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The Doctrine of Judicial Review

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THE DOCTRINE OF JUDICIAL REVIEW

The relationship of the judiciary to the legislature is necessarily close, inasmuch as a large part of the court’s time is spent in interpreting and applying law created by legislature. On the other hand legislative bodies in their turn, exercise considerable power over the judiciary. For one thing, legislative appropriations are necessary for the maintenance and operation of the judicial departments. Then too, where provisions of organization and tenure are not completely set forth in the Constitution, it becomes the duty of the legislature to make such provisions as are necessary.1 This places a large control of the judicial department in the hands of the legislature.2

Certain judicial powers have also been retained by legislative bodies.3 The power of impeachment is one instance of this kind. Up to date this power has been sparingly used in this country and the independence of the executive and the judiciary

1 The Constitution of the United States, for example, provides that the judicial power shall be vested in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish. Consequently, Congress can determine the number of judges appropriate for the Supreme Court and create any additional tribunals which appear necessary for the transaction of federal business. Thus it might reduce the number of judges by providing that on the death or resignation of any of them the vacant post shall be abolished; then at the proper moment it might increase the number of judges to secure the appointment of men to its liking. The most outstanding example of legislative activity in this regard took place in 1802 in Jefferson’s administration, when Congress repealed a law providing for sixteen circuit judgeships which President Adams had filled with Federalists the year before.

2 In 1809, the legislature of Ohio passed an act declaring that the Constitution was to be interpreted as vacating all seven-year appointments in 1810, not excepting cases in which the current incumbent had been appointed to fill a vacancy caused by the death or resignation of the original holder. By this use of this provision, the legislature was able to reconstruct the judicial personnel of the state. Three supreme court judges, three president judges of the common pleas courts, all the associate judges of that court (more than a hundred in number), and all of the justices of the peace of the state, were removed by this so-called “sweeping resolution.” See Rufus King, Ohio, First Fruit of the Ordinance of 1787 (1888), p. 314. For an interesting account of the rivalry between the legislature and judiciary in early Ohio, see William T. Utter, “Judicial Review in Early Ohio,” Mississippi Valley Historical Review, Vol. XIV, pp. 3-26; also “Saint Tammany in Ohio: A Study in Frontier Politics,” Ibid., Vol. XV, pp. 321-340.

The Doctrine of Judicial Review

have not been affected by it. It could be used, however, in such a way as to seriously interfere with the work of the courts. In view of its comparatively limited use in the past, however, it would seem that the courts have little to fear in this connection.

The most important point of contact existing at the present time between the legislature and the judiciary arises from the power of the courts to review the constitutionality of legislation and refuse to enforce that which they declare unconstitutional.

The principle that an act of legislation contrary to the law under which a legislative body is organized is invalid was familiar to Americans long before the Constitution was adopted. Before the Revolution, colonial legislation was frequently subjected to review by the Privy Council, and both before and

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4 The United States Senate has sat as a Court of Impeachment in the cases of the following accused officials:
William Blount, a Senator of the United States from Tennessee; Blount expelled; charges dismissed on various grounds; Monday, Dec. 17, 1798, to Monday, January 14, 1799.
John Pickering, Judge of the United States District Court for the District of New Hampshire; removed from office; Thursday, March 3, 1803, to Monday, March 12, 1804.
Samuel Chase, Associate Justice of the Supreme Court of the United States; acquitted; Friday, November 30, 1804, to March 1, 1805.
James H. Peck, Judge of the United States District Court for the District of Missouri; acquitted; Monday, April 28, 1830, to Monday, January 31, 1831.
West H. Humphreys, Judge of the United States District Court for the middle, eastern, and western Districts of Tennessee; removed from office; Wednesday, May 7, 1862, to Thursday, June 26, 1862.
Andrew Johnson, President of the United States; acquitted; Friday, March 3, 1876, to Tuesday, August 1, 1876.
William W. Belknap, Secretary of War; acquitted; Friday, March 3, 1876, to Tuesday, August 1, 1876.
Charles Swayne, Judge of the United States District Court for the northern district of Florida; acquitted; Wednesday, Dec. 14, 1904, to Monday, Feb. 27, 1905.
Robert W. Archbald, Associate Judge, United States Commerce Court; removed from office; Saturday, July 13, 1912, to Monday, January 13, 1913.
G. W. English, District Judge of Illinois; resigned; March 25, 1926, to Nov. 10, 1926.

5 Before the Revolution, the validity of an act could be tested by an appeal to the King in Council to set aside the enactment of a

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after the adoption of the federal Constitution, courts in a number of states had held state statutes in conflict with state constitutions to be invalid.⁸

Although neither the federal Constitution⁹ nor any of the state constitutions expressly recognize or sanction this so-called colonial legislature, or by an appeal from the decision of a colonial court. These powers were not lightly considered. In fact, it has been estimated that some 3,563 acts of the American colonies were submitted to the Privy Council, of which 469 were disallowed. Imperfect records of the Privy Council make it impossible to determine how many of these were set aside because of lack of authority on the part of the legislature to enact them, but enough is known to indicate that the proportion is large. (See Russel, The Review of Colonial Legislation by the King in Council; Andrews, British Committees, Commissions, and Councils of Trade.) In addition to appeals from the enactments of colonial legislatures to the Privy Council, there were also appeals from the decisions of colonial courts. Included in this group were three well known cases: (1) Winthrop v. Lechmere (1727-8), Thayer, Cases on Constitutional Law, I, 34; (2) Philips v. Savage (1738), Acts of the Privy Council, III, 432; (3) Clark v. Tousey (1745), Acts of the Privy Council, III, 540. The records of the Privy Council are imperfect in this connection also. In consequence it is almost impossible to determine how many of the cases appealed to it from the American colonies, aggregating more than 260 in number, were based on an alleged conflict between a legislative enactment and a colonial charter. See A. M. Schlesinger, "Colonial Appeals to the Privy Council," Pol. Sci. Quarterly, Vol. 28, pp. 279, 433; Hazeltine, Appeals from the Colonial Courts to the King in Council, Annual Report of the American Historical Association for 1894, p. 299. See Lawrence B. Evans, Cases on Constitutional Law, pp. 253-255.

*The rights of the courts to invalidate acts of the legislature had been exercised in at least five states before the constitutional convention assembled. As early as 1780, the highest court of New Jersey asserted the right of the courts to determine the validity of acts of the legislature in the case of Holmes v. Walton. (See The American Historical Review, Vol. IV, 456.) In 1782, in the case of Commonwealth v. Caton, the same doctrine was asserted in Virginia; in 1784 in the case of Rutgers v. Waddington it was asserted in New York; in 1786 in the case of Trevett v. Weedon, decided in Rhode Island, a similar view was expressed (See Arnold, "History of Rhode Island, Vol. II, Ch. 24; Coxe, Judicial Power and Unconstitutional Legislation, p. 234 ff.; Kent, Commentaries, 12th ed., pp. 450-453); and in Bayard v. Singleton, decided in 1787 in North Carolina, the court asserted a similar principle. (All of these cases except Holmes v. Walton are printed in Thayer, Cases, I, 55-83.) See also B. F. Moore, The Supreme Court and Unconstitutional Legislation (1913), Ch. I; C. G. Haines, The Conflict Over Judicial Powers in the United States to 1870 (1909), p. 21; Lawrence B. Evans, Cases on Constitutional Law, pp. 255-256. In the Federal Constitutional Convention of 1787, and in the state ratifying conventions as well, the question was frequently raised as to what would happen in case Congress should adopt an act which contravened or exceeded the powers with which it was vested. This discussion is summarized in Melvin, "The Judicial Bulwark of the Constitution," The American Political Science Review, VIII, p 167; see also Elliot's Debates, III, 553; III, 325; IV, 155; II, 186; II, 151; IV, 257; II, 489; see also the Federalist.
doctrine of unconstitutionality; it is nevertheless generally considered to be a part of the state and federal jurisprudence. Both the state and federal courts have without exception recognized and applied the doctrine, apparently with the general consent of the people. This does not mean that the doctrine has been accepted from the beginning of our system without question. As a matter of fact, some time elapsed after the

