. at 127 and 128.
12 Ibid. at 149 and 151.
13 Ibid. at 150.
Neither the "New Jersey" nor the "Hamilton" plans provided for a judicial negative over acts of Congress.

The question of the power to be granted the Supreme Court of the United States by the Constitutional Convention arose through the provisions of Resolution 8 of "Randolph's Resolutions." Resolution 8 reads as follows:

"Res'd that the Executive and convenient number of the National Judiciary, ought to compose a Council of Revision with authority to examine every act of the National Legislature before it shall operate and every act of a Particular Legislature before a negative thereon shall be final and that the dissent of the said Council shall amount to a rejection, unless the Acts of the National Legislature be AGAIN PASSED OR THAT OF A PARTICULAR LEGISLATURE BE AGAIN NEGATIVED BY MEMBERS OF EACH BRANCH."  

The debates which follow show clearly that the power of the Supreme Court to invalidate an Act of Congress was expressly denied.

*Proceedings of the Constitutional Convention of 1787.*

"Monday, June 4, 1787. In Committee of the Whole.

First Clause of proposition 8th relating to a Council of Revision, taken into consideration."

"On the question of Mr. Gerry's motion which gave the executive alone without the Judiciary the revisionary control on the laws unless overruled by two-thirds of each branch.

**MOTION CARRIED BY A VOTE OF 8 STATES TO 2.**

Mass., aye; Conn., no; N. J., aye; Pa., aye; Del., aye; Md., no; Va., aye; N. C., aye; S. C., aye; Ga., aye.

"Wednesday, June 6th, in Committee of the Whole. Mr. Wilson moved to reconsider the vote excluding the Judiciary from a share in the revision of the laws and to add after 'National Executive' the words 'with a convenient number of the National Judiciary.' Mr. Rutledge—He was opposed to an introduction of the judges into the business. Mr. Madison seconded the motion. Mr. Wilson: 'The wisdom and weight of the Judiciary to the Executive seemed incontestable.' Mr. Gerry thought the Executive, whilst standing alone, would be more impartial than when he could be covered by the sanction and secured by the sophistry of the judges.'
ON THE QUESTION OF JOINING JUDGES TO THE EXECUTIVE IN THE REVISIONARY BUSINESS. "MOTION LOST BY 8 STATES TO 3."

Mass., no; Conn., aye; N. Y., aye; N. J., no; Pa., no; Del., no; Md., no; Va., aye; N. C., no; S. C., no; Ga., no.

"Saturday, July 21, in Convention.

"Mr. Wilson moved an amendment to Resolution 10 (formerly Resolution 8), that the Supreme National Judiciary should be associated with the Executive in the Revisionary Power. This resolution had been made before and failed. 'The Judiciary ought to have an opportunity of remonstrating against projected encroachments on the part of the people as well as on themselves. It has been said that the Judges as Expositors of the Laws, would have an opportunity of defending their constitutional rights, but this power did not go far enough. Laws may be unjust, may be unwise, may be dangerous, may be destructive, and yet may not be unconstitutional as to justify the judges in refusing to give them effect. Let them have a share in the Revisionary Power, and they will have an opportunity of taking notice of these characters of a law and of counteracting, by the weight of their opinions, the improper views of the legislature.'

"Mr. Ellsworth, Mr. Madison, Mr. Mason, approved the motion. Mr. Gerry objected because the motion combined and mixed together the legislative and the other departments. To this Mr. Strong agreed. Mr. Morris believed a check necessary, but 'he was extremely apprehensive that the auxiliary firmness and weight of the Judiciary would not supply the deficiency.' Mr. L. Martin considered the association of the judges with the Executive as a dangerous innovation. ***

'And as to the constitutionality of the laws, that point will come before the judges in their proper official character. In this character they have a negative on the laws. Join them with the executive and they will have a double negative.'

"Mr. Ghorum: 'All agree that a check on the Legislature is necessary, but *** there are two objections; the 1st is, that the Judges ought to carry into the exposition of the laws no prepossessions with regard to them; 2nd., that as the Judges will outnumber the Executive, the reversionary check would be thrown entirely out of the Executive's hands, and instead of enabling him to defend himself, would enable the Judges to sacrifice him.'

"Mr. Rutledge thought the Judges, of all men, the most unfit to be concerned in the Revisionary Council. The Judges ought never to give their opinions on a law until it comes before them.'

"On the question of Mr. Wilson's motion for joining the Judiciary in the Revision of the Laws, it passed in the negative, 4 states to 3.

---

18 Ibid. at 390 and 391.
19 Ibid. at 398.
20 Ibid. at 399.
Wednesday, August 15, In Convention.

"Mr. Madison moved that all acts before they become laws should be submitted both to the Executive and Supreme Judiciary Departments; that if either of these should object, three-fourths of each House, should be necessary to overrule the objection and give to the acts the force of law. Wilson seconds the motion."

"Mr. Pinkney opposed the interference of the Judges in the legislative business. It will involve them in parties and give a previous tincture to their opinions."

"Mr. Mercer: 'It is an axiom that the Judiciary ought to separate from the Legislative; but equally so that it ought to be independent of that department. The true policy of the axiom is that legislative usurpation and oppression may be obviated. He disapproved of the doctrine that the Judges, as expositors of the Constitution, should have authority to declare a law void. He thought that laws ought to be well and cautiously made and then to be uncontrollable."

