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The Development and Evaluation of Judicial Review

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This is the concluding portion of Mr. Patterson's continued article. The first portion, in the JOURNAL for January, 1938, covered the background of the theory of judicial review in the Federal Constitution. In the April issue he indicated the manner of incorporating the principle in the Constitution, and in the current installment he shows the wide use of judicial review and discusses its significance.

III. The Wide Use of Judicial Review

Judicial review is by far the most widely copied principle of the Constitution. It continues to be a part of the imperial constitution of the British Empire and the power is exercised by the Privy Council—the Supreme Court of the British Empire. It is also a part of the constitutions of Canada, Australia, South Africa, the Irish Free State, New Zealand, Cape of Good Hope, and the Transvaal. The supreme courts of Canada and of Australia have in the last few months declared complete programs of their Parliaments unconstitutional as violating the rights of the Provinces in Canada and of the States in Australia.

Judicial review is used extensively in Latin America—in Mexico, Argentina, Brazil, Bolivia, Colombia, Cuba and Venezuela.

In 1928, M. Andre Blondel, avocat, in the Cour d'Appel of France wrote a very famous treatise on judicial review (Le Controle jurisdictionnel de la constitutionalite des lois) in which he advocates the adoption of judicial review for France. On pages 374 *et sequor,* he has the following to say:

> "From this comparative study of the American and French constitutional systems, it is possible to see that there is a governmental principle in both countries which demands some method of passing upon the constitutionality of laws. That principle is that rigid constitutions require independent tribunals to pronounce the law. In the United States, historical precedents encouraged and fore-shadowed the establishment of judicial control. But in France, tradition was opposed to it and has operated as a powerful influence to prevent its establishment. The records of the early parliaments instead of supporting a system of judicial review, have served as a warning against it each time the judiciary has been reorganized. The legislative power, which in the United States was made subject to the Constitution and placed on a level

with the other branches of government has, in France, been made the center of our governmental system. It became a privileged body; in practice it continues to be. That is one of the principal reasons why France has rejected the theory of judicial review. Without discussing further the merits and demerits of the arguments against such a system, it is possible to suggest certain conclusions which appear to be valid not only for the United States and France, but for all countries with similar constitutional structures:

"(1) Judicial control of legislative acts is a normal attribute of rigid constitutions which are designed to remain superior to ordinary legislation.

"(2) The legislative body ought not to exercise any power of the ultimate sovereign. The legislative power is created in the same manner as the executive and the judicial. It, like the others, should be subject to law, and particularly to the higher law of the constitution.

"(3) Law is to be simply the statement not the creation of tribunals, civil or administrative.

"(4) The ordinary courts are best qualified to pass upon the constitutionality of laws. They possess this qualification because they are in a position to see that the superior law is enforced above the inferior.

"(5) The law which the judges ought to enforce should consist first of the written constitutional laws. These laws are sufficient in countries whose constitutions are very comprehensive, as in the United States, but in France, under the Constitution of 1875, where the laws of legislative procedure are brief and simple, the guardianship of the courts should be extended not only to written but *customary* constitutional principles. Of the latter, here are examples: Most of our modern liberties, formerly protected by successive Declarations of Rights;—the principle of the separation of powers, the prohibition against *ex post facto* laws, the provision for annual budgets, etc.

"The constitutional practice of judicial review should be introduced into France. It has functioned long and well in the United States and has been adopted in more and more countries. In this book it has been the aim to prepare the ground for it and to show that it should no longer be opposed. In fact, conditions have become more and more favorable to it. . . ."

IV. An Appraisal of Judicial Review

Harold J. Laski in his *Modern State* says:

"The one assured result of historical investigation is the lesson that uncontrolled power is invariably poisonous

> to those who possess it. They are always tempted to impose their canon of good upon others, and they assume that the good of the community depends upon the continuance of their power. Liberty always demands a limitation of political authority."