10 "There is no evidence," says Arthur N. Holcombe, "in the Constitution or bill of rights of any of the original states, that the judiciary were originally looked to by the Fathers as the special guardians of the Constitution. On the contrary, the implication is decidedly the other way. In New York, for instance, the judiciary were certainly expected to accept the construction of the Constitution adopted by the council of revision, or in the last instance by the court of errors, a court in which the judicial element was in a minority. In most of the states, moreover, the principle of the separation of power was either not logically worked out, as it was in New York, or not recognized at all. . . . The governments of the original states, . . . were for the most part, governments characterized by the supremacy of the legislature, and if judicial interference with legislative acts was sometimes tolerated, the operation of the governmental system was not consciously altered thereby. . . . The main reliance of the framers of the Massachusetts Constitution for the protection of the rights of the people was placed in the legislature. (See Art. 12.) This was also the case in the beginning throughout the United States." State Government in the United States, 1928, pp. 62-63; see also, pp. 49-52. In ten of the original states the judges were arbiters of all constitutional questions, in the sense that they had the same right as the other departments of government to construe the Constitution, with the added advantage that they acted upon constitutional questions as a rule, after the other departments of government had acted. See A. N. Holcombe, State Government in the United States (1928), p. 66. The governments of Vermont, Rhode Island and Connecticut were not as strongly influenced by the doctrine of the separation of powers as were the other states. Characterized by legislative supremacy the governments of these states gave small opportunity for judicial interference with legislative acts. Chipman's Sketches of the Principles of Government (1793), pp. 119-127. In Pennsylvania and Vermont an attempt was made to prevent abuses in the exercise of legislative and executive powers, by the establishment of a council of censors, instead of through judicial action. These councils were expected to ascertain whether the Constitution had been preserved inviolate in every part; and whether the legislative and executive branches of the government had performed their duties as guardians of the people, or had assumed to themselves, or exercised other or greater powers than they are entitled to by the Constitution. The Pennsylvania Council of Censors was established in 1776 and continued in operation till 1790. It was not successful. [See Allen Nevins, The American States During and After the Revolution, 1775-1789 (1924).] The Vermont Board of Censors was created in 1777 and existed until 1870. The system seems to have worked better in Vermont than in Pennsylvania. See L. H. Meader, "The Council of Censors," in Papers from Historical Seminary of Brown University (1899); Arthur N. Holcombe, State Government in the United States (1928), pp. 55, 59, 77-80; W. F. Dodd, State Government (1928), pp. 115-116. In both states the existence of the council of censors may have delayed the
setting up of the national government and our first state government before the doctrine was put into effect. The constitution itself is silent concerning the question. Although it


Although the Federal Constitution contains no provision conferring upon the courts the power to invalidate acts of the legislature, it was apparently looked upon by some members of the constitutional convention of 1787 as being an inherent part of the judicial power. [See Warren, *Congress, The Constitution and the Supreme Court* (1925), Chs. 2-4]. Alexander Hamilton was prominent in this group. “There is no position which depends on clearer principles,” he said, “than that every act of delegated authority contrary to the tenor or commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm that the deputy is greater than the principal; that the servant is above the master; that the representatives of the people are superior to the people themselves; that mere men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.” (*The Federalist*, No. 78, Dawson's Ed.). “... Where the will of the legislature, declared in statutes,” he said, “stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental.” (*The Federalist*, Dawson's Ed., p. 542.)

“Nor can there be much doubt that the members of the Convention were also substantially agreed that the Supreme Court was endowed with the further right to pass upon the constitutionality of acts of Congress. The available evidence strictly contemporaneous with the framing and ratification of the Constitution shows us seventeen of the fifty-five members of the Convention asserting the existence of this prerogative in unmistakable terms and only three using language that can be construed to the contrary. More striking than that, however, is the fact that these seventeen names include fully 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 the Constitution its final form. And these were precisely the members who expressed themselves on all the interesting and vital subjects before the Convention, because they were its statesmen and articulate members.” Corwin, *John Marshall and the Constitution*, pp. 11-12. See also C. A. Beard, *The Supreme Court and the Constitution*, p. 128; Charles Warren, *Congress, The Constitution, and the Supreme Court*. On the other hand it has been contended by some writers that sentiment in the federal convention was on the whole unfavorable to the idea of granting the judiciary the power to declare acts of Congress invalid. These writers contend that the exercise of such a power is a usurpation. See William Trickett, “Judicial Dispensation from Congressional Statutes,” *American Law Review*, Vol. 41, p. 65; “The Great Usurpation,” *American Law Review*, Vol. 40, p. 356; “Judicial Nullification of Acts of Congress,” *North American Review*, Vol. 155, p. 848; L. B. Boudin, “Government by Judiciary,” *Pol. Sci. Quarterly*, Vol. 26, p. 238; Address by Chief Justice Walter Clark of North Carolina, *Congressional Record*, July 31, 1911; also *The Independent*, Sept. 26, 1907.
would be a difficult if not impossible task to set forth the exact time when the doctrine of judicial review was accepted by the American people, certain important steps can be noted.

The doctrine was set up as a national principle in 1803 in the case of *Marbury v. Madison*. After that decision, the

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14 In May, 1791, the United States Circuit Court declared a Connecticut statute invalid because contrary to the treaty of peace with Great Britain. In 1792, in the case of *Bradsford v. Spalding*, the same court made a similar decision in Georgia. In 1793, in the case of *Higginson v. Greenwood*, the United States Circuit Court in South Carolina decided the same way. These cases anticipated the case of *Ware v. Hylton* (1796), 3 Dallas, 197, in which the United States Supreme Court took the same view as to the supremacy of a treaty over a state statute. The Federal Circuit Courts held other state statutes invalid in Connecticut in 1793, in Pennsylvania in 1795, and in Vermont in 1799. In 1792 the United States Circuit Court in Pennsylvania rendered the first decision holding an act of Congress unconstitutional in *Hayburn's Case* (1792), 2 Dallas 409. See Warren, *The Supreme Court in United States History*, I, 65 ff.

15 In this case Chief Justice John Marshall in a classic statement asserted the proposition that a Constitution is fundamental law, that legislative and executive powers are limited by this fundamental law, and that the courts as interpreters of the law, must preserve and defend the Constitution. "The powers of the legislature" he said, "are defined and limited; and that these limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. ... The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts on the part of the people to limit a power, in its own nature illimitable." For a criticism of the decision in this case see E. S. Corwin, *The Doctrine of Judicial Review and the Constitution*, Ch. 1 (1914); J. A. C. Grant, "Marbury v. Madison Today," *Amer. Pol. Sci. Rev.*, Vol. 23, pp. 673-681 (Aug., 1929); A. C. McLaughlin, "Marbury v. Madison Again," *Amer. Bar Assoc. Journ.*, Vol. 11, pp. 155-159 (Mar., 1928); see also *Eakin v. Raub*, 12 Sarg. & *R.
doctrine was accepted quite generally by state courts, state legislatures, and the people generally. By 1818, the power of the courts to pass upon the constitutionality of legislation was recognized in every state but Rhode Island and the courts were largely following the lead of Marshall in proclaiming the independence of the Judiciary. As a result of this trend, the principle of the separation of powers was perfected and the system of checks and balances was made a workable substitute for the earlier practice of legislative supremacy.

