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C. Perry Patterson

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The Development and Evaluation of Judicial Review

By C. PERRY PATTERSON
The University of Texas

I. Introduction

The doctrine of judicial review is as much a principle of the Constitution as the principle of federalism or the doctrine of separation of powers and checks and balances. It is a far more definite power than the powers of Congress or those of the President. It should be remembered that the Constitution nowhere mentions federalism, separation of powers, checks and balances, national supremacy or concurrent powers, taxation for only a public purpose, business affected with a public interest is subject to regulation, contracts involving governmental powers are null and void, neither the national government nor the states can tax the instrumentalities of the other, and the doctrine of implied powers, yet no one can doubt that these are principles of the Constitution. The fact that they are not specifically mentioned is no argument at all that they are not in the Constitution. How have they been discovered? By judicial interpretation. What valid reason is there for the unequivocal and complete acceptance of these principles derived from the language of the Constitution and the rejection of the principle of judicial review which is even more definitely a fundamental principle of the Constitution. Indeed without which the other principles of the Constitution could not have been derived.

II. History of Judicial Review

1. *Judicial Review Was a Practice of English and Colonial Courts Prior to the Revolution.*

The doctrine of judicial review is much older than the Constitution and has always been regarded as a part of a fundamental law. It was practiced by English courts as a check upon an arbitrary monarch prior to the establishment of parliamentary sovereignty. It was then superseded by legislative supremacy. It must be remembered in this connection that in theory and law Parliament is the High Court of Parliament and that its upper house, the House of Lords, is still the supreme court of the kingdom in both civil and criminal matters. Legislation in the process of its enactment with the exception of budgetary legislation must have the approval of this supreme court unless the matter in controversy is specifically submitted to the people in a general election and sometimes in two or three elections. Moreover, legislation in Great Britain is always framed by the Parliamentary Council which is composed of distinguished barristers. Private bills are almost completely controlled by the House of Lords because they are considered to be a judicial matter and a fee is

charged for this consideration. It can, therefore, be very accurately stated that English legislation passes judicial review in the process of its enactment. It must be approved by a supreme court whose personnel holds for life. The same court is the final interpreter of this legislation.

Throughout the colonial period of our history the acts of the colonial assemblies were reviewed by the Judicial Committee of the Privy Council and by the Courts of Westminster to see if they were in pursuance of the charters of the colonies and the laws of England—these two constituting the supreme law of the colonies. There were approximately 8823 acts of the colonial assemblies submitted to these bodies in the period from 1696 to 1782 (eighty-six years) and more than 600 were held null and void. This is a rather formidable record for judicial review as compared with the seventy-seven out of 55,000 acts of Congress over a period of 150 years under a much more rigid constitution—less than 1/8,000%—and possibly less than 1/16,000% of measures of major significance.

2. Revolution a Result of Legislative Supremacy and a Lack of Judicial Review.

The forefathers, therefore, were, even during the colonial days, very familiar with the doctrine of judicial review. They were also familiar with the principle of legislative supremacy so far as the acts of Parliament applied to them. The British Empire was like the late German Republic. There was judicial review of the acts of local or state governments but not of the acts of the general or central government. The results in both instances was a tyranny on the part of the general government. In Germany the states were abolished and in the British Empire a revolution to prevent the destruction of local self-government or state rights. This revolution was a revolt from legislative supremacy. It was the many Navigation Acts, the Molasses Act of 1733, the Sugar Act of 1764, the Stamp Act of 1765, the Townsend Acts of 1767, and the Intolerable Acts of 1774 that caused the Revolution. Because of the principle of Parliamentary sovereignty and legislative supremacy there was no escape from these acts except revolution.

