

# The Supreme Court and Unconstitutional Laws

AMERICANS have become so accustomed to having courts, especially the Supreme Court of the United States, determine the constitutionality of national laws that they consider it to be a "self evident truth" that this function was assigned to the courts by the Constitution of the United States. The Constitution, however, makes no such assignment; and the question may be asked, Did the framers of the Constitution intend that courts should determine the constitutionality of congressional enactments? Only the Lord knows; and so far as I am aware, He has never answered the question. Since the Constitution is silent on the point, and since Deity has withheld revelation on the subject, we are forced to take refuge in the theory of probabilities.

The specific paragraph in the Constitution which makes it somebody's duty to determine the constitutionality of national laws is contained in article VI, and reads:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

From the wording of this paragraph, two things are clear. In the first place, any enactment which is not made in pursuance of the Constitution is not a law at all, and is void. In the second place, it is the Constitution itself, and not the judges or anybody else, which makes it void. As to who shall determine the pursuance of an enactment the paragraph is anything but clear. Was it intended that Congress should determine its own powers; or should the executive or the judicial branch of the government prevent the operation of unconstitutional laws by refusing to carry them into operation?

In the search for answers to these questions, the origin of the paragraph is worth noting. The original form of it was presented in the Convention by Luther Martin of Maryland, and his object was to compel the states to obey laws made by Congress. In other words, his purpose was to enforce national laws—not to limit them.

In the Convention a proposal had been made to give Congress a veto on laws passed by the states. Such a veto was opposed by Martin, who offered as a substitute "the supreme law of the land" clause in its original form. We quote the explanation given later in his own words:

"To place this matter in a proper point of view, it will be necessary to state, that as the propositions were reported by the committee of the whole house, a power was given to the general government to negative the laws

passed by the state legislatures, a power which I considered totally inadmissible; in substitution of this I proposed the following clause, which you will find very materially different from the clause adopted by the Constitution, 'that the legislative acts of the United States, made by virtue and in pursuance of the articles of the union, and all treaties made and ratified under the authority of the United States, shall be the supreme law of the respective states, as far as those acts or treaties shall relate to the said states or their citizens, and that the judiciaries of the several states shall be bound thereby in their decisions, any thing in the respective laws of the individual states to the contrary notwithstanding.' When this clause was introduced, it was not established that inferior continental courts should be appointed for trial of all questions arising on treaties and on laws of the general government, and it was my wish and hope that every question of that kind would have been determined in the first instance in the courts of the respective states . . ."<sup>1</sup>

It is obvious, from this explanation, that Martin's sole purpose was to prevent the states from impeding the operation of national laws and treaties, and that he was not seeking to augment the powers or functions of the national judiciary. In fact, in the same essay, Martin complains bitterly because the Constitution had given the "supreme judiciary" appellate jurisdiction "both as to law and fact," . . . "a power of the most dangerous and alarming nature, that of setting at nought the verdict of a jury . . ."<sup>2</sup> It is hard to believe that he considered an act of Congress to be of less importance than the verdict of a jury. Martin states that his "supreme law of the land" clause was altered later, so as to deprive the states "of every right and privilege," and so that the "general government . . . may, at its discretion, make laws in direct violation of those rights."<sup>3</sup> Since laws are made by Congress, it must have been that body which he feared. He does not say by whom the alterations were made. It has sometimes been conjectured that they were foisted upon an unsuspecting Convention by those who desired to institute court review. There seems to be no evidence of such a design, unless it be an enigmatical letter written by Gouverneur Morris, a delegate from Pennsylvania. As Chairman of the Committee on Style, Morris drafted the Constitution in its final form. Writing to Pickering of Massachusetts, in 1814, Morris said:

"That instrument [The Constitution] was written by the fingers which write this letter. Having rejected redundant and equivocal terms, I believed it to be as clear as our language would permit; excepting, nevertheless, a part of what relates to the judiciary. On that subject, conflicting opinions had been maintained with so much professional astuteness, that it became necessary to select phrases which, expressing my own notions, would not alarm others, nor shock their self-love . . ."<sup>4</sup>

He does not explain what his "notions" were; but he was an ardent

<sup>1</sup> FORD, *ESSAYS ON THE CONSTITUTION*. (1892) 360, 361.

<sup>2</sup> *Ibid.* at 362.

<sup>3</sup> *Ibid.* at 361.

