Washington Law Review

Volume 13 | Number 2

4-1-1938

The Development and Evaluation of Judicial Review [Part 2]

C. Perry Patterson

The Development and Evaluation of Judicial Review

By C. PERRY PATTERSON
The University of Texas

In the previous portion of this article, Mr. Patterson attributed the American Revolution to the tyrannies resulting from the failure of the British government to provide for judicial review of acts of the central government as well as of the acts of the local governments. After noting a resulting desire among the former colonists to substitute constitutional supremacy for legislative supremacy, Mr. Patterson observed the use of judicial review in the courts of several of the states prior to the Convention of 1787, pointed out the embodiment of its principles in the enactments of the Congress of the Confederation in 1787, and quoted from the journals of the Convention to show that the theory of judicial review was accepted by the framers of the Constitution. He now carries his theme into an appraisal of the Constitution, illustrates how the principles of judicial review were reaffirmed in the ratification of the Constitution, and elaborates upon its significance.

8. The Granting of Judicial Review by the Constitution.

There are two clauses in the Constitution itself which definitely grant *the power of judicial review to both state and federal courts.* The first of these is Article VI, Section 2:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

The latter part of this clause imposes upon the state judges the duty of sustaining in their decisions the supreme law of the land in preference to the state constitutions or acts of state legislatures. This means that a state judge must nullify a part of his state constitution or an act of his state legislature, if, in a case before his court, he should find it to be in conflict with the supreme law of the land. It is also a part of his duty to nullify an act of Congress if he should find such an act unconstitutional, because he takes an oath to sustain only the supreme law of the land. In other words, he is under no obligation to nullify a part of his state constitution or an act of his state legislature because they conflict with an unconstitutional act of Congress. How can a

state judge perform this duty if he is denied access to the Constitution of the United States and to Acts of Congress?

It is obvious, therefore, that a state judge is given the power to declare an act of Congress or an act of his state legislature or a part of his state constitution unconstitutional if it conflicts with the Constitution of the United States. Why would a constitution of one government confer the power of judicial review of its acts upon the judges of another government, yet deny this power to its own judges? How could the judicial power of the United States extend to the appellate cases from state courts involving judicial review without conferring power of judicial review upon federal courts? The reason why the Constitution specifically confers judicial review upon the state courts is that they are agents of other governments which the Constitution of the United States does not establish. Moreover, Congress has the power to make inferior federal courts out of the state courts. If this should be done, they would have the power of judicial review by virtue of the Constitution of the United States and only the amendment process could take it away from them.

It may well be argued that the fact that the Constitution is made a fundamental law "ordained and established by the people" confers the power of judicial review upon the federal courts, since it has been shown that judicial review was regarded as an inherent feature of the fundamental law. If the fundamental law controlled the Congress, it also controlled the courts and the executive, The courts, of course, have no chance to express themselves except in cases. Were they given jurisdiction over cases arising under the Constitution? Here is where the other clause of the Constitution comes to the support of the clause just discussed.

Article III, Section 2 (1), reads as follows:

> "The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

This clause makes judicial power coextant with legislative power. What body does the Constitution say shall exercise this power?

Article III, Section 1, says that:

> "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish."

Since the judges were denied participation in a Council of Revision, it was understood that they could exercise their power of judicial review only in "cases." If the judicial power of the United States had not been vested in the courts alone and had not been extended to all cases arising under the supreme law of the land, they would have been denied this power. Now, how can a federal court decide whether a case arises under the Constitution if the Constitution does not come before the court? It

is clear that a court could not decide the question of jurisdiction if it could not consider the Constitution. If the Constitution confers jurisdiction, it must control the case because the case exists only by virtue of the Constitution. When the Constitution comes into court, it controls the court's decision because it is always the supreme law. Acts of Congress or treaties have no validity except when made in pursuance of or under its authority. Congress may repeal its own acts or revoke a treaty, but it cannot change the Constitution; hence the Constitution is more fundamental than a constitutional act of Congress or treaty made under the authority of the United States.

