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THE DOCTRINE OF JUDICIAL REVIEW AND NATURAL LAW

by

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The title of this article suggests that judicial review bears a unique relation to natural law, that it is related in a way that the legislative power and the executive power are not. This is indeed the case: judicial review immediately evokes the idea of "*jurisdiction*"; on the other hand, "legislative power", "executive power" signify *government*. The distinction between government and jurisdiction is at the heart of the whole theory of constitutional or limited government.

Before speaking of John Marshall's use of judicial review in establishing the jurisdiction of government, it might be well to spend a moment inquiring into the original source of this notion of *government limited by jurisdiction*. Professor Charles H. McIlwain has spoken of the "riddle" of constitutionalism: this riddle is expressed most strikingly in the dictum of mediaeval courts that the king is above the law and under the law; it may be expressed in more contemporary fashion by pointing out that limited government is not one which is not in full control of affairs. We know for example that Marshall not only established effective limits to the authority of government, but that he made that authority absolutely effective within its limits,—within the limits of its jurisdiction. It might be well to take a preliminary glance at the source of this important political conception.

As in other matters, so in these it is Aristotle who, by attending to the most elemental things, attained the most profound and far-reaching. And so, although it may seem at first irrelevant, a consideration of Aristotle's doctrine is, on the contrary, most useful for a beginning understanding of the meaning of limited government.

In the first book of his *Politics*, Aristotle observes: ". . . there are many kinds both of rulers and subjects . . .; for in all things which form a composit . . . and which are made up of parts . . . a distinction between the ruling and subject element comes to light. Such a duality exists in living creatures; but not in them only; it originates in the constitution of the universe. . . . At all events, we may . . . observe in living creatures a . . . constitutional rule; for . . . the intellect rules the appetites with a constitu-

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tional and royal rule".¹ Now the term "royal" here signifies (as could be demonstrated if we went back to Aristotle's *Psychology and Ethics*) *the full perfection of the governing principle*; the term "constitutional" signifies *the jurisdiction under which the governing principle operates*. The virtuous man is said to rule himself "royally" because he is in full control of himself—he does the good easily and with pleasure. His self-government is not weak—he is not weak. At the same time he is said to rule himself "constitutionally" *because what he does easily and with pleasure is what he ought to do*—what he is *bound* to do by the constitution of his nature, by the law of his nature, by the natural law. It is the things that he *ought* to do that he does with full control. Now the virtue by which a man chiefly does what he ought to do is the virtue of prudence—a virtue which St. Thomas Aquinas says is the virtue proper to all government. Prudence—the virtue proper to government—operates with respect to means, not to ends: hence when we say that government is in full control of affairs it is with respect to finding the means to ends which are fixed by man's constitution as a rational animal, by the law of his nature, by the natural law. These ends may very conveniently and appropriately for our purposes be summed up by the terms "substantive rights" and "procedural rights." By the first is meant all that is implied in living and living well; and by the second, all the procedures that prudence entails—e.g. deliberation, counsel, judgment.

As I said at the beginning that judicial review is related to natural law in a way that the legislative power and executive power are not. This is not to say government itself is not also related to natural law: the decrees and statutes of government are said to be derived from natural law by way of *determination* of common principles of the natural law: for example, one's substantive right to life is made determinate by the statute providing for a living wage, social security, etc. As St. Thomas points out, a positive law derives its force from human agreement, from human determination or convention; it does not of itself have the force of natural law. But—and this is the important point—"the human will can, by common agreement, make a thing to be just provided it be not, of itself, contrary to natural right".² And within this area lies the function of judicial review.

When John Marshall established the doctrine of judicial review in 1803 in the case of *Marbury v. Madison*³, he not only confined the

¹ POLITICS I, ch. 5, 1254a20—1254b.

² SUMMA THEOLOGICA II-II, q. 57, Art. 2, ad 2.

