The Relations of Congress and the Supreme Court.

A Thesis for the degree of M.L.
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The Development of the Mutual Relations of the Legislative and Judicial Functions in United States Government.

The fact that at the time of the establishment of our present form of government there did not exist, and had not existed, in any country, a national judiciary separated from the other powers of state, and coordinate with them, has apparently given rise to belief that the separation and coordination of the legislative and judicial functions in the American system, as established by the Constitution of 1787, is something wholly unique in the history of governments,
something entirely without precedent, the happy conjunction of a number of wise men sitting in convention at Philadelphia.

Now it would be strange, indeed, if a number of men, however wise, should be able after a few days deliberation to hit upon a plan of government so complex as is ours, so well adapted to the whole life of a mighty nation, then only in its simplicity, and so powerful and certain, yet so just, and so great, in its workings, unless there had been a preceding course of events or a progression of ideas tending toward this grand result. It would be little short of a miracle; for successful forms of government do not originate in mere
Inspiration, more are they to be derived from any amount of abstract reasoning. They are products of growth, of centuries of evolution, keeping pace with the slow development of man and society, and every step, every forward movement, is the result of past experience and established ideas.

It would therefore have been most remarkable if the legislative and judicial departments of our government had been established with mutual relations wholly new and original. It is hardly probable that the three fundamental powers of government would have been separated and placed on an equal footing had the idea of such division not been already more or less developed. It
is still more unlikely that the judicial function should not only have been vested in a separate and coordinate member of government, but also have been given the power of setting aside official acts of legislation and of acting as a check to limit the dominion of the law creating power, unless there had been some sort of precedent leading up to and serving as a guide in the establishment of this new order of things. It was a change entirely too radical to have been conceived and established in a day.

It is true, however, that there is not and never has been, in any other country, a system of government in which the judiciary is permitted to disregard certain
acts of the national legislature, and, in effect, to declare them null and void. Such judicial prerogative can exist only in a government having a written constitution, and a separation of the governmental functions; and while to the American and to the strictest observance of constitutional provisions, it seems absolutely essential to the preservation of the supreme law of the constitution, and hence to the rights and liberties of the people, that to some independent department should be intrusted the power of restraining the legislative from overstepping its proper bounds, yet it is the United States alone of all the monarchy nations now living under written constitutions that has conferred this
power upon its highest tribunal, the Supreme Court.

A glance at the status of the judicial element in the most advanced govern-ments of Europe will show that in none of them are there given anything like the ample powers which have been vested in our federal judiciary. In the Swiss Republic, where we might expect, perhaps, to find the nearest approach to our own system, the Federal Tribunal is absolutely powerless as against the federal legislature, and must enforce every law it may choose to pass, however unwise or even unconstitutional. The Tribunal may, however, may submit its opinions on any can-
Institutional questions to which it may take exception, to the people for their approval or rejection; but the final and incontestable judgments of the national court, to which we are accustomed, is then something wholly unknown. In France, a measure which has passed the Senate and the Chamber of Deputies, is a law whose validity the Court of Cassation has no power to question. In Spain, the highest judiciary seemingly occupies an exalted position, since it may try the highest officials in the government, yet a royal decree is completely beyond its reach. In Germany, the Supreme Court cannot set aside or disregard any law which has once passed the Federal Council.
and the Imperial Diet. In Belgium, while the jurists have maintained for a
great many years that an unconstitutional
act of parliament may be declared of
no effect, yet the question seems
never to have been put to the test and
legislative acts have continued to be
enforced as if the sovereignty of par-
liament were absolute. While in
Great Britain, the supremacy of Parliament
and the unquestionable legality of its
acts is one of the most firmly estab-
lished principles of English government.
And so we might continue
our analysis of foreign governments,
and should find, in all of them,
the judicial function holding a
position subordinate to that of the legislative, and nowhere enjoying either the freedom or the power which is allowed the Supreme Court of the United States. This element of government in the foreign states appears to the American to be especially defective, and we can never cease to wonder that the liberties of the subjects suffer so little. For the only checks upon the legislative powers appear to be those of public opinion, and a general regard for which clusters in the constitutions, and declarations of rights, as may have been, from time to time conceded to the people. Still, with all these uncertain means of restraining improper
legislation, and with almost no provisions by which popular rights and constitutional laws may be protected, it cannot be denied that those governments were, on the whole, successfully and satisfactorily administered.