9. Judicial Review Specifically Explained in The Federalist by Alexander Hamilton

The Federalist papers were written by Hamilton, Jay and Madison at the time the Constitution was being considered by the state ratifying conventions. They were published in the newspapers and circulated throughout the Union. In paper No. LXXVIII, Hamilton in discussing the reasons for the independence of the judges says: "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 bills 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 the 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."

Further in the same paper he says: "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. If there should happen to be an irreconcilable variance between the two, that which has the superior obligations and validity ought, of course, to be preferred; or in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."

In paper No. LXXX, Hamilton in speaking of the extent of judicial authority says: "The states, by the plan of the convention, are prohibited from doing a variety of things; some of which are incompatible with the interests of the Union, and others with the principles of good government. The importance of duties on imported articles, and the emission of paper money, are specimens of each kind. No man of sense will believe that such prohibitions would be scrupulously regarded, without some effectual power in the government to restrain or correct the infractions of them. This power must either be a direct negative on state laws, or an authority in the federal courts to overrule such as might be in manifest contravention of the Articles of the

Union. There is no third course that I can imagine. The latter appears to have been thought by the convention preferable to the former, and, I presume, will be most agreeable to the states."

These quotations establish a number of important facts: (1) that the Constitution was intended to be a fundamental law; (2) that it was to be superior to legislative acts; and that the courts rather than the sword were to prevent the legislatures of the nation from substituting their will for that of the people as expressed in the Constitution. As James Madison said of the Supreme Court: "Some such tribunal is clearly essential to prevent an appeal to the sword and a dissolution of the compact."

10. Judicial Review Approved by the Ratifying Conventions.

In the debates in the Virginia Convention, Patrick Henry, a rabid states-righter and interested in limitation of the powers of Congress as a means of preserving the rights of the states, asked the pointed question if it was understood that the courts would exercise the power of judicial review. John Marshall, who was a member of this convention in 1788—15 years before *Marbury v. Madison*—replied as follows: "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. They would not consider such a law as coming under their jurisdiction. They would declare it void.*"

Luther Martin, a delegate to the Federal Convention from Maryland, in making his report to the Maryland ratifying convention called "The Genuine Information" said: "Whether, therefore, any laws or regulations of the Congress, any act of its President or other officers, *are contrary to or not warranted by the Constitution, rests only with the judges.*"

In the Connecticut Convention of 1788 Oliver Ellsworth in explaining how the national government and the states could operate in the same territory and on the same subject matter said that a "coercion of law" was provided to make this possible: "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, 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 to be so.*"

Here is the unequivical assertion of judicial review of both the acts of Congress and those of the states and the statement that the judges were made independent to enable them to exercise this power impartially.

In the Pennsylvania Convention of 1787 James Wilson, a delegate to the Federal Convention as well as to the ratifying convention of Pennsylvania in discussing the supremacy of the Constitution said: "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.*"

11. Judicial Review Approved by the First Congress under the Constitution in 1789.

The Constitution was not self-executing in its judicial provisions. The system of federal courts had to be established and jurisdiction, except the original jurisdiction of the Supreme Court, conferred upon the courts by Congress even though this task was in some respects obligatory upon Congress. The task was performed by the Judiciary Act of September 25, 1789, and marked the completion of the unfinished work of the Convention.

Several of the delegates to the Federal Convention were members of the Senate and House of Representatives at the time the Judiciary Act of 1789 was passed. This Act must be considered as a contemporary construction of the Constitution made by those who wrote it and by many others who were conversant with its principles. Oliver Ellsworth and William Johnson of Connecticut, Robert Morris of Pennsylvania and William Paterson of New Jersey—former delegates to the Federal Convention—were members of the Senate and voted for the Judiciary Act of 1789. James Madison, George Wythe of Virginia and Abraham Baldwin of Georgia, who were members of the House of Representatives also voted for the act. On June 19, 1789, Baldwin, in a speech to the House, stated that it was the province of the courts "to decide upon our laws" and that if they found any law unconstitutional, they would "not hestitate to declare it so." George Wythe had been on the bench of the Court of Appeals of Virginia which had held an act of the legislature of Virginia unconstitutional in the case of *Commonwealth v. Caton* previously cited.

