AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 4: The Early National Era – Judicial Power and Constitutional Authority

Senate Debate on the Repeal of the Judiciary Act of 1801 (1802)[1]

The first order of business for the Seventh Congress was the repeal of the Judiciary Act of 1801. Angered by the Federalist effort to pack the judiciary with persons hostile to the Jeffersonian administration and by the judicial decision to issue the show cause order in Marbury, *Jeffersonians sought to prevent Federalists justices from further interfering with Republican policies. Federalists maintained that the repeal was unconstitutional. The constitutional requirement that federal justices hold their office during good behavior, they maintained, forbade legislation abolishing judicial offices. Jeffersonians responded that the congressional power to establish lower federal courts entailed the congressional power to abolish lower federal courts.*

The repeal of the Judiciary Act sparked the first extensive debate on judicial review in American history. Federalists uniformly insisted that courts had to remain independent of the judiciary in order to exercise the power to declare laws unconstitutional. Opponents of the repeal measure defended judicial review at length and, more so than had previously been the case, asserted that the judicial power to declare laws unconstitutional was the primary means of preserving constitutional rights and limitations. The Federalist constitution of 1801 vested the judiciary with the ultimate authority to determine what the constitution meant. No Federalist who spoke during the debates over repeal maintained that courts should strike down only clearly unconstitutional laws. Jeffersonians during the debates over repeal spoke less on judicial review and did not adopt a common position. Most rejected judicial supremacy. Several prominent Republicans claimed that justices, when deciding cases, should ignore laws believed unconstitutional, but that judicial decisions on constitutional questions did not bind elected officials. Some Jeffersonians rejected judicial review entirely, insisting that such a power would make the judiciary more powerful than the people's elected representatives. Others insisted that the power of judicial review was not an issue in the debate, that no effort was being made to interfere with the Supreme Court. That tribunal, in their view, remained sufficiently independent to exercise whatever judicial power was warranted by the Constitution. No Jeffersonian claimed that judicial review was a necessary means for preserving constitutional rights. Several who supported some version of that practice declared that justices should declare laws unconstitutional only when the constitutional violation was very clear.

The Marbury *litigation played a minor role in the debates over repeal. Jeffersonians declared that the show cause order revealed a court bent on usurping political power. Federalists responded that the order demonstrated the virtues of an independent judiciary. During the debates, a Jeffersonian representative suggested that Congress had no power to expand the original jurisdiction of the Supreme Court. Federalists responded by claiming that past practice established that the justices had the necessary jurisdiction to issue a writ of mandamus in* Marbury.

Sen. John BRECKENRIDGE (Republican, Kentucky)

It will be expected of me. . . to assign my reasons for wishing a repeal of [the Judiciary Act of 1801]. This I shall do; and shall endeavor to show.

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1st. That the act under consideration was unnecessary and improper, is, to my mind, no difficult task to prove. No increase of courts or judges could be necessary or justifiable, unless the existing courts and judges were incompetent to the prompt and proper discharge of the duties consigned to them. To

[1] Excerpt taken from *Annals of Congress*, 7th Cong., 1st sess. (1802): 25–30, 56–59, 61–63.

hold out a show of litigation, when in fact little exists, must be impolitic; and to multiply expensive systems, and create hosts of expensive officers, without having experienced an actual necessity for them, must be a wanton waste of the public treasury.

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. . . . I am inclined to think, that so far from there having been a necessity at this time for an increase of courts and judges, that the time never will arrive when America will stand in need of thirty-eight federal judges. Look sir, at your Constitution, and see the judicial power there consigned to federal courts, and seriously ask yourself, can there be fairly extracted from those powers subjects of litigation sufficient for six supreme and thirty-two inferior court judges? To me it appears impossible.

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I will now inquire into the power of Congress to put down these additional courts and judges.

First, as to the courts, Congress are empowered by the Constitution Afrom time to time, to ordain and establish inferior courts.@ The act now under consideration, is a legislative construction of this clause in the Constitution, that Congress may abolish as well as create these judicial officers. . . .

. . . . It would, therefore, in my opinion, be a perversion, not only of language, but of intellect, to say that although Congress may, from time to time, establish inferior courts, yet, when established, that they shall not be abolished by a subsequent Congress possessing equal powers. It would be a paradox in legislation.

2d. As to the judges. . . .