But while there was no government after which the American system could have been patterned, the idea which led to its establishment with powers separated and equal, yet mutually interdependent, was by no means original with the writers of the Philadelphia Convention. As far back as the time of the Greek philosophers, at least, the theory of the three divisions of government was in existence. Aristotle, writing more than
time hundred years before the birth of Christ, said; "Now in all states there are three particulars in which the careful legislator ought well to consider what is expedient to each form of government; and if these are in a proper condition, the state cannot necessarily prosper, and according to the variation of each of these, one state will differ from the other. The first of these is the assembly for public affairs; the second the officers of state; and the third, the judicial department." Two and three centuries later it was a subject of discussion among the Romans, notably Cicero and Tacitus, but it was left to Montesquieu to seek out the fundamental truth involved.
in the idea, and to develop more fully the essential principles it contained. Writing perhaps a half century before the Philadelphia Convention, he says, in the eleventh Book of his Esprit des Lois, "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, because apprehensions may arise lest the same monarch or senate should exact tyrannical laws, or execute them in a tyrannical manner. Again there is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary
control; for the judge would be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of everything were the same man, or the same body, whether of the nobles or of the people, were to exercise these three powers: that of enacting laws, that of executing the public resolutions, and that of trying the causes of individuals."

Blackstone says, in his celebrated Commentaries, written about thirty years later, "In all tyrannical governments, the supreme magistracy, or the right both of making and enforcing laws, is vested in the
same man, or in the same body of men, and whenever these two powers are united together, there can be no public liberty. The magistrate may enact tyrannical laws, and execute them in a tyrannical manner, since he is possessed, in quality of dispenser of justice, with all the power which he as legislator thinks proper to give himself. But where the legislative and executive authority are in distinct hands, the former will take care not to intrust the latter with so large a power as may tend to the subversion of its own independence, and therefore the liberty of the subject."

And again, in another part of the same
work, he says, "In this distinct and separate existence of the judicial power in a peculiar body of men, nominated, indeed, by, but not removable at the pleasure of the crown, consists the main preservation of the public liberty; which cannot long subsist in any state unless the administration of common justice be in some degree separated from the legislative and also from the executive power." And, after supporting this declaration with reasons very similar to Montesquieu's, he adds "Nothing, therefore, is more to be avoided, in a free constitution, than limiting the powers of a judge and a minister of state."
The eminent Dr. Paley says, in his work on "Moral and Political Philosophy," which was given to the world a few years before the meeting of the Constitutional Convention, "The first maxim of a free state is that the laws be made by one set of men and administered by another, in other words, that the legislative and judicial characters be kept separate. When these offices are united in the same person or assembly, particular laws are made for particular cases, springing oftentimes from partial incentives, and directed to private ends, whilst they be kept separate, general laws are made by one body of men, without foreseeing whom they may affect, and
when made, they cannot be applied by the other, but then effect whom they will, etc."

These examples are sufficient to show that the idea of separating the three departments of government is old, that it was shoar with age when our constitution was framed, that it had been in existence for at least 2000 years, and had developed into a well established theory of government, tho its practical application was as yet unknown. It will

* [Note. It might be objected, and with some justice, that this leaves out of account the government of Athens, and of Rome after the expulsion of her kings. But it can hardly be said that the distribution of power in those governments was of the same kind as that which we are here contemplating.]
he noticed, however, that the theories of even the most advanced of these writers seemed to contemplate little more than the placing in different bodies of the three principal functions of government. That they had any conception of making the judicial equal with the legislative and competent to overrule its acts does not appear. This is a principle distinctively American, tho' it, too, was a matter of growth and not the product of any one time, place, or occasion. But tho' American, its root may be traced to a beginning in English law and institutions; and to England, therefore, we must first turn in following its history and development.

