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THE ROLE OF THE SUPREME COURT

INTRODUCTION BY WHITMAN H. RIDGWAY*

The role of the Supreme Court in our constitutional system has been the subject of lively debate over the past two hundred years. Article III of the Constitution vested all judicial power "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."¹ The supremacy clause of article VI made the Constitution the supreme law of the land and bound the state and federal governments to it.² What was left unsaid, however, was which branch of government has the responsibility to decide whether a law is constitutional.

The founding fathers considered alternative methods to deal with laws deemed to be inconsistent with the Constitution. In the Virginia Plan presented at Philadelphia in May 1787, James Madison proposed the creation of a Council of Revision, composed of the Executive and a convenient number of the National Judiciary, to examine federal and state acts and to reject those which it found wanting.³ The founding fathers rejected this plan, adopting one dividing such power between the Executive,⁴ who could veto congressional legislation, and the judiciary.⁵

Both the Federalists and Anti-Federalists recognized that the power of judicial review was implicit in the design of the Constitution. As Alexander Hamilton wrote in *The Federalist* No. 78: "A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body."⁶ Anti-Federalist writers, such as Brutus, made essentially the same point: "[T]he supreme court has the power, in the last resort, to determine all questions that may arise in the course of legal discussion, on the meaning and construction of

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1. U.S. CONST. art. III, § 1, cl. 1.

2. *Id.* at art. VI, cl. 2.

3. See Virginia Resolutions Presented to the Constitutional Convention on May 29, 1787, reprinted in M. KAMMEN, *THE ORIGINS OF THE AMERICAN CONSTITUTION* 24 (1986).

4. See U.S. CONST. art. I, § 7.

5. See *id.* at art. III, § 2.

6. *THE FEDERALIST* No. 78, at 467 (A. Hamilton) (C. Rossiter ed. 1961).

the constitution."⁷ The First Congress affirmed the principle of judicial review in section 13 of the Judiciary Act of 1789,⁸ which defined the Supreme Court's appellate jurisdiction.

The most forceful statement of judicial review was made by Chief Justice John Marshall. He wrote in *Marbury v. Madison*⁹ as follows:

[I]f 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 with the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty.¹⁰

There was only one logical conclusion to this problem: "[A] law repugnant to the constitution is void; and . . . courts, as well as other departments, are bound by that instrument."¹¹

Several Presidents have dissented from this view. While Thomas Jefferson was unhappy with Marshall's interpretation at the time, Andrew Jackson would make the most vociferous challenge to judicial supremacy. Contrary to the ratification debate, which placed the will of the majority in the legislature, Jackson argued that the people gave the President an electoral mandate that included deciding what was constitutional and what was not.¹² Such a majoritarian view has been echoed by other strong Presidents.

The most recent public debate on the proper role of the Supreme Court and the doctrine of judicial review has been evident in speeches by Attorney General Edwin Meese III, and Supreme Court Justice William J. Brennan, Jr. In a lecture at Tulane University in October 1986 Mr. Meese observed:

Once we understand the distinction between constitutional law and the Constitution, once we see that constitutional decisions need not be seen as the last words in constitutional construction, once we comprehend that these decisions do not necessarily determine future public policy—once we see all of this, we can grasp a correlative point:

7. Brutus, *Essay No. XII*, in *THE ANTI-FEDERALIST* 168 (H. Storing ed. & M. Dry abr. 1985).

8. Judiciary Act, ch. 20, § 13, 1 Stat. 73, 81 (1789).

9. 5 U.S. (1 Cranch) 137 (1803).

10. *Id.* at 177.

11. *Id.* at 179 (emphasis added).

12. See R. REMINI, 3 *ANDREW JACKSON AND THE COURSE OF AMERICAN DEMOCRACY* 1833-1845, at 338-40 (1984).