

## DISTURBING THE BALANCE

THOMAS RAEBURN WHITE †

In his message to Congress of January 3, 1937, the President said:

“The carrying out of the laws of the land as enacted by the Congress requires protection until final adjudication by the highest tribunal of the land. The Congress has the right and can find the means to protect its own prerogatives.”<sup>1</sup>

This statement standing alone might reasonably be construed to indicate an intention or desire on the part of the President to prevent interference by judicial action with the enforcement of laws passed by Congress, even though unconstitutional, until a final adjudication by the Supreme Court. In the light of his more recent proposals, however, it is apparent that the President had in mind the final action of the Supreme Court itself as being an undue interference with federal legislation, and meant to suggest that Congress should take steps, as he put it, “to protect its own prerogatives.”

This brings to the fore the question of the extent of the power of Congress under the Constitution to limit or interfere with the jurisdiction and power of the federal courts, and especially of the Supreme Court, to pass upon the constitutionality of acts of Congress.

The relevant provisions of the Constitution are as follows: “The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.”<sup>2</sup> “The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States and . . .”<sup>3</sup> to other cases not now material. And, after providing that in certain cases the Supreme Court shall have original jurisdiction, “In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.”<sup>4</sup>

How far can Congress go in depriving the courts of jurisdiction in constitutional cases? It may be considered to be settled law that Congress has full power over the inferior courts of the United States, in the sense

---

† B. L., 1896, LL. D., 1935, Earlham College; LL. B., 1899, University of Pennsylvania; member of the Philadelphia bar; author of COMMENTARIES ON THE CONSTITUTION OF PENNSYLVANIA (1907); *Constitutional Protection of Liberty of Contract: Does it Still Exist?* (1935) 83 U. OF PA. L. REV. 425.

1. N. Y. Times, Jan. 4, 1937, p. 8, col. 7.

2. U. S. CONST. Art. III, § 1.

3. *Id.* at § 2 (1).

4. *Id.* at § 2 (2).

that it can deprive them of jurisdiction of cases or classes of cases<sup>5</sup> or may destroy them altogether by repealing the acts providing for their establishment.<sup>6</sup>

However, while Congress could vest exclusive jurisdiction of constitutional questions in the federal courts,<sup>7</sup> it could not prevent state tribunals from passing on such questions if there were no federal courts competent to do so. If a citizen were injured by the attempted enforcement of an unconstitutional act, the due process clause would entitle him to the protection of *some* court, and if there were no federal courts empowered to hear his case, he could resort to the state courts.<sup>8</sup> Moreover, if an act of Congress could prohibit the state as well as the federal courts from exercising any jurisdiction in cases involving constitutional issues, it would, for all practical purposes, preclude enforcement of federal statutes, judicial action being obviously necessary to the construction, application and enforcement of any statute. It therefore seems clear that Congress could not deprive a citizen altogether of the right to have constitutional issues judicially determined.

However, the real question which becomes of special interest in the light of various bills recently introduced in Congress<sup>9</sup> is the extent to which Congress can constitutionally interfere with the appellate jurisdiction of the Supreme Court. It appears to be settled by decisions of the Court itself that Congress has the power to deprive it of appellate jurisdiction in cases or classes of cases.<sup>10</sup>

5. *Assessors v. Osborne*, 9 Wall. 567 (U. S. 1870); see *Home Life Insurance Co. v. Dunn*, 19 Wall. 214, 226 (U. S. 1873).

6. *Cf. Ex parte United States*, 226 U. S. 420 (1913).

7. This is a necessary implication of the principle that Congress may provide for the removal of a suit begun in a state court, where a federal question is involved. *Home Life Insurance Co. v. Dunn*, 19 Wall. 214 (U. S. 1873); *Railroad Co. v. Mississippi*, 102 U. S. 135 (1880).

8. That judicial process may be a requisite of due process of law where constitutional rights are involved is established by *Smyth v. Ames*, 169 U. S. 466 (1898); *Ex parte Young*, 209 U. S. 123 (1908).