Possibly one of the most convincing appraisals of judicial review is found in De Tocqueville's *Democracy in America:* speaking of the powers of the justices of the Supreme Court he said:

> "The peace, the prosperity, and the very existence of the Union were placed in the hands of seven judges. *Without their active cooperation the Constitution would be a dead letter.* The Executive appeals to them for assistance against the encroachments of the legislative powers. The legislature demands their protection from the designs of the Executive. They defend the Union from disobedience of the states, the states from the exaggerated claims of the Union, the public interest against interests of private citizens, and the *conservative spirit of order against the fleeting innovations of democracy.*"

Lord Brougham said:

> "The devising means for keeping the Union's integrity as a federacy while the rights and powers of individual states are maintained entire is the very greatest refinement in social policy to which any age has ever given birth."

Sir Henry Maine said:

> "The powers and disabilities attached to the United States and to the several states by the Federal Constitution and placed under the protection of deliberately contrived securities have determined the whole course of American history. That history began in a condition of society produced by war and revolution which might have condemned the Republic to a fate not unlike that of her disorderly sisters in South America. The provisions of the American Constitution have acted on her like those dikes which strike the eye of the traveler, controlling the course of a mighty river beginning in mountain torrents and turning it into an equable waterway."

James Bryce in his *American Commonwealth* says:

> "It is nevertheless true that there is no part of the American system which reflects more credit on its authors or has worked better in practice (than the Supreme Court). It has had the advantage of relegating questions not only intricate and delicate, but peculiarly liable to excite political passions, to the cool, dry atmosphere of judicial determination. The relations of the central federal power to the States and the amount of authority which Congress and the President are respectively entitled to exercise, have been the most permanently grave questions in American history, with which nearly every other po-

litical problem has become entangled. If they had been left to be settled by Congress, itself an interested party, or by any dealings between the Congress and the State Legislatures, the dangers of a conflict would have been extreme, and instead of one civil war there might have been several. But the universal respect felt for the Constitution, a respect which grows the longer it stands, has disposed men to defer to any decision which seems honestly and logically to unfold the meaning of its terms. In obeying such a decision they are obeying not the judges but the people who enacted the Constitution.

"The Supreme Court is the living voice of the Constitution—that is, of the will of the people expressed in the fundamental laws they have enacted. It is, therefore, as some one has said, the conscience of the people, who have resolved to restrain themselves from hasty or unjust action by placing their representatives under the restriction of a permanent law. It is the guarantee of the minority, who, when threatened by the impatient vehemence of a majority, can appeal to this permanent law, finding the interpreter and enforcer thereof in a Court set high above the assaults of faction.

"To discharge these momentous functions, the Court must be stable even as the Constitution is stable . . . It must resist transitory impulses, and resist them the more firmly the more vehement they are. Entrenched behind impregnable ramparts, it must be able to defy at once the open attacks of the other departments of government, and the more dangerous, because impalpable, seductions of popular sentiment."

V. The Importance of the Independence of the Supreme Court as a Means of Maintaining Our Constitutional Democracy

The outstanding liberal on the present bench of the Court, Associate Justice Harlan F. Stone, has the following to say on this important matter:

"The progress of the Court to its present position as the acknowledged arbiter between conflicting claims of governmental power is in itself an interesting chapter of constitutional history. That it has attained to that position is not due alone to the fact that its great powers were conferred upon it by a written constitution. It is due quite as much to the position which it early assumed and has always maintained of independence from every external influence, and to thoroughness and fidelity in the performance of its judicial labors.

"If time would permit, it would be interesting to refer to the repeated decisions of the Court in the past 50 years, where, as in earlier periods, its action has shown the complete detachment of its judges from all external in-

> fluences. Where the Court has divided, the divisions have not been along party or political lines, but have rested on more fundamental differences of legal and political philosophy. And so it may be said, with the support of its entire history, that the position of the Court as the controlling influence which holds each of the governments in our system and each branch of the National Government moving within its own orbit, with general acquiescence in the fairness and justice of its judgments, has been due more to its steadfast adherence to the best traditions of judicial independence than to any other cause."