³ 1 Cranch 137 (U.S. 1803).

authority of the Federal government to the jurisdictional limits imposed by our written Constitution (this is a somewhat complicating point arising out of our unique Federal system, and a point of comparative unimportance since Marshall might have interpreted the Judiciary Act of 1789 in such a way as to allow the Court jurisdiction in the Marbury Case); but the important point is that Marshall held the authority of the Federal Government bound by a jurisdiction more fundamental than that of the written constitution. To understand this we must examine briefly the issues involved in *Marbury v. Madison*. The facts of the case were briefly these: near the end of the term of his office President Adams nominated William Marbury to the office of Justice of the Peace in the District of Columbia. The nomination was confirmed by the Senate, the commission signed by the President and the Great Seal affixed. On the expiration of Adams' term, Marbury applied to the Secretary of State—now James Madison under President Jefferson—for the delivery of his commission. Jefferson refused, holding that the appointment had not been completed since the commission had not been delivered. Marbury moved for a Writ of Mandamus before the Supreme Court to have Madison deliver the commission.

The legal issue turned out to be a very simple and narrow one: Marbury had moved for a Writ of Mandamus before the Supreme Court; the question was: does the issuing of a Writ of Mandamus fall within the original jurisdiction of the Court? Now the importance of the case lies not so much in the answer given by the Court to this question nor in the Court's finding that the Judiciary Act of 1789 Sec. 13 was void because contrary to Art. III, §2 of the U.S. Constitution. The deeper significance of the case lies in Marshall's answers to two questions which he raised before coming to the special legal issue. Paradoxically, after having concluded in his own mind that the Court was without jurisdiction, Marshall proceeded to decide the merits of Marbury's claim. And it is this portion of the decision that is of greatest import.

Marshall approached the decision by asking three questions. The first question asked was: had the applicant a right to the commission? The second question was: if he had a right, and that right had been violated, did the laws of his country afford him a remedy? The third question contained the legal issue: if the laws of his country did afford Marbury a remedy, was this remedy a mandamus issuing from the Supreme Court?

In answering the first question, the Court, having come to the conclusion that the appointment was made when a commission had been signed by the President, and that the commission was complete when the

seal of the United States had been affixed to it by the Secretary of State, declared that the right to the office was in the person appointed and therefore to withhold his commission was "an act deemed by the Court not warranted by law, but violative of a vested legal right".⁴ The thing to be observed is that this ruling was based neither upon the special language of any statute nor upon the language of the Constitution. It was based on principles of natural justice.

The answer to the second question was likewise reached not by a study of federal statutes but instead by an application of common law principles. Marshall observed: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right".⁵ Note then, that Marshall is saying that the laws *must* furnish such a remedy (for the violation of a vested legal right) whether there is specific statutory provision or not. As Professor Carl Brent Swisher puts it: "Having made this assumption, which was based on no constitutional or statutory provision, he examined the case to see if there was anything in it to exempt it from the general rule, and he found nothing".⁶ Hence, note the argument of the Court: Marbury has been found to have a legal title to the office, "a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy"—*the laws of his country*, although, as we have seen, no specific statute so provided.

We may observe then, that there was a federal statute (the Judiciary Act of 1789) which provided Marbury with a procedural right (the Writ of Mandamus) but the issuance of such a writ *by any court* would depend on proof of neglect of ministerial duty in the Secretary of State, which neglect would itself depend on proof of Marbury's substantive right to the office to which he had been appointed. It was this substantive right that was not provided for in any statute, but which according to Marshall, the laws of the country must enforce.

Having said all this, Marshall found (somewhat amusingly it must be conceded) that the Court lacked original jurisdiction to issue a writ of mandamus. It was the first time that the Supreme Court had declared void a law of Congress, and it was not to do so again for over half a century. Now the greatness and significance of the Marbury decision are

⁴ This is a somewhat complicating point arising out of our unique Federal system, and a point of comparative unimportance since Marshall might have interpreted the Judiciary Act of 1789 in such a way as to allow the Court jurisdiction in the *Marbury* case.

⁵ *Id.* at 162.