In the beginning the doctrine of judicial review was exercised infrequently and with great caution by the United States Supreme Court and the state high courts as well. During

(Pa.) 330 (1825); also in Thayer, Cases, I, 133; Jackson’s veto of the United States Bank Bill; Richardson, Messages and Papers of the Presidents, II, 531; also speech by Roscoe Conkling, April 18, 1860, Congressional Globe, 36th Cong., 1st Session, App. 233.


The doctrine of judicial review, as stated by Justice Woodbury of New Hampshire in 1818, came to be the rule adopted in every state. See Merrill v. Sherburne, 1 N. H. 204.

From its institution in 1789 to July 1, 1924, the Supreme Court has disposed of about thirty thousand cases. In fifty-three cases, it has held acts of Congress unconstitutional. Three of these cases: (1) United States v. Todd, 13 Howard 40 (1793); (2) Marbury v. Madison, 1 Cranch 137 (1803); and (3) Scott v. Sanford, 19 Howard 393 (1857); were decided before the Civil War. Fifty of the cases have come since then. For a list of these cases see Lawrence B. Evans, Cases on Constitutional Law (1925), p. 282. See also Warren, Congress, the Constitution and the Supreme Court (1925), Ch. 9. A list of federal and state statutes and municipal ordinances, held unconstitutional down to 1911, may be found in Moore, The Supreme Court and Unconstitutional Legislation (1913), Studies in History, Economics, and Public Law, Columbia University, Vol. LIV, App. III, pp. 139-141. The total number of measures held invalid by the United States Supreme Court during this period amounts to 279. Of this number 32 measures were held invalid between 1790 and 1850; and some 247 were held invalid between 1850 and 1911. In Martin and George, American Government and Citizenship (1927), somewhat different figures are set forth.

For the period 1776 to 1819, C. G. Haines lists only eighteen cases in which state statutes were held invalid by state courts. See The American Doctrine of Judicial Supremacy, p. 228. Although this list is incomplete it indicates the trend. During the first half century of Ohio’s statehood, there were only seven officially reported cases in which the Ohio Supreme Court declared acts of the state legislature
the formative period of American political institutions, that is, the period from 1789 to 1861, the number of laws, state and national, invalidated by the courts, was extremely small as compared to the number invalidated since that time. As a matter of fact, the Civil War period may be said to introduce a new era in American judicial history. From that time on judicial power expanded rapidly all over the country.

There were several reasons for this expansion. Constitutional changes explain the matter in part. The growing complexity of state constitutions and the increasing number of limitations necessarily encouraged state judicial supervision over statutory enactments. Important changes in the federal constitution immediately after the Civil War were also an


Only thirty-seven state acts were declared unconstitutional by the federal courts before 1860. From 1860 to 1910 the federal courts declared one hundred and eighty state acts invalid. See B. F. Moore, The Supreme Court and Unconstitutional Legislation (1913), Studies in History, Economics, and Public Law, Columbia University, Vol. LIV, App. III, pp. 139-141. See also Jackson H. Ralston, Study and Report for the American Federation of Labor Upon Judicial Over Legislatures as to Constitutional Questions (1923).

In the brief span between 1903 and 1908, 400 state laws were held invalid by the courts, state and federal. Charles G. Haines, The American Doctrine of Judicial Supremacy, p. 307. All but 28 of these vetoes were by state courts. A count by B. B. H. Meyer of the Library of Congress of state legislation (including constitutional provisions and municipal ordinances as well as ordinary laws) invalidated by the United States Supreme Court between 1910 and 1922 shows a total of 166 such cases in the eleven years. See Congressional Record, Vol. 64, Pt. 5, pp. 4566-4570.

Prior to the year 1912, 285 acts or parts of acts had been declared unconstitutional by the state courts of New York. Of this number, barely one per cent was enacted under the original Constitution of 1777, and not much more than two per cent under the second Constitution of 1821. Of the number remaining, about three-fifths were enacted under the Constitution of 1846, and about two-fifths under the Constitution of 1894. See H. H. Davis, The Judicial Veto. In Illinois, cases involving the constitutionality of legislation have multiplied as legislative restrictions have been increased by successive revisions of the Constitution. The greater part of this increase came during the last thirty years. More cases involving constitutional questions were decided between 1890 and 1913 than between 1820 and 1870. III. Const. Conv. Bull., No. 10 (1920), p. 847 ff.; B. F. Moore, "The Judicial Veto and Political Democracy," Amer. Pol. Sci. Rev., Vol. 10, pp. 700-709 (Nov., 1916).
As a result of the thirteenth, fourteenth, and fifteenth amendments, the jurisdiction of the federal courts over state legislation has been completely changed. Important changes in the economic life of the country also tended to increase the business of the courts, enlarge their jurisdiction, and expend their structure.

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24 Before the adoption of the Fourteenth Amendment, due process of law in the states was guaranteed only by state constitutions and the guarantee was given a restricted interpretation. See Edward S. Corwin, "Due Process of Law Before the Civil War," Harvard Law Review, Vol. 24, p. 375. Since that time, however, the United States Supreme Court has become a veritable censor of state legislation. Consequently the tribunal has exercised a large influence in shaping the industrial and economic development of states by controlling the character of legislation affecting such development. Whether or not the states have been held in narrower bounds in the exercise of their police power, as a result of this transfer of power is a moot question. Viewed in the light of some cases which could be cited, the conclusion would seem to favor the affirmative. In this connection one might list the following: Lochner v. New York, 198 U. S. 45 (1905); Bunting v. Oregon, 243 U. S. 422 (1917); Coppage v. Kansas, 236 U. S. 1 (1915); Truax v. Corrigan, 257 U. S. 312 (1921); Minimum Wage Board v. The Children's Hospital, 261 U. S. 525 (1923). On the other hand, the Supreme Court of the United States has been somewhat more liberal in its interpretation of the "due process of law" clause and "police power" than many state courts. [See R. A. Brown, "Due Process, Police Power, and the Supreme Court," 40 Harvard Law Review 943-968 (May, 1927); Edward S. Corwin, "Judicial Review in Action," 74 Univ. of Penn. Law Rev., pp. 639-671 (May, 1926)].

25 In 1877, in discussing the growing tendency to raise questions under the Fourteenth Amendment the court said: "... it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a state court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded." Davidson v. New Orleans, 96 U. S. 97, 104 (1877). In 1885, in a vigorous protest against the continued exercise of this practice it said: "This court is not a harbor where refuge can be found from every act of ill-advised and oppressive state legislation." Missouri Pacific Ry. Co. v. Humes, 115 U. S. 512, 520 (1885).