<sup>4</sup> 1 ELLIOT, *DEBATES* (1888) 507.

champion of property rights, and likely to prefer a court to a legislative body. Even in its final form, however, it is the judges of the states who are specifically bound.

Whatever Morris' notions may have been, the Supreme Court of the United States, in 1803, in the *Marbury* case,<sup>5</sup> inaugurated the practice of declaring laws of Congress void, when they are believed to violate the Constitution. Since that time, the American federal courts have exercised two functions. They decide cases between parties in accordance with some law, and they determine whether the statutory law involved is, in fact, a valid law. Their right to perform either function is derived from Article III, Section 2 of the Constitution, which reads:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority."

Now, what is a case, and does it include a determination of the validity of the law under which it is tried? Usually we think of a *case* as a dispute between parties under some particular law. If the Convention used the word *case* in this limited sense, of course no curb on Congress was intended.

American courts were the first to exercise the second function, even though a few apparent exceptions to this statement may be cited from British jurisprudence. In general, the laws of Parliament are supreme, and American jurists were fully cognizant of that fact. In *Vanhome's Lessee v. Dorrance*<sup>6</sup> Judge Patterson, in his charge to the jury, made interesting comments on the supremacy of Parliament. He first cited Coke, in the following quotation:

"The power and jurisdiction of Parliament is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds."

Judge Patterson, himself, then remarked:<sup>7</sup>

"From this passage it is evident that, in England, the authority of the parliament runs without limits, and rises above control . . . Some of the judges in England have had the boldness to assert that an act of parliament, made against natural equity, is void; but this opinion contravenes the general position, that the validity of an act of parliament cannot be drawn into question by the judicial department: it cannot be disputed, and must be obeyed."

The statesmen who framed the Constitution of the United States well understood the omnipotence of the British Parliament. In their own governmental system, it is obvious that they intended to limit all branches of the government within the confines of the Constitution;

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<sup>5</sup> *Marbury v. Madison* (1803) 5 U. S. (1 Cranch) 137.

<sup>6</sup> (1795) 2 U. S. (2 Dall.) 303.

<sup>7</sup> *Vanhome's Lessee v. Dorrance*, *supra* note 6, at 307.

but it is not so obvious that they intended their own national legislature to be overridden by another branch of the government.

In the formation of any government, certain practices and procedures may have become so well established that they are taken for granted and not deemed necessary to mention. Such was the reason given for not having included a bill of rights in the original Constitution. When, however, an important function of one of the great departments—such as the voiding of national laws by the courts—is something new under the sun, or nearly so, it seems strange that the Constitution is silent on this subject.

The records of the Constitutional Convention are nearly as unsatisfactory as the Constitution itself in throwing light on the subject of judicial negative. When the proposal to give Congress a veto on state laws was under discussion, Gouverneur Morris opposed it, and asserted that:

“A law that ought to be negatived will be set aside in the Judiciary department [department] and if that security should fail, may be repealed by a National [National] law.”<sup>8</sup>

Note that he speaks of the possibility of failure in curbing even State laws by court decision, and of the possibility that Congress might have to repeal them.

On July 21, 1787, the Convention discussed the proposal to join the judges with the executive as a council to review laws passed by Congress, and the records disclose that:

“Mr. L[uther] Martin considered the association of the Judges with the Executive as a dangerous innovation; as well as one which, could not produce the particular advantage expected from it. A knowledge of mankind, and of Legislative affairs cannot be presumed to belong in a higher . . . degree to the Judges than to the Legislature. And as to the Constitutionality of laws, that point will come before the Judges in their proper official character. In this character they have a negative on the laws.”<sup>9</sup>

In reply, Mason of Virginia stated his views:<sup>10</sup>

“It had been said (by Mr. L. Martin) that if the Judges were joined in this check on the laws, they would have a double negative, since in their expository capacity of Judges they would have one negative. He would reply that in this capacity they could impede in one case only, the operation of laws. They could declare an unconstitutional law void. But with regard to every law however unjust oppressive or pernicious, which did not come plainly under this description, they would be under the necessity as Judges to give it a free course. He wished the further use to be made of the Judges, of giving aid in preventing every improper law.”

Mason seems to agree with Martin that the courts may declare unconstitutional laws void, but he is far more interested in the “check and balance” system as a preventive. Whether other members of the

<sup>8</sup> FARRAND, RECORDS (1911) 28.

<sup>9</sup> *Ibid.* at 76.