The history of England is preeminently
a history of the emancipation and enfranchise-
ment of the people, with a corresponding
decline of royal power. The king, from
being law maker, executor, and judge,
gradually lost his prerogatives, while the
people, constantly acquiring new power
and privileges, and tenuously clinging
to every gain, became in time the
real rulers of England. Intricately inter-
woven with this gradual transference of
power, is the history of the growth of
judicial freedom. The judges, dependent
at first for their offices upon the good
will of the king, and answerable to the
king alone, soon rose naturally service-
im their demeanor and extremely timid
in dispensing justice. Later, when the
power of the people began to manifest itself, the courts found themselves compelled to adjust their actions to the demands of two sources of authority—the crown and the people. As the people continued to gain the ascendancy over the king, the courts grew bolder, and were able finally to oppose an effective check to the violent and arbitrary acts of the crown. Thus by degrees the judiciary rose to the level of the executive, but when this unequal had been gained, it found itself still a subordinate branch of government, and such it has remained to this day. Such was the development of English government that to the legislative fell the sovereign power, while
the executive and judicial powers were
forced into inferior positions. And
such positions they must continue to
hold as long as England's present theory
of government shall live.

But the judiciary did not
assume this subordinate position
without a protest. Worse than was
English jurisprudence of prominence has denied
the omnipotence of Parliament and stoutly
maintained that it, too, can act only
in accordance with established law.

Sir Edward Coke, one of the greatest of
England's judges, most vehemently
asserted, in the beginning of the 17th
century, the complete supremacy of
the law, and a century before, Sir
Thomas More had laid his head on the block for holding the same opinions. But the


gem of this doctrine, which from the


crime of England’s government was forced
to lie dormant and fruitless there, is


the germ which, transplanted to the magic


soil of the new world, was to develop


into the American constitutions of today,
in which legislatures, magistrates, judges


and all, were to acknowledge their


subservience to the law, the interpretation


which was to be the peculiar privilege


of the courts.


As might be supposed, the


...(continued on next page)
Britain, differed little from the established order in the mother country. The colonists were Englishmen, bound to the English form of government, and did not, moreover, belong to a class which was likely to originate any very radical improvements in civil institutions, even had they been at liberty to do so. Accordingly the colonial legislature, the Assembly, was made sovereign within the colony, excepting only in so far as appeals lay from it to the king in council. The mutual relations of the three functions underwent some change from time to time, and moreover varied somewhat in the different colonies, the legislative power being said to have
continued as the largest power until
the revolt against England resolved in
a new order of things, while the judi-
ciciary held high for the weakest and least
significant position. The history of
government in the American colonies
is not greatly unlike the history of
government in the parent country—
the growth of power tending constantly to
the advantage of the legislative at the
expense of the executive departments.
The rupture with England necessi-
sitated, of course, some changes in the
administration of affairs of government
within the colonies; but this change
was unequal less than might at first
thought be supposed. Each colony
simply assumed as its own the powers which it had before been compelled to yield to England, and added them to those which it had enjoyed as a dependency; and the legislature became the supreme authority and court of last resort, instead of the English Privy Council as heretofore. Each colony became in effect, and in fact, a separate state*, both politically and governmentally, and the forms which the governments assumed

*Note:—It is not intended that this statement shall settle the much disputed point as to the character and power of the new states. It is simply the expression of the writer's humble opinion, after much study and some thought. If it is desired to investigate the subject further, Story on the Constitution Vol. 1., and Van Nostrand's Constitutional Law may be consulted with profit.
in these separate estates, were, very naturally
the same in all essential particulars. The
colonies, tho' settled at different times and
often under different conditions, by men
differing widely in religion, manners,
and habits of life and thought, were yet
English in character, and in much
the same degree. The people were
accustomed to but one form of
government, were acquainted with but
due legal systems, and iso, naturally
and almost involuntarily, the same
method of administering the necessary
functions of government was adopted
in each colony; and, as has been said
before, this did not especially affect the
relations of the legislative and judicial
functions, but permitted them to retain about the same relative positions as before the independence of the colonies, which positions corresponded very nearly with the established order in England, hence the supremacy of the legislative power. Upon it the judicial was dependent for its privileges and answerable to it for its actions.

