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Recommended Citation
Culp, Maurice S. (1929) "A Survey of the Proposals to Limit or Deny the Power of Judicial Review by the Supreme Court of the United States," Indiana Law Journal: Vol. 4: Iss. 6, Article 2.
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A SURVEY OF THE PROPOSALS TO LIMIT OR DENY THE POWER OF JUDICIAL REVIEW BY THE SUPREME COURT OF THE UNITED STATES

MAURICE S. CULP*

The "self-appointed" function of the courts of exercising the power of judicial review has often been the subject of acrimonious debate in the halls of Congress and a subject of controversy throughout our national history, even since the adoption of the Articles of Confederation. This power of the courts has often been exercised in a manner to thwart the interests and transgress the conception of government held by various groups. From the beginning Congress made provisions for the exercise of appellate jurisdiction by the Supreme Court, and as a result that tribunal became and continues to be the final arbiter over important questions of law and equity affecting the federal system. Naturally the groups which became disaffected with the decisions of that court sought to use their political influence to quench the Supreme Court's power of judicial review. The result has been many proposals to put an end to that power. The object of this study is to point out and discuss briefly the proposals, principally in Congress, which have been made to curb this power of the Supreme Court.

It is not necessary, however, to go into a discussion of the correctness of the view that the power of judicial review has been "usurped". This question has been ably discussed by several serious students of the subject,1 and we can at least indulge in a strong presumption that the early constitution makers and leaders knew of the power and were not unfavorable to its exertion by the federal judiciary. Furthermore, it is a power which has been continuously exerted since the famous case of Marbury v. Madison in 1803.2

The proposals to curb this power have been varied in nature, but they may be conveniently grouped under four heads: (1) Proposals to appeal from the decisions of the Supreme Court to a tribunal more representative of the people in important consti-

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* See p. 400 for biographical note.

1 Haines, C. G., The American Doctrine of Judicial Supremacy; Beard, C. A., The Supreme Court and the Constitution; Warren, Charles, Congress, the Constitution and the Supreme Court.

2 1 Cranch, 137 (1803).
tutional questions; (2) Proposals to require more than a majority of the members of the Court to declare certain legislative acts unconstitutional; (3) Proposals to change the mode of selecting and removing judges; (4) Proposals to divest the Supreme Court in part or in toto of its power to review legislative acts.

PART I

PROPOSALS TO APPEAL FROM THE DECISIONS OF THE COURT

The opposition to the power of judicial review originated even before the adoption of the Constitution if we are to believe the sentiments expressed in certain recommendations made by state ratifying conventions.

The Massachusetts Convention adopted a resolution which reads as follows:3

"Resolved, as the opinion of this committee, that the person aggrieved by any judgment, sentence or decree of the Supreme Court of the United States, with such exceptions and under such regulations, as the Congress shall make concerning the same, ought upon application, to have a commission issued by the President of the United States, to such learned men as he shall nominate . . . and . . . appoint not less than seven, authorizing such commissioners, or any seven of them, to correct the errors in such judgment, or to review such sentence and decree, as the case may be and to do justice to the parties under the premises."

There is no specific reference to the power of judicial review here, but the mere fact that the judgments of the Supreme Court would have been subject to review by a "commission of learned men" would have allowed an aggrieved party a review of the Court's decision.

Likewise the New York Convention recommended that the decisions of the Supreme Court, in its original jurisdiction, should be subject to review by a commission. It resolved:4

"That person aggrieved by a judgment, sentence or decree of the Supreme Court of the United States, in any cause in which that Court has original jurisdiction, with such exceptions, and under such regulations, as the Congress shall make concerning the same, shall, upon application, have a commission, to be issued by the President of the United States, to such men learned in the law as he shall nominate, and by and with the consent of the Senate appoint, not less than seven, authorizing such commissioners

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... to correct the errors in such judgment, or to review such sentence and decree, as the case may be, and to do justice to the parties in the premises."