<sup>10</sup> *Ibid.* at 78.

Convention agreed with Martin, or what degree of importance was attached to his remarks, we cannot say, for the records contain nothing further on the subject; but we do know that courts were viewed with distrust in that period, and, had the negative power of courts been generally understood, it is likely that there would have been vigorous protests.

The records of the state conventions chosen to consider the adoption of the Constitution give us little information on the subject which we are discussing. In Virginia, Richard Henry Lee condemned the Constitution because it made Congress omnipotent:<sup>11</sup>

"But what is the power given to this ill-constructed body? To judge of what may be for the general welfare; and such judgments, when made the acts of Congress, become the supreme laws of the land. This seems a power coëxtensive with every possible object of human legislation."

John Marshall answered by pointing out a corrective, which he was destined later to apply as Chief Justice of the United States:<sup>12</sup>

"Can they [Congress] go beyond the delegated powers? If they were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void."

In addition to the records of the state conventions themselves, contemporary opinions of statesmen and of publicists are contained in various essays and letters of the time. Of special importance are the views of James Madison, for he contributed more than any other person to the subject matter of the Constitution. Better than anyone else, he was qualified to say what the provisions of that document were intended to mean. In one of the *Federalist* articles, when discussing unconstitutional laws, Madison wrote:<sup>13</sup>

"If it be asked what is to be the consequence, in case the Congress shall misconstrue this part of the Constitution, and exercise powers not warranted by its true meaning, I answer, the same as if they should misconstrue or enlarge any other power vested in them . . . In the first instance, the success of the usurpation will depend on the executive and judiciary departments which are to expound and give effect to legislative acts; and in the last resort a remedy must be obtained from the people, who can, by the election of more faithful representatives, annul the acts of the usurpers. The truth is that this ultimate redress may be more confided in against unconstitutional acts of the federal than of the State legislatures, for this plain reason, that as every such act of the former will be an invasion of the rights of the latter, these will be ever ready to mark the innovation, to sound the alarm to the people; and to exert their local influence in effecting a change of federal representatives."

He then explained that the "supreme law of the land" clause was designed to compel states to obey national laws.

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<sup>11</sup> 1 ELLIOT, *op. cit.* *supra* note 4, at 503.

<sup>12</sup> 3 *ibid.* at 553.

<sup>13</sup> See FORD, *THE FEDERALIST* (1898) No. 44, pp. 300-301.

It may be noted that, while Madison speaks of *expounding* by both executive and judiciary, he nevertheless asserts that the "last resort remedy" must be exercised by the people and the states. In 1798, he sought to apply this remedy in the well known Virginia Resolutions. In No. 51 of the Federalist essays, Madison says that "In republican government, the legislative authority necessarily predominates," that an absolute executive veto would prevent legislative abuse of authority, but that such a veto might be used unwisely. He makes no mention here of the courts.<sup>14</sup>

In his "Observations" on Jefferson's draft of a constitution for the state of Virginia, written in October, 1788, Madison makes his views still more explicit. He believes that legislative bills should be submitted to both executive and judicial departments; and should either object to the bill, a two-thirds or three-fourths vote should be required to override the objection, but:

"It sh<sup>d</sup> not be allowed the Judges or y<sup>e</sup> Executive to pronounce a law thus enacted unconstitu<sup>l</sup> & invalid.

"In the State Constitutions & indeed in the Fed<sup>l</sup> one also, no provision is made for the case of a disagreement in expounding them; and as the Courts are generally the last in making y<sup>e</sup> 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 Dep<sup>t</sup> paramount in fact to the Legislature, which was never intended and can never be proper."<sup>15</sup>

This is the most definite statement concerning intention which I have been able to find.

As a member of the first Congress, Madison made similar remarks on the right to expound the Constitution. When discussing proposed amendments on June 17, 1789, and speaking on the subject of removing officials from office, he said:

"But the great objection drawn from the source to which the last arguments lead us is, that the Legislature itself has no right to expound the Constitution; that whenever its meaning is doubtful, you must leave it to take its course, until the Judiciary is called upon to declare its meaning. I acknowledge, in the ordinary course of Government, that the exposition of the laws and Constitution devolves upon the Judiciary. But I beg to know, upon what principle it can be contended, that any one department draws from the Constitution greater powers than another, in marking out the limits of the powers of the several departments? The Constitution is the charter of the people to the Government; it specifies certain great powers as absolutely granted, and marks out the departments to exercise them. If the Constitutional boundary of either be brought into question, I do not see that any one of these independent departments has more right than another to declare their sentiments on that point.