Indeed, where the constitutionality of an act's application depends on facts, it has been strongly intimated that a judicial determination of these facts is essential. *Cf. Crowell v. Benson*, 285 U. S. 22 (1932). Apparently, however, this decision relied less on the due process clause than on the principle that only "courts" may exercise judicial power. Compare the language of Hughes, J., *id.* at 56, with that of Brandeis, J., dissenting, *id.* at 87. The implications of the decision for administrative law are carefully analyzed in Dickinson, *Crowell v. Benson: Judicial Review of Administrative Determinations of "Constitutional Fact"* (1932) 80 U. OF PA. L. REV. 1055.

9. H. R. REP. NOS. 7997 (requires majority of 7), 8054 (majority of 7), 8100 (three-fourths majority), 8123 (three-fourths majority), 8168 (unanimous), 74th Cong., 1st Sess. (1935); H. J. RES. NO. 301, 74th Cong., 1st Sess. (1935) (to eliminate all constitutional review); H. R. REP. NOS. 9478 (to eliminate all constitutional review), 10196 (majority of 7), 74th Cong., 2d Sess. (1936); S. J. RES. NO. 149, 74th Cong., 2d Sess. (1936) (two-thirds majority).

10. *Wiscart v. D'Auchy*, 3 Dall. 321 (U. S. 1796); *Durousseau v. United States*, 6 Cranch 307 (U. S. 1810); *Ex parte McCardle*, 7 Wall. 506 (U. S. 1868); *American Construction Co. v. Jacksonville Ry.*, 148 U. S. 372 (1893); Albertsworth, *The Mirage of Constitutionalism* (1935) 29 ILL. L. REV. 608, 625; Haines, *Judicial Review of Acts of Congress and*

There remains, however, a further question which is raised by some of the bills now pending—whether Congress can constitutionally prohibit the Supreme Court from holding any act of Congress to be unconstitu-

*the Need for Constitutional Reform* (1936) 45 YALE L. REV. 816, 850; Lewinson, *Limiting Judicial Review by Act of Congress* (1935) 23 CALIF. L. REV. 591, 594; Martig, *Congress and the Appellate Jurisdiction of the Supreme Court* (1936) 34 MICH. L. REV. 650, 660. Although the cases, some of which are cited above, appear to have settled the question that Congress may deprive the Supreme Court of its appellate jurisdiction in whole or in part, there is room for speculation as to whether the framers of the Convention really intended this.

There are several references in the records of the Federal Convention to the jurisdiction of the federal courts. It was early suggested that there must be one supreme tribunal and that the national legislature should be empowered to appoint inferior tribunals; the first reference to the jurisdiction of the "national judiciary" did not distinguish between the Supreme and inferior courts; it was proposed that the jurisdiction should extend to cases respecting the collection of national revenue, impeachment of national officers, "and questions which involve the national peace and harmony." See I FARRAND, THE RECORDS OF THE FEDERAL CONVENTION (1911) 231, 237, 238. Madison reports a resolution of June 15 (1 *id.* at 244) which seems to suggest that the federal courts should have very little original jurisdiction, but should have a broader jurisdiction by way of appeals, the reference apparently being to appeals from the state courts, not from a lower federal court to a higher court. This jurisdiction was somewhat elaborated when the matter came up again in the middle of July (2 *id.* at 39, 46) but the only change was to make certain that the jurisdiction extended to all cases of the classes mentioned, there still being no distinction between the upper and the lower federal courts. The Committee of Detail made slight verbal changes in this resolution (2 *id.* at 132), but no change in substance. Later, in the Committee of Detail, a distinction between the jurisdiction of the "supreme tribunal" and the lower federal courts was made (2 *id.* at 146, 147) and it was for the first time suggested that it might be within the power of the national legislature to assign jurisdiction as between the upper and the lower tribunals (2 *id.* at 173, 186).