"Mr. Gerry: 'This motion comes to the same thing with what has already been negatived.'

Question on the motion of Mr. Madison;
MOTION LOST BY A VOTE OF 8 STATES TO 3.
N. H., no; Mass., no; Conn., no; N. J., no; Pa., no; Del., aye; Md., aye; Va., aye; N. C., no; S. C., no; Ga., no.

"Mr. Dickinson was strongly impressed with the remarks of Mr. Mercer as to the power of the Judges to set aside the law. He thought no such power ought to exist. 'The Judiciary of Arogon, he observed, had become by the law-giver.'"

Mr. Gouverneur Morris: "He could not agree that the judiciary which was part of the Executive, should be bound to say that a direct violation of the Constitution was law."

Mr. Sherman: "He disapproved of Judges meddling in politics and parties. We have gone far enough in forming the negative as it now stands."

---

21 Ibid. at 399.
22 Ibid. at 536.
23 Ibid. at 537.
24 Ibid. at 537 and 538.
25 Ibid. at 538.
26 Ibid. at 538.
Mr. Carrol: "He thought the controlling power however of the Executive could not be well decided till it was seen how the formation of that department would be finally regulated."

Mr. Wilson: "He insisted that we had not guarded against that danger on this side by a sufficient self defense power either to the Executive or the Judiciary Department."

"Mr. Ghorum, Ellsworth and Rutledge protested postponement. The question of postponement was passed in the negative. Delaware and Maryland only being in the affirmative."

Thus, for the fourth time, the delegates decided that the United States Supreme Court was NOT TO HAVE THE POWER OF INVALIDATING NOR OF HOLDING UNCONSTITUTIONAL LAWS PASSED BY CONGRESS.

If the power to invalidate an Act of Congress was denied the Supreme Court, may the power be implied? The records of the Convention deny this power. The signers of the Constitution feared the evils of paper money. Mr. Gerry moved to strike out 'and emit bills on the credit of the United States.' Mr. Madison: "Will it not be sufficient, the making them a tender. This will remove the temptation to limit them with unjust views." Mr. Ghorum: "***was for striking out without any prohibition. If the words stand they may suggest and lead to the measure." Mr. Reed: "*** thought the words, if not struck out would be as alarming as the mark of the Beast in Revelations." Mr. Langdon had rather reject the whole measure than retain the three words, "and emit bills."

On the motion for striking out: The motion was carried by a vote of 9 states to 2. New Jersey and Maryland alone voted no.

The delegates to the Convention feared the possibility of the Federal Government attempting to control the governments of the states. For this reason, the delegates forced a revision of Section 1, Article 7 of the Constitution, relating to the purchase of state lands by the Federal Government.

"So much of the fourth clause as related to the seat of government was agreed to nem con; on the residue to-wit '*** to exercise like authority over all places purchased for forts, etc. ***.' Mr. Gerry contended that this power might be made use of to enslave any particular state by buying up its territory and that the strongholds proposed would be a means of awing the state into undue obedience to the General Government."
"Mr. Gouverneur Morris seconded the motion, adding the words: '*** by consent of the Legislature of the State;' which was agreed to nem con, as was then the rest of the clause as amended."82

In fact, the delegates to the Constitutional Convention decided that the theory of Judicial Review was not to be held by the Supreme Court, either directly or by implication.88

Part III

Does the Supreme Court of the United States have the power to invalidate acts of the legislatures of the several states? This was argued by the delegates to the Constitutional Convention under the Provisions of Resolution 6, as drawn by Randolph of Virginia.

"6. Resolved that the National Legislature ought to possess the right *** to negative all laws passed by the several states contravening in the opinion of the National Legislature, the Articles of Union."

"Friday, June 8th. In Committee of the Whole."

The question of the invalidating or negativeing of the laws of the states was first argued on this day.

"Mr. Pinkney moved that the National Legislature should have authority to negative all laws which they should judge to be improper, *** that under the British Government the negative of the crown had been found beneficial, and that the states are more one nation now, than the colonies were then."84

Mr. Madison seconded the motion:

"Experience had evinced a constant tendency in the states to encroach on the Federal Authority; to violate national treaties; to infringe the rights and interests of each other. A negative was the mildest expedient that could be devised for preventing these mischiefs."85

Mr. Williamson *** "was against giving a power that ought to restrain a state from regulating their internal police."88

Mr. Gerry *** "thought a remonstrance against unreasonable acts of states would reclaim them. If it should not, force might be resorted to. The proposed negative would extend to the regulation of the militia, a matter on which the existence of a state might depend. The National Legislature with such a power may enslave the states. Such an idea will never be acceded to."87

82 Ibid. at 678.
88 Ibid. at 546, 547 and 631.
84 Ibid. at 88 and 89.
85 Ibid. at 88.
86 Ibid. at 88 and 89.
87 Ibid. at 90 and 91.
Mr. Bedford: "In answer to his colleague's question, where would the
danger be to the states from this power, would refer him to the smallness of his
own state, which may be injured at pleasure without redress. In this case, Dela-
ware would have about 1/90th for its share in the General Councils, *** whilst
Pennsylvania and Virginia would possess one-third of the whole. Is the National
Legislature to sit continually on the laws of the states?" 88

Mr. Madison *** "observed that the negative might very properly lodge
in the Senate alone." 89

Mr. Butler *** "was vehement against the negative in the proposed extent,
as cutting off all hopes of equal justice to the distant states." 90

ON THE QUESTION FOR EXTENDING THE NEGATIVE POWER TO
ALL CASES AS PROPOSED: MOTION DEFEATED 7 STATES TO 3.