26 The range and intensity of governing political, social, and economic forces are accurately reflected in the volume and variety of federal litigation. This is markedly illustrated by the era beginning with the defeat of the Confederacy. Peace brought with it an accelerated industrial development, partly because normal processes which had been put up, during the war, were released, and partly be-
From the Civil War period till the present, the federal courts have continued to expend their power. The state courts, have met with a similar experience. Their work was increased not only because of the comprehensive character of the newer constitutions which defined in detail the organization and function of the various branches of the government, but also by their tendency to follow the example of the federal courts in a frequent application of the "due process clause." Moreover, there arose a tendency in many states to construe constitutional limitations as limiting the legislative powers very strictly. There was a good reason for this development. The cause of their intensification by the war. The transcontinental railroads increased domestic commerce tremendously. The railroads steadily pushed the frontier westward. They brought economic penetration of the Northwest and Southwest. Population and politics followed in their wake. The public domain became territories and the territories states. Even more significant perhaps, was the repercussion of railroad development upon our foreign trade. America became a great food exporter. Contemporaneous advances in steam navigation furthered this industrial expansion. Frankfurter and Landis, The Business of the Supreme Court, 1929, pp. 56-57. The forces which combined to introduce a new economic and social order into American life in the sixties and seventies affected the state courts likewise.

In 1873 in the Slaughter House Cases, 16 Wallace 36, Justice Miller in advocating a restricted construction of the Fourteenth Amendment, expressed the fear that any other view of its meaning would constitute the Supreme Court a perpetual censor upon all legislation of the states, and upon the civil rights of their citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time the Fourteenth Amendment was adopted. Professor E. S. Corwin in commenting on this matter in 19-, was of the opinion that Justice Miller's apprehension had been realized. Professor Corwin points out that whereas, there were only seventy-one cases arising under the Fourteenth Amendment between 1868 and 1889, there were one hundred and ninety-seven cases between 1890 and 1901. See his article "Doctrine of Due Process of Law Before the Civil War," Harvard Law Review, Vol. 24, p. 366; and his "The Supreme Court and the Fourteenth Amendment," Michigan Law Review, Vol. 1, p. 671. For a good statement as to the manner in which the "due process" clause has been given a wider meaning and application by the courts see A. N. Holcombe, State Government in the United States, pp. 435-442 (1926). W. F. Dodd, State Government, pp. 86-92 (1928). Between 1870 and 1913, there were 115 cases before the Illinois Supreme Court under the "due process" clause, and considerably more than one-half of these cases arose after 1900. See Illinois Constitutional Convention Bulletin, No. 10 (1920), p. 847 ff. See Ohio Constitution, Sec. I, Art. 20. "State constitutions are not grants of power, but limitations of power. Such legislatives can exercise such powers as are not inhibited by the fundamental law. To construe the provision in question as a grant of authority is to impute to the framers the doing of a useless and idle thing." Scott v. Flowers, 60 Neb. 675 (1900). To avoid this kind of restrictive interpretation the Oklahoma Constitution of 1907 provides that "any spe-
attitude of the people towards the courts had undergone a change. Losing confidence in legislative bodies in the forties and fifties, the people in many states turned hopefully to the judiciary. In constitutional conventions held in the middle of the century in many states the judiciary was given a more independent status. In some states the increased use of judicial review followed immediately in the wake of constitutional provisions for the popular election of judges and for stricter constitutional limitations upon legislative powers and procedures.

Indeed the power of the courts has grown so rapidly since the Civil War that our system has been characterized by a French commentator as a "government by judges". According to this observer the final control of the social and economic policy of the country is vested in the courts. It is undoubtedly true that under such broad constitutional provisions as the "due process of law" clause, the courts do fix the limits of legislative power and accordingly determine policy in connection with social and economic legislation.

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22 Constitutional conventions were held in New York (1846); Wisconsin (1848); California (1849); Kentucky, Missouri, Pennsylvania, Virginia (1850); Indiana, Maryland (1851); Ohio (1851); Louisiana (1852); Tennessee (1853); Kansas (1855); Iowa, Minnesota, Oregon (1857). The adoption of popular election in Mississippi in 1832, marked the beginning of a swing to this system. By the time of the Civil War popular election had been written into nineteen of the thirty-four state constitutions. See W. S. Carpenter, Judicial Tenure in the United States, pp. 180-182.
23 Where laws had formerly been invalidated by the courts to protect their own constitutional rights, they were now invalidated because of defective legislative procedure, or because of conflict with the "due process of law" clause of the federal constitution or its equivalent in the state constitutions. Before the Civil War, the state courts were on the defensive. During this period they used their power to invalidate statutes to protect their own constitutional rights. They now use it to invalidate the results of incorrect legislative procedure and to maintain the integrity of "due process." In consequence it is the legislative body which is now on the defensive. See Charles G. Haines, The American Doctrine of Judicial Supremacy, p. 238; F. R. Aumann, "The Course of Judicial Review in the State of Ohio," Amer. Pol. Sci. Rev., Vol. 25, pp. 370-371 (May, 1931).
25 This tendency has been particularly marked in our state govern-
In recent years, considerable opposition has arisen to the power and practice of judicial review, principally because of decisions which have nullified social and economic legislation on the ground that it contravened the "due process of law" clause. Dissatisfaction arising from these decisions has been increased by the prevailing uncertainty as to the meaning of the phrase "due process." In the opinion of many, the states exercise that wide range of authority called the "police power," which includes all regulative authority to promote the health, safety, good order and morals of the community. In its broadest sense this power includes all legislation and almost every function of civil government. [Barbier v. Connolly, 113 U. S. 27 (1885)]. It is not subject to definite limitations, but is co-extensive with the necessities of the case and the safeguards of public interest. (Comfield v. U. S., 167 U. S. 518.) Being the most general and least defined of the inherent powers of government, it necessarily imposes a large responsibility of interpretation on the judiciary. The judiciary has retained its authoritative position by refusing to define the term and reserving to itself the right to determine whether any act is warranted under that power or not. Remaining undefined, the "police power" like that other vague phrase "the due process of law" clause, is left wholly within the keeping of the judicial conscience. The resulting interpretation largely reflects the personal opinions and general social and political theory of the judges. In consequence different judges may take completely different views of the same problem. This actually amounts to fixing public policy, rather than determining a question of law. See Geo. W. Alger, The Old Law and the New Order (1913), pp. 149-178; 237-261.

"But now the court, in accordance with what it denominates the 'rule of reason' in effect inserts in the act the word 'undue,' which means the same as 'unreasonable,' and thereby makes Congress say what it did not say, what, as I think, it plainly did not mean to say, and what, since the passage of this act, it has explicitly refused to say. It has steadily refused to amend the act so as to tolerate a restraint of interstate commerce even where such restraint could be said to be 'reasonable' or 'due.' In short, the court, now, by judicial legislation in effect, amends an act of Congress relating to a subject over which that department of the government has exclusive cognizance." Statement of Mr. Justice Harlan in United States v. American Tobacco Co., 221 U. S. 105 (1911).