Likewise, the formation of a general government under the Articles of Confederation, effected little if any change in these relations. The feature of the federal compact was such that almost no alterations were necessary within the state, while single judicial powers as well
given to the general government, were of an order which the state governments had not had occasion, and, perhaps, were not competent to exercise, since they related only to the settling an appeal, of "all disputes and differences now subsisting or that hereafter may arise between two or more states concerning boundary, jurisdiction, or any other cause whatever." And between the legislative and judicial powers of the Confederation itself the same relations were unavowed. The rank of the judiciary was not advanced. It was not even intrusted to a separate body, but was vested in the Federal Congress, and its functions were exercised by the Congress
This want of an independent judiciary was one of the prominent defects of the government under the Articles of Confederation; and would if itself have been sufficient to produce results embarrassing, if not actually destructive to the union. But it continued a few years longer. There was wanting to give a legal sanctity to the acts of the government, without which no laws can be fully effective. There was no proper power to determine the true import of laws, or to ascertain the scope, meaning, and justice of any legislative enactments whatever. Only the wisdom, learning
and integrity of the men to whom the new government was intrusted could be depended upon for its proper administration. But the Confederation, and unreasonably from other causes, no doubt, was of short duration. Its fall and the constitution of a new government under the Constitution ended the period of the legalized subordination of the judicial power, and started it on a new career in the acquisition of freedom, power, and equality with the other functions of state.

Before we enter upon the history of this new period it may be well to take a swift backward glance to see what we have so far gained,
and to notice a point which it has been thought best to omit until this stage in the development of our theme.

It has been attempted, in the foregoing pages, to trace the progress of some governmental ideas, and the history of their practical application, whenever possible, in order to discover, if possible, the roots of the system by virtue of which our legislature and judiciary came to hold their present structural relations. We have seen that the conception of the division into three powers is comparatively ancient; that it has been in process of development for at least twenty centuries, that in
England it took root, and expanding
more or less slowly, produced a
separation of powers, but with the
judicial branch subordinated to the
legislative function; that as our early
ideas of government were, necessarily
imported from the mother country,
the same inequality in rank of
the legislature and judiciary became
established in America; and that up
to the time of the fall of the Confederation
no official measures had been adopted
which had perceptibly altered these relations.
The legislative was still the dominant
power; the validity of whose acts the
courts had no legal right to question.
But while studying recently
the powers and privileges which, according to legal theory, the legislature and the courts were respectively permitted to enjoy, it thus seems that a most striking inequality existed in their mutual relations. Further investigation shows that the subjection of the courts was not, in fact, so great as we might be led to believe. At first glance it might appear that in transplanting the English system to our soil little change had been effected, and the judicial element had gained little since this period of its existence. But a closer inspection shows that tho it was regarded as a power inferior to the legislature, it had from time to time made some
vigorously and more or less effective protests against this assumption. The same spirit which had prompted Lord Coke to declare that "The Common Law doth control acts of Parliament and adjudge them when against common right to be void," and which had led Hobart and Moore to incur the wrath of Parliament for the sake of judicial liberty—this same spirit had found a home in this country and was manifesting itself in the actions and attitudes of American jurists. This is the spirit which gave rise to the coordination of the legislative and judicial functions in the new government, and which we may therefore consider as directly responsible for the
enamorhisation of the courts, and their elevation to their present exalted position. It is the history of the growth of this spirit which it was thought best to omit until this point, but which we are now prepared to take up.

The fact that during our dependency upon Great Britain the acts both of the colonial courts and the colonial legislatures were subject to review and possible rejection by the Council in England, doubtless did much to restrain American jurists from seeking to enlarge the sphere of the judiciary. As time went on, however, this revisionary power of the English Council ceased to be enforced.
Tho the Council never expressly relinquished the right, it gradually ceased to exercise it, so that after a time it was no longer taken into account by our judges and statesmen in performing the duties of their respective offices. Naturally, as soon as it became reasonably certain that the acts of the courts and the assemblies were no longer liable to suffer from the interference of England, a great stimulus was given to the study of law and the growth of an esprit de corps among the legal profession. Theories as to the place and importance of laws, the jurisdictions of courts, and the relations of legislatures to charters and constitutions began to receive the
attention of the American people, and the effect was a constantly increasing
tendency toward the augmentation of the judicial function.

