MADISON'S THEORY OF JUDICIAL REVIEW

By Edward M. Burns*

The recent tendency of the Supreme Court to make vigorous assertion of its powers in the face of New Deal legislation has again brought to the fore the question of the origin of judicial review. Did the founding fathers intend that this prerogative should be exercised by the judiciary, or has the highest court in the land simply usurped a power of life and death over legislation enacted by the representatives of the people? Curious reactions anent this question were produced by the decision of the Court in the Schechter case1 last May. Senator Borah, in a radio address soon afterward, upheld the decision as a confirmation of the doctrine of Madison, Jefferson, and Washington that the Constitution of the United States establishes a limited government, and that it is the duty of the Court to enforce those limitations. But the following day General Hugh S. Johnson condemned the decision and just as emphatically avowed himself on the side of Madison, Jefferson, and Washington.

As everyone knows the Constitution of the United States makes no express grant of a judicial power to annul legislation. Moreover, no proposition to confer such a power was ever submitted to the Federal Convention of 1787. Yet there can be no reasonable doubt that Madison and the majority of his more prominent colleagues in that convention had definite convictions in favor of the principle of judicial review.2 Proof of this statement can be found in the seventeenth century theory of law which all of these men accepted, and in various declarations which they made from time to time in speeches and writings.

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American legal theory in colonial times represented an accumulation of ideas that ran all the way back to Cicero and the

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* Member of the faculty of Rutgers University; A. B., 1925, Ph. D., 1935, University of Pittsburgh. Author of The Political Philosophy of James Madison, University of Pittsburgh Bulletin, vol. 32, no. 1.


Stoics, and included the contributions of the Medievalists, of Braeton, of Coke, and most of all of Locke. Cicero and the Stoics furnished the idea of a law of nature, the embodiment of justice, universal, constant, and eternal. Medievalists, like John of Salisbury, contributed the doctrine of authority as intrinsically conditioned or limited by its very nature. Braeton and Coke evolved the conception of the common law as the primary expression of right reason, of the higher law, and therefore as a limitation upon the powers of King and Parliament. Locke was preeminently responsible for setting up the substantive rights of the individual as an automatic restraint upon the powers of government. But all of these limitations were in perfect accordance with a single main tradition, that is, the tradition of a higher law of universal right, eternal reason, and abstract justice, which is superior to all ordinary statutes and decrees.

As a result of these different influences American lawyers and philosophers in the latter half of the eighteenth century had adopted a view of law that was quite different from the modern conception. They did not think of law in the positivist sense of the command of a superior addressed to an inferior, but mainly as the expression of eternal principles of right and reason, self-evident to the minds of all enlightened men. Of course they did not regard statutes and decrees as examples of law in this sense; they conceived of them merely as governmental acts, subject to the limitations of the higher law. They did gradually adopt the idea, however, that a written constitution was a prime example of the higher law; and while of course they did not take it to include the whole body of that law, they nevertheless believed that it derived its main validity from the fact of its content, from the fact that it incorporated within itself principles of intrinsic sanctity.

The doctrine of judicial review was a direct outgrowth of the theory of law that has just been described. Since the belief prevailed that there were sacred principles of universal right which acted as limitations upon all authority, and since ordinary statutes were regarded as mere experiences of the will of

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governing agents, it was perhaps almost inevitable that some system should be developed whereby conflicts between the higher law and the inferior enactments could be settled in favor of the former. This system did not necessarily have to take the form of review of legislation by the courts; it might have conformed to the English pattern of making the legislative body the supreme judge of the validity of its own enactments. There were several reasons, however, that precluded the latter development. In the first place the American legislatures were not judicial bodies, whereas Parliament under late medieval theory did have the status of a "high court". Besides, the legislatures in this country, by reason of their interferences with private rights, had brought themselves into disrepute with the ruling classes, and a means of curbing their power was ardently desired.