The courts have never attempted a precise definition of "due process," preferring to arrive at its meaning by the gradual "process of inclusion and exclusion in the course of decisions as they arise." Twining v. New Jersey, 211 U. S. 78 (1908); Although refusing a definition of due process, it has declared that in the Fourteenth Amendment "it refers to that law of the land in each state, which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the basis of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws and alter them at their pleasure." Hurtado v. California (1894), 110 U. S. 515, 535. The lines which separate legislation which is compatible with the "due process" clause from legislation which is not "are pricked out by the gradual approach and contact of decisions on the opposing sides." [Noble State Bank v. Haskell, 219 U. S. 104, 112 (1911)].
validity of a law under this clause depends not so much upon any definitely ascertainable standard,\(^3\) or precise definition\(^4\) as to what constitutes "due process,"\(^4\) but upon the "meaning" the court wishes to give it.\(^4\) If we are to believe two observers as widely separated as Theodore Roosevelt\(^2\) and Justice Cardozo,\(^4\) we must accept the view that this "meaning" is

\(^3\)Mr. Walter F. Dodd groups all constitutional provisions roughly into four classes: (1) Narrow and definite constitutional standards capable of application by a court without any great discretion as to the interpretation or to the extent of the limitation. (2) Limitations, broad in character, but still definite, and presenting something of an objective standard by which to test the validity of legislation. (3) Limitations, narrow in character, but so indefinite that they do not present an objective standard by which the validity of legislation may be tested. (4) Limitations, broad in scope and indefinite in character, which neither restrict themselves to the control of definite types of legislative action nor present an objective standard by which to test the validity of legislation. The provisions of the Fourteenth Amendment that no state shall "deprive any person of life, liberty, or property, without due process of law" and similar provisions in state constitutions, as they have been applied since 1885, belong in this last group. *State Government*, pp. 130-132.

\(^4\)In applying "due process of law" the courts are guided by nothing more definite than "the fundamental principles of justice and right which the guaranty of due process in the Fourteenth Amendment is intended to preserve." [Truax v. Corrigan, 257 U. S. 312 (1921).] In consequence we have courts dividing sharply as different judges have different views as to what is "fundamental".

Although "due process" may be incapable of exact definition the decisions of the court indicate that it possesses certain essential elements, including: (1) Jurisdiction, the right to declare the law, which is the foundation of due process; (2) notice and hearing which are fundamental attributes of due process in judicial proceedings; (3) An ascertainable standard of conduct to which it is possible to conform which is also essential; (4) Opposition to laws which operate arbitrarily or unequally which is also a characteristic of due process. [Grozza v. Tierman (1893), 148 U. S. 657. Evans, *Cases on Constitutional Law*, pp. 957, 958 (1925).]


\(^{21}\) "The chief lawmakers in our country may be, and often are, the judges, because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process of law, liberty, they necessarily enact into law parts of a system of social philosophy; and as such interpretation is fundamental, they give direction to all law-making. The decisions of the court on economic and social questions, depend upon their economic and social philosophy; and for the peaceful progress of our people during the twentieth century we shall owe most to those judges who hold to a twentieth century economic and social philosophy and not to an outgrown philosophy, which was itself the product of primitive economic conditions." 43 Congressional Record, Pt. 1, p. 21.

\(^{42}\) "I have spoken of the forces of which judges avowedly avail to shape the form and content of their judgments. Even these forces are
greatly influenced by the character and personality of the judge; his predispositions and prejudices; his individual and social background; his social and economic point of view; and all those diverse factors which give him individuality. An analysis of the decisions of some of our great judges over a period of years would certainly reveal some interesting facts in this connection.

seldom in consciousness. . . . Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge. . . . There has been a certain lack of candor in much of the discussion of the theme, or rather perhaps the refusal to discuss it, as if judges must lose respect and confidence by the reminder that they are subject to human limitations. . . . None the less, if there is anything of reality in my analysis of the judicial process, they do not stand aloof on these chill and distant heights; and we shall not help the cause of truth by speaking and acting as if they do. The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by. We like to figure to ourselves the processes of justice, as coldly objective and impersonal. The law, conceived of as a real existence, dwelling apart and alone, speaks through the voices of priests and ministers, the words which they have no choice except to utter. This is an ideal of objective truth toward which every system of jurisprudence tends. It is an ideal of which great publicists and judges have spoken as of something possible to attain. . . . Marshall's own career is a conspicuous illustration of the fact that the ideal is beyond the reach of human faculties to attain. He gave to the constitution of the United States the impress of his own mind; and the form of our constitutional law is what it is, because he molded it while it was still plastic and malleable in the fire of his own intense convictions. Cardozo, The Nature of the Judicial Process, pp. 167-170.


"There is in each of us a stream of tendency, whether you choose to call it philosophy or not (Cf. N. M. Butter, Philosophy, pp. 18, 43), which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James' phrase of "The total push and pressure of the Cosmos," which, when reasons are nicely balanced, must determine where choice shall fall. In this mental background, every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes but our own. To that test they are all brought—a form of pleading or an act of parliament, the wrongs of paupers, or the rights of princes, or a village ordinance or a nation's charter." Cardozo, The Nature of the Judicial Process, pp. 12-13.

During the latter part of the nineteenth century, the economic life of the country underwent still further changes. The older agricultural economy which had been the basis of American society since its beginning gave way before an urban, industrial order. A great mass of legislation was enacted to meet the changing needs of the times. It was a trying period for the courts. Old landmarks lost their significance. Much of the new legislation demanded by an industrial society collided with the traditional constitutional and legal principles developed in an agricultural society. When, because of modern conditions a new policy such as a compulsory workmen's compensation law was passed, there was a fair possibility that it would be held unconstitutional as being opposed to one of the broad guarantees of the state or federal constitution such as the "due process" clause.


Dean Pound presents a summary of labor laws which courts have disapproved in this connection. Included in this group we find: (1) Legislation forbidding employers from interfering with the membership of their employees in labor unions; (2) legislation prohibiting the imposition of fines upon employees; (3) legislation providing for the mode of weighing coal in order to fix the compensation of miners; (4) legislation against company stores, requiring employers to pay wages in money; (5) legislation as to the hours of labor. "One cannot read the cases in detail he says, "without feeling that the great majority of the decisions are simply wrong, not only in constitutional law, but from the standpoint of the common law, and even from that of a sane individualism." "Liberty of Contract," Yale Law Journal, Vol. 18, pp. 481-82. See also Frankfurter and Landis, The Business of the Supreme Court (1928), pp. 101-98.
In short, the social scheme was changing rapidly and there were many people who viewed with alarm the shift from the old traditional individualism of the country to a new and untried system, collectivistic in character. It is not strange that many members of the judiciary were included in this group. The tenacious adherence of some courts to the principles of the old order was brought to public attention time and again. It was particularly conspicuous in cases where social and economic legislation, enacted under the "police power" became involved in a conflict with a broad, indeterminate constitutional provision such as the "due process" clause. In these cases the courts were not only exercising judicial authority but determining a question of public policy as well, and deciding it in such a way as to defeat the will of the people as expressed in legislation.

Criticism of this state of affairs appeared from all sides. Leaders of organized labor, social workers, lawyers and public...
licists as well, worked in unison to curtail the political power of the judiciary by one means or another.57 In both 1912 and 1924 judicial power was an important factor in a national political campaign. This was not a novel experience for our courts.58 There had been opposition to the power of judicial review, in one form or another, from the early history of the country,59 on to the present day, often resulting in proposals to modify or abolish the principle altogether.60


See Gilbert E. Roe, Our Judicial Oligarchy (N. Y., 1912); W. L. Ransom, Majority Rule and the Judiciary (N. Y., 1912); A. M. Kales, Unpopular Government in the United States (Chicago, 1914), Ch. 17.


In the early history of the country the conflict over judicial power was very bitter. Thomas Jefferson, the contemporary and political antagonist of John Marshall, would never admit the paramount authority of the Supreme Court to determine the validity of acts of Congress. In his opinion it was the design of the framers of the Constitution to establish three coordinate and independent departments of government. Being equal and separate, each department was equally empowered "to decide on the validity of an act according to its own judgment and uncontrolled by the opinions of any other department." To give the judiciary the power to pass upon the acts of the other departments would be to make that department supreme.
Opposition was particularly bitter during the time John Marshall sat on the bench. Before his appointment by John

This view was shared by many public men of his day. In Jefferson's opinion all questions involving the constitutionality of acts of Congress which might come before the court would be "political questions." Although a statute might conflict with the Constitution, that fact would not of itself endow the court with power to invalidate it. In fact it would be the duty of the court to enforce the statute without questioning its validity. Jefferson also opposed the power of the court to pass upon the acts of state governments. Admitting the supremacy of the federal government in its sphere, he contended that to give the federal judiciary the right to determine the validity of state laws would enable the Federal Government to define its own sphere of power and to destroy the sovereignty of the state.