Owing to the incompleteness of our records of those early times, it is
impossible to discover the very beginnings of the open attempts on the part of our
Jurists to deny the authority of the Legislatures. The first recorded case
which I have been able to find was in Virginia, in 1772. In the case
of Robbins vs Hardaway, Mason argued against the validity of an act which
provided for the sale of the descendants of Indian women as slaves. The act
was contrary to natural right and
justice, he argued, a violation of the duties and obligations which men owe to each other in a state of nature, and therefore void. Before a decision could be reached, it was found that the statute had been repealed. Consequently the court was not compelled to commit itself. The case is interesting as showing that American lawyers were already fully awakened to the possibility of opposing the legislative authority with judicial objections.

In the same state, in 1778, a bill of attainder was passed against a certain outlaw, Josiah Phillips. Shortly after the passage of the act, the outlaw was captured, tried in court, convicted
and executed, in entire disregard of the will of the people.

Two years later, in the Supreme Court of New Jersey, Chief Justice Borden and his associates rendered a decision in which it was asserted that the judiciary had the undoubted right to pronounce upon the constitutionality of laws. This is the case of Holmes v. Walton. Governor Morris, writing to the Pennsylvania legislature, in 1785, refers to this and says: "In New Jersey, the judges pronounced a law unconstitutio-
al and void. Surely no good citizen can wish to see the point decided in the tribunals of Pennsylvania. Such power in judges is dangerous, but unless
it somewhat exists, the time employed in framing a bill of rights and form of government was unevenly thrown away.

The next case illustrating the tendency of the growth of the judiciary was in Virginia, in 1752. The Assembly had, a few years before, passed an act taking the power of pardoning from the governor and transferring it to itself. A case involving this law was brought into the courts, where it was argued that the act of the Assembly was contrary to the intention of the Constitution, and therefore void. When it was objected that whether contrary to the constitution or not, the courts had no other choice than
to apply it, the Chief Justice made the remarkable answer, that "If the whole legislature (an act to be deprecated) should attempt to overstep the bounds prescribed to them by the people, I, in administering the public justice of the country, will meet the restricted powers in any seat in this tribunal, and, pointing to the Constitution will say to them, 'Here is the limit of your authority, and either shall you go but no further.'" The court, it appears, did not decide the point, tho' the report of the case says: "Chancellor Blair, with the rest of the judges, was of the opinion that the court had power to declare any resolution of the legislature or of either
branched of it, to be unconstitutional and void.

Following this was a case in New York, known as Ritzger v. Waddington in 1784, in which an act which authorized actions by owners against those who had occupied their houses under British orders during the British occupation, was held to be unconstitutional and void. The decision created great excitement, and the Assembly passed resolutions in which it was declared that if such principles were upheld "it would render legislatures useless."

Two years later, in 1786, Rhode Island added another to the list of decisions adverse to legislative supremacy.
and in the same year Massachusetts
enacted all other states, and put herself
in record as the first commonwealth
to grant to its courts the power of
setting aside the acts of the legislature.
In providing for the proper enforcement
of the treaty with Great Britain it was
enacted "that the courts of law and
equity within this commonwealth be,
and hereby are directed and required
in all cases and questions coming
before them respectively, and arising
from or touching the said treaty, to
decide and adjudge according to the
tenor, true intent and meaning of the
same, anything in the said acts
or parts of acts to the contrary thereof.
in circumstances notwithstanding.

