Judicial Review in the United States of America

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I. Introduction.

In any society, the rights of the individual are protected to some extent by custom and public opinion, and — except where the government is totalitarian — certain statutes that add stability to the position of the individual are likely to be regarded as fundamental. America's contribution to the ever-present problem of reconciling individual liberty and governmental authority has been the theory and practice of government under a written constitution that defines and limits the powers of government. If the government, either national or state, seeks to encroach upon the rights of the individual safeguarded by the Constitution, he may vindicate them by an appeal to the courts, which are vested with supreme authority in constitutional questions. Limitations upon governmental powers are thus made effective by the presence of adequate machinery for their enforcement.

Judicial review, the power of the courts to pass upon the constitutionality of acts of the legislative and executive branche of government, is not uniquely American in theory, but the extent to which this theory is practiced is distinctively American (1). The Supreme Court today plays a leading role in the formulation of public policy. It exercises

(1) Judicial bodies exercise a form of judical review in at least fifteen countries, but in none do the courts exercise the power to the extent of the United States Supreme Court. See Joseph TANENHAUS, *Judicial Review, 8th International Encyclopedia of the Social Sciences,* 1968, pp. 303-306 ; David J. DANELSKI and Glendon SCHUBERT, *Comparative Judicial Behavior : Cross-Cultural Studies in Political Decision-Making in East and West,* New York, Oxford University Press, 1969 ; Joel GROSSMAN and Joseph TANENHAUS, *Frontiers of Judicial Research,* New York, John Wiley and Sons, Inc., 1969 ; Edward McWHINNEY, *Judicial Review,* Toronto, University of Toronto Press, 1969.

this exalted role in the guise of interpreting the Constitution, but the cult of the robe is all but dead and buried. Even the man in the street knows that vague generalities in the Constitution like « due process » and « equal protection » mean largely what the justices say they mean. In this respect, the unwritten constitution of England is quite as meaningful as the written Constitution of the United States.

It is the more active participation of the American judiciary in the political process rather than the presence of a written constitution that distinguishes most clearly the American and English political systems. Sir Edward Coke, most responsible for England's Petition of Right (1628), wrote in doctor Bonham's case that « it appears in our books, that in many cases the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void : for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void » (2). But Coke cited no examples, and this theory of judicial supremacy never became a practice in England. It is to America that one must turn to see the flowering, and perhaps the going to seed, of judicial review.

II. Basic issue.

Individual rights versus popular sovereignty is frequently presented as the basic issue in judicial review. In the Declaration of Independence Thomas Jefferson held it to be « self-evident that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness ». And for the brave men who were to sign, the last paragraph of the Declaration proclaimed : « We ... the representatives of the United States of America ... appealing to the Supreme Judge of the World for the rectitude of our intentions, do ... mutually pledge to each other our lives, our fortunes, and our sacred honor ». Certainly these men were not Sophists. Their thought was saturated with concepts of justice and reason, described by philosophers of the day as natural law.

But while the Declaration of Independence reflected the Stoic concept of law based upon reason — a higher law concept — it reflected at the same time the doctrine of popular sovereignty. It boldly proclaimed that « governments are instituted among men, deriving their

(2) Arthur E. SUTHERLAND, *Constitutionalism in America*, New York, 1965, p. 61.

just powers from the consent of the governed ». Abraham Lincoln echoed this same thought when at Gettysburg he dedicated the nation to the proposition « that government of the people, by the people, for the people shall not perish from the earth ».

Is the concept of popular sovereignty compatible with a higher law concept ? Will not a momentary majority sometimes pass enactments « no more deserving the name of law than if enacted by highwaymen » ? Life in general is made up of competing forces, and one valid political principle often competes with another equally valid one. The American constitutional system with judicial review presents one approach toward reconciling this dilemma.

This line of argument is put forward by those who favor judicial review, and, from a theoretical point of view, the argument has strong appeal. But judicial review in practice in America has not lived up to the exalted position given to it in theory. The incidence of judicial review has, on the whole, been rather appalling (3). Viewing the American governmental system in operation over a long period of time, one is pressed toward the conclusion that, by and large, the basic issue in constitutional litigation is : *Who* is to decide political issues ? And when tested on the merits of past performance, one is hard pressed to find convincing evidence to support the thesis that a small group of men appointed to the Supreme Court for life are better qualified than the people's chosen representatives in Congress.

III. Judicial review in action.

It is well to emphasize that the federal courts will pass upon the constitutionality of a statute or executive action only when a decision of that question is necessarily involved in the decision of an actual case. Nothing could be more erroneous than the notion that acts of Congress and executive orders are presented to the Supreme Court for approval before they are put into operation. A statute which is in fact unconstitutional may be enforced for years unless it is challenged and brought before the courts in a case.