In discussing the right of Congress to negative the laws of the states, Dele-
gate Lansing said:

"Such a negative would be more injurious than that of Great Britain hereto-
fore was." 91

"Tuesday, July 17, In Convention.

"The 6th Resolution in the *** Report of the Committee of the Whole,
was now resumed." 92

Mr. Sherman observed that it would be difficult to draw the line between
the powers of the General Legislature, and those to be left to the states; and moved
to amend to insert "to make laws binding on the people of the United States
but not to interfere with *** the government of the individual states in any matter
internal police . . . ."

"Gouverneur Morris opposed it. The internal police ought to be infringed in
many cases, as in the case of paper money and other tricks by which citizens of other
states may be affected." 93

Mr. Bedford moved that the section be so altered as to read "*** and also
in those to which the states are separately incompetent, or in which the harmony
of the United States be interrupted." 94

Mr. Randolph: "This is a formidable idea indeed. It involves the power
of violating all the laws and constitutions of the states and of intermeddling
with their police." 95

---

88 Ibid. at 92.
89 Ibid. at 93.
90 Ibid. at 93.
91 Ibid. at 169.
92 Ibid. at 349.
93 Ibid. at 350.
94 Ibid.
95 Ibid. at 351.
"On the rest of the Resolution 'To negative all laws passed by the several states contravening the articles of the union or any treaties under the authority of the Union.'”

Gouverneur Morris opposed this power as likely to be terrible to the states. Mr. Sherman thought it unnecessary. Mr. L. Martin considered the power as improper and inadmissible. Shall all the laws of the states be sent up to the General Legislature before they shall be permitted to operate?247

Mr. Madison considered the negative of the laws of the states as essential to the efficacy and security of the General Government. It proceeds from the propensity of the states to pursue their particular interest.48

Mr. Gouverneur Morris was more and more opposed to the negative. The proposal would disgust all states. A law that ought to be negatived will be set aside in the Judiciary Department and if that security should fail; may be repealed by a National Law.” 49

"On the question for agreeing to the power of negativing the laws of the states.”

"It passed in the negative, by a vote of 6 states to 3. So on July 17, the Convention refused Congress the power to negative the laws of the states.60

The question was raised again on August 23, 1787.

In Convention, Thursday, August 23, 1787.

"Mr. Gerry: Let us at once destroy the State Government. He warned the Convention against pushing the experiment too far *** a civil war may be produced by the conflict.”61

"Mr. Pinkney moved to add as an additional power to be vested in the Legislature of the United States: "To negative all laws passed by the several states interfering with the general interests and harmony of the Union.”

"Mr. Williamson thought it unnecessary and having been already decided a revival of the question was a waste of time. Wilson considered this as the keystone—to complete the wide arch of government we are raising. The firmness of judges is not of itself sufficient. It will be better to prevent the passage of an improper law than to declare it void when passed.”

Then Rutledge, afterward appointed Chief Justice of the Supreme Court of the United States, denounced the motion in the following words:

---

46 Ibid. at 351.
47 Ibid. at 351.
48 Ibid. at 351.
49 Ibid. at 353.
50 Ibid. at 353.
51 Ibid. at 599.
"If nothing else, this alone would damn it and ought to damn the Constitution. Will any state ever agree to be bound hand and foot in this manner? It is worse than making mere corporations of them whose by-laws would not be subject to this shackle." 52

"Mr. Ellsworth, afterward Chief Justice of the Supreme Court, observed that the power contended for would require either that all laws of the State Legislatures should be previously to their taking effect transmitted to the General Legislature or should be repealable by the latter or that the State Executives should be appointed by the General Government or have a control over state laws.

If the last was meditated LET IT BE DECLARED." 58

"ON THE QUESTION FOR COMMITMENT TO THE CONSIDERATION OF A COMMITTEE", as moved by Mr. Gouverneur Morris:

MOTION DEFEATED BY A VOTE OF 6 STATES TO 5. 54

MR. PINKNEY THEN WITHDREW HIS PROPOSITION.

Later some of the delegates were dissatisfied with the situation as to the lack of a negative on the laws of the states. "Mr. Dayton of Pennsylvania, was afraid the proviso would enable Pennsylvania to tax New Jersey. Mr. Ghorum and Mr. Landon thought there would be no security if the provision should be agreed to." 55

Mr. Madison: "There will be the same security as in other cases. The jurisdiction of the Supreme Court must be the source of redress." So far, only had provision been made by the plan against injurious acts of the states. His own opinion was that this was insufficient. A negative on the state laws alone could meet all shapes which these could assume. But this had been overruled. 56

In all probability the delegates believed that constitutional questions could be resolved by arbitration, as was set forth in the Articles of Confederation. Certainly the delegates never decided that the Supreme Court of the United States was to be granted the power to invalidate or hold unconstitutional the laws of the Congress of the United States or the acts of the Legislatures of the several states. The very words of the delegates disprove the claim as does the constitutional history of the United States during the life of the Union prior to the "War between the States."

(Article IX of Articles of Confederation).