All the foregoing acts and cases occurred prior to 1787, but early in this same year, the question of the power of the courts to refuse to enforce a law because unconstitutional was elaborately argued and considered in North Carolina so that when the members of the Philadelphia Convention came together, it had been most forcibly brought to the attention of the people in six of the thirteen states—viz.: Virginia, New Jersey, New York, Rhode Island, Massachusetts and North Carolina—and it is not to be supposed that the delegates from the other seven were ignorant of what had been done along this line, for it
had aroused two much discussion and excitement to escape the notice of anyone worthy of a seat in this convention. Knowing this, and being, further, aware of the constant tendency toward the separation of the powers of government into three parts more or less distinct which we have seen was rapidly increasing, and whose history we have already followed up to this point, we can no longer think it surprising that the legislative and judicial powers of the government established under the constitution should have been established as separate and coordinate departments. It was but the natural result of tendencies which had been for a long
time in process of development. However, when the Convention had met and decided that a new plan of government was necessary, the part which the judiciary should play therein, and the exact form which it should have, was by no means clear. The discussions which occurred seem to indicate that in the minds of the framers of the Constitution, the object to be attained by the establishment of a national judiciary was not so much the protection of the law of the Constitution against the incursions of careless or vicious legislatures, as it was the protection of the national union against the power of the states.
It was felt that some measures must be provided for keeping the states within their proper bounds and in their proper relations to the federal government. Various plans having this as their objective purpose were submitted early in the convention, but it was long before anything approaching a definite conclusion was reached. One plan proposed to attain this end by leaving the governors of the states appointed by the national government another provided for the repeal, by the national legislature, of all state laws repugnant to the constitution; and still another plan was for the formation of a council of revision, of which the judiciary should be a part, thro
which all state laws should pass before they should be permitted to operate. The second of these plans, which proposed to give to the national legislature the power "to negative all laws passed by the several states contemning the articles of union or any treaty subsisting under the authority of the union," came up for debate on the 17th of July, and at first received the strong support of a number of the most prominent men in the Convention. James Madison was one of these, and his remarks on the occasion illustrate well the feelings of a large number of the delegates. Said he: "The necessity of a general government proceeds from
the prosperity of the States to pursue their particular interests in opposition to the general interest. This propensity will continue to disturb the system unless effectively controlled. Nothing short of a negative on their laws will control it. They will pass laws which will accomplish their injurious objects before they can be repealed by the general legislature, or set aside by the national tribunals. Confidence cannot be put in the state tribunals as guardians of the national authority and interest. In all states these are removed or less dependent on legislatures. In Georgia they are appointed annually by the legislature.
In Rhode Island the judges who refused to execute an unconstitutional law were displaced and others substituted who would be the willing instruments of the wicked and arbitrary plans of their masters." (This was in the case of Trenchett vs Weedon, 1786.) "A power of enacting the improper laws of the states is at once the worst evil and certain means of preserving the harmony of the system. Its utility is sufficiently displayed in the British system. Nothing could sustain the harmony and subordination of the various parts of the Empire but the prerogative by which the crown stifles in the birth every act of every part tending to
discord or encroachment. It is true that the prerogative is sometimes misapplied thru cignovance or partiality to one particular part of the empire, but we have not the same reason to fear such misapplication in our system, etc.

The plan which brought forth these remarks was finally rejected, however, and the Convention passed to the consideration of other measures. It seemed to be pretty generally admitted among the delegates, that in order to maintain the supremacy of the law, and to preserve the equilibrium between state and federal power, some authority was required competent to decide
whether, in a given instance, the
national Congress or a state legislature
had transgressed the law of the Constitution.
It had been, moreover, early agreed
that a national judiciary should form
one of the departments of the new govern-
ment; but, as I have already said,
it's exact function and its relations
to the other departments, seems to have
been far from clear. There was,
however, the state governments, with
their aspiring jurisdictions to guide
the efforts of the Convention. These state
governments, the young and presenting
many crevices in place and application
showed, yet, the trend of the growth
of governmental ideas in this
country, and were necessarily influenti
ful in determining the character of the new government. The example of Massachusetts must have been especially powerful in this relation. This state had adopted in 1779, a new constitution, in which was embodied a complete conception of a government of three coordinate depart-
ments, and seven years later had virtually admitted the competency of the judiciary to decide and adjudge contrary to legislative enactment if need be. (See page 43). However, the experience of the states had not been so positive as to point at once to the proper method to be pursued in shaping
the relations of the members of the general government. The matter was up for consideration almost continually through the summer, and it was not until the 15th of September that the constitutional provisions for the national judiciary were finally determined upon, and sent in their present form to the convention.

In the state conventions, these provisions were the subject of much debate. Two principal objections were raised against them: First, that the workings of the state judiciaries were liable to be interfered with, and the judiciaries themselves oppressed. Second that it made a practically sovereign...
State liable to suit by an individual a proceeding thought to be humiliating and improper. Some of the conventions even went so far as to propose amendments which would change the nature and powers of the judiciary and put it on a different basis. None of the proposed amendments were adopted, however, and when the new government was finally inaugurated, on the 20th April, 1784, the constitutional provisions for a national judiciary remained as they were originally drawn.