⁶ *Id.* at 163.

usually said to lie in this invalidation of the federal statute. This was indeed significant, but it was not the matter of deepest significance; it involved, after all, merely finding one written law (the Judiciary Act of 1789) incompatible with another written law (the United States Constitution). Furthermore, we may notice that it would not have been at all impossible for Marshall—had he been so disposed—to have found the Judiciary Act of 1789 §13 quite constitutional. The specific legal issue before the Court was this: the Court was acting in this case not as an appellate tribunal but as a court of original jurisdiction. Section 2, Art. III of the Constitution, listed types of cases in which the Supreme Court was to have original jurisdiction. It stated that in all other cases within the judicial power of the United States the Supreme Court should have appellate jurisdiction, with such exceptions and under such regulations as Congress should make. There was doubt as to whether the power of Congress to make exceptions applied both to the original and appellate jurisdiction of the Court, or only to the latter. Marshall concluded that it applied only to the latter. The description of the original jurisdiction of the Supreme Court in the Constitution, he reasoned, was complete. Congress had no power to add to that jurisdiction. Among the items listed in it he did not find authority to issue writs of mandamus. The relevant provision of the Judiciary Act was, therefore, not authorized by the Constitution. This line of reasoning enabled Marshall to expound the principle that an act of Congress repugnant to the Constitution is void. Granted the significance of this principle, it is still subordinate to the other principle that Marshall laid down in answering his two preliminary questions, namely, that the authority of government is regulated by a jurisdiction more fundamental than any written law—even that of the Constitution.

I should like to add a brief *coda* to the considerations we have been making. I think we have seen that the Constitution is not of itself a guarantee of basic natural rights: the Constitution needs always to be interpreted and applied. The principles of constitutionalism are philosophical principles, but they were inherited in this country through the legal structure—especially the common law—of England. The philosophical principles underlying constitutionalism were, in the Eighteenth Century, undergoing that corruption whose full issue is now evident in what Mr. Walter Lippmann calls our Jacobin education. I may point out that Professor Carl Brent Swisher, a very distinguished authority in the field of Constitutional Law, in speaking of those portions of Marshall's decisions which rest on natural law principles, uses the terms "fictions", "assumptions", and "devices", and observes that we find in Marshall "an intermingling of conceptions of *law as emanating from government* and of *law as emanating from a source superior to any earthly government which*

effectively closes the channels of thought and reasoning".⁷ This view expresses what is by no means an uncommon contemporary appreciation of Marshall. Professor Swisher's position leads directly to the abandonment of the distinction between government and jurisdiction: the only law that counts is what the government says. The unfortunate truth is that today, behind the magnificent façade of our legal structure, the substance of what Mr. Lippmann calls the "Public Philosophy" is fast being eaten away by "the acids of modernity". Let me illustrate this point by concluding with two questions relative to two basic rights guaranteed by the Constitution—that of property and that of religion. Is the right of property, as guaranteed by the Fourteenth Amendment, a right that understands property as an instrument of living and fundamentally instrumental in the perfection of family life? Or is it to be understood in the Lockean sense, which is primarily designed to protect large and abstract financial interests? I needn't say that it was the Lockean sense that largely determined the opinion of the Court from 1900 to 1930 and has been responsible for that breakdown of the social structure which the Popes have ceaselessly sought to have remedied. Secondly, is the guarantee of religious freedom by the First Amendment a declaration—as Father John C. Murray S.J. seems to believe—of the traditional doctrine of the independence and superiority of the spiritual? Or is it, as Karl Marx understood it (and he was an astute student of the 18th Century revolutions) a formal relegation of religion to what he called "the refuse heap of arbitrary private whims"? If students and scholars of the caliber of Professor Swisher have come to think of natural law principles as "devices", "fictions", "assumptions" that effectively close the channels of thought and reasoning, what—one wonders—becomes of supernatural principles? I mention these unpleasant things merely as a caution against supposing that John Marshall's fine spirit must inevitably animate the laws of our land.

⁷ AMERICAN CONSTITUTIONAL DEVELOPMENT p. 162 (1943).