Part IV

Further evidence of the theory that the Supreme Court was not to hold power to invalidate the acts passed by Congress and the laws of the several states, will be

52 Ibid. at 602.
53 Ibid. at 603.
54 Ibid. at 603.
55 Ibid. at 736.
56 Ibid. at 737.
seen from the fact that so much of the Resolution numbered 6 as applied to the "USE OF COERCION UPON THE STATES" WAS DEFEATED.

The Resolution reads, in part:

"*** and to call forth the force of the Union against any member of the Union failing to fulfill its duty under the articles thereof."

On June 1, 1787, Madison warned the delegates that the remedy of coercion was impracticable and moved that the clause "to call forth the force of the Union against any member, be postponed." AGREED TO NEM CON.57

Again, on June 1, Madison advised against the theory, saying that "Coercion was impracticable—any government for the United States formed on the supposed practicability of using force against the unconstitutional proceedings would prove us visionary and fallacious as the government of Congress."58 (Meaning the Congress of the Articles of Confederation).

Randolph, author of the Resolution admitted "coercion to be impracticable, expensive, cruel to individuals. A provision for harmony among the states, as in trade, naturalization, etc.—for crushing rebellion whenever it may rear its crest—and for certain other general benefits must be made." Randolph at this point had in mind rebellion by people within a state and not a protest by the state itself.59

On June 18, 1787, Alexander Hamilton took the floor and in a great speech saved the Convention from disintegrating. He warned the delegates as to the use of force against the several states in the following words: "But how can this force be exerted on the states collectively? It is impossible. It amounts to war between the parties."60

Congress has the power to deny the Supreme Court appellate jurisdiction. This is an effective brake on the theory of Judicial Review now claimed by the Supreme Court. In the case of Ex parte McCardle,61 Congress put this power in effect and the Supreme Court held with Congress.

"It is quite clear, "said Chief Justice Chase," therefore, that this Court cannot proceed to judgment in this case for it no longer has jurisdiction."

The theory of Judicial Review now claimed by the Court presupposes full powers. Here the power of the Court is limited by the Constitution.

"Questions of power," wrote Chief Justice Marshall, "do not depend upon the degree to which it may be exercised; if it may be exercised at all, it may be exercised

57 Ibid. at 34.
58 Ibid. at 89.
59 Ibid. at 137.
60 Ibid. at 141.
61 Ex parte McCardle, 6 Wall. 318 (1868), dismissed in 7 Wall. 506 (1869).
at the will of those in whose hands it is placed."\(^{62}\) *A fortiori,* if the power does not exist its use is sheer usurpation.

**Part V**

Under the Constitution the Supreme Court has appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.\(^{68}\) In 1789, under the provisions of Section 25, of the Judiciary Act, Congress extended the appellate jurisdiction of the Court far beyond anything directly provided for in the Constitution. The section reads as follows:

"A final judgment or decree in any suit in the highest court of law or equity of a state in which a decision the validity of a treaty or of statute of, or any authority exercised under the United States and the decision is against their validity; or where is drawn in question the validity of a statute or an authority exercised under a state, on the ground of their being repugnant of the Constitution, treaties, or the laws of the United States and the decision is in favor of their validity, or where is drawn in question the construction of any clause of the Constitution, of a treaty or a statute of or a commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party under such a clause of the said constitution, treaty, statute, or commission, may be reexamined and reversed or affirmed in the Supreme Court of the United States upon a writ of error."\(^{64}\)

"The effect of this act was nothing less than to render the Federal Judiciary superior, at least by implication, over state courts, state legislatures and the Federal Congress."\(^{66}\)

"It provided for appeals from state courts to the Supreme Court; it provided that the constitutionality of state laws should be subject to the decision of the Supreme Court; and it provided that a Federal law could be declared unconstitutional by a state court if this decision was upheld in the Supreme Court; and it went as far as mere logical implication without explicit statement could well go in giving the Supreme Court the direct power to declare Federal laws unconstitutional."\(^{68}\)

This result was reached despite the fact that the delegates to the Constitutional Convention declared time after time that nothing was to be implied in the Constitution against the rights of the states and the people. That is the full meaning of the 10th Amendment. Furthermore, Madison, the Father of the Constitution, previously had protested this doctrine. From the floor of the Convention to ratify the Constitution, in Virginia, Mr. Madison stated:

\(^{62}\) *Brown v. Maryland,* 12 Wheat. 19.

\(^{65}\) *U.S. Const. Art. III, § 2,* paragraphs 1 and 2.

\(^{64}\) *Judiciary Act of 1789.*


\(^{66}\) Ibid. at 39.
"In the state constitutions and indeed in the Federal one also, no provision is made for the case of a disagreement in expounding them (the laws), and as the courts are generally the last making the decision, it results to them by refusing or not refusing to execute a law, to stamp it with its final character. This makes the Judiciary Department paramount in fact to the Legislature, WHICH WAS NEVER INTENDED AND CAN NEVER BE PROPER."  

We must remember that on four occasions, Madison attempted to have the Supreme Court made part of the Revisionary Power and he failed every time. He never went so far as to approve the theory that the court was to hold REVIEWING POWER alone. Neither did any other delegate. Such a resolution, if presented, would have broken the convention asunder. Congress passed the Judiciary Act of 1789 without first securing the approval of the several states by way of a constitutional amendment. Thereafter, Virginia, Ohio, California, Wisconsin and Georgia refused to abide by the mandates of the United States Supreme Court, as will be seen later on in this article.  