Thus ends the history of the judiciary in the formation of the constitution. And now that
we have traced the progress of our
governmental ideas from remote antiquity
to their application in the American
federal government, and have seen
that government inaugurated upon
a plan which has since suffered no
practical change, we might suppose
the place and character of the judiciary
settled, and our task is tracing its
rise to the level of the legislative
at an end. But not so. There is
still another chapter to be added
before we have completed our
sketch of the essential relations of
these two functions of government.

In framing the Constitution
and in establishing the government
under it, the limits of judicial authority seem not to have been anticipated. At first the exact place and function of the new judiciary were not known, and it was only after some years had passed that its powers to set aside a legislative act was fully and freely admitted. The State courts had continued the practice of opposing the unconstitutional acts of their legislatures, and were constantly gaining ground. Case after case was being taken up, and the results were increasingly in favor of the courts. With these as precedents it was little wonder that the federal judiciary resolved at length consent...
its authority in controversies in -

valuing the Constitution. Its advances

were at first made with the utmost

timidity. The judges did not proclaim

their power with any insolent

boldness, but with the utmost

modesty. They knew doubt

felt some of their positions, and

were ready to maintain them, they

yet felt that they were venturing

upon practically untried ground;

and were extremely reluctant to
declare the full extent of their author-

ity.

The first case in which the

federal courts showed a disposition
to assert their power to decline to
enforce an act of Congress, originated in the circuit court for the district of New York, in 1792. On March of that year Congress had passed an act directing the United States circuit courts to pass upon the claims of widows, orphans, and残疾人 applying for pensions, but making the decision of the courts subject to review by the Secretary of War and Congress. This service the judges regarded as foreign to the duties of the courts and, therefore, inadmissible. They accordingly declined to act as judges, but declared that "as the objects of this act are exceedingly beneficent, and so do real honor to the humanity and justice of Congress"
and as the judges desire to manifest
on all proper occasions and in
every proper manner their highest
respect for the National Legislature, they
will execute this act in the capacity
of Commissioners, " With the exception
of this protest, nothing appears to have
been done in the matter until the
August term of the Supreme Court, when
the question was put to the test. This
was brought about by an application
for a mandamus to the district
court for the district of Pennsylvania
commanding it to pass upon
the claim of a man named
Hayden, who petitioned to be placed
in the invalid pensioners list. Again
was argued the impropriety of forcing the courts to proceed in this kind of work, and the right which they might have to refuse to obey the orders of Congress. The judges seem to have been certain of the justice of the position which they had assumed, but not wishing to bring about a conflict with Congress if it were avoidable, their decision was withheld, and the motion taken under advisement. Fortunately, as it then seemed, Congress soon afterward repealed the offending statute, and the judges were relieved of the disagreeable necessity of rendering a decision which might lead to discord, or of compromising their judicial character.
In 1798, and in 1800, the question was again raised but each time a decision was avoided. Opinions were not wanting pro and con the power of the courts to invalidate a law of Congress, but no official action had yet been taken which would in any way settle the disputed point. But in 1803 a case came up which made it impossible for the courts any longer to postpone rendering an opinion. This was the celebrated case of Marbury v. Madison celebrated because the first instance in which the federal judiciary had formally asserted its power to set aside an act of the federal legislature, and as the
case, moreover, which virtually placed beyond any further question the equality of the judiciary in government.

The case in question originated in this way: John Adams, just before the end of his term as president, nominated to the Senate one William Washington for justice of the peace for the District of Columbia. The nomination was confirmed by the Senate, a commission was drawn up, signed by the president, and sealed with the seal of the United States; but before it could be delivered to Washington, President Adams' term expired. Mr. Madison, the new Secretary of State, acting under the direction of President Jefferson, who believed the
appointment by his predecessor to be in no effect because not completed, refused to deliver the commission. Therefore Marbury made application to the Supreme Court for a writ of mandamus to compel Madison to make the delivery. The Court was unanimously of the opinion that Marbury was entitled to this commission and that a writ of mandamus was the proper remedy to be applied in this violation of his legal right; but that the act of Congress giving to the Supreme Court the power of issuing this writ, was contrary to the will of the Constitution and therefore of no effect and void. No criticism that might be
made could show so well the attitude of the Court, as does the language of Chief Justice Marshall in delivering the opinion in this case. I quote from the latter part of the opinion: "The question whether an act repugnant to the Constitution can become the law of the land, is a question deeply interesting to the United States; but, happily, most of our constitution is proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it."