Our history proves that in the cases of interference by the President or the Congress with the independence of the Supreme Court, the rights of American citizens have suffered an abridgment and the Constitution has been misinterpreted. The Dred Scott decision, the Prize cases, the McCardle case and the Legal Tender decisions are a few examples of what political interference has done to constitutional interpretation.

Our history further shows what politics has done to constitutional principles. What has happened to the Electoral College? to separation of powers between the President and the Congress? to checks and balances? Are not the state governments the agents of the same party that is in power at Washington? How can a Governor and a state legislature refuse to do what the party in power at Washington wants done? Where is the independence of the states which is guaranteed by the Constitution? Where does the Constitution make the President the boss of the American people? It is the party system that does this. All this is a *fait accompli.* Constitutionally speaking it does not matter whether one favors or opposes this revolution, the fact which must be admitted is that the party system has destroyed the independence of practically every division of our governmental system except the Federal Courts. The state courts have not escaped party influences due to the failure to provide for their independence in state constitutions. Since state courts interpret the Constitution of the United States and since the Supreme Court is inclined to follow their decisions, politics through this channel touches the fundamental law of the United States.

This tendency of the party system to secure control of the people is not peculiar to American history. It is universally true. It is true in Great Britain, France, Germany, Italy and Russia. The final word cannot as yet be said on the ultimate results in Great Britain and France. The parties have the power to establish any kind of economic or political order in these two countries. The results in Germany, Italy and Russia do not require elaboration.

It is childish not to realize that the only way to prevent the party system from imposing an unwritten constitution upon the Ameri-

can people superior in effect to the written constitution is to maintain the independence of the Supreme Court. Since this independence is not provided by the letter of the Constitution it would be a matter of superlative statesmanship to complete the structure whose foundation was so well laid in 1787.

Congress can constitutionally practically destroy the Federal Court system. It can abolish all lower federal courts. It can abolish the appellate jurisdiction of the Supreme Court. The original jurisdiction is relatively unimportant. By abolishing future vacancies in the bench of the Supreme Court, it could reduce the Supreme Court to one justice. This would be tantamount to its abolition, though constitutionally the institution would still exist. It can pack the bench of the Court and make it the instrument of the President and the Congress. This would make it a legislative agent and a part of the party system. This is also tantamount to its abolition though technically there would still be a Supreme Court. Of course Congress could refuse to grant adequate financial support to the courts and thus seriously impair their efficiency. In all of these possibilities, the command of the Constitution that "there shall be one Supreme Court" is not legally violated though the spirit of the Constitution is destroyed. Are not our friends across the border who insist that the spirit of the Constitution be given free reign a little inconsistent when at the same time they propose to destroy this spirit by taking advantage of technical deficiencies in the Constitution?

While this issue is before the people it is a most opportune time to remedy the defects in the Constitution concerning our federal court system. The Constitution should be amended to give independence to the Supreme Court and stability to our democratic institutions. The membership of the court should be fixed at nine and the compulsory age of 75 for retirement applying to future appointees by constitutional amendment.

The Public and the Bar

"First, the public thinks that you give yourselves too many airs and pretend to knowledge of ultimate truth which you do not possess. . . .

"Second, the public thinks you take a month to do a job which could be finished, with reasonable diligence, in a day. . . .

"Third, the public thinks that the court and the lawyers cooperate to make a game, or at least a test of wits, out of what should be a solemn process to arrive at justice. . . .

"Fourth, the public thinks you charge too much for your services. . . .

". . . Indeed, from the standpoint of public opinion, too much stress cannot be laid upon the paramount necessity of policing your own risks.

"This is the day and this America the place for widespread publicity on every public act and organization. I wonder whether the full story of what the legal profession is doing to improve itself and to serve the public has ever been adequately set forth. . . .

". . . Why do you insist in hiding your light under a bushel?"

—Paul Bellamy, Editor of the Cleveland Plain Dealer, speaking before the Junior Bar Conference of the American Bar Association at Cleveland, July 24, 1938, published in full in XXIV American Bar Association Journal 928, November, 1938.