This proposal was not materially different from that made by the Massachusetts Convention, although its scope was more definite and restricted. The obvious intent in both instances was to protect the aggrieved individual from national power, and the latter proposal would have given an effective method to review the decision of the Supreme Court in any case wherein a state was or claimed to be a party.

These resolutions were in the form of instructions to the representatives of Massachusetts and New York who would assemble in the first congress. The objective was to procure amendments to the Constitution in these particulars.

Nor were these early resolutions the last attempts to restrict the finality of the decisions of the New Court. In 1821, Mr. R. M. Johnson, of Kentucky, spoke against the great authority of the Supreme Court. Senator Johnson inveighed against the disposition of that court to enlarge the constitutional powers of the general government by interpretation and construction.

"It is the opinion of many eminent statesmen that there is a manifest disposition, on the part of the federal judiciary, to enlarge, to the utmost stretch of constitutional construction, the power of the general government, at least in that branch, and by consequence to abridge the jurisdiction of state tribunals."5

He went on to say that the laws of state and federal governments had been nullified by this power over which the people had no control, the judges being appointed for good behavior. And he felt that an appeal should lie from the courts to some body which was responsible to the people. The people should determine whether an act of the legislature had transgressed constitutional power, and where a state used unauthorized power it was not for the federal government to judge, but for the people to decide. The latter idea was advanced, in all probability, to combat the action of the Supreme Court which had just recently declared unconstitutional certain acts of the Kentucky legislature purporting to determine the land policy of the state. Senators Holmes of Maine and Otis of Massachusetts concurred with Mr. Johnson.6

5 Annals of Congress, 17th Cong., 1 sess., p. 73, 74.
6 Ibid, p. 69 ff.
Senator Johnson introduced a joint resolution for a constitutional amendment, embodying his ideas, on December 12, 1821. The resolution follows:7

"Resolved, by the Senate and House of Representatives of the United States of America in Congress assembled; That in all controversies where the judicial power of the United States shall be construed as to extend to any case in law or equity, arising under the Constitution, the laws of the United States, or treaties . . . and to which a state shall be a party; and in all controversies in which a state may desire to become a party, in consequence of having the constitution or laws of such state questioned, the Senate of the United States shall have appellate jurisdiction."

The effect of this would have been to make the Senate a court of appeal from the decisions of the Supreme Court in all controversies, under federal jurisdiction, wherein a state might be a party, or where a state might choose to be a party in a case wherein its constitution or laws were questioned. The proposed amendment received no support.

And in the same Congress, in response to the agitation against the court's action in fearlessly declaring legislative acts unconstitutional and against the lack of popular control over the judiciary, it was proposed in the Senate, on January 15, 1822, that a controlling power, the appellate idea, be vested in "the Senate or some other body who shall be responsible to the elective franchise."8

Four years later Mr. Holmes, of Virginia, informally proposed that the decisions of the Supreme Court, particularly those holding the laws of a state unconstitutional, be subject to review by some tribunal. The power of the court was to be muzzled thus:9

"I would either give the states a voice in the appointment of the federal judges, or they should have an appeal to this Senate or to some other tribunal that might review the decisions of the judges of the Supreme Court, especially where these decisions were to declare the law of a state unconstitutional."

Throughout all of these proposals can be seen the fear of an uncontrollable judiciary vested in the federal government, and an effort to safeguard the laws of the states from being irrevocably nullified by that judiciary.

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7 Ibid, p. 68.
8 Annals of Congress, 17th cong., 1 sess., p. 113, 114.
9 Ibid, 19th cong., 1 sess., p. 458.
Not until the year 1867 were any similar proposals made. Then Senator Davis, of Kentucky, proposed an amendment to the Constitution which would have greatly curtailed the jurisdiction of the Supreme Court. A new court would have been instituted to hear certain constitutional questions:\textsuperscript{10}

"Resolved, That the Constitution should be so amended as to create a tribunal with jurisdiction to decide all questions of a constitutional character that shall arise in the government of the United States, and all questions of conflict of jurisdiction between it and state governments; said tribunal to consist of one member from each state, to be appointed by the state to hold his office during good behavior, and a majority of the whole number of said tribunal to be necessary to make a decision."