If the Constitutional Convention expressly denied Judicial Review to the United States Supreme Court, then under the Tenth Amendment to the Constitution, every attempt by the Court to invalidate an act of Congress has been illegal and void and unconstitutional.  

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."  

This was the understanding of all the parties to the Constitution in the days immediately following the ratification of the Constitution by the people of the several states. As late as 1800, Mr. Justice Chase of the United States Supreme Court, in a majority opinion, held;  

"Although it is alleged that all the acts of the legislatures, in direct opposition to the prohibitions of the Constitution, would be void, yet it still remains a question, where the power resides, to declare it void."  

That the power to void or invalidate an act of Congress lies only with the people, through their representatives, can be seen from the fact that Congress, under the Constitution, was given the right to determine the jurisdiction of the Supreme Court on all appellate matters. Since the appellate jurisdiction of the Supreme Court constitutes not less than ninety-five per cent of the duties of the Court, Congress may therefore, by the passage of an act, deny to the Court practically all of its functions.  

67 Ibid. at 30.  
68 Cooper v. Telfair, 4 Dallas 14.  
Throughout the formative years of the Government the Supreme Court was constantly battling Congress, the President and the several states for power. Invariably the Supreme Court lost the decision.

A. As to Congress and the Court:

In 1852 the Supreme Court held a bridge over the Ohio River to be an unlawful structure and a nuisance.\(^7\) Thereupon, Mr. Justice Daniel of the Court, in dissent, said the majority opinion was an act of usurpation, for the decision interfered with the legislative process of Congress. Thereafter Congress passed an act holding the bridge "to be a lawful structure in the present position and elevation and shall be so held and taken to be, anything in any law or laws of the United States to the contrary notwithstanding." Congress overruled the Supreme Court by passing an act "validating" the bridge. Now the Bridge Company refused to "abate the nuisance."\(^7\)1

When the bridge burned the Company built a new one regardless of the Court's previous mandate enjoining the bridge. Again the case was argued before the Supreme Court in 1856. Now the Court abdicated and held:

"An Act of Congress, that a certain bridge across the Ohio is declared to be a lawful structure, supersedes the effect and operation of the decree of the Court previously rendered."\(^7\)2

On February 5, 1867, Congress passed an act whereby appeals in *habeas corpus* cases, formerly limited to a few classes, were now greatly extended to "all cases where any person may be restrained of his or her liberty." This in aid of the original Reconstruction Laws. Now an "unreconstructed Southern" named McCordle, who had been arrested and held for trial, petitioned for *habeas corpus* under the act. The case was advanced to a speedy hearing.

Suddenly Congress discovered that under the terms of the laws the Supreme Court would hold the original Reconstruction Laws unconstitutional and thereby free McCordle. Thereupon, Congress passed an amendment to the Act of 1867, "repealing the appellate jurisdiction of the Court under the act and further prohibiting the exercise of any jurisdiction by the Court on appeals which had been or might be taken."

Speaking on the repeal, the Republican House Leader, Schenck, said: "I hold it to be not only my right, but my duty as a Republican representative of the people, to clip the wings of the Court." The repeal was passed over the President's veto, March 27, 1868. Thereafter the Supreme Court held:

"It is quite clear that this Court cannot proceed to pronounce judgment in the case, for it has no longer jurisdiction of the appeal; and the judicial duty is not less fitly performed by declining ungranted

---

\(^7\)0 Pennsylvania v. Wheeling Bridge Co., 13 Howard 518 (1852).
\(^7\)1 Act of August 31, 1582.
\(^7\)2 18 Howard 421 (1856).
jurisdiction than in exercising firmly that which the Constitution and
the laws confer." 78

Or as the Court held on another occasion:

"Jurisdiction once prescribed by Act of Congress may be withheld
or withdrawn in the discretion of Congress, even to the extent *** of
the withdrawal of jurisdiction in a pending case." 74

Chief Justice Marshall was in full agreement with this practice for in 1804,
in fear of possible impeachment, Marshall wrote his brother as follows:

"I think the modern doctrine of impeachment should yield to a jur-
sisdiction in the legislative. A reversal of those doctrines deemed unsound,
by the legislature would certainly better comport with the mildness of our
character than the removal of a judge all unknowing of his faults." 75

B As to the President and the Court:

1. In 1807, when Mr. Justice Johnson, of the Supreme Court, attempted to
interfere with the enforcement of President Jefferson's "Embargo," the President
overruled the Justice with an opinion from his Attorney General. This opinion
was forwarded to all collectors, with instructions that the legal opinion of the
Attorney General be followed and Justice Johnson's decision ignored. 76

2. Chief Justice Taney, in 1860, issued a writ of habeas corpus to bring a man
named "Merryman" before him to test the right of the U. S. Army to hold Merry-
man under arrest. 77 General Cadwalder declined to respond to the writ. Taney
therefore issued an attachment for the General's "body." The Army guard refused
permission to the United States Marshal to serve the attachment. Thereupon the
Chief Justice wrote an opinion holding that Congress and not the President had
the power, under the Constitution, to suspend the writ of habeas corpus; hence,
Merryman must be set free. Now President Lincoln secured a legal opinion from
the Attorney General holding that the President, in times of great public danger,
may suspend the writ of habeas corpus. (War powers). Congress, then in session,
acquiesced in the opinion. Merryman remained a prisoner of the Army and of
President Lincoln as Commander-in-Chief of the Army and Navy. 78