Probably the most important of all the reasons, however, was the long series of precedents for judicial review that had been established in England and America in the seventeenth and eighteenth centuries. The first of these precedents was Coke's famous decision in Dr. Bonham's Case in 1610. The renowned chief justice ruled in this case that the common law would control and adjudge "utterly void" an act of Parliament against common right or reason, or impossible of performance. In America as early as 1657 a Massachusetts court in the case of *Giddings v. Brown* set aside an act of a town meeting on the ground that it conflicted with the law of nature. The most numerous and the most significant precedents on this side of the Atlantic, however, were established in the second half of the eighteenth century. The conflict between the colonies and the mother country gave rise to frequent attacks upon the power of Parliament, and the same basis of an appeal to a higher law characterized nearly all of them. John Adams, for an example, in denouncing the Stamp Act, declared: "It is utterly void and of no binding force upon us; for it is against our rights as men and our privileges as Englishmen. . . . Parliaments may

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6 *3 Co. Rep. 114a, 77 Eng. Rep. 646 (1610).*
7 *2 Hutchinson Papers (Prince Soc. 1885), 1-15.*
8 *Plucknett, Bonham's Case and Judicial Review (1926), 40 Harv. L. Rev. 30, 61-62.*
err, they are not infallible. . . . There are certain principles fixed unalterably in nature."

In 1761 James Otis, in the famous Writs of Assistance Case, affirmed the right of an ordinary court to condemn irrevocably the enacted will of Parliament in the event of a violation of the higher law. Soon afterwards American courts began to act on that principle. A county court in Virginia in 1766 declared the Stamp Act unconstitutional and directed that it need not be obeyed. And on the eve of the Declaration of Independence, Judge Cushing, later a justice of the United States Supreme Court, charged a Massachusetts jury to ignore certain acts of Parliament as "void and inoperative".

After independence had been secured the courts continued the practice of the judicial veto, directed, now, of course, against the legislatures of the States in their interferences with the rights of creditors and property owners. Among the examples of judicial review in this period were the Rhode Island case of Trevett v. Weedon, the South Carolina case of Bowman v. Middleton, and the North Carolina case of Bayard v. Singleton. In the last of these the Supreme Court of North Carolina declared invalid an act of the legislature on the definite basis of its conflict with the written constitution. It may be of significance that the attorneys who argued against the constitutionality of the statute were William R. Davie, a delegate to the Philadelphia Convention, and James Iredell, who later was appointed to the original bench of the Federal Supreme Court.

Most of the attempts that have been made to prove that the fathers of the Constitution had no intention of giving to the Federal courts the power to invalidate laws of Congress and the State legislatures spring from a lack of knowledge of the basic

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*Quincy Reports, 200; quoted by McLaughlin, The Courts, the Constitution and Parties, p. 80.

Quincy (Mass.) 51 (1761); Corwin, The "Higher Law" Background of American Constitutional Law, (1928-29), 42 Harv. L. Rev. 149, 398.


No report, save the pamphlet by Varnum (Providence, 1786), who was counsel for the defense. The record is in 10 Records of the State of Rhode Island (1865), 219.

1 Bay 252 (1792).

11 N. C. 5 (1787).

Ibid., p. 39.
principles accepted by the leading members of the Federal Convention. Virtually all of them subscribed to the natural rights philosophy with its doctrine of law as a product of reason and the natural order of things instead of will. They believed in a written constitution as the embodiment of a law superior to statutes, but also as a law enforceable by the courts, and binding upon all agencies of the government. Furthermore, one of the principal reasons that had brought the Philadelphia Convention into existence was distrust of the recent activities of the State legislatures. "To curtail legislative power as it existed in the State constitutions in the interest, first, of an adequate national power and, secondly, in the interest of private rights" made logically necessary either a Congressional veto on State laws or a judicial veto. When the former was rejected for reasons of expediency, the latter was easily accepted as a fundamental feature of the new system.17

Additional evidences can also be found, especially in the assertions of particular members of the Convention which indicate that they took judicial review for granted as an essential part of the new government. Elbridge Gerry, for example, referred on June 4 to the fact that "In some States the judges had already set aside laws, as being against the Constitution."18 On July 23 Madison declared that "A law violating a treaty ratified by a pre-existing 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."19 Madison made one other assertion on the floor of the Convention which seemed to imply that the Federal Courts would have the right to review acts of Congress. On August 28 he declared that "retrospective interferences" with private rights would be prohibited by the interdiction against ex post facto laws.20 As the ex post facto clause which had been theretofore adopted by the Convention applied only to Congress, and not to the States, Madison’s