In a speech in the Senate,\textsuperscript{11} on January 14, 1868, Mr. Davis defended his resolution on the grounds that there was no express constitutional investment of jurisdiction over cases or questions of conflict of authority between the governments of the United States and the states, though he admitted the implication, and that political questions are much more eruptive and dangerous than those per se judicial, "and over those most frequent, most urgent, and dangerous the court could but rarely acquire jurisdiction, and then by reason of the mode of appointing the judges and of the liability of impeachment, it would have cogent motives to delay, to mislead, and to deter it from the performance of its duties, particularly in times of great party excitement and revolution."

This is an isolated proposal of its kind, and we have to wait until the 1920's for anything of a kindred nature. In 1922 Senator La Follette made a proposal which in effect gives a right of appeal from the Supreme Court to both houses of Congress. In a speech made before the Convention of the American Federation of Labor, on June 14, 1922, his utterance being approved by the Federation, Senator La Follette inveighed against the "usurped" power of the courts, and proposed a constitutional amendment to the effect:\textsuperscript{12} "That no inferior judge shall set aside a law of Congress on the ground that it is unconstitutional. . . . That if the Supreme Court assumes to decide any law unconstitutional, or by interpretation undertakes to assert a public policy at variance with the statutory declaration of Congress, which alone under our system is authorized

\textsuperscript{10} Congressional Globe, 40th cong., 2 sess., 196.
\textsuperscript{11} Ibid, 492.
\textsuperscript{12} 8 American Bar Association Journal, 459 (August, 1922)
to declare the public policies of our government, the Congress may, by repassing the law, nullify the action of the Court.”

A similar proposal was made in Congress in 1923. At that time Representative Frear, of Wisconsin, introduced a joint resolution, proposing a constitutional amendment, which provided for a review of the decisions of the Supreme Court by both houses of Congress:

“Congress . . . may further provide by law for . . . a review and setting aside of any such court decision providing that not less than two-thirds of the vote of both houses shall agree to such recall or review.”

This proposal was both for a recall of judges and a review of the decisions of the Supreme Court, and that explains the use of the word “recall” in the above quotation.

The last attempt or suggestion of this kind was made in the La Follette Platform of 1924, which, reiterating the allegations of Senator La Follette against the Court and its alleged “usurpation” of power, contained the following plank:

“We favor submitting to the people, for their judgment, a constitutional amendment providing that Congress may by reenacting an statute make it effective over a judicial veto.”

Charles Grove Haines, in a letter to The Forum, in commenting upon the growing discontent with the Court, says:

“That there is a growing sentiment to the effect that the policies of a nation, whether political, economic or social should rest ultimately on popular sanction. Leave it to the Court to pass on state statutes in conflict with federal. But where the acts of Congress are invalidated by the Supreme Court, Congress ought to be given, by constitutional amendment, the right to reenact the measure thus invalidated by a two-thirds vote of each house after a general election has transpired, if the measure in any way restricts or changes materially the power of the states; and by a majority vote after a general election if the act is one relating primarily to the powers granted by the Constitution to the Federal Government.”

He feels that the practice of condemning well formulated economic and social legislation is bad because the only resort then is to a constitutional amendment.

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14 2 Congressional Digest, 271.
PART II

The Concurrence of More Than a Majority of the Court in Certain Cases

There was no effort during the very early years of the Court’s history to require an extraordinary number of the judges of the Supreme Court to concur in decisions adverse to legislative enactments of any sort. However, the opposition to the Court in the 1820’s took various forms, and this was one of them. In 1823 Johnson of Kentucky proposed a bill requiring the concurrence of seven judges in any opinion involving, presumably adversely, the validity of state statutes or acts of Congress. And on March 11, 1924, Senator Martin Van Buren, of New York, reported, from the committee on judiciary, a bill providing that no law of any of the states should be rendered invalid without the concurrence of five of the seven justices of the Supreme Court.