But because the Constitution declares that a judge shall hold his office during good behavior, can it be tortured to mean, that he shall hold his office after it is abolished? Can it mean, that his tenure should be limited by behaving well in an office which did not exist, although its duties are extinct? Can it mean, in short, that the shadow, to wit, the judge, can remain, when the substance, to wit, the office, is removed? It must have intended, all these absurdities, or it must admit a construction which will avoid them.

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. . . . [A]s no government can, I apprehend, seriously deny that this Legislature has a right to repeal a law enacted by a preceding one, we will, in any event, discharge our duty by repealing this law; and thereby doing all in our power to correct the evil. If the judges are entitled to their salaries under the Constitution, our repeal will not affect them; and they will, no doubt, resort to their proper remedy. For where there is a Constitutional right, there must be a Constitutional remedy.

Sen. Uriah TRACY (Federalist, Connecticut)

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. . . . Our powers are limited, many acts of sovereignty are prohibited to the National Government, and retained by the States, and many restraints are imposed upon State sovereignty. If either, by accident or design, should exceed its powers, there is the utmost necessity that some timely checks, equal to every exigency, should be interposed. The Judiciary is established by the Constitution for that valuable purpose.

. . . . In the United States, the caution must be applied to the existing danger; the Judiciary are to be a check on the Executive, but most emphatically on the Legislature of the Union, and those of the several States. What security is there to an individual, if the Legislature of the Union or any particular State, should pass a law, making any of his transactions criminal which took place anterior to the date of the law? None in the world but by an appeal to the Judiciary of the United States, where he will obtain a decision that the law itself is unconstitutional and void, or by a resort to revolutionary principles, and exciting a civil war. . . . The danger in our Government is; and always will be, that the Legislative body will become restive, and perhaps unintentionally break down the barriers of our Constitution. It is incidental to man, and a part of our imperfections, to believe that power may be safely lodged in our hands. We have the wealth of the nation at command, and are invested with almost irresistible strength; the judiciary has neither force nor wealth to protect itself. That we can, with propriety, modify our judiciary system, so that we always leave the judges independent, is a correct and reasonable position; but if we can, by repealing a law, remove them, they are in the worst state of dependence.

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. . . . I apprehend the repeal of this law will involve in it the total destruction of our Constitution. It is supported by three independent pillars; the Legislative, Executive and Judiciary; and if any rude hand should pluck either of them away, the beautiful fabric must tumble into ruins. The Judiciary is the center pillar, and a support to each by checking both; on the one side is the sword, and on the other is the wealth of the nation; and it has no inherent capacity to defend itself. . . .

Sen. Stevens MASON (Republican, Virginia)

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I agree with gentlemen, that it is important, in a well regulated Government, that the judicial department should be independent. But I have never been among those who have carried this idea to the extent which seems at this day to be fashionable. Though of opinion that each department ought to discharge its proper duties free from the fear of the others, yet I have never believed that they ought to be independent of the nation itself. Much less have I believed it proper, or that our Constitution authorizes our courts of justice to control the other departments of the Government.

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. . . . Suppose, then, Congress should establish special tribunals to continue for three, four, or five years, to settle these claims [over land titles]. Judges would be appointed. They would be the judges of an inferior court. If the construction of the Constitution now contended for be established, what would the judges say, when the period for which they were appointed expired? Would they not say, we belong to inferior courts? Would they not laugh at you when you told them their term of office was out? Would they not say, in the language of the gentleman from New York, though the law that creates us is temporary, we are in by the Constitution? Have we not heard this doctrine supported in the memorable case [*Marbury*] of the mandamus, lately before the Supreme Court? Was it not there said that, though the law had a right to establish the office of a justice of the peace, yet it had not a right to abridge its duration to five years; that it was a right in making the justices, but unconstitutional in limiting their periods of office; that being a judicial officer, he had a right to hold his office during lifeBor, what is the same thingBduring good behavior, in despite of the law which created him, and in the very act of creation limiting his official life to five years.

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I fear . . . that if you take away from these judges that which they ought officially to do, they will be induced, from the want of employment, to do that which they ought not to do; they may do harm. They may be induced, perhaps to set about that work gentlemen seem so fond of. They may, as gentlemen have told us, hold the Constitution in one hand, and the law in the other, and say to the departments of Government, so far shall you go and no farther. This independence of the Judiciary, so much desired, will, I fear sir, if encouraged or tolerated, soon become something like supremacy. They will, indeed, form the main pillar of this goodly fabric; they will soon become the only remaining pillar, and they will presently, become so strong as to crush and absorb all the others into their solid mass.