In the period immediately following the case of McCullough v. Maryland, which was decided in 1819, the Supreme Court was subjected to a very bitter attack in this connection. In 1821, the Virginia Assembly passed a resolution urging the abolition of the whole system of review of state acts by the Supreme Court. Chief Justice Spencer Roane of Virginia drafted a proposed amendment to that end. In Ohio and Kentucky vigorous resistance to nullification of state laws by the federal courts was carried on. Ohio, which had previously passed a law taxing each branch of the bank of the United States within its limits $50,000, attempted to collect the tax in spite of the Supreme Court's decision. It was compelled to recede from its position eventually but its attitude toward the Supreme Court remained unchanged for some time. (See Ames, "Documents on Federal Relations," Senate Documents, 16th Cong., 2nd Session, XII, No. 72, pp. 6, 7, 8, 10, 11, 17, 18, 22, 25, 34; Osborn v. U. S., 9 Wheaton 738 (1824). In Kentucky, the opposition to judicial review was even greater, the state legislature protesting vigorously against the decision on Green v. Biddle, 8 Wheaton 1 (1823), which set aside the so-called "Occupying Claimant Laws." The legislature demanded a reorganization of the court in such wise that the concurrence of at least two-thirds of the judges should be necessary in an opinion affecting the validity of state laws. (See Ames, State Documents on Federal Relations, pp. 12-23; Senate Document, 18th Cong., 1st Sess., Vol. IV, No. 69, p. 8.)

During these years there was a continuous assault upon the courts. Judge Roane and John Taylor were two of the leading critics. [See John Taylor, Construction Construed (1820); Tyranny Unmasked (1822); New Views of the Constitution (1923).] There were many others also, including Senator Richard M. Johnson of Kentucky, Congressman Stevenson of Virginia. In 1826 Senator Johnson proposed to give the Senate appellate jurisdiction when the laws of a state were questioned. In 1823, he discarded this suggestion in favor of a new proposal which would require unanimous concurrence of the judges to void a state law. (Annals of Congress, 18th Cong., 1st Sess., Dec. 10, 1822.) In 1822, Congressman Stephenson urged the repeal of the twenty-fifth section of the Judiciary; and in 1831, the House Judiciary Committee favored this same proposal. In 1824, the Senate Judiciary Committee proposed that five out of seven votes be required for invalidating an act by the court. In 1825, came the most elaborate criticism of all. It was in the form of a dissenting opinion. It was made by Justice Gibson in the case of Eakin v. Rawb, 12 Sergeant and Rawle (Penn.), 330 (1825). The expression by Justice Gibson appears to be the most critical examination of the whole doctrine by one who was opposed to judicial supremacy on the ground of principle and policy. (See C. G. Haines, The American Doctrine of Judicial Supremacy, pp. 235-246).
Adams, only six decisions involving constitutional questions of importance were decided. From 1801 to 1835, the period he served as Chief Justice, sixty-two decisions were rendered. Marshall, himself, wrote thirty-six of them. During this time, some seven hundred and fifty-three cases were taken on appeal from the lower courts. In nearly one half of these cases the decisions were reversed. It did not take long for this activity to develop a bitter opposition; so that the judicial tenure of John Marshall was a period of conflict. "If, indeed, the judiciary is to be destroyed," wrote Story in the early part of this period, "I should be glad to have the decisive blow now struck, while I am young and can return to my profession and earn an honest livelihood." Before Marshall came there was no controversy or criticism over judicial power. After he left, controversy was again stilled, until a time when the Supreme Court was drawn into the fierce struggle over slavery in the Dred Scott case in 1857.

The gist of the majority opinion in this case was that Congress had no power to prevent slavery in the territories. This ran directly counter to the ideas of the new Republican party which was working on the principle that Congress could and should exercise that very power. There was a storm of protest in the North. Abraham Lincoln was an outstanding critic of the decision. In the Lincoln-Douglas debates, the Dred

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62 With the triumph of the Jacksonian group in 1828, a renewed attack was made upon the doctrine of judicial nullification. Although Jefferson and his followers had resisted the extension of the power of the judiciary through Marshall's efforts, they were unable to prevent this body from interfering greatly with the legislative enactments of the state. In the "reign of Andrew Jackson" however, opposition to judicial review was met with a stern and more effective opposition. During Jackson's administration the onward march of federal judicial power was checked; the entire personnel of the Supreme Court was changed; and some of Marshall's foremost decisions were modified greatly. With Roger B. Taney serving as Chief Justice, the Supreme Court was a changed body. Standing for a strict construction of the Constitution, a great respect for the rights of the state, and a lessening of judicial interference in the public affairs of the nation; this reconstituted Supreme Court created by Andrew Jackson did not become involved in contests over the assertion of authority either with the states or the department of the federal government.

63 19 Howard 395 (1857).

64 The legislatures of Connecticut, Maine, Ohio, New Hampshire, Vermont, and Massachusetts passed resolutions condemning the decision. (See Senate Misc. Doc. No. 14, 35th Cong., 1st Sess., 1857-1858.)

65 Lincoln and Douglas Debates, pp. 1-5.

66 In his debates with Douglas, Lincoln drew upon the arguments of Jefferson. Jefferson had attacked the idea that judges must be re-
Scott decision was one of the most important issues. In 1860, the Republican platform declared that "the new dogma that the Constitution, of its own force, carries slavery into any or all of the territories of the United States, is a dangerous political heresy, at variance with the explicit provisions of that instrument itself, with contemporaneous exposition, and with legislative and judicial precedent; is revolutionary in its tendency and subversive of the peace and harmony of the country." In his first inaugural address, Lincoln announced a doctrine that was in some ways a modified form of the view of Andrew Jackson.

As the debate progressed Lincoln continued to take stronger ground. In his speech at Edwardsville on Sept. 13, he said: "My friends, I have endeavored to show you the logical consequences of the Dred Scott decision, which holds that the people of the territory cannot prevent the establishment of slavery in their midst. . . . What constitutes the bulwark of our own liberty and independence? . . . Our reliance is in the love of liberty which God has planted in us. Our defense is in the spirit which prized liberty as the heritage of all men, in all lands everywhere. Destroy this spirit and you have planted the seeds of despotism at your own doors. Familiarize yourselves with the chains of bondage and you prepare your own limbs to wear them. Accustomed to trample on the rights of others, you have lost the genius of your own independence, and become the fit subjects of the first cunning tyrant who rises among you. And let me tell you, that all of these things are prepared for you by the teachings of history, if the elections shall promise that the next Dred Scott decisions and all future decisions will be quietly acquiesced in by the people." Nicolay and Hay, *Works of Abraham Lincoln*, Vol. 11, pp. 109-111.