Again on May 3, 1824, Representative Letcher, of Kentucky, suggested that provision ought to be made for the concurrence of a certain number of justices of the Supreme Court where the validity of any part of the Constitution of a state or any legislative act of a state is drawn in question and is held unconstitutional. His resolution read as follows:

"Resolved, That a quorum of the Supreme Court to transact the business of the tribunal should consist of such a number of the Justices composing it, that a majority of the quorum shall be a majority of the whole court, including the chief justice."

On May 4, Daniel Webster proposed an amendment to the Letcher resolution:

"Resolved, That provision ought to be made by law that, in all suits now pending, or which may hereafter be pending in the Supreme Court of the United States where is drawn in question the validity of any treaty or statute of a state, or the constitution thereof, or of any authority exercised under any state, on the ground of repugnancy to the Constitution, treaties, or laws of the United States, no judgment shall be pronounced or rendered until a majority of all of the justices of said court, legally com-

17 18th cong., 1 sess., 28.
18 Ibid, 336.
19 Warren, The Supreme Court in United States History, is valuable in giving the texts of many important proposals.
20 18th cong., 1 sess., 2513.
21 18th cong., 1 sess., 2527.
petent to sit in the cause, shall concur in the opinion, either in favor of or against the validity thereof; and until such concurrence, such suit shall be continued under advisement . . .”

This would have prevented decisions on such questions by a majority of a quorum of the court which might not have been a majority of the full court. Mr. Henry Clay spoke in opposition to this amendment and in favor of the original resolution. He insisted on the equity and policy of requiring five judges to concur when the whole authority of one or of many states was to be set aside. No danger, he argued, would accrue to the general government, and it would soothe the states having laws set aside, and gain the confidence of all parties concerned. In addition he warned the country of the consolidating influence of this power, and maintained the necessity of guarding the state tribunals, the Supreme Court being virtually an arbiter between the general government and the states, and would lean in its decisions toward that power to which it owed its appointment. Mr. Webster, on the other hand, contended that it was a fair presumption that state judges would lean toward the authority of their own states. A mere majority of these judges could decide against the United States, but now more than a majority was to be required to decide against a state. And he asserted that the whole weight of the Court's decisions with the community rested on the strength of the reasoning which it used in its decisions.

A stronger proposal was made when one Mr. Metcalfe, on May 17, 1824, proposed an amendment to a judiciary bill. He justified his proposal on the ground that the great conflict between the state and federal government must be quieted. His amendment read:

"Be it further enacted, That in any case now or hereafter depending in the Supreme Court, in which shall be drawn in question the validity of any part of the constitution of a state, or of any part of an act passed by the legislature of a state unless two-thirds of the whole number of justices composing the court shall concur or pronounce such part of said constitution or act to be invalid, it shall not be deemed invalid."

Later Mr. Metcalfe withdrew the amendment.
Later in 1826 one Mr. Rowan moved to further amend a then pending bill for the extension of the judicial powers of the judiciary:

"And be it enacted, That the Supreme Court shall, in no instance, decide that the constitution of any state or any provision thereof, or the law of any state, or any law of Congress, or any part or portion thereof, or of either or any of them, and the Constitution of the United States, or any article, section or clause thereof is invalid unless at least seven (of the ten proposed) justices of said court shall concur in that decision."

Mr. Van Buren, speaking on the dangerous powers of the court, said that "it has been justly observed elsewhere, that there exists not upon earth, and there never did exist, a judicial tribunal clothed with powers so various and so important as the Supreme Court. . . . Its veto, therefore, may absolutely suspend nine-tenths of the acts of the national legislature subject to its review, but it stands as the umpire between the conflicting power of the general and state governments. That wide field of debatable ground between these rival powers is claimed to be subject to the exclusive and absolute dominion of the Supreme Court." He continued to speak of the overturning of state laws which, to the minds of the states' rights people, were quite proper, and in faith of which immense wealth had been invested. And the great power of review of legislation was productive of dissatisfaction, productive of prejudice which might endanger if not destroy the institution.