3. In effect, President Andrew Jackson overruled Marshall's great decision, in
McCulloch v. Maryland, 79 when he vetoed the Act of Congress of 1832, renewing
the charter of the Bank of the United States, on July 10, 1832:

"If the opinion of the Supreme Court," wrote President Jackson,
"covered the whole ground of this Act, it ought not to control the co-

78 Re Yerger, 8 Wall. 85 (1869); Kline v. Burk Construction Co., 260 U.S. 226; also
see n. 61.
74 Ex parte Merryman, Taney, p. 246; Bates, "Story of the Supreme Court," pp. 167 and 168.
78 Boudin, "Government by the Judiciary," Vol. 2, pp. 34 and 35.
79 4 Wheat. 316 (1819).
ordinate authorities of this Government. 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 Judges when it may be brought before them for 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. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive, when acting in their legislative capacities, but to have only such influence as the force of their reasoning deserve.”

Jackson's views on this question were in accord with those of the statesmen who drew the Constitution and with Jefferson as well.

Madison, in 1788, one year after the meeting of the Convention, stated:

"In the State Constitutions and indeed in the Federal one also, no provision is made for the case of a disagreement in expounding them (laws), and as the courts are generally the last making the decision, it results to them, by refusing or not refusing to execute a law, to stamp it with its final character. This makes the Judiciary Department paramount in fact to the Legislative, which was never intended and can never be proper."  

Jefferson followed the above rule throughout his long career. In 1819 he wrote:

"These are examples of my position, that each of the three departments has equally the right to decide for itself what is its duty under the Constitution, without any regard to what the others may have decided for themselves under a similar question."  

It was for this reason that Jefferson, when President, challenged the Marbury decision with the statement:

"The doctrines of that case were given extra judicially and against law and their reverse will be the rule of action with the Executive."

He kept his word.

Actually, Marshall's Marbury decision was nothing more than an attempt on the part of the Federalists to salvage what they could through the con-

80 Richardson, "Messages," p. 643. The Secretary of the Treasury under Jackson, Taney, later Chief Justice of the United States, wrote the above veto message for President Jackson; Bates, "History of the Supreme Court," p. 143.
control of the Federal Judiciary, packed by the Federalist President, John Adams, once the Federalists lost their campaign to defraud Jefferson and his party of the Presidency. Thereafter Jefferson unpacked the Judiciary by repealing the law. Never thereafter did John Marshall invalidate an act of Congress. When next the effort was made in the Dred Scott case, the then Chief Justice did not even dignify Marbury v. Madison as a precedent for invalidating the Missouri Compromise of 1819. And so, when for a second time, an effort was made to invalidate an act of Congress, the decision led to the rise of the Republican Party, the nomination and election of Abraham Lincoln to the presidency, the secession of the southern states, the firing on Sumter, war and the loss of nearly a million dead, and the destruction of billions of dollars of property, together with the consequent rise of fascism in the years 1870 to 1900.84

That the Marbury decision was nothing more than a political decision may be seen from the conditions surrounding the political situation in the period of the election of a successor to President John Adams.

Fraud was to be used to stop Jefferson and his Republicans from succeeding the Federalists in national office.

"I know of no more danger of a political convulsion," wrote President John Adams, "if a President Pro Tempore, or a Secretary of State [John Marshall] or a Speaker of the House should be made President, than if Mr. Jefferson or Mr. Burr is declared such. The President would be as legal in one case as in either of the others and the people as well satisfied."85

During the last days of John Adams' term in the presidency, John Marshall was holding two great offices under the Federalists:

a. He was Secretary of State.

b. He was Chief Justice of the Supreme Court of the United States.

During this period he inserted a letter in the Washington "Federalist" reading as follows:

"Congress may appoint another President till another election is made."86

He could not bring himself to aid Mr. Jefferson.

Thereafter the conspiracy to defraud Jefferson of the presidency was dropped by reason of threatened civil war.87

C. As to the States and the Supreme Court:

1. In 1816 the Supreme Court overruled a decision of the Court of Appeals of

Virginia and held that the ownership of certain lands in issue in Virginia belonged to Martin, who held under a treaty between the United States and England. When the Virginia court received the Federal mandate, the Court of Appeals of Virginia promptly issued another decision, holding:

"The Court is unanimously of the opinion that the Appellate power of the Supreme Court does not extend to this court, under a sound construction of the Constitution of the United States—that so much of the 25th Section of the Act of Congress as extends the appellate jurisdiction of the Supreme Court, to this court is not in pursuance of the Constitution of the United States; that the Writ of Error in this cause was improvidently allowed under the authority of that Act; that the proceedings thereon in the Supreme Court were 'coram non judice' in relation to this Court; and that obedience to the mandate be declined by this Court."

2. Georgia, in 1828, condemned an Indian named "Corn Tassel" to death. An appeal was taken to the United States Supreme Court. The Supreme Court accepted jurisdiction. Before the appeal could be heard, the authorities of Georgia hanged the man. In this case and a companion case involving a man named "Worcester" the sympathies of the President, Andrew Jackson, were with the State of Georgia and against the claims of the Cherokee Indians then living in Georgia. It was then that Jackson said, or is supposed to have said: "John Marshall has made his decision—now let him enforce it." Since enforcement of judicial mandates is performed by United States marshals controlled by presidential appointment, quite naturally then—if the President were to order his marshall to refuse to enforce the mandates of the Judiciary, the order would be obeyed. Of the above incidents, Jackson wrote:

"The decision of the Supreme Court has fell stillborn and they find they cannot coerce Georgia to yield."