3. Constitutional Supremacy Substituted for Legislative Supremacy.

After the Revolution in the establishments of governments resting on the consent of the governed it was hardly to be expected that the forefathers would provide the principle of legislative supremacy. How was a government to be established without the use of a legislative body? It had never been done. There was not one such government in existence. How was Jefferson's philosophy of the Declaration to be realized? After considerable experimentation, Massachusetts, in making her third constitution in 1780, discovered the formula. What was it? It was to have a constitutional convention composed of delegates elected by the people for the specific purpose to propose a constitution, submit

it to the people for ratification, and adjourn *sine die*. The people then in their original sovereignty at the ballot box enacted a fundamental law. Here is where legislative supremacy was superseded by a fundamental law and judicial review was established to maintain it. In rapid process the constitutional convention was used in the other states as the means of revising their constitutions and establishing the principle of popular sovereignty and judicial review as its agent. In this way legislative supremacy was abolished from American soil and the state courts under these new constitutions began to declare the acts of state legislatures unconstitutional.

4. *The Exercise of Judicial Review by State Courts Prior to 1787 as a Principle of Constitutional Supremacy*

There were several cases in which state courts exercised this power before the meeting of the Federal Convention of 1787. Among the most important are *Holmes v. Walton* (1780), a New Jersey case; *Commonwealth v. Caton* (1782), a Virginia case; *Trevitt v. Weeden* (1786), a Rhode Island case; and *Bayard v. Singleton* (1787), a North Carolina case. It is significant that in the Virginia case of *Commonwealth v. Caton* that Justice Wythe, John Marshall's law professor of William and Mary and later a delegate to the Federal Convention, had this to say in his opinion:

"If the whole legislature, an event to be deprecated, 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."

5. *Judicial Review Approved by the Congress of the Confederation.*

On March 21, 1787, just a few weeks before the Federal Convention met, Congress, having had trouble with Great Britain because the states were violating the treaty of 1783, asked the states to empower their courts to nullify the acts of the state legislatures in violation of this treaty. It worked out a resolution which it asked every legislature of the states to pass, and which reads as follows:

Therefore . . . it is hereby enacted . . . that such of the acts or parts of acts of the legislature of this state, as are repugnant to the treaty of peace between the United States and his Britannic Majesty, or any article thereof, shall be, and hereby are repealed. And further, that the courts of law and equity within this state be, and they hereby are directed and required in all causes and questions cognizable by them respectively, and arising from or touching the said treaty, to decide and adjudge according to the tenor, true intent, and meaning of the same, anything in the said acts, or parts of acts, to the contrary thereof in any wise notwithstanding.

Here you will notice that the state constitution and treaties would be the supreme law of the land. The state courts, the only courts in existence at this time, were to nullify all legislative acts in contravention of state constitutions and treaties. At this time the states had the sole power of legislation; the old Congress could not legislate. All of its acts had to be approved by the states to have the effect of law and thereby became the acts of the states. By 1787 judicial review had been established by the states and was being exercised by state courts. The supreme law of the land clause later placed in the Constitution of the United States had been suggested by making state constitutions and treaties superior to legislative acts. The resolution of Congress had advertised judicial review to all the members of the thirteen legislatures. The doctrine of judicial review was well known in 1787 and was not established by a *coup d'état* of the Federal Convention of 1787 or by John Marshall in *Marbury v. Madison*.

6. *Judicial Review Approved by the Federal Convention of 1787 as a Means of Preventing Legislative Supremacy.*

It is not surprising to find that in the New Jersey proposal for the Constitution in the Federal Convention of 1787 in which state in the case of *Holmes v. Walton* an act of the legislature was held unconstitutional and in which case William Paterson, David Brearly and William Livingston had participated—all later delegates to the Federal Convention—that Article 3 of this proposal read as follows: “The acts of Congress and treaties to be the supreme law of the land, the acts of the state legislatures to the contrary notwithstanding.” Here is the germ of the supreme law of the land clause which is now Article VI of the Constitution of the United States. Throughout the debates of the Federal Convention on this clause and in the state ratifying conventions it was repeatedly stated by various members of these conventions that the courts would nullify acts of Congress or of the state legislatures when they conflicted with the supreme law.