"Perhaps this is an omitted case. There is not one Government on the face of the earth, so far as I recollect, there is not one in the United States, in which provision is made for a particular authority to determine the limits of the Constitutional division of power between the branches of

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<sup>14</sup> *Ibid.* at 345.

<sup>15</sup> 5 MADISON, WRITINGS (Hunt ed. 1904) 294.

the Government. In all systems there are points which must be adjusted by the departments themselves, to which no one of them is competent. If it cannot be determined in this way, there is no resource left but the will of the community, to be collected in some mode to be provided by the Constitution, or one dictated by the necessity of the case. It is therefore a fair question, whether this great point may not as well be decided, at least by the whole Legislature as by a part, by us as well as by the Executive or Judiciary? As I think it will be equally Constitutional, I cannot imagine it will be less safe, that the exposition should issue from the Legislative authority than any other . . . " <sup>16</sup>

And on the following day he said:

"And have we not as good a right as any branch of the Government to declare our sense of the meaning of the Constitution?"

"Nothing has yet been offered to invalidate the doctrine, that the meaning of the Constitution may as well be ascertained by the legislative as by the judicial authority." <sup>17</sup>

On June 21, 1789, Madison told Edmund Pendleton in a letter that:

"In truth, the Legislative power is of such a nature that it scarcely can be restrained either by the Constitution or by itself. And if the federal Government should lose its proper equilibrium within itself, I am persuaded that the effect will proceed from the Encroachments of the Legislative department." <sup>18</sup>

Clearly the chief author of the Constitution did not contemplate legislation by permission of the courts.

In his earlier Federalist essays, Alexander Hamilton's comments on usurpation of powers are vague and impracticable. In No. 33, when discussion the "necessary and proper" clause, he wrote:

"But it may be again asked, Who is to judge of the *necessity* and *propriety* of laws to be passed for executing the powers of the Union? . . . I answer . . . that the national government, like any other, must judge, in the first instance, of the proper exercise of its powers, and its constituents in the last. If the federal government should surpass the just bounds of its authority and make a tyrannical use of its powers, the people, whose creature it is, must appeal to the standard they have formed, and take such measures to redress the injury done to the Constitution as the exigency may suggest and prudence justify." <sup>19</sup>

In No. 57, he stresses the power of public opinion, and the desire of members of Congress for re-election:

" . . . They will be compelled to anticipate the moment when their power is to cease, when their exercise of it is to be reviewed, and when they must descend to the level from which they were raised; there forever to remain unless a faithful discharge of their trust shall have established their title to a renewal of it." <sup>20</sup>

In neither of these essays does he allude to restraint by the courts.

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<sup>16</sup> *Ibid.* at 403-404.

<sup>17</sup> *Ibid.* at 407.

<sup>18</sup> *Ibid.* at 406.

<sup>19</sup> FORD, *op. cit.* *supra* note 14, at 203.

<sup>20</sup> *Ibid.* at 379.

In the long run, however, it was likely that Hamilton's penetrating mind would follow the question through to its practical applications and foresee the problem which would inevitably face the courts, whatever the intention of members of the Constitutional Convention may have been. In No. 78 of the Federalist essays, he makes the following comments:

"The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it should pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

"Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all American constitutions, a brief discussion of the ground on which it rests cannot be unacceptable.

"There is no position which depends on clearer principles than that every act of delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.

"If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed that the Constitution could intend to enable representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute; the intention of the people to the intention of their agents."<sup>21</sup>

Hamilton's argument is interesting, but by no means conclusive. He does not pretend that it is based upon his knowledge of the intentions of the Constitutional Convention, but upon his own deductions as to

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<sup>21</sup> *Ibid.* at 520-521.



what the members must have intended. Congress is denied the right to judge of its own powers, because "this cannot be the natural presumption"; and the courts must make the decision, because it is "rational to suppose" they were intended to do so. No one denied that "the Constitution ought to be preferred to the statute" or "the intention of the people to the intention of their agents"; but judges as well as legislators are *agents* of the people, and it is begging the question to assume that judges, alone, may divine the intentions of the people. To offset Hamilton's deductions we have Madison's direct statement that such a function of courts "was never intended and can never be proper." Madison had attended all meetings of the Constitutional Convention, and had heard the various debates; Hamilton had been present for a brief period only.

