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Judicial Review Prior to Marbury v. Madison

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JUDICIAL REVIEW PRIOR TO *MARBURY V. MADISON*

THE foundations of the doctrine of judicial review[1] were formulated on the continent of Europe and in England many years prior to the time of the American Revolution. In England, prior to the Glorious Revolution of 1688, the doctrine of a fundamental law — a law which acts of Parliament might not contravene — was vigorously defended by Lord Coke in his controversy with James I.[2] In the noted *Dr. Bonham's Case,* Coke asserted:

> 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 or reason, or repugnant or impossible to be performed, the common law will control it and adjudge such act to be void.[3]

Reason and the common law as interpreted by the courts was regarded as superior to both the King and Parliament.[4]

The doctrine of judicial review was exercised by England in her relations with the American colonies. The acts of the colonial assemblies were constantly reviewed by the Judicial Committee of the Privy Council to make sure they were in pursuance of the supreme law of the colonies — the charters of the colonies and the laws of England. Out of 8,823 acts of the colonial assemblies

[1] Edward S. Corwin said that the doctrine of judicial review comprises the following propositions: "that the constitution is law in the strict sense of a body of rules known to and enforceable by courts; that it is law of higher obligation than any legislative act which purports to have been made under its sanction; that consequently the court must in case of conflict between the constitution and a legislative act determine the rights of parties in accordance with the former; that by the principle of the separation of powers a judicial interpretation of the standing law and so of the constitution is final for the determination of the case in which it was rendered." 8 ENCYC. SOC. SCI. (1932), *Judicial Review,* p. 457.

[2] HAINES, CHARLES GROVE, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY (Univ. of Calif. Press, Berkeley, Calif., 2d ed. 1932) 44 ff.

[3] 8 Co. 113b, 118a, 77 Eng. Rep. 646, 652 (C. P. 1610).

[4] HAINES, *op. cit. supra* note 2, at 99.

submitted to the Privy Council from 1696 to 1782, more than 600 were declared null and void.[5]

Another precedent for judicial review was that the state courts had been exercising this power prior to the Federal Convention. Some of the outstanding cases in which legislative acts were declared null and void by state courts are: *Holmes v. Walton* (1780), a New Jersey case;[6] *Commonwealth v. Caton* (1782), a Virginia case;[7] *Trevitt v. Weeden* (1786), a Rhode Island case;[8] and *Bayard v. Singleton* (1787), a North Carolina case.[9]

Likewise, there can be no doubt that the majority of the members of the Federal Convention of 1787 believed that the Constitution would secure to the courts the right to pass on the validity of the acts of Congress. The following members of the Federal

[5] Patterson C. Perry, *The Development and Evaluation of Judicial Review,* 13 Wash. L. Rev. 76 (1938). Thus, the work of the Privy Council constituted a precedent and a preparation for the power of judicial annulment upon constitutional grounds now exercised by the state and federal courts in the United States. HAINES, *op. cit. supra* note 2, at 49.

[6] The courts of New Jersey were pioneers in practicing the doctrine of judicial review. *Holmes v. Walton* is the first recorded case where a court invalidated an act because it was in conflict with a provision of the constitution of the state. HAINES, *op. cit.,* at 92.

[7] In this case Justice Wythe, John Marshall's law professor and later a delegate to the Federal Convention, had the following to say regarding judicial review: "If the whole legislature, an event to be depreciated, should attempt to overleap the bounds prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers at my seat, in this tribunal; and pointing to the Constitution, will say to them, here is the limit of your authority, and hither shall you go, but no further."

[8] In this case James Varnum asserted "that the legislative have the uncontrollable power of making laws not repugnant to the constitution; the judiciary have the sole power of judging of those laws, and are bound to execute them; but cannot admit any act of the legislative as law, which is against the constitution."

[9] About the same time that the Federal Convention began its work in Philadelphia, the court of North Carolina handed down its decision in *Bayard v. Singleton.* The court made the following observation on its right to declare a legislative act void: "But that it was clear, that no act they [the Legislature] could pass, could by any means repeal or alter the constitution, because if they could do this, they would at the same instant of time, destroy their own existence as a legislature and dissolve the government thereby established. Consequently the constitution (which the judicial was bound to take notice of as much as of any other law whatever) standing in full force as the fundamental law of the land, notwithstanding the act on which the present motion was grounded, the same act must of course, in that instance, stand as abrogated and without any effect." COMMAGER, HENRY STEELE (Editor), DOCUMENTS OF AMERICAN HISTORY (F. S. Crofts & Co., N. Y. 1934) 151.