What did the Judiciary Act of 1789 provide with respect to judicial review? Section 25 of this Act contains the following provision concerning the appellate jurisdiction of the Supreme Court:

> A final judgment or decree in any suit, in the highest court of law or equity of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; . . . where is drawn in question the construction of any clause of the Constitution, or of a

> treaty or statute of, or commission held under, the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute, or commission—may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error.

It is to be noticed here that the Supreme Court is given power to re-examine, reverse, or confirm decisions of state courts in which acts of Congress or treaties have been declared of no effect. How could the Supreme Court confirm such decisions without holding acts of Congress unconstitutional? In fact, how could it re-examine, reverse, or confirm without having by implication the power of judicial review?

12. Judicial Review Approved by State Legislatures in 1798 and 1799.

It is also very convincing to notice that in 1798 and 1799 when Virginia and Kentucky announced the doctrine of state nullification of acts of Congress that many state legislatures called attention to the fact that the courts alone had this power. The legislature of Rhode Island passed the following resolution:

> *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.

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 department.

The legislature of Massachusetts resolved:

> That this legislature are persuaded that the decision of all cases in law and equity arising under the Constitution of the United States, and the construction of all laws made in pursuance thereof, are exclusively vested by the people in the judicial courts of the United States.

By summary the following historically established facts concerning judicial review as a principle of the Constitution may be stated:

1. Judicial review was well known as a principle of law and constantly practiced by both British and colonial courts prior to the Revolution.

2. It was exercised by state courts from 1780 to 1787 as a principle of a fundamental law after state constitutional supremacy over legislative acts had been established by means of state constitutional conventions and popular ratification.

3. It was recommended by the Congress of the Confederation to the states as a means of eliminating conflicts between treaties and the acts of state legislatures.

4. It was adopted by the Federal Convention as the means of solving the problems of the coercion of the states and of maintaining a government of law.

5. It was discussed as a principle of the Constitution by Hamilton and Madison in the Federalist papers.

6. It was discussed and approved in the state ratifying conventions which adopted the Constitution of the United States. This method of ratification was specifically adopted to make the Constitution a fundamental law and thus to establish judicial review. Madison made this explanation on the floor of the Federal Convention and the Convention adopted it.

7. It was approved by the first Congress of the United States in the Judiciary Act of 1789.

8. It was again approved by state legislatures in the period of the Virginia and Kentucky Resolutions 1798-99. All of this preceded *Marbury v. Madison.* It is, therefore, an historical fact that judicial review is older than the Constitution of the United States and that it was a nationally known doctrine and practice of American jurisprudence before the Supreme Court was even established by Congress and before it had ever touched the Constitution of the United States. It would, therefore, have been revolutionary if the Court had not exercised this power in *Marbury v. Madison* and would have been tantamount to amending the Constitution and the usurpation of the powers of the American people.

The Vanishing Bar

"When $200,000 worth of litigation costs an association member only $15, lawyers rise up in arms. The Bar rushes in to prevent natural progress in the practice of law. Its chief weapon is the hide-bound rule that corporations cannot act as attorneys. This is applied against automobile clubs, against collection agencies, against not-for-profit taxpayers' associations. Even in states where laws expressly permit such organizations to practice law for the benefit of the public, lawyers find judges who will reverse the law. As most legislators, all judges, are lawyers, the public is faced with a tough struggle in getting lawyers to modernize their methods."

This paragraph, in large boldface type, two columns wide and eight inches long, heads a three-page article on page 76 of KEN, issue of May 5th.

CAN THE BAR REMAIN MUTE AND UPHOLD ITS DUTY AS AN ORGANIZATION FOR PUBLIC SERVICE?