In December 1787, Oliver Ellsworth of Connecticut, former member of the Constitutional Convention and later to be Chief Justice of the United States, befogged rather than clarified the issue in an article written in answer to criticisms of the Constitution. We quote his remarks:

"A legislative power, without a judicial and executive under their own control, is in the nature of things a nullity. Congress under the old confederation had power to ordain and resolve, but having no judicial or executive of their own, their most solemn resolves were totally disregarded . . .

"In all these matters and powers given to Congress, their ordinances must be the supreme law of the land, or they are nothing. They must have authority to enact any laws for executing their own powers, or these powers will be evaded by the artful and unjust . . ." <sup>22</sup>

This statement seems to aver that courts are under the *control* of Congress and that they are designed to *enforce* laws rather than to ascertain their constitutionality.

Elbridge Gerry of Massachusetts, also a member of the Convention, denounced the part of the Constitution which relates to the judiciary; but his criticism is couched in general terms and discloses bewilderment, rather than knowledge, concerning the intentions of the Convention:

"There are no well defined limits of the Judiciary Powers, they seem to be left as a boundless ocean, that has broken over the chart of the Supreme Lawgiver, 'thus far shalt thou go and no further,' and as they cannot be comprehended by the clearest capacity, or the most sagacious mind, it would be an Herculean labour to attempt to describe the dangers with which they are replete." <sup>23</sup>

James Iredell, noted jurist and member of the North Carolina convention, seems to have believed that constitutional limitations would automatically restrict the activities of Congress. In answer to certain criticisms, he wrote:

"So it is in regard to the new Constitution here: the future government which may be formed under that authority certainly cannot act beyond

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<sup>22</sup> FORD, *op. cit. supra* note 1, at 159-160.

<sup>23</sup> FORD, PAMPHLETS ON THE CONSTITUTION (1888) 9.

the warrant of that authority. As well might they attempt to impose a King upon America, as to go one step in any other respect beyond the terms of their institution."

And again:

"If Congress, under pretense of exercising the power delegated to them, should in fact, by the exercise of any other power, usurp upon the rights of the different Legislatures, or of any private citizens . . . it would be an act of tyranny, against which no parchment stipulations can guard, and the Convention surely can be only answerable for the propriety of the powers given, not for the future virtues of all with whom those powers may be intrusted."<sup>24</sup>

He makes no mention of courts or of their possible use in restricting Congress within constitutional limits.

In 1788, John Dickinson of Delaware, who had been a member of the Philadelphia Convention, defined a constitution as "the *organization* of the contributed rights in society."<sup>25</sup> It will, said he, be an "offense against Heaven" to violate it. This would be serious offense, indeed, but again we are not told who is to determine the violation.

Alexander C. Hanson, a prominent attorney and member of the Maryland convention, is one of the few who had definite ideas on the relation of courts to legislative enactments. To those who had asserted that Congress might abuse its powers, he replied:

"They may reflect however, that every judge in the union, whether of federal or state appointment, (and some persons would say every jury) will have a right to reject any act, handed to him as a law, which he may conceive repugnant to the constitution."<sup>26</sup>

This statement would solve our problem if we could be sure that it had been based on knowledge of the Convention's intentions, and not merely on Hanson's opinion or desire. Concerning Hanson's knowledge, however, Luther Martin of the same state has recorded that:

". . . if he [Hanson] is as much mistaken in other parts of the Constitution, as in that which relates to the judicial department, the Constitution which he is so earnestly recommending to his countrymen . . . is a thing of his own creation and totally different from that which is offered for your acceptance."<sup>27</sup>

Prominent publicists of the time seem to have relied on the states, or on voters, rather than on courts, as agents for keeping Congress within constitutional bounds. Noah Webster, for example, asserted that unauthorized appropriations of money would be unconstitutional and "will expose the Congress to the resentment of the states, and the members to impeachment and loss of their seats."<sup>28</sup>

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<sup>24</sup> *Ibid.* at 335, 356-7.

<sup>25</sup> *Ibid.* at 181.

<sup>26</sup> *Ibid.* at 234.

<sup>27</sup> FORD, *op. cit. supra* note 1, at 372.

<sup>28</sup> FORD, *op. cit. supra* note 24, at 372.