"That the people have an original right to establish, for their future government, such principles as in their opinion shall most conduce to
to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exception; nor can it nor ought it to be frequently repeated. The principles, therefore, so established are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

"This original and supreme will organizes the government, and assigns to different departments their respective powers. It cannot either step here, or establish certain limits not to be transcended by those departments."
"The government of the United States is of the latter description. The powers of the legislature are defined and limited, and that those limits may not be mistaken or forgotten, the Constitution is written. XXXXX. The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons upon whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or that the legislature may alter the constitution by an ordinary act."
"Between these two alternatives there is no middle ground. The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other legislative acts, is alterable when the legislature shall please to alter it."

"If the former part of the alternative be true, then a legislative act contrary to the Constitution is void; if the latter part be true, then written constitutions are absurd attempts on the part of the people to limit a power inseparable from nature incapable."

"Certainly all those who have
framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of such government cannot be that an act of the legislature repugnant to the constitution is void.

"If an act of the legislature repugnant to the constitution is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthower in fact what was established in theory; and would seem, at first
view, an absurdity too gross to be insisted on, x x x x x.

"It is eminently the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."

"So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, or ---"
disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty."

"If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply."

"Those, then, who contended the principle that the constitution is to be considered in court as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution and see only the law."
"This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which according to the principles and theory of our government is entirely void, is yet in practice completely obligatory. It would declare, that, if the Legislature should do what is forbidden, such act, notwithstanding the express prohibition, is in reality effective. It would be giving to the Legislature a practical and real omniscience, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure."
"The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: 'I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as , according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States.'

"Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule
for his government? If it is closed upon him, and cannot be inspected by him?"

"If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime."

So conclusive was the argument and so cogent the reasoning, "approaching" as Chancellor Kent says, "to the precision and certainty of a mathematical demonstration," that the decision seems to have aroused little, if any, opposition; nor was the position of the courts ever afterward very seriously questioned. This may be looked upon as the final act in the effort to bring
the judiciary to a legal equality with the other powers of government, and that one which settled for all time the right of the courts to protect our fundamental law against the dangers which would otherwise have it from unwisely, carelessly, or viciously legislatures.

As to the history of the process by which the Supreme Court established its right to set aside the unconstitutional acts of the state legislatures—that seems to me to belong outside of our present inquiry, and will not, therefore, be discussed here. It was established in the same manner as was the power of the courts to set aside acts of the federal legislature—viz., by test cases
and decisions, but for less easily and quickly. It was a result attained only after a long series of cases, extending over a long period of years. It may, perhaps, be said far from the truth to say that it was never really and fully established as long as the "State Rights" theory continued to be seriously entertained.

Such was the history of the law to which we owe our national judicial system, and of the progress of those ideas to which we may trace the origin of the peculiar relations which characterize the three departments in American government. And it is hoped that it has been made plain in
the course of this exposition, that these relations did not have their beginnings in the deliberations of the Philadelphia Convention, but that they are, in reality, an inheritance from the Past; that the fundamental law from which they sprang is that the embodiment, in concrete form, of principles which had been in existence, in theory, for centuries; that for ages before, men had dreamed of a government, an ideal government, founded upon such principles, that had dreamed in vain until the age of Freedom dawned in the New World; and that even the framing of the Constitution and the establishment of the government
under it, did not at once determine the relations of Congress and the Supreme Court, but that some years of trial were unnecessary before they were finally agreed upon.

If this has been sufficiently shown, a sketch of the history of the relations of the legislative and judicial functions is ended, for since 1803 there have occurred no appreciable changes in those relations, nor have any incontrovertibly attempts been made to bring about such changes.

C. W. Carter.