21 Ibid., pp. 62-63. Interestingly enough Jefferson replied to Madison’s recommendation of a congressional negative on state laws by suggesting that this function would be better taken care of by the Federal judiciary upon appeal from the state courts. Letter to Madison, June 20, 1787, Writings of Jefferson (Ford ed.), vol. IV, p. 391.
23 Ibid., vol. II, p. 98.
remark appears to have been a definite recognition of the power of the judiciary to hold an act of the national legislature unconstitutional and void.\textsuperscript{21}

During the period when the Constitution was before the States for ratification, the idea that it provided for control of legislation by the courts was scarcely ever questioned.\textsuperscript{22} Opponents of the new instrument criticized it, either because they thought it would make the judiciary supreme over the representatives of the people, or because they feared that judicial enforcement of limitations upon Congress could never be an effective substitute for a bill of rights. In other words they took for granted that judicial review had been provided for by the Convention. Hamilton replied to these criticisms in Number 78 of the Federalist; not, however, by denying that judicial review was included in the Constitution, but by affirming it, and insisting that it was necessary, to keep the legislature within the prescribed limits of its authority and to protect individual rights.\textsuperscript{23}

On the basis of these and other evidences many of the ablest commentators on our constitutional history have concluded that the members of the Federal Convention clearly intended that judicial review in some degree should be included as a fundamental part of the new system of government; that it was the natural outgrowth of ideas that had been commonly accepted for many years prior to 1787, and of precedents entirely too numerous and impressive to be ignored. This is the reasoned judgment of Professors Corwin, McLaughlin, Farrand, Channing, and Charles Warren.\textsuperscript{24}

\section*{II}

Madison's theory of the power of the courts, like most of the rest of his political philosophy, was a product of influences dominant at the time the Constitution was adopted, and it did not differ materially from the views of most of his political as-


\textsuperscript{22}Corwin, The Doctrine of Judicial Review, p. 17.

\textsuperscript{23}Lodge edition, p. 485.

sociates of that day. Like them he conceived of all governmental authority as limited by a superior law, derived partly from the order of nature, and partly from the ultimate sovereigns who formed the political compact. He regarded the Constitution as an expression of that law; and he considered the courts to be better qualified than any other branch of the government to expound the Constitution, and therefore charged with the responsibility of maintaining it and protecting individuals under the general body of abstract rights.

As long as he lived Madison did not modify his earlier theories of judicial power very much. Despite significant changes in constitutional theory and practice he never abandoned his belief in the authority of the courts to pass upon the validity of legislation, especially of the sort that affected private rights. As a member of the First Congress he not only assumed the existence of such an authority, but warmly defended it. Having introduced a set of amendments to constitute a bill of rights, he declared that the courts would "consider themselves in a peculiar manner the guardians of those rights; they would be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights stipulated for in the Constitution by the declaration of rights".25

When Chief Justice Marshall in the case of Marbury v. Madison26 affirmed the power of the Supreme Court to declare an act of Congress unconstitutional, Madison made no protest; and neither for that matter did any of the other thirty-nine members of the Philadelphia Convention who were living at that time, with one or two exceptions.27 Madison censured the Court rather severely, however, for its decision in the case of McCulloch v. Maryland28 on the very interesting thesis that John Marshall and his colleagues had abdicated their proper function of controlling the legislative exercise of unconstitutional powers. He believed that the opinion in this case, with its broad definition of the implied powers of Congress, would leave the exercise of legislative authority in the future almost unchecked.