The first case in which an act of Congress was held unconstitutional was Marbury v. Madison, decided in 1803. The chief facts in the case were as follows : William Marbury was appointed justice of the peace for the District of Columbia by President John Adams just before he

(3) Henry W. EDGERTON, *The Incidence of Judicial Review over Congress, Cornell Law Quarterly*, April 1947, XXII, 299.

left office. Because of the late date of the appointment, Marbury's commission, duly signed and sealed, was not delivered before Thomas Jefferson was inaugurated President. The new Secretary of State, James Madison, refused to deliver the commission. The affair was but an incident in the feud then raging between the incoming Republicans and the outgoing Federalists. The Republicans charged that their opponents, defeated at the polls in 1800, had sought through the judiciary act passed by the lame-duck Congress on February 13, 1801, to retire to the judiciary as a stronghold from which to batter down the works of Republicanism. Marbury petitioned the Supreme Court for a writ of mandamus to force the new Secretary of State to deliver his commission.

In writing the opinion of the Court, Chief Justice Marshall first established the facts that Marbury had a right to the commission in controversy and that mandamus was the proper remedy for securing it. He then arrived at the question of the authority of the Court to issue the writ. The Constitution provided that « In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction... ». Since Marbury was neither an ambassador, public minister, or consul, nor a state, Marshall concluded that the Supreme Court could not exercise original jurisdiction in his case. The fact that the Judiciary Act of 1789 specifically vested the Supreme Court with authority « to issue writs of mandamus in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office under the authority of the United States » was of no avail, for this provision of the act was in conflict with the Constitution and therefore void. Marshall's statement was so forceful and appealing that it has become the classic defense of judicial review. It boils down to three propositions : 1° the Constitution is the supreme law of the land ; 2° statutes enacted by the legislature are subordinate to and cannot conflict with the supreme law ; 3° judges, sworn by oath to support the Constitution, must declare void any legislative act found by the judges to conflict with the Constitution (4).

During the period before the Civil War the Supreme Court invalidated acts of Congress in only two cases, Marbury v. Madison (1803), and

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(4) The classic rebuttal of Marshall's statement is Mr. Justice Gibson's opinion in Eakin v. Raub, 12 Sergt. and Rowle 330 (Pennsylvania Supreme Court, 1825). This case is included in Robert E. CUSHman's excellent little volume *Leading Constitutional Decision*, 13th edition, New York, 1966, p. 331.

Dred Scott v. Sanford (1857). The Marbury Case, already discussed, was significant for the theory involved, but of little practical importance since it involved merely a refusal of the Supreme Court to order that Marbury be commissioned a justice of the peace for the District of Columbia. The Dred Scott Decision, however, was intended by the Court to put an end to the pressing political problem of the day, namely, the issue of slavery in the territories of the United States. The rigid decision backing the pro-slavery interests, holding void the Compromise of 1850 and other agreements reached in Congress, was no shining success.

Thomas Jefferson had denounced the « gratuitous opinion » in Marbury v. Madison, and denied it to be law. « The Constitution intended that the three great branches of the government should be co-ordinate, and independent of each other », explained Jefferson. « As to acts, therefore, which are to be done by either, it has given no control to another branch... Where different branches have to act in their respective lines, finally and without appeal, under any law, they may give to it different and opposite constructions... From these different constructions of the same act by different branches, less mischief arises than from giving to any one of them a control over the others » (5). Abraham Lincoln expressed the contempt felt by most citizens for the Dred Scott Decision when he said in his First Inaugural Address : « The candid citizen must confess that if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned the government into the hands of that tribunal ».

During the period from 1861 to 1937 the Supreme Court invalidated seventy-two acts of Congress, and hundreds of state laws. The basic doctrine of constitutional law during the period was protection of vested property rights. The Court used the due process clause as a basic for enforcing a *laissez faire* philosophy. The adoption of this philosophy as a constitutional principle came at a time when the frontier was passing away and an industrial society was emerging ; hence it resulted in a social lag.

The Court at its worst as a barrier to needed social legislation is illustrated by such cases as Lochner v. New York which struck down

(5) Paul Leicester FORD, *The works of Thomas Jefferson,* New York, 1905, X, 395-396.

a New York statute limiting employment in bakers' shops to sixty hours per week, Coppage v. Kansas which struck down a Kansas statute prohibiting yellow dog contracts, and Adkins v. Children's Hospital which struck down an act of Congress prescribing minimum wages for women in the District of Columbia.

Dissenting in the Lochner Case, Justice Holmes stated :

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law... (6).

Opposition to the Court's interference in economic matters reached a high point following its invalidation of the National Industrial Recovery Act, the Agricultural Adjustment Act, and other significant parts of President Franklin D. Roosevelt's New Deal Program. On February 5, 1937, the President submitted to Congress a plan to pack the Court by increasing its membership to fifteen. During the weeks that this plan was under study, Justice Owen J. Roberts changed his mind and began voting to sustain social legislation. With only one vote changed, the court in 1937 sustained a state minimum wage law, the Social Security Act, and the National Labor Relations Act. Moreover, Justice Van Devanter, an arch-conservative, announced that he would retire. Thus the alleged need for changing the personnel of the Court by extraordinary means lost most of its force, and Congress rejected the Court packing proposal.