When this section next came before the Convention for discussion, it was moved and seconded that original jurisdiction should be left in the courts of the several states in all cases except where the Supreme Court had original jurisdiction "with appeal both as to Law and fact to the courts of the United States with such exceptions and under such regulations as the Legislatures shall make" (2 *id.* at 424). This motion, evidently intended to protect the jurisdiction of the State Courts, especially in matters of fact, was withdrawn, but it appears to be the genesis of the clause which finally appears in Article III, Section 2 of the Constitution, which was immediately adopted, after amendment to include the words of the resolution just withdrawn, substantially in the form in which it now appears in the Constitution (2 *id.* at 424). In connection with this motion there was some discussion as to whether the appellate jurisdiction of the Supreme Court was meant to include questions of fact as well as law (2 *id.* at 431).

In a plan for the judiciary found among Mason's papers, it was proposed that the Supreme Court should have appellate jurisdiction as to law only in all cases, but that in cases of equity and admiralty it should have jurisdiction both as to law and fact (2 *id.* at 432, 433). Hamilton's plan provided for no exceptions to the appellate jurisdiction of the Supreme Court except as contained in the Constitution itself (3 *id.* at 626). The inclusion of questions of fact in the jurisdiction of the federal courts on appeal, and especially of the Supreme Court, was a sore point with some of the members of the Convention (see, for example, remarks of Luther Martin, 3 *id.* at 222, 287), and it may be that the exceptions which Congress could make were intended to be limited to appeals on questions of fact. It has been noted above that the first appearance of the clause which afterwards became incorporated in the Constitution on this point was in connection with a discussion of appeals from the state courts to the federal judiciary, and provided that the exceptions as to cases in which there could be appeals, both as to law and fact, should be decided by the legislatures of the various states.

Under these circumstances, it leaves the matter somewhat doubtful whether the Convention really intended, after vesting all of the judicial power of the United States in the federal courts, to permit Congress so large a control over the jurisdiction as to enable it to abolish the inferior jurisdiction entirely and withhold appellate jurisdiction from the Supreme Court except in a very limited class of cases. It is impossible to explain the case of *Abelman v. Booth*, 21 How. 506 (U. S. 1858), except on the assumption that the Supreme Court then believed that it had full appellate jurisdiction under the Constitution in all cases arising under the Constitution and laws of the United States. It was said in that case (at page 521)

tional,<sup>11</sup> or, if it cannot do that, whether it can at least require a specified majority of the Court to vote against the validity of an act of Congress before it can be held void.<sup>12</sup> In this connection, a distinction must be drawn between the power of Congress to deprive the Supreme Court of appellate jurisdiction of cases or classes of cases, and its power to interfere with the action of the Court in any case of which it has jurisdiction. Congress may give or withhold jurisdiction over a case or a class of cases, but it seems fundamental that if jurisdiction in a particular case is granted to the courts, they have full judicial power over that case, and there can be no interference with the manner in which they exercise it, not only because they have the judicial power but because no other department has *any* judicial power, all of it having been vested in the courts.

In the early case of *Martin v. Hunter's Lessee*<sup>13</sup> the question under discussion was whether the Court of Appeals of the State of Virginia was bound to obey a mandate of the Supreme Court of the United States. It was argued that the Constitution did not clearly vest jurisdiction in the Supreme Court to entertain appeals from the state courts. In this connection Mr. Justice Story said:

"But even admitting that the language of the Constitution is not mandatory and that Congress may constitutionally omit to vest judicial power in courts of the United States, it cannot be denied that when it is vested it may be exercised to the utmost constitutional extent."<sup>14</sup>

It may be suggested that the case of *The Francis Wright*<sup>15</sup> sustains the proposition that the Court might be forbidden to pass on certain questions, even in a case of which it has jurisdiction. In this case the Act of

---

that the Supreme Court was ". . . erected, and the powers of which we have spoken conferred upon it, not by the Federal Government, but by the people of the States, who formed and adopted that Government, and conferred upon it all the powers, legislative, executive, and judicial, which it now possesses. And in order to secure its independence, and enable it faithfully and firmly to perform its duty, it engrafted it upon the Constitution itself, and declared that this court should have appellate power in all cases arising under the Constitution and laws of the United States."