Pelataiah Webster, noted economist, told his readers, in 1788, that:

"... Congress can never get more power than the people will give, nor hold it any longer than they will permit; for should they assume tyrannical powers, and make incroachments on liberty . . . they would soon atone for their temerity, with shame and disgrace, and probably with their heads."<sup>29</sup>

In the opinion of James Sullivan of Massachusetts, should Congress overstep the bounds of the Constitution "its violators [will] be hurled from the seat of power, and arraigned before a tribunal where impartial justice will no doubt preside, to answer for their high-handed crime."<sup>30</sup> Such a remedy might indeed be court review, but not the type which we have under consideration.

If the right and duty of courts to pronounce acts of Congress void, because unconstitutional, were the "self evident" intentions of those who drafted the Constitution, why is it that the federal courts did not perform this "self evident" duty during the period between 1789 and 1803? Members of the Supreme Court encountered laws which they thought to be unconstitutional, but they seemed to doubt their power to declare them void. At any rate, they dodged the issue by merely refusing to act in certain cases to be noted below. They did hold laws of Congress to be constitutional, but this is a very different matter. By so doing, they were upholding Congress and overruling individuals who had alleged that Congress had violated the Constitution. When it came to overruling Congress, they hesitated and evaded.

The Invalid Pension Act passed by Congress in March, 1792, gave members of the Supreme Court an opportunity to declare a national law unconstitutional, had they been certain of their power and had cared to exercise it. This law assigned to the judges the duty of determining the merits of pension claims. In the New York district, Chief Justice Jay and his associates declined to act as *judges*, but performed the service as *commissioners* and thus evaded the issue.<sup>31</sup> In the *Hayburn* case,<sup>32</sup> which was presented in the Pennsylvania district, Justice Wilson and his associates declined to act on the claims in any capacity, but they did not formally declare the pension law to be unconstitutional and void. Certain newspapers praised the judges for refusing to act; other maintained that they should be impeached for questioning the validity of an act of Congress.

When, in 1798, Congress enacted the Alien and Sedition Laws, many persons thought them to be palpably unconstitutional. They did not,

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<sup>29</sup> *Ibid.* at 127.

<sup>30</sup> FORD, *op. cit.* *supra* note 1, at 44.

<sup>31</sup> See Farrand, *The First Hayburn Case, 1792* (1908) 13 AM. HIST. REV. 281-285.

<sup>32</sup> *Ibid.*

however, ask the courts to pronounce them void, but turned to the states for redress. James Madison drafted resolutions which were passed by the state of Virginia. He asserted that the powers of Congress were limited by the Constitution and "that, in case of a deliberate, palpable, and dangerous exercise of other powers not granted by the said compact, the States, who are parties thereto, have the right and are in duty bound to interpose for arresting the progress of the evil, and for maintaining within their respective limits the authorities, rights, and liberties appertaining to them."<sup>33</sup> Jefferson, who drafted the resolutions passed by Kentucky, went even further and asserted that states had the right to nullify unconstitutional laws enacted by Congress. These contentions were plausible enough, for, since the states had reserved all powers not delegated to the national government, it followed that a usurpation of power by Congress must be at the expense of the states. Such a remedy, however, could not be effective unless backed by force, but it is interesting to note that Madison adhered to his original contention that states were the proper safeguard against the operation of unconstitutional laws.

We have now arrived at the point from which we started. We may ask what the intentions of the Federal Convention were, but it seems to be impossible for any one to answer with certainty. My own belief is that many of the members did not consider the problem at all; that others had a vague notion that the Constitution itself, the states, or popular indignation, would keep the national legislature within proper bounds; and that a few members may have foreseen that the courts must decline to enforce laws which they thought to be unconstitutional. Whatever the intention of the Convention may have been, I believe that it was both inevitable and desirable that the courts should have assumed this function. There was no feasible way by which the people could apply a corrective; and if the states were to decide, there might conceivably have been as many decisions on a given point as there were states in the Union. Court decision, I believe, was inevitable, because doubtful questions are taken to courts, and, under our system of a written constitution, the judges could not ignore indefinitely the question of constitutionality. At any rate, the Supreme Court assumed the function in 1803, and has been exercising it ever since. It has the merit of locating final judgment in a single tribunal which is supposed to be both independent and impartial. On the other hand, neither inevitability nor desirability is sufficient to prove original intention. That subject still affords opportunity for mental gymnastics.

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<sup>33</sup> MACDONALD, *SELECTED DOCUMENTS* (1898) 156.