Since 1937 no economic measure enacted by Congress has been held void by the Court, and the Court has displayed a tolerant attitude toward economic regulations enacted by the states. In this area judicial neutralism advocated by Justice Holmes has become dominant.

But the Supreme Court has by no means abandoned judicial review. It has simply turned its attention from economics to other areas. *Certiorari* has been granted liberally in cases dealing with race, religion, and representation, as well as in cases on speech, association, and criminal procedure.

In the period before 1937 the Supreme Court used tradition and precedent as its guide. It sought to preserve practices of the past, to

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(6) Lochner v. New York, 198 US 45 (1905).

maintain the status quo. What was the guide for the Court after 1937 when its attention turned from economic to social matters ? To single out characteristics that accurately describe the Court's leading decisions of the past three decades is difficult, but even a fumbling attempt may be helpful. Protection of minority groups suggests itself as a label. Numerous cases have dealt with Jehovah's Witnesses, atheists, Negroes, Communists, and alleged criminals. The scope of the First and Fourteenth Amendments has been expanded enormously, and equal protection has become the dominant note in the law.

The Court has assumed the role of formulator of new policy rather than the conservator of an established one, and it has made sudden and sweeping changes in the law. Decisions like Brown v. Board of Education banning segregation in the public schools, and Reynolds v. Sims requiring representation on a population basis in both houses of state legislatures were revolutionary in character.

Theoretically the Court is only enforcing the Constitution when it invalidates state or national legislation, but under the policy of « judicial activism » employed under Chief Justice Warren, the sky became the limit of what the Court might promulgate as the law (7). It is difficult to find anything in the Constitution of the United States that requires that both houses of a state legislature be apportioned according to population, yet the Warren Court imposed such a rule upon the states.

Whether one agrees or disagrees with the desirability of the social legislation promulgated by the Warren Court, it is difficult to justify the means by which it was brought into being.

Dissatisfaction with the Warren Court's « experiment in venturesome constitutionalism » was widespread, and by the fall of 1969 the legislatures of thirty-three states had petitioned Congress to call a constitutional convention (8).

IV. **Evaluation.**

The proper role of the judiciary in the American constitutional system has always been a subject of debate, and the extreme position taken

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(7) See, for example, Shapiro v. Thompson, 394 US 618 (1969) holding void all state laws and an act of Congress prescribing a year of residence as a qualification for relief benefits.

(8) *Congressional Quarterly*, August 1, 1969, p. 1372. In August, 1958, the Conference of Chief Justices (of the Supreme Courts of the fifty states) adopted a resolution calling upon the United States Supreme Court to « depart from politics and return to the law ». « Report of the Committee on Federal-State Relationships », *The Conference of Chief Justices*, August, 1958, p. 14.

by the Supreme Court in recent years has made the question of curbing its power a paramount issue. Viewing the Court's work in historical perspective, it appears to have been least successful on the occasions when it abandoned judicial restraint and sought to enforce extreme economic or social policies based primarily upon the personal views of the justices. Some element of judicial participation in the formulation of public policy is inherent in our constitutional system, but it appears to be a mistake for the Court to seek to elevate to the status of constitutional law policies not rooted in the traditions of the American people and upon which there is no widespread consensus. Judge-made law hampers experimentation and evolution, breeds disrespect for law, and invities either stagnation or revolution.

In a period when the public at large recognizes that the Court is seeking to enforce extreme policies, it is easy to criticize ; but it would be a mistake to overlook the blessings of liberty that accompany an independent judiciary and the constructive work that the Court has done. Consider, for example, the benefits resulting to the nation from such famous decisions as McCulooch v. Maryland, sustaining a theory of implied power for Congress, Gibbons v. Ogden, liberating a developing national commerce from the creeping tentacles of local monopoly, and Ex parte Milligan, prohibiting a suspension of the writ of habeas corpus in districts outside the zone of military operations. The decisions of the Supreme Court as a whole have been of a high quality ; the judges, with few exceptions, have been men of ability and devotion to duty ; and during most of our national history the Court has stood high in public esteem. But recurring crises cast doubts upon the wisdom of a system that places nine appointed judges in a position where they can exercise unrestrained political power.

V Conclusion

Judicial review as practiced in the United States is by no means a complete solution to the age old problem of reconciling individual liberty and governmental authority. Courts as well as legislatures exercise governmental authority, and judges as well as legislators are capable of abusing authority. There is much truth in Alexander Pope's lines :

For forms of government let fool contest ; whate're is best administered is best (9).

(9) *The Poetic works of Alexander Pope,* Philadelphia, 1830, p. 108.

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