And Mr. Rowan felt that a law which was in violation of the Constitution would be so perceived by the people and they would repeal it. He was opposed to opinions by a divided court (four to three then), and he protested against submitting the sovereign power of any state to any judicial tribunal, least of all to the Supreme Court of the United States.

In the House, on the same measure, Mr. Forsyth, of Georgia, proposed the following amendment:

"Provided, That no final judgment shall be pronounced by the Supreme Court, which shall not be approved by such number of the justices as shall constitute a majority of all the justices of the said court."

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27 19th cong., 1 sess., 423.
28 19th cong., 1 sess., 407-421.
29 19th cong., 1 sess., 445-446.
30 19th cong., 1 sess., 1119.
To this several suggestions were made, and finally Mr. Wycliffe moved to substitute:31  
"That in all cases brought before the Supreme Court, in which shall be drawn in question the validity of any act of Congress or treaty of the United States, any part of the constitution of a state, that six justices32 of the Supreme Court shall concur in pronouncing such . . . to be invalid and that, without the concurrence of that number of justices, no act . . . shall be deemed or holden invalid."

These proposals ended this form of agitation for a reconstitution of the court until the post-civil war days. Then, while the famous Ex Parte McCordale case, 6 Wallace, 318, was coming to a decision, the radicals in Congress grew apprehensive of the validity of their legislation. With the intent of preventing an adverse decision by the Court, the judiciary committee of the House reported a bill which provided that two-thirds of the judges of the Supreme Court must concur in a decision adverse to the validity of a law of Congress.33

On January 14, 1867,34 an amendment was proposed to Senate Bill No. 163, which was of a like character; it read as follows:

"That no cause pending before the Supreme Court of the United States shall be decided adversely to the validity of such law without the concurrence of two-thirds of all the members of said court in the decision upon the several points in which said law or any part thereof may be deemed invalid."

The amendment provided further that a district or circuit court which held any act of Congress invalid must certify the judgment to the Supreme Court, and if two-thirds of all the members did not affirm the decision below, the judgment was to be held reversed.

This was followed by a proposal even more drastic. On January 21, 1867, Mr. Williams, of Pennsylvania, introduced the following bill in the House:35

"Be it enacted, That in all cases of writs of error from and appeals to the Supreme Court of the United States wherein is drawn in question the validity of a statute or of any authority exercised by the United States or the validity of a statute or any authority exercised under any state, on the grounds of repugnancy to the Constitution, or laws of the United States, the hearing shall be had only before a full bench of the judges of

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31 19th cong., 1 sess., 1124.
32 The plan was to reconstitute the Court to consist of ten judges.
33 40 cong., 2 sess., 478 ff. It passed the House only.
34 Ibid., 503.
said court and no judgment shall be rendered and decision made against
the validity of any statute, or any authority exercised by the United States,
except with the concurrence of all of the judges of the said court."

Again in 1896 a bill of a similar character was introduced
in Congress. The following bill applied only to Congressional legislation:36

"Be it enacted, That from and after the passage of this act no bill or
joint resolution that has passed Congress and received the approval of the
President and become a law . . . shall be held or adjudged to be un-
constitutional by the Supreme Court except where all the judges concur in
an opinion to that effect."

Of late years the interest of the country, or better the interests
of certain economic groups, have been affected by decisions of
the Supreme Court. Often the court would be divided, and
sometimes there would be a five to four decision.37 These groups
have tried to show that the country is losing confidence in the
Supreme Court. They insist that it is absurd to have a court,
divided five to four, hold up the will of the country as expressed
in the vote of the two houses of Congress and the approval of
the President. Naturally there have been a series of proposals
in the last twenty-five years which savor much of the proposals
of a century ago, and are advanced in many cases for the same
reasons.