26 1 Cranch (U. S.) 137, 2 L. Ed. 60 (1803).
28 4 Wheat. (U. S.) 316, 4 L. Ed. 579 (1819).
He contended that if any means is to be considered constitutional simply because it is "expedient" or "conducive to" a legitimate end, then it would have to be left to Congress to determine every means that should be employed to carry into effect a specified power. He thought that the Court could hardly presume to pass upon questions of expediency. As a consequence there would be practically no limits to legislative authority, and the whole scheme of government would be changed.\(^2\)

At first thought Madison may seem in these assertions to have contradicted his earlier opinions in the attack on the United States Bank. On that occasion he had declared that each department should have the right to mark out the limits of its own powers; now he appeared to be contending that the Supreme Court should determine the scope of legislative power. There was no real contradiction, however. In the earlier instance he had in mind, of course, the limits of each department's powers in relation to the other departments, but now he was referring to legislative usurpations of power which he held to have been reserved by the States.

There is additional evidence that Madison regarded judicial review as an appropriate device for preserving the balance between the Federal and State authorities, as well as a safeguard for individual rights. He declared on one occasion that "The Federal judiciary is the only defensive armour of the Federal government, or, rather, for the Constitution and laws of the United States. Strip it of that armour, and the door is wide open for nullification, anarchy, and convulsion."\(^3\) In other words the Supreme Court, through its power to veto unconstitutional laws of both the national and State legislatures, would uphold the original division of sovereignty made by the Constitution. He considered that it would be impossible to leave this function to the individual States, lest the Constitution be given a different meaning in each, and the principle of equality of the States be destroyed, since some would claim a greater measure of sovereignty than others.\(^4\) Moreover, he appeared

\(^3\)Letter to J. C. Cabell, April 1, 1833, Writings (Cong. ed.), vol. IV, pp. 295-97.
\(^4\)Letter to Spencer Roane, June 29, 1821, Writings (Hunt ed.), vol. IX, p. 66.
to believe, in the latter period of his life at least, that the national government was in greater need of protection against a disturbance of the constitutional balance of power, than the States. He maintained that this was particularly true inasmuch as the officers of the former were elected directly or indirectly by, and were responsible to, the States, while the officers of the State governments were entirely independent, in their appointment and responsibility, of the government of the United States. He assumed, however, that it would also be the function of the Court to protect the States against usurpations of power by the national government.

III

Nevertheless, in spite of his strong conviction of the value of the Court's functions, Madison made several important qualifications of his theory of judicial control. In the first place he denied that the Supreme Court of the United States should have an absolute authority to decide controversies between the central government and the States over the respective spheres of each. He argued that there might be cases of usurpations by the Federal government of which the judiciary would never take cognizance; or that the forms of the Constitution, to which the courts were supposed to adhere, might not prove effectual safeguards against transgressions of the rights of the States. Furthermore, the Federal judiciary itself might exercise or sanction dangerous powers in excess of constitutional grants. In all such cases as these, he maintained, the people in the States, who are the parties to the compact, must have the ultimate right to judge. And this right must extend to violations by one delegated authority as much as by another, by the judicial department as well as by Congress or the President. Or as he himself expressed it in the Report on the Virginia Resolutions:

"The States, then, being the parties to the constitutional compact, and in their sovereign capacity, it follows of necessity that there can be no tribunal above their authority to decide, in the last resort, whether the compact made by them be violated; and consequently, as the parties to it, they must themselves decide, in the last resort, such questions as may be of sufficient magnitude to require their interposition."

34 Writings (Hunt ed.), vol. VI, p. 349.
In other words, the people in the States, having been the original authors of the division of sovereignty, must retain the ultimate right, in extreme cases, to adjudge disputes pertaining to that division. This did not imply, however, the right of the people in an individual State to nullify Federal laws, or to secede from the Union. Only the States collectively, he maintained, could have any authority to construe the constitutional compact.

In the second place, Madison qualified his theory of judicial control by denying to the courts the final power to decide questions involving controversies between departments of the government. He insisted that inasmuch as the three great branches of the government were coordinate, and equally bound to support the Constitution, "each must in the exercise of its functions be guided by the text of the Constitution according to its own interpretation of it; and that consequently in the event of irreconcilable interpretations, the prevalence of one or the other department must depend on the nature of the case, as receiving its final decision from the one or the other, and passing from that decision into effect, without involving the functions of any other." What he evidently had in mind was that each department should have the final authority to decide questions relating to the exercise of powers within its own sphere of action. The Supreme Court, that is, should have no authority to question the judgment of Congress concerning what would be a valid exercise of legislative power; or of the President concerning an exercise of executive power. The opposite hypothesis, he maintained, would establish a judicial oligarchy, and destroy the principle of the separation of powers.