Lincoln said: "I do not forget the position, assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding, in any case, upon the parties to a suit, as to the object of the suit, while they are also entitled to a very high respect and consideration in all parallel cases by all other departments of the government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can be better borne than could the evils of a different practice. At the same time the candid citizen must confess that if the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people have ceased to be their own rulers, having to that extent practically resigned their government into the hands of the eminent tribunal. Nor is there in this view any assault upon the court or the judges. It is a duty from which they may not shrink to decide cases properly brought before them and it is no fault of theirs if others turn their decisions to political purposes." *Works*, Vol. 6, pp. 179-180.
After enjoying a period of tranquillity during the major part of the Civil War period the courts again became the object of attention in 1867, when Mr. Williams of Pennsylvania introduced a bill to "regulate the practice and define the power of the Supreme Court of the United States in certain cases arising under the Constitution and laws thereof." Not content with this proposal, the same legislator introduced a joint resolution later in the year to amend "the Constitution in regard to the judges of the supreme and other courts." In 1868, Senator Trumbull of Illinois, chairman of the Senate judiciary committee, reported a bill providing for the definition of "the jurisdiction of the Supreme Court in certain cases." In 1869, he again reported this bill. The purpose of these various bills was to limit the court's function of judicial review.

In 1895, criticism of the judiciary was renewed. In that year the Supreme Court by a five to four vote reversed a previous decision in invalidating a federal income tax law. This decision was criticized severely. Since the income tax law had been enacted by a Democratic Congress, members of that party were particularly outspoken in their protests. Controversies over the use of the injunction increased the opposition to the courts. When the Democratic National Convention met in

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"Ibid., p. 655.
"Ibid., 40th Congress, 2nd Session, pp. 1204, 1423, 1621.
"Ibid., 41st Congress, pp. 3, 27, 45, 96, 152, 167.

The legislative history of this period records several attempts to modify the practice of judicial review. In 1887, a proposal was made that two-thirds of the entire court must concur in deciding adversely on the constitutionality of any law of the United States. The Senate judiciary committee reported it back with a substitute amendment requiring five of the seven judges to constitute a quorum of the court, but not requiring more than a majority for a decision. In this form it passed the Senate on December 4, 1867. (Congressional Globe, 40th Congress, 2nd Session, p. 19.) The House judiciary committee in reporting it reinserted the proposal for a two-thirds vote. On January 13, 1868, the House rejected a proposal requiring a unanimous decision, but passed the bill as reported by the committee, by a vote of 115 to 39. (Ibid., pp. 96, 478, 489.) The country at large did not seem to receive the proposal favorably, however, and when it was sent back to the Senate, it was postponed several times, and finally died in committee. [See Charles Warren, The Supreme Court in United States History (1923), III, pp. 188-193; Congressional Globe, 40th Congress, 2nd Session, p. 505].

"Pollock v. Farmers Loan and Trust Co., 157 U. S. 429 (1895), and 158 U. S. 602 (1895). In this case the court held that an income tax is a direct tax, thereby reversing its decision in Springle v. U. S., 102 U. S. 556 (1880).
1896, the stage was set for a sharp indictment of the federal judiciary. The Committee on resolutions brought in a platform censuring the court and individual members expressed themselves in no uncertain terms concerning the activities of the Court.

From 1900 to 1912, criticism of the court continued unabated. The most persistent source of such criticism was to be found among social reformers and labor leaders. However, one need go no further than the Supreme Court itself to find dissatisfaction with, and distrust of, the expanding character of judicial review. Much of the criticism existing during this period was directed toward the "five-to-four" decision. Although there have been comparatively few such decisions in the history of the Supreme Court, several of them have unfortunately nullified laws in which great numbers of

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18 "We declare that it is the duty of Congress to use all the constitutional power which remains after that decision, or which may come from its reversal by the court as it may hereafter be constituted, so that the burden of taxation may be equally and impartially laid, to the end that wealth may bear its due proportion of the expenses of government." Official Proceedings of the National Democratic Party (1896).

19 "They criticize us for criticism of the Supreme Court of the United States," said William Jennings Bryan. "My friends, we have made no such criticism. We have simply called attention to what you know. If you want criticism, read the dissenting opinions of the court. That will give you criticisms. They say we passed an unconstitutional law. I deny it. The income tax was not unconstitutional when it was passed. It was not unconstitutional when it went before the Supreme Court for the first time. It did not become unconstitutional until one judge changed his mind; and we cannot be expected to know when a judge will change his mind." Ibid.


78 For a criticism of this tendency by the court itself, see C. G. Haines, The American Doctrine of Judicial Supremacy (1914), pp. 313-328.


80 Ex parte Garland, 4 Wallace 333 (1866); Pollock v. Farmers Loan and Trust Co., 158 U. S. 601 (1895); Fairbanks v. United States, 181 U. S. 253 (1901); Employers' Liability Cases, 207 U. S. 463 (1908); Hammer v. Dagenhart, 247 U. S. 251 (1918); Elsner v. Macomber, 252 U. S. 189 (1920); Kinkerkbocker Ice Co. v. Stewart, 253 U. S. 149 (1920); Newberry v. United States, 256 U. S. 232 (1921); and Adkins v. Children's Hospital, 261 U. S. 525 (1923).
people were interested. In consequence, certain modifications of the present arrangement have been proposed.

One of these proposals would require the agreement of six or seven of the nine justices in order to declare a law unconstitutional. A second proposal would provide for a constitutional amendment, permitting Congress to repass a law declared void by the Court and give effect to it in spite of the decision of the court. A third proposal would abolish altogether the power of the courts to pass upon the constitutionality of statutes. Some people have also favored the adoption of an easier method for the amendment of the Constitution. This would indirectly limit judicial power.

Efforts to limit judicial control which had persisted since the turn of the century were given a new impetus in 1912 when Theodore Roosevelt brought the matter to the attention of the country in the campaign of that year. Important constitutional changes were adopted in Ohio and North Dakota as a result. Mr. Roosevelt was an advocate of the recall of judicial decision. This plan provided that where the court had declared an act invalid, the matter might be submitted to a popular referendum. If a majority of the electorate voted in favor of the law, it would be maintained in force, notwithstanding the

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81 A glance at the list of cases above indicates that every single case was of extraordinary interest to one large group or another.


85 Both Roosevelt and LaFollette advocated such a change.

86 This proposal has been severely criticized. See Taft, Popular Government, p. 174 ff.; Wickersham, The Changing Order, Chs. 12-13; Merriam, American Political Ideas, pp. 194-195.
opinion of the court that it was unconstitutional. A provision of this character inserted in the constitution of Colorado, was later declared unconstitutional by the state supreme court. ⁹⁸

In 1924, the courts were again subjected to attack. This time the attack was led by Senator Robert LaFollette. Although a modification of judicial power was one of the chief issues of the campaign of that year, the matter was soon lost sight of with the defeat of LaFollette at the polls. Having successfully withstood the attacks of 1912 and 1924, the courts continue to declare laws null and void when they deem them to be in conflict with a superior law. ⁹⁹ From all present appearances public opinion in this country regards judicial control of legislation as a practice fundamentally sound in character, which should be maintained at all costs, without the interference of any restrictive limitations.