3. The State of California, in 1854, in the case of *Johnson v. Gordon*, refused to permit the case, then pending in the state courts, to be transferred to the United States District Court. The California Supreme Court held:

a. The Constitution of the United States gives no authority to the Supreme Court of the United States to exercise appellate jurisdiction over state courts, nor can such authority be derived by implication or construction.

---

88 Martin v. Hunter, 1 Wheat. 304 (1816).
89 4 Mumford 3 (1810).
93 4 Calif. 368.
94 In other words, if Marshall in the Marbury case could refuse jurisdiction from Congress, Virginia could act similarly, and did. See § 25, Judiciary Act of 1789.
b. The state courts and the Federal Courts are coordinate tribunals with concurrent jurisdiction in many cases, and the decision of the one in which jurisdiction first attaches, is final and conclusive.

c. No cause can be transferred from any state court to a Federal Court.

d. Neither a writ of error nor an appeal lies to take a case from a state court to the Supreme Court of the United States.

e. The Court stated that the decision of the United States Supreme Court in the *Fairfax v. Hunter* and *Martin v. Hunter* cases had been studied along with Story's "Commentaries on the Constitution" and the Court preferred the reasoning laid down by the Virginia Court in the *Fairfax v. Hunter* and *Martin v. Hunter* cases along with the arguments of John Calhoun in his "Discourse on the Constitution of the United States."

4. In the celebrated "Booth" cases in Wisconsin, just before the period of the "War between the States," Booth was arrested several times by Federal authorities, in connection with the rescue of an escaped negro slave named "Glover," under the terms of the "Fugitive Slave Law" (Federal) of 1850. The United States Commissioner issued a warrant for the arrest of Booth and when arrested he was immediately freed under a writ of *habeas corpus* emanating out of the state courts. He was again arrested in the Federal Courts and convicted; but was again released by a writ of *habeas corpus* issued by the state courts.

   In both instances the state Supreme Court refused to abide by the decisions of the United States Supreme Court previously laid down. In the second instance the Supreme Court of Wisconsin actually defied the United States Supreme Court mandate and released the prisoner from the custody of the United States marshal under a judgment of conviction in a federal court. The Supreme Court of Wisconsin held the "Fugitive Slave Act" of 1850, passed by Congress, to be unconstitutional:

   a. Because Congress held no power to legislate on the subject.
   b. Because it provided that a man might be reduced to slavery without trial by jury.
   c. Because the law vested judicial power in court commissioners contrary to the Constitution, which vested such powers in certain courts.
   d. The state courts would decide on the appellate powers of the Federal Courts as set forth in Sec. 25 of the Federal Judiciary Act of 1789, just as did Virginia previously in the *Fairfax v. Hunter* case.

5. In 1854 the state of Ohio, through the Supreme Court of that state, reacted similarly to Virginia, Wisconsin and California, by refusing to accept the mandates of the United States Supreme Court in the cases of *Piqua, etc. v. Knoop*, 16 Howard 369, and *Ohio Life Insurance Company, v. Debolt*, 16 Howard 416, and upon the same grounds. The Ohio Supreme Court held that the United States Supreme

---

95 7 Cranch 603 (1813).
96 1 Wheat. 304 (1816).
Court did not have the right to set aside Ohio rulings and that Section 25 of the Judiciary Act of 1789 was unconstitutional as to appellate powers.\textsuperscript{88}

Thus it is seen that all through the period from the time the Constitution was adopted to the years of the "War between the States", Congress, the Chief Executive and the several states refused to accept the theory that the United States Supreme Court held invalidating powers over acts of Congress, or over the acts of the President, or over the acts of the several states. All of the above knew to a certainty that the power of Judicial Review had been expressly denied to the Supreme Court by the Constitutional Convention.

When John Marshall was practicing law before the United States Supreme Court, he advised that Court, in *Ware v. Hylton*, 3 Dallas 199 (1797), that:

"The legislative authority of any country can only be restrained by its own municipal constitution. *** And the judicial authority can have no right to question the validity of a law, unless such a jurisdiction is expressly given by the Constitution."

Since this right was not granted to the Supreme Court by the Constitution expressly, as has been shown above, every attempt on the part of the Supreme Court to invalidate an act of Congress or an act of the several states has been, logically, invalid, void and unconstitutional. It takes more than an act of Congress to amend the Constitution.

**Conclusion**

In the light of the above cases and incidents, Marshall's ruling in *Marbury v. Madison*, wherein he claimed the right to invalidate Section 13 of the Judiciary Act of 1789 as an illegal attempt to confer original jurisdiction on the Supreme Court, is a nullity except so far as the Court only can be concerned. The decision did not bind the people, nor the several states, nor the Chief Executive, nor Congress in actual practice, at least up to 1870.