It would seem as if the court then had in mind a possible construction of the Constitution, that the Supreme Court has full appellate jurisdiction in all matters of law, and that the clause reading "with such exceptions and under such regulations as the Congress shall make" has reference only to cases in which questions of both law and fact are to be considered. On this theory the Supreme Court would have full appellate jurisdiction in all matters of law, but its jurisdiction in matters both of law and fact would be subject to such exceptions as Congress might make.

It is also interesting to note that it was proposed to insert in this article a clause reading "in all the other cases before mentioned, the judicial power shall be exercised in such manner as the legislature shall direct", but that this motion was defeated (2 *id.* at 425).

11. E. g., H. R. REP. No. 9478, 74th Cong., 2nd Sess. (1936).

12. E. g., H. R. REP. No. 10196, 74th Cong., 2nd Sess. (1936); S. J. RES. No. 149, 74th Cong., 2nd Sess. (1936).

13. 1 Wheat. 304 (U. S. 1816).

14. *Id.* at 337.

15. 105 U. S. 381 (1881).

February 16, 1875,<sup>16</sup> limiting the appellate jurisdiction of the Supreme Court in admiralty cases to questions of law, was held constitutional. The effect of this decision, of course, was that findings of fact by the court below in admiralty cases were final, the review by the Supreme Court being limited to errors of law. In this connection the Court said:

“Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not. To our minds it is no more unconstitutional to provide that issues of fact shall not be re-tried in any case, than that neither issues of law nor fact shall be re-tried in cases where the value of the matter in dispute is less than \$5,000.”<sup>17</sup>

The first sentence quoted above might lead to the inference that certain *questions* could be withheld from consideration by the Supreme Court when deciding cases appealed to it. This sentence, however, must be read in connection with the case before the Court, and, so read, it clearly means that the appellate jurisdiction of the Supreme Court may be limited to an examination of questions of law.

This by no means carries us to the conclusion that Congress could constitutionally forbid the Court to consider constitutional questions in deciding cases of which they do have jurisdiction in matters of law. *Marbury v. Madison*<sup>18</sup> is conclusive on this point. When any case is brought before the Court, it cannot be conceived that it is not its duty to look into the Constitution to determine the proper decision. A law forbidding the Court to rule on constitutional questions in cases of which it has jurisdiction would clearly be an illegal attempt by one department of government to interfere with the proper discharge of its duty by a coordinate department—in this instance an attempted invasion of the judicial department by the legislative department which has no judicial power and cannot function in that field.<sup>19</sup>

It might, however, be suggested that Congress could accomplish the same result in a different way by depriving the Court of appellate jurisdiction in all cases in which it found unconstitutional a law involved in the case. This would be a method of beating the devil around the bush, which quite certainly could not succeed. In *United States v. Klein*,<sup>20</sup> an act of

16. 18 STAT. 315 (1875); compare this statute in its present form in 28 U. S. C. A. § 771 (1928).

17. 105 U. S. 381, 386 (1881).

18. 1 Cranch 137 (U. S. 1803).

19. *Hayburn's Case*, 2 Dall. 408 (U. S. 1792); *United States v. Ferreira*, 13 How. 40 (U. S. 1851); *Gordon v. United States*, 117 U. S. 697 (1864); *United States v. Klein*, 13 Wall. 128 (U. S. 1871).

20. 13 Wall. 128 (U. S. 1871).

Congress was under consideration which undertook to oust the jurisdiction of the court in cases before it if certain facts were proven. The court denied the power of Congress to do this, saying:

"We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. . . . Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it? We think not; . . .

"We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.

"Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the Court of Claims on appeal. Can it prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself."<sup>21</sup>

If it were possible for Congress to pass a law which would deprive the Supreme Court of jurisdiction in constitutional cases, the practical result would be such that it would probably not be attempted. If jurisdiction to decide the validity of acts of Congress were left in the inferior federal courts, there might be, and probably would be, contrary decisions in different jurisdictions, so that the rights of litigants would depend upon the districts in which they happened to reside. If the jurisdiction should be withdrawn altogether from the federal courts by act of Congress, state courts would necessarily have jurisdiction of cases involving the constitutionality of federal statutes for the reasons already given,<sup>22</sup> and the diversity of opinion would perhaps be even greater than if jurisdiction were left in the inferior federal courts. It is, therefore, highly improbable that any such arrangement as this would be attempted even if its constitutionality could be sustained.

Proposals which have been made at various times, many of which are now pending, to the effect that Congress should provide that the Supreme Court can hold a law unconstitutional only by a specified majority,<sup>23</sup> should logically meet the same fate as the proposal to deprive the court altogether of the power to pass upon constitutional questions. There is no doubt that courts in common law countries have from the earliest times acted as a unit by a majority of the quorum taking part in the decision.<sup>24</sup> It is difficult to

---

21. *Id.* at 146.

22. See *supra* note 8.

23. See *supra* note 12; Culp, *A Survey of the Proposals to Limit or Deny the Power of Judicial Review by the Supreme Court of the United States* (1929) 4 *IND. L. J.* 386.

24. See WARREN, *CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT* (1935) 210. That the original justices of the Supreme Court considered the judgment of a majority of justices to be that of the Court is indicated by the entry of a decision on a three to two vote

escape the conclusion that the method whereby a court arrives at its decision is an exercise of a judicial function; certainly it is an exercise of judicial power.<sup>25</sup> As *all* of the judicial power of the United States is vested in the federal courts, it is not perceived how the legislative department could constitutionally direct the Supreme Court as to the manner in which it should exercise this power.

The difficulty of applying such a rule in practice, even if it were constitutional, becomes apparent on examination. The proposal most frequently made is that an act may not be held unconstitutional unless seven of the nine judges vote in favor of the decision. This would, in effect, mean that a law would be sustained although six of the nine judges believed it to be null and void. If the judges of the lower court had unanimously held a law unconstitutional and an appeal were taken to the Supreme Court, there would on this arrangement be a reversal, although six judges of the nine believed the lower courts were correct. But little weight would be given to a decision of this nature concurred in by only three out of the nine judges. To what extent executives and even lower courts would feel bound by it is problematical.

The principal argument in favor of some such law is the supposed unfortunate effect of five to four decisions of the Supreme Court, where the deciding vote is cast by only one judge. This difficulty would not be avoided by the proposed plan, for quite obviously the vote of one judge in a case where the court was divided six to two would decide the case. A rule of this kind has been introduced by constitutional amendment in several states, and the operation thereof has been anything but satisfactory.<sup>26</sup>

It thus seems clear that nothing practicable can be done by Congress to limit or interfere with the operations of the Supreme Court in passing on the constitutionality of acts of Congress. It cannot prevent the constitutionality of such acts from being passed upon by some court, and it cannot destroy the appellate jurisdiction of the Supreme Court in cases which may involve constitutional questions without bringing about a chaotic condition of conflicting decisions which would be intolerable.

---

in *Georgia v. Brailsford*, 2 Dall. 402, 415 (U. S. 1792). In *Boyle v. Zacherie & Turner*, 6 Pet. 635 (U. S. 1832) the Court stated that a previous four to three decision [*Ogden v. Saunders*, 12 Wheat. 213 (U. S. 1827)] was the settled law of the court. See also *Gordon v. United States*, 117 U. S. 697 (1864), wherein it is stated at p. 701: "The jurisdiction and judicial power being vested in this court, it proceeded to prescribe its process and regulate its proceedings according to its own judgment, and Congress has never attempted to control or interfere with the action of the court in this respect." From the language which follows, it is clearly inferable that no such interference would be permitted. Compare *Hertz v. Woodman*, 218 U. S. 205 (1910), where it is stated that a judgment by an evenly divided court can only affirm the lower court and is not a decision to which the rule of *stare decisis* applies.