Convention asserted that this would be the case; Gerry and King of Massachusetts, Wilson and Gouverneur Morris of Pennsylvania, Martin of Maryland, Randolph, Madison and Mason of Virginia, Dickinson of Delaware, Yates and Hamilton of New York, Rutledge and Charles Pinckney of South Carolina, Davie and Williamson of North Carolina, Sherman and Ellsworth of Connecticut. While these are only seventeen names out of a total of fifty-five members, they constitute three-fourths of the leaders of the Convention, four of the five members of the Committee of Detail which drafted the Constitution, and four of the five members of the Committee of Style which gave final form to the Constitution.[10]

Many critics of judicial review ask why, if the framers of the Constitution wanted judicial review and still thought it necessary to provide for it specifically, did they not choose and place in the Constitution the appropriate language to give the courts this power as was true, for example, with the veto power of the President. The answer is that judicial review was universally regarded as a feature of the new system while its adoption was pending. In short, judicial review rested upon certain principles which the framers of the Constitution believed needed no further elaboration, as, for example, certain general principles made unnecessary specific provision for the President's power of removal.[11]

The attitude of some of the delegates toward the doctrine of judicial review was expressed by Sherman and Gouverneur Morris when the convention voted down on July 17, 1887, by a vote of seven to three,[12] the clause "to negative all laws passed by the several states, contravening, in the opinion of the national legislature, the Articles of Union, or any treaties subsisting under the authority of the Union." Mr. Sherman thought that the resolution

[10] CORWIN, EDWARD S., THE DOCTRINE OF JUDICIAL REVIEW (Princeton Univ. Press, Princeton, N. J. 1914) 10, 11.

[11] *Id.* at 16.

[12] 5 ELLIOTT, JONATHAN (Editor), DEBATES ON THE FEDERAL CONSTITUTION (J. B. Lippincott Co., Philadelphia, 1901) 322.

giving Congress the authority to veto state laws was "unecessary, as the courts of the states would not consider as valid any law contravening the authority of the Union," and Morris believed "a law that ought to be negatived will be set aside in the judiciary department."[13]

On the same day that this resolution was defeated, Luther Martin presented a resolution which had appeared in the small-state plan on June 15, providing that the national laws made in pursuance of the national constitution, and all treaties of the United States, shall be the supreme law of the several states. The resolution was adopted without dissent.[14]

On August 23 Mr. Rutledge moved to amend Mr. Martin's resolution to read:

> This Constitution, and the laws of the United States made in pursuance thereof, and all the treaties made under the authority of the United States, shall be the supreme law of the several States, and of their citizens and inhabitants: and the judges of the several states shall be bound thereby in their decisions, anything in the constitutions or laws of the several states to the contrary notwithstanding.[15]

This resolution was also agreed upon without a dissenting vote.[16] The wording of the provision as it finally appeared in the Constitution differs but slightly.[17] It made the Constitution, as well as laws and treaties passed in pursuance of the Constitution, the supreme law of the land. In seeking a constitutional basis for judicial review, one cannot overemphasize the importance of this declaration. Since the Constitution is law, nothing contrary to it can also be law. Furthermore, the judges in their courtrooms must maintain the authority of government and the binding effect of the Constitution on which the federal system rests. The judges are bound to recognize and apply the Constitution as the fundamental law.

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[13] *Id.* at 321.
[14] *Id.* at 192.
[15] *Id.* at 467.
[16] *Ibid.*
[17] Article VI, ¶ 2.

The supreme law clause, as finally adopted, only mentions state judges; but federal judges must also treat the Constitution as law. This simple logic is supplemented by the words of the Third Article of the Constitution giving to the federal courts jurisdiction of cases arising under the Constitution, laws of the United States and treaties.[18] It is only logical to assume that the courts must interpret the Constitution and determine its particular applications before they can decide certain kinds of controversies; and in doing so they may be called upon to uphold the Constitution and ignore an act.

The arguments of several delegates on a proposed council of revision for the general government present further evidence that the framers of the Constitution were thoroughly familiar with the doctrine of judicial review and most of them expected the courts to exercise it.[19]

Madison believed that a council of revision would enhance the independence of the judiciary by "giving it an additional opportunity to defend itself against legislative encroachments." He thought that "it would be useful to the executive, by inspiring additional confidence and firmness in exerting the revisionary power." He stated that a council of revision would be "an *additional* check against a pursuit of those unwise and unjust measures which constituted so great a portion of our calamities."[20]

Mr. Gerry, however, was opposed to the council of revision because "it was making the expositors of the laws the legislators, which ought never to be done." Mr. Strong also thought "that the power of making ought to be kept distinct from that of expound-

[18] Article III, § 2, ¶ 1.

[19] The Virginia plan, providing for a council of revision, read: "Resolved, that the executive, and a convenient number of the national judiciary, ought to compose a council of revision, with authority to examine every act of the national legislature before it shall operate, and every act of a particular legislature before a negative thereon shall be final; and that the dissent of the said council shall amount to a rejection, unless the act of the national legislature be again passed, or that of a particular legislature be again negatived by—of the members of each branch." 5 ELLIOTT, *op. cit. supra* note 12, at 128.