Finally, the *Marbury* case was the last attempt on the part of the Federalist Party to deny to President Jefferson the prerogative of his high office. Marshall never again held as invalid an act of Congress, and when next the theory was attempted by the Supreme Court in the *Dred Scott* case,\textsuperscript{99} the decision was reversed:

a. By Lincoln's election to the presidency.

b. By Lincoln's pronouncement of the Emancipation Proclamation of January 1, 1863.

c. By the surrender of the Confederate Army at Appomatox.

d. By the passage and ratification of the Thirteenth Amendment.

Abraham Lincoln, although a former Whig-Federalist, along with Jackson and Jefferson, never accepted the *Marbury* decision as sound law, either before

\textsuperscript{88} 1 Ohio St. 603; 6 Ohio St. 342 (1 ).

\textsuperscript{99} Scott v. Sanford, 19 Howard 393 (1857).
election to the presidency or thereafter. During his campaign for the United States' Senate against Douglas, a speech at Springfield, Illinois in 1858, on the matter of the *Dred Scott* decision, Lincoln said:

"He (Douglas) would have the citizen conform his vote to that decision; the member of Congress, his; the President, his use of the veto power. He would make it a rule of political action for the people and all the departments of the government. I would not. By resisting it as a political rule, I disturb no right of property, create no disorder, excite no mobs."

Thereafter, in this speech, Lincoln quoted a letter written by Jefferson, in 1820, wherein that statesman wrote:

"The Constitution has erected no single tribunal, knowing that, to whatever hands confided, with the corruptions of time and party, its members would become despots. It has more wisely made all the departments co-equal and co-sovereign within themselves."

Senator Sumner of Massachusetts, Federalist-Whig-Republican-Abolitionist leader, followed the Jefferson-Jackson-Lincoln theory in the matter of Judicial Review, for in a speech before the Senate, August 26, 1852, he said:

"But whatever may be the influence of this judgment as a rule to the Judiciary, it cannot arrest our duty as legislators. And here I adopt with entire assent the language of President Jackson, in his memorable veto, in 1832, of the Bank of the United States. **The early legislation of Congress and the decisions of the Supreme Court cannot stand in our way.**"

Henry Adams, distinguished historian and direct descendent of two conservative presidents, said of the theory of Judicial Review:

"I contend that no court can—because of its being—effectively check a popular majority, acting through a coordinate legislative assembly."100

The founding fathers were steeped in the English Common Law; they probably intended following the British parliamentary system in law-making and judicial construction, as Blackstone wrote:

"The Acts of Parliament derogatory from the power of subsequent legislatures are not binding. Because the legislature being in truth the sovereign power, is always equal, always absolute, and it acknowledges no superior on earth, which the prior legislature must have been if its ordinances could bind a subsequent parliament."

Probably Marshall had the above statement in mind when he wrote:

"A reversal of those doctrines deemed unsound by the Legislature would certainly better comport with the mildness of our character than the removal of the Judge All unknowing of his faults."101

Or as Marshall stated the case in his greatest decision, *Gibbons v. Ogden*:102

"There is no danger that Congress will abuse that power because of the identity of Congress with the people, and the influence which their

---

102 9 Wheat. 195.
constituents possess at elections. They are restraints on which the people must rely solely in all representative governments."

Thus, we see that the theory of Judicial Review as we now know it was not the law of the land in the years before the period of the "War between the States". The theory was rejected by the several states, by the Congress and by the President. It was denounced by the men who wrote the Constitution.

Marshall's greatest admirers, Corwin, Beveridge and Landon, all distinguished students of the Constitution, admit the irregularity of the Marbury decision, although they admire Marshall and the decision seemingly because of Marshall's attempt to override the Constitution.

a. Corwin states: "What the Court should have done *** was to dismiss the case as not falling within the contemplation of Section 13, and not on the ground of unconstitutionality of that section." Nevertheless, says Corwin, the opinion was a political "coup" of the first magnitude.103

b. Beveridge, who wrote the definitive biography of Marshall, agrees with Corwin. Beveridge insists that the decision was "innovating and revolutionary" and calls the decision a "coup".

c. Landon, conservative author of a book entitled "Constitutional History," says of the decision: (Pages 307, 309)

"The Court held Marbury was entitled to the commission; that Mr. Madison had no right to withhold it; that mandamus was a proper proceeding to compel its delivery. But after holding so much in favor of Mr. Marbury and against the administration, it then held that the Supreme Court had no power to issue the mandamus [although the Supreme Court prior to Marshall had issued the writ four times] and therefore could not give Mr. Marbury aid. One would suppose (writes Landon) that if the Court had no power to aid the claimant, its decision that the claim was a valid one would not be authoritative. Be that as it may (continues Landon), the great point decided and which the Court did not have the right to decide was that the Court could not grant the mandamus ***. Still the decision is a part of the Constitution itself."104

Since Corwin, Beveridge and Landon hold the Marbury decision to be a "coup"—that word defined means: "a sudden and decisive measure in politics—especially one effecting a change in government illegally or by force", then Marshall's decision smacks of illegality. Hence if the theory of Judicial Review depends upon the Marbury case, then we face anarchy for if Marshall may decide cases by illegal methods all judges have a similar right. If the implications of the Marbury decision were not the law of the land before 1865—by what processes of legerdemain has the decision become the law of the land now?

"I do not think that the United States would come to an end," wrote Mr. Justice Holmes, "if we, the Supreme Court, lost our power to declare an act of Congress void."

103 Corwin, "John Marshall and the Constitution," pp. 63 and 64.