25. See remarks of Charles Evans Hughes in a lecture delivered at Columbia University in 1928, which are reprinted in NICHOLS, *CONGRESS OR THE SUPREME COURT* (1935) 393, 394.

26. Maddox, *Minority Control of Court Decisions in Ohio* (1930) 24 AM. POL. SCI. REV. 638; WARREN, *op. cit. supra* note 24, at 186 *et seq.*

The only recourse left to the executive and legislative departments, therefore (in the absence of constitutional amendment), is to adopt temporary expedients to force the judiciary department by some indirect means to make decisions in accordance with the present desires of the executive and the Congress. This is the nature of the proposal now put forward by the President to increase the number of judges of the Supreme Court from nine to fifteen, with the purpose (no longer disavowed) of changing its opinion on the question of the validity of certain legislation recently enacted or now proposed.

Unfortunately, there can be no constitutional objection to this proposal. It has long been recognized as a weakness in our constitutional system that the Constitution does not provide the number of judges which should constitute the Supreme Court.<sup>27</sup> It is, therefore, always within the power of the party which controls both the executive and legislative departments to supply additional judges to control the prevailing opinion in the Court at any given time. Such action, of course, amounts to a direct assault upon the judicial department by the other two departments, which have found some action of theirs thwarted because found by the court to be in violation of the will of the people as expressed in the Constitution.

In defense of this proposal, it has been said that changes in the number of the Court have been made before without serious effect upon its reputation or the integrity of its decisions. Changes have been made but never under circumstances such as exist at present, nor of so radical a nature. The increases which were made in the early history of the Court were required by its expanding work, particularly when its judges were "on circuit",<sup>28</sup> and it was not until reconstruction days that we find a change in the number of the court made avowedly for political reasons.

During the administration of President Johnson an act was passed which provided that vacancies in the court (which then consisted of ten judges) should not be filled until the number was reduced to seven.<sup>29</sup> This

27. It is interesting to note that there were some members of the Convention who did at one time think it was important to fix the number of justices in the Supreme Court, although afterwards the matter appears to have been lost sight of. Mr. Hamilton, during the course of his speech on June 18, submitted a sketch of the Constitution, containing the following sentence: "The Supreme Judicial authority to be vested in \_\_\_\_\_ Judges to hold their offices during good behaviour with adequate and permanent salaries." 1 FARRAND, *op. cit. supra* note 10, at 292. Hamilton later filled in the blank contained in one of the original drafts of this "sketch" with the number "12". 3 *id.* at 618.

In a later plan prepared by Hamilton, but never submitted to the Convention, this sentence occurs: "The supreme Judicial authority, except in the cases otherwise provided for in this Constitution, shall be vested in a Court to be called the SUPREME COURT to consist of not less than six or more than twelve Judges." 3 *id.* at 619. And a draft found among the Wilson papers, evidently believed to be an outline of the Pinckney plan, contained the following: "The Court shall consist of \_\_\_\_\_ Judges to be appointed during good Behaviour." 2 *id.* at 136.

28. See I WARREN, *THE SUPREME COURT IN THE UNITED STATES HISTORY* (2d ed. 1926) 682 *et seq.*

29. 14 STAT. 209 (1866).

was done in order to prevent President Johnson from filling a vacancy which had already occurred and another which it was thought might happen in the near future.<sup>30</sup>

During the administration of President Grant, the court was again increased to nine, making one vacancy.<sup>31</sup> After one or two ineffectual attempts to fill the vacancy, Grant finally did fill it on the very day that the first legal tender case, *Hepburn v. Griswold*,<sup>32</sup> was decided.<sup>33</sup> He also at the same time appointed another justice to take the place of Justice Grier, who had resigned.<sup>34</sup> It has been said<sup>35</sup> that this was done by Grant with the object of securing a reversal of *Hepburn v. Griswold*, which afterwards did occur.<sup>36</sup> It is scarcely to be doubted that President Grant had reason to believe that the two justices whom he named at that time would be favorable to the validity of the legal tender act, although there is no conclusive evidence that when these appointments were actually sent to the Senate, President Grant had any foreknowledge of what the decision would be.<sup>37</sup>