[20] *Id.* at 345.

ing the laws."[21] The crowning argument for judicial review was given by Mr. Luther Martin when he stated that he saw no need for a council of revision to act as a check upon legislation, for "as to the constitutionality of laws, that point will come before the judges in their official character." He further commented that "in this character they have a negative on the laws. Join them with the executive in the revision, and they will have a double negative."[22]

The council of revision was finally defeated because most of the delegates were afraid that a supreme court veto would drag the court into politics, destroy its dignity and weaken instead of strengthen its powers. Mr. Sherman voiced the sentiments of many of the delegates when he made the statement on August 15, 1787, that he "disapproved of judges meddling into politics and parties. We have gone far enough in forming the negative as it now stands."[23]

On July 23 Madison, arguing for ratification of the Constitution by the people instead of by state legislatures (as many delegates advocated — including Ellsworth, Morris and King), made the following statement, which is formidable evidence of the right of the courts to declare legislative acts null and void because of their unconstitutionality. He considered:

> the difference between a system founded on the people to be the true difference between a *league* or *treaty*, and a *constitution*. The former, in point of *moral obligation*, might be as inviolate as the latter. In point of *political operation*, there were two important distinctions in favor of the latter. First, a law violating a treaty ratified by a preexisting law *might* be respected by the judges as a law, though an unwise or perfidious one. A law violating a constitution established by the people themselves *would be* considered by the judges as null and void.[24]

Also, controversies that might arise over the division of powers

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[21] *Ibid.*

[22] *Id.* at 346.

[23] *Id.* at 430.

[24] *Id.* at 356.

between the federal and state governments were a sound reason why the courts would, out of necessity, exercise the power of judicial review. Madison wrote in *The Federalist* that judicial supremacy was necessary "to prevent an appeal to the sword and a dissolution of the compact." In settling a controversy between the federal and state governments Madison said that "the decision is to be impartially made, according to the rules of the Constitution, and all the usual and most effectual precautions are taken to secure this impartiality."[25]

Moreover, declarations were made by delegates to the various ratifying conventions of the states contending that the courts had the power of judicial review. In the Pennsylvania Ratifying Convention of November 20, 1787, Mr. Wilson made the following remarks:

> If a law should be made inconsistent with those powers vested by this instrument in Congress, the judges, as a consequence of their independence, and the particular powers of government being defined, will declare such law to be null and void; for the power of the Constitution predominates. Anything, therefore, that shall be enacted by Congress contrary thereto, will not have the force of law.[26]

Mr. Ellsworth, speaking before the Ratifying Convention of Connecticut on January 7, 1788, also upheld the right of judicial review.[27] John Marshall, speaking before the Virginia Ratifying

[25] RHYS, ERNEST (Editor), THE FEDERALIST (E. P. Dutton & Co., N. Y. 1934) No. 39 at 195. Hamilton, on judicial review, wrote in *The Federalist:* "The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bill of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." No. 78 at 396.

[26] 2 ELLIOTT, *op. cit. supra* note 12, at 489.

[27] *Id.* at 196. Mr. Ellsworth said: "This Constitution defines the extent of the powers of the general government. If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be made independent, will declare it to be void. On the other hand, if the states go beyond their limits, if they make a law which is a usurpation upon the general government, the law is void; and upright, independent judges will declare it so." *Ibid.*

Convention, said that "if they [the Congress] were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard." Furthermore, "they would not consider such a law as coming under their jurisdiction. They would declare it void."[28] Mr. W. R. Davie, speaking in the North Carolina Ratifying Convention, likewise believed the courts would exercise the power of judicial review.[29] It is significant to note that all of these men except John Marshall were members of the Federal Convention.

It is interesting to note that Oliver Ellsworth, who strongly favored judicial review, is credited with drafting the Federal Judiciary Act of 1789.[30] This Act, setting up our federal courts, was passed by the First Congress and approved by President Washington on September 24, 1789. The Act provided for a Supreme Court, which was to consist of a chief justice and five associate justices; and inferior courts, comprising circuit courts and district courts for the separate states.[31]

Finally, in 1798 and 1799, when Virginia and Kentucky announced the doctrine of state nullification of acts of Congress, the doctrine of judicial review was again brought to the forefront. Several state legislatures called attention to the fact that the courts alone had the power of judicial review.[32]

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[28] 3 ELLIOTT, *op. cit.*, at 553.

[29] 4 ELLIOTT, at 160.

[30] HAINES, *op. cit. supra* note 2, at 144.

[31] COMMAGER, *op. cit. supra* note 9, at 153.

[32] It is interesting to note that the Legislature of New Hampshire resolved: "That the state legislatures are not the proper tribunals to determine the constitutionality of the laws of the general government; that the duty of such decision is properly and exclusively confided to the judicial departments." 4 ELLIOTT, *op. cit.*, at 539.

The Legislature of Rhode Island and Providence Plantations resolved: "That, in the opinion of this legislature, the second section of the third article of the Constitution of the United States, in these words, to wit,—'The Judicial power shall extend to all cases arising under the laws of the United States,'—vests in the Federal Courts, exclusively, and in the Supreme Court of the United States, ultimately, the authority of deciding on the constitutionality of any act or law of the Congress of the United States." *Id.* at 533.

Thus, in contrast to general belief, it is firmly proved from a historical point of view that the doctrine of judicial review, as propounded by the celebrated John Marshall in *Marbury v. Madison*,[33] was merely a reaffirmation of a judicial principle long since established and practiced as a necessary corollary to the operation of the American system of jurisprudence.

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[33] 1 Cranch 137 (1803).

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