Many of the most able members of the Convention, including Madison, Hamilton, James Wilson, Gouverneur Morris, Ellsworth, and Mason, wanted to make a further use of the judges by associating them with the President in a Council of Revision to which all acts of Congress and of the states would have to be submitted before they went into effect. This Council of Revision was proposed four times and was defeated each time. These proponents were afraid of the legislature and did not think that judicial review was an adequate check.

It was the fact that judicial review had already been provided that defeated this proposal. Luther Martin, a delegate from Maryland, in opposing this proposal said:

“And as to the Constitutionality of laws, that point will come before the Judges in their official character. 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.”

Morris, in support of the Council of Revision said:

“He concurred in thinking the public liberty in greater danger from legislative usurpation than from any other source. It had been said that the Legislature ought to be relied on as the proper guardian of liberty. The answer was short and conclusive. Either bad laws will be pushed or not. On the latter supposition, no check will be wanted. On the former, a strong check will be necessary. And this is the proper supposition. Emissions of paper money, largesses to the people—a remission of debt, and similar measures, will at some time be popular, and will be pushed for that reason. At other times, such measures will coincide with the interests of the Legislatures themselves, and that will be a reason not less cogent for pushing them. It may be thought that the people will not be deluded and misled in the latter case. But experience teaches another reason.”

Gerry of Massachusetts opposed the Council, saying:

“They (the judges) will have a sufficient check against encroachments of their own department by their exposition of the laws, which involved a power of deciding on their constitutionality.”

Mason, in replying to Gerry, said that:

“He would reply that in this capacity they could impede, in one case only, the operation of laws. They could declare an unconstitutional law void. But with regard to every law, however unjust, oppressive or pernicious, which did not come plainly under this description, they would be under the necessity as Judges to give it a free course. He wished the further use to be made of the Judges, of giving aid in preventing every improper law.”

It must be noticed in this debate that both the opponents and proponents of the Council of Revision admit the fact of judicial review. It is not judicial review that is being debated but the Council of Revision. The defeat of the proposal of the Council of Revision in no way changed the status of judicial review. The Council of Revision was a collective form of veto because at this stage of the proceedings of the convention the members were not willing to give the veto to the President alone.

*7. The Linking of a Fundamental Law and Judicial Review
by James Madison and Its Approval by the
Federal Convention.*

When the question of how the Constitution was to be ratified, whether by state legislatures or by conventions, came up in the Federal Convention, Madison said the state legislatures were incompetent for the purpose because the ratification of the Constitution would radically change every state constitution in the Republic. This would mean that the state legislatures would change the constitutions under which they held their powers and that they would be the creators of the Constitution of the United States.

This would make the state legislatures supreme over both the national and state constitutions. This would establish legislative rather than constitutional supremacy.

Madison said that "He considered the difference between a system founded on the Legislatures only, and one 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 inviolable as the latter. In point of *political operation*, there were two important distinctions in favor of the latter. (1) 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.* (2) The doctrine laid down by the law of nations in the case of treaties is that a breach of any one article by any of the parties, frees the other parties from their engagements. In the case of a union of people under one constitution, the nature of the pact has always been understood to exclude such an interpretation. Comparing the two modes in point of expediency he thought all the considerations which recommended this Convention in preference to Congress for proposing the reform were in favor of state conventions in preference to the legislatures for examining and adopting it."

Madison plainly states that if the Constitution was ratified by state conventions rather than by state legislatures, it would establish a "union of people" and that "*A law violating a constitution established by the people themselves, would be considered by the judges as null and void.*"

What happened? The Convention unanimously accepted Madison's proposal as the proper method of ratification. The Constitution was referred to state conventions elected by the people to ratify it for them. The Constitution was ratified by state conventions, a union of people was established, the Constitution was made a fundamental law enacted by the American people in their original sovereignty, was made "inviolable" and judicial review was established to maintain it against legislative infraction.

(Continued in next issue)