However, a President is not to be criticized for filling vacancies which occur naturally with qualified lawyers whom he may have reason to believe would belong to the same school of thought as the appointing power. This is one way, and an entirely proper way, in which the opinions of the Supreme Court slowly change to bring its decisions more in accord with the needs and wishes of the times. It is clear, however, that suddenly to increase the membership of the Court from nine to fifteen, with such purpose in view, is an attack on the integrity and independence of the court which is not to be defended.

James Bryce, writing fifty years ago, foresaw that exactly such a situation might arise:

“Suppose a Congress and President bent on doing something which the Supreme court deems contrary to the Constitution. They pass a statute. A case arises under it. The court on the hearing of the case unanimously declares the statute to be null, as being beyond the powers of Congress. Congress forthwith passes and the President signs another statute more than doubling the number of the justices. The President appoints to the new justiceships men who are pledged to hold the former statute constitutional. The Senate confirms his appointments. Another case raising the validity of the disputed statute is brought up to the court. The new justices outvote the old ones: the

30. See Martig, *supra* note 10, at 653, n. 9.

31. 16 STAT. 44 (1869), 28 U. S. C. A. § 321 (1928); see 2 WARREN, *op. cit. supra* note 28, at 501. Although the court had been reduced by statute, *supra* note 29, to seven, there remained eight justices from the original ten.

32. 8 Wall. 603 (U. S. 1870).

33. 2 WARREN, *op. cit. supra* note 28, at 516.

34. *Ibid.*

35. See *id.* at 517.

36. Legal Tender Cases, 12 Wall. 457 (U. S. 1870).

37. 2 WARREN, *op. cit. supra* note 28, at 517.

statute is held valid: the security provided for the protection of the Constitution is gone like a morning mist.”<sup>38</sup>

He then added:

“What prevents such assaults on the fundamental law—assaults which, however immoral in substance, would be perfectly legal in form? Not the mechanism of government, for all its checks have been evaded. Not the conscience of the legislature and the President, for heated combatants seldom shrink from justifying the means by the end. Nothing but the fear of the people whose broad good sense and attachment to the great principles of the Constitution may generally be relied on to condemn such a perversion of its forms.”<sup>39</sup>

Another method of attacking the judicial department so as to accomplish the temporary expedient of changing its decisions would be for Congress to establish a new national court of appeals, which could be given power and jurisdiction to hear all cases of which the Supreme Court now has appellate jurisdiction, leaving to it only its original jurisdiction. It has already been noted that Congress has power to make exceptions to the appellate jurisdiction of the Supreme Court so long as it does not undertake to interfere with the exercise of its judicial functions, and under this power Congress could, after establishing a national court of appeals, deprive the Supreme Court of all appellate jurisdiction,<sup>40</sup> or it could accomplish the same result by transferring to the new court the appellate jurisdiction of the Supreme Court so far as it relates to cases which involve controverted constitutional questions such as are now agitating the nation, but leaving its jurisdiction otherwise undisturbed.<sup>41</sup> This expedient would be a frontal attack upon the existing court, which would no doubt meet with great opposition from those who believe that the Supreme Court has well discharged its functions of guarding the Constitution against attack, but it would be a more frank approach to the issue than to attempt to weaken the Court by diluting it with judges who would vote to sustain legislation now believed by the Court to be unconstitutional.

The proposed increase in the number of judges of the Supreme Court, (or the establishment of a national court of appeals), should be recognized

38. 1 BRYCE, AMERICAN COMMONWEALTH (3d ed. 1895) 276.