The first proposal in this series was in the form of a joint
resolution for a constitutional amendment which would have
provided that no law could be held unconstitutional by the
Supreme Court without the concurrence of at least all but two
justices.38

Another joint resolution, in 1921, provided:

"No law shall be held unconstitutional and void by the Supreme Court
without the concurrence of at least all but two of the judges."39

Then a bill regulating the procedure in the Supreme Court
purported to have a restraining effect on the Supreme Court.
The pertinent part of the bill reads as follows:40

36 54th cong., 1 sess., 5441 (May 20, 1896).
37 Mr. Charles Warren, in ch. 9, pp. 273 ff. of his book, Congress, the
Constitution and the Supreme Court has an excellent summary of such
decisions.
38 66th cong., 1 sess., H. J. Res. 16.
39 2 Congressional Digest, 271.
40 2 Congressional Digest, 271 (H. Res. 9755).
“That in any case heard and decided by the Supreme Court of the United States where is drawn in question a statute of any state of the United States on the grounds that said statute is charged to be in conflict with the Constitution of the United States, said statute of a state shall not be held and declared to be in conflict with the Constitution of the United States, . . . unless at least seven members of the said court decide, agree and concur in the opinion that such statute is unconstitutional, null and void.”

The year 1923 was very productive of proposals to increase the number of judges necessary to hold legislative acts unconstitutional. A joint resolution for a constitutional amendment was introduced by Representative Frear. This resolution provided not only for complete congressional regulation of the constitution of the court, but included a proposal to have a legislative recall of judges. It purported to give Congress power to determine "how many members of the Supreme Court shall join in a decision that declares unconstitutional, set aside or limits the effect of any federal or state law . . . ."41

Again a proposal to require the concurrence of seven judges in a decision to hold laws unconstitutional was made by Representative Woodruff in 1923.42

Senator Borah has often spoken against the occurrence of five to four decisions. Accordingly, in 1923, Mr. Borah introduced a bill in the Senate which he thought would restore the prestige of the Court to the unquestioned position which it should have. The bill provided:43

"That in all suits now pending, or which may hereafter be pending, in the Supreme Court of the United States, except in cases affecting ambassadors, other public ministers and consuls and those in which a state shall be a party, where is drawn in question an act of Congress on the ground of repugnancy to the Constitution of the United States, at least seven members of the Court shall concur before pronouncing said law unconstitutional."

His proposal therefore would apply only to acts of Congress. Congress failed to act on his bill, but he reintroduced it in the next Congress.44

One proposal took the form of an open letter to the press by

41 67th cong., 4 sess., H. J. Res. 436; 2 Congressional Digest 271.
42 Ibid., H. R. 14209.
43 Ibid, S. B. 4483.
44 68th cong., 1 sess., S. B. 1197.
Senator-elect Fess of Ohio on March 26, 1923.\textsuperscript{45} He advocated the concurrence of not less than six of the nine members of the Supreme Court in any decision pronouncing a law unconstitutional and void.\textsuperscript{46}

In the 68th Congress,\textsuperscript{47} in addition to the Borah proposal, Representatives Woodruff and La Guardia each introduced a bill in the House similar to that introduced by Borah in the Senate. And finally in the 69th Congress, Mr. Woodruff reintroduced his bill to require at least seven judges of the Supreme Court to concur in a decision declaring certain laws unconstitutional.\textsuperscript{48}

(To Be Continued.)

\textsuperscript{45} 2 Congressional Digest 272.
\textsuperscript{46} It has been impossible in many cases to find the text of proposals in the Congressional Record, and outside sources have to be used.
\textsuperscript{47} 68th cong., 1 sess., H. R. 697, H. R. 721.
\textsuperscript{48} 69th cong., 1 sess., H. R. 6762.
INDIANA LAW JOURNAL

Published Monthly, October to June, Inclusive, by The Indiana State Bar Association

EXECUTIVE OFFICE, 106 CITY HALL, INDIANAPOLIS, INDIANA
EDITORIAL OFFICE, BLOOMINGTON, INDIANA

SUBSCRIPTION PRICE, $3.00 A YEAR
SINGLE COPIES, 50 CENTS

Canadian Subscription Price is $3.50; Foreign, $4.00

Subscription price to individuals, not members of the Indiana State Bar Association, $3.00 a year; to those who are members of the association the price is $1.50 and is included in their annual dues, $5.00.

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