Madison also modified the doctrine of judicial control by insisting upon the rights of Congress to interpret the Constitution. He did not regard this as the exclusive prerogative of the judiciary, although he admitted that in the ordinary course of things it would appertain to that branch. He insisted, nevertheless, that it was not the intention of the authors of the fundamental law to give the judges a monopoly of that power, particularly in cases involving disagreements among the three departments regarding the scope of their authority. But his con-

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*Manuscript, Madison Papers, Library of Congress.

ception of the power of Congress to engage in exposition of the
Constitution did not end here. He maintained that the national
legislature had at least a limited power to decide questions of
constitutionality that had been left in doubt by the written
organic law. To be sure no one Congress would have the right
to settle the issue; but over a considerable time the deliberate
and reiterated assertions of a particular constitutional construc-
tion, by a succession of Congresses, should be taken to possess
a de facto validity, and should therefore be entitled to the re-
spect of all branches of the government.37 In other words he
believed in a kind of rule of stare decisis for legislative as well
as judicial interpretation of the Constitution. He appeared to
think a course of such legislative expositions, sufficiently delib-
erate, uniform, and definite, would really be an expression of
the sovereign public will, almost tantamount to a constitutional
amendment.38 It was partly on this basis that he considered
the question of the constitutionality of the United States Bank
to have been finally settled,39 and he regarded legislative con-
struction of the Constitution as an important factor in favor of
the legality of protective tariffs.40 After he had retired from
public life, he even suggested that it might be used to sanction
Federal expenditures for public improvements.41 He maintained,
however, that a careful distinction should be drawn between
cases where Congress opposes the will of its constituents, as hap-
pened in the enactment of the Alien and Sedition laws, and cases
where the legislative will is in harmony with the will of a major-
ity of the people and the States. Only in cases of the latter
sort, would Congressional exposition of the Constitution have
any validity.42

Finally, in the Federal Convention Madison had even been
opposed to giving the Supreme Court a general jurisdiction over

37 Letter to C. J. Ingersoll, June 25, 1831, Writings (Cong. ed.),
vol. IV, pp. 185-186.
IX, p. 443.
IX, p. 443.
40 Letter to Professor Davis, 1832, Writings (Cong. ed.), vol. IX,
p. 246.
41 Letter to Jefferson, Feb. 17, 1825, Writings (Cong. ed.), vol. III,
p. 433.
42 Letter to N. P. Trist, Feb. 7, 1827, Writings (Cong. ed.), vol. III,
p. 551.
cases arising under the Constitution. He also condemned a general power of judicial review in his remarks on Jefferson’s Draught of a Constitution for Virginia. It would appear justifiable to say then that the main objectives of Madison’s conception of judicial review were limited to the protection of private rights against impulsive legislatures and the settlement of ordinary conflicts between Federal and State authorities. But it can hardly be assumed that this would place many stumbling blocks in the path of the courts.

In conclusion, then, the practical effect of Madison’s theory of judicial review would probably not differ much from that of the doctrine which prevails today. His devotion to the principle of the separation of powers led him to oppose judicial supremacy, but his theory of the Constitution as a higher law made acceptance of control by the judicial branch logically inevitable. Moreover, his belief in the sanctity of private rights, including the right of property, compelled him to look with favor upon a veto of legislation by the courts as a necessary means of protecting minorities, although it must be conceded that his conception of property was somewhat more restricted than that which the courts now apply. He always conceived of property as real wealth as opposed to the “paper wealth” created by stock-jobbing capitalists. Finally, he regarded the whole body of individual rights, whether mentioned in the Constitution or not, as a limitation, which the courts should enforce, upon the powers of government. This was the same view which had been expressed by Hamilton in Federalist 78, and it formed an essential basis of Chief Justice Hughes’ recent decision in the case of Perry v. United States.