39. *Ibid.*

40. See *supra* note 10.

41. The only possible constitutional defect in such a plan might arise in regard to the exercise of appellate jurisdiction over decisions of the highest state courts. However, since Congress may vest complete and exclusive judicial power over federal questions in federal courts (see *supra* note 3), and since it may apparently place appellate jurisdiction in lower federal courts [see *Martin v. Hunter's Lessee*, 1 Wheat. 304, 337 (U. S. 1816)], there would appear to be no available objection to such action.

In any event, Congress could provide for the removal of all cases involving a constitutional question to federal courts of first instance [*Home Life Insurance Co. v. Dunn*, 19 Wall. 214 (U. S. 1873)], and an appeal from their decisions to the new court of appeals could obviously be provided for.

as an attack upon the integrity of the judicial department, in the effort so to change its personnel as to bring about decisions which, while perhaps in accord with the views of the executive and legislative departments as to their constitutional power, are not in accord with the considered judgment of the judicial department, consisting of judges appointed not for any particular purpose or upon any particular occasion but naturally as events have made vacancies in its membership. The success of either expedient would destroy public confidence in the judicial department and would so disturb the balance of power among the three great departments that it might never be regained.

The power of judicial review, although even yet occasionally attacked on the ground that it involves usurpation of power by the judges,<sup>42</sup> is an integral part of our constitutional system, which is built upon the principle early advanced by Thomas Jefferson in connection with the framing of the constitution of Virginia,<sup>43</sup> that in every free government all governmental power should be divided into three great divisions, legislative, executive, and judicial, that each department should be a check upon the others, and that none should be permitted to interfere with any other.<sup>44</sup> The maintenance of the integrity and independence of the judicial department is essential to the continued existence of our form of government. If it can be coerced by the executive and legislative departments, it will cease to function as the guardian of the Constitution and the absorption of power by the executive and legislative departments will continue until the judicial department becomes as powerless in America as it is in some other countries of the world.

Our courts now have "a great and stately jurisdiction"<sup>45</sup> to protect and enforce the will of the people as laid down in the fundamental law. If assaults upon them succeed in undermining their influence or destroying public confidence in the integrity of their decisions, it will mean much more than the mere accomplishment of a political end, however worthy in purpose; it will mean the passing of an era, for such assaults once successfully made will be repeated and constitutional government as we have known it will cease to exist. Jefferson, Madison and Adams agreed that the accumulation of powers, legislative, executive and judicial, in the same hands was the "very definition of tyranny", and that by balancing the powers of one department against the other could "the efforts of human nature toward tyranny alone be checked and restrained and any degree of freedom pre-

---

42. See NICHOLS, CONGRESS OR THE SUPREME COURT (1935) 93, 306.

43. See 2 LISCOMB, WRITINGS OF THOMAS JEFFERSON (Mem. ed. 1903) 283.

44. See an interesting discussion of this point in an article by Senator John K. Shields, printed in 65 CONG. REC. 247 (1923), and reprinted in NICHOLS, *op. cit. supra* note 42, at 144 *et seq.*

45. See THAYER, LEGAL ESSAYS (1908) 32.

served.”<sup>46</sup> In this respect there was full agreement by Hamilton, who said in the *Federalist*:

“I agree that ‘there is no liberty if the powers of judging be not separated from the legislative and executive powers.’”<sup>47</sup>

The Massachusetts constitution of 1780 provides

“In the government of this Commonwealth the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise legislative and judicial powers, or either of them; the judicial shall never exercise legislative and executive powers, or either of them; to the end that it may be a government of laws not of men.”<sup>48</sup>

It cannot be doubted that if, even by temporary expedients, the executive and legislative departments override the judicial, and the balance among the three great departments is disturbed, “government of laws and not of men” will be seriously endangered.

---

46. NICHOLS, *op. cit. supra* note 42, at 145.

47. THE FEDERALIST (1831) No. 78, at 386.

48. See NICHOLS, *op. cit. supra* note 42, at 146.