In this respect, our thinking as to the proper relationship of the judiciary and the legislature is at variance with present day thought on this matter elsewhere. ⁹⁰ In fact, in most countries where the principle of judicial review has been adopted, in whole or in part, it has had definite limitations imposed upon it. The case of Switzerland is in point. Some form of federal government has existed in Switzerland since the Middle Ages. To render this system effective the federal court is given the power to invalidate a cantonal law, if it finds it to be

⁹⁸ People v. Western Union Telegraph Co., 70 Colo. 90 (1921); People v. Max, 70 Colo. 100 (1921).
⁹⁰ "The governments of the world may, with respect to judicial review of legislation, be roughly grouped into the following classes: (1) Governments in which the legislature interprets the fundamental law. Examples: England, with an unwritten constitution; Chile, France, Italy, and Switzerland, with written constitutions. (2) Governments in which the authority to interpret finally provisions of the constitution, and as a consequence to invalidate acts in conflict therewith, is implied as a necessary requirement to maintain the equilibrium between federal and state governments. Examples: United States, Australia, Canada, Brazil, and Argentina. (3) Governments in which the constitution grants authority to the courts to interpret the constitution and to prevent violations of its provisions. Examples: Columbia, Czecho-Slovakia, Honduras, Irish Free State, Portugal. (4) Governments in which the power is considered as belonging to the courts to review the acts of coordinate departments but in which the power has been exercised so infrequently as to have little significance. Examples: Greece, Norway, and South Africa, prior to 1910." C. G. Haines, "Shall We Remake the Supreme Court? The Practice of Other Countries," Nation, CXXVIII, pp. 527-528, May 7, 1924.
in conflict with the federal constitution or with federal laws. But it has no authority to declare the unconstitutionality of a federal law. The legislature of Switzerland is the final interpreter of the constitution, subject only to a referendum by which such a decision may be changed. As a matter of fact the federal constitution expressly declares that "the court shall enforce all laws enacted by the federal parliament." This provision was inserted after a careful study and report on the American system by a group of experts. As a result the federal court of Switzerland, a government with the federal form and a written constitution, has been precluded from assuming the judicial supremacy which the United States Supreme Court has acquired.

In constitutions adopted throughout the world since the World War, the principle of judicial review has been given a larger recognition than it has had in the past. Despite this fact it does not seem probable that it will in any case acquire the influence it has had in America. In the new constitutions of Germany, Austria, Czecho-Slovakia, Ireland, China,

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91* The new constitution of Germany asserts the supremacy of national laws over state laws and provides that the superior judicial court of the Reich may be called upon by the proper national or state authority to decide whether a state law is compatible with the law of the Reich when differences of opinion arise as to this matter. Under the old constitution the courts exercised this power, but the decision in such cases was conclusive only between the parties. Under the new constitution, the question may be raised as an independent issue by either the national government or a state government. When the Supreme Court declares a state law inconsistent with a national law, the effect is general, and the law is null and void for the future. Although no power is expressly conferred on the Supreme Court to declare a national law unconstitutional, it has been held that the court has such a power. See Blackly and Oatman, "Judicial Review of Legislative Acts in Germany," Amer. Pol. Sci. Rev., Feb., 1927, pp. 118-119.

92 The new Austrian constitution gives the Supreme Constitutional Court the exclusive power to decide upon the validity of federal laws, at the request of the federal ministry. When a question of constitutionality is raised in due order in an actual case before the court, a request by the ministry is unnecessary and the court may decide the question on its own responsibility.

93 The new constitution of Czecho-Slovakia declares that legislative enactments which are in conflict with the constitution are void. The Supreme Constitutional Court is given the exclusive authority to pass on such measures.

94 The Constitution of the New Irish Free State expressly confers upon the courts the power to decide upon the validity of legislative
Rumania, it has been given a place in the governmental system. On the other hand the new constitutions of Finland and Yugoslavia make no mention of it and the recently adopted constitution of Poland expressly denies to the courts the power to inquire into the validity of statutes.

In the British Dominions and in Latin America the principle of judicial control has received favorable attention, judged by some standards, but here again its acceptance in no wise approaches the practice in this country. In Canada, the Union of South Africa, and the Irish Free State it has been adopted in one form or another. In Argentina, Brazil, Bolivia, Colombia, Costa Rica, Cuba, Haiti, Honduras, Mexico, and Venezuela, it also exists to some extent.

In conclusion it might be said that the principle and practice of judicial review has served a very useful purpose in this country. The division of powers characteristic of a federal system of government requires the presence of some supreme arbiter to settle the problems arising out of this multiple districts which are alleged to be in violation of the Anglo-Irish treaty. A right of appeal to the British Privy Council lies in such cases.

The constitution of China proclaimed in 1923 expressly provides that laws in conflict with the constitution are null and void.

The constitution of Rumania adopted in 1923 expressly confers upon the court of appeal the right to decide on the constitutionality of laws and to refuse to apply those which are unconstitutional. The decision, however, is limited to the case decided. The court cannot render a decision upon the request of the government in hypothetical case.

In Canada acts of the dominion and the provincial parliaments which are in conflict with the British North America Act, and provincial acts which are contrary to acts of the dominion parliament may be invalidated because of their unconstitutionality. Appeals may be taken to the Judicial Committee of the Privy Council. See W. B. Munro, Governments of Europe, pp. 274-276, 358-364 (1925); Charles G. Haines, "Judicial Review of Legislation in Canada," Harvard Law Review, Vol. 28, p. 565 (1914-15); W. B. Munro, The Constitution of Canada, pp. 5, 219.

In Australia when a law of a state is inconsistent with a law of the commonwealth, the latter prevails and the former is deemed invalid. Although the power to decide the question of the invalidity of a statute is not expressly conferred upon the courts in Australia, they have assumed the power, on the principle that it is an incident of the judicial power and as such belongs to the courts. The courts of the commonwealth and of the states both exercise the power of judicial review. Not only are state laws held invalid but in some instances acts of the commonwealth legislature as well. See Charles G. Haines, "Judicial Interpretation of the Constitution of Australia," Harvard Law Review, Vol. 30, p. 595 ff. (1916-17); Charles Warren, Congress, the Constitution, and the Supreme Court, p. 163.

bution of authority and its resultant conflicts. In our system the Supreme Court has successfully filled this role.

Other advantages might also be cited. In the plan of limited government contemplated by the framers of our system, judicial review becomes almost an indispensable necessity. In its absence, the distinction between constitutional law and statutory law is largely broken down; the supremacy of the Constitution has little meaning; the legislature is for the most part the judge of its own powers; and individual rights conferred by the Constitution would have a tendency to be uncertain if not insecure.

On the other hand, there is food for thought in the criticisms which have been made of the practice. Laws enacted by the chosen representatives of the people are abrogated by courts which have not been selected to formulate rules for new relations requiring legislation. The judicial department has been given a power and position which most countries attempting a demo-

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101 Justice Holmes in a speech before the Harvard Law School Assn. of New York at a time when the power of judicial review was being criticized (Feb. 16, 1913), said: "I do not think that the United States would come to an end if we lost our power to declare an act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states. For one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end." Collected Papers, pp. 295-296 (1921).

102 In discussing this subject Charles G. Haines says: "Where a federal government is established some agency must delimit the powers between the central and local governments. It has been quite common to place this delimitation of powers upon the courts, and in a number of federal systems the judiciary tests the validity of laws of the states or provinces to discover whether they are in accord with the fundamental written law. This is the practice in Switzerland, where the courts exercise such powers but are denied the greater authority of passing on the acts of coordinate bodies. Judicial review of subordinate divisions is established in Australia, in Canada, and in the new German constitution, and comprises the most important part of judicial review in these countries. A similar review has been established in the federal systems of Brazil and Argentina. This type of judicial review needs to be distinguished very carefully from the attempt of the courts to pass on acts of coordinate legislative bodies. It is in the latter field where the courts exercise their most important function in the review of legislation in the United States. "Shall We Remake the Supreme Court? The Practice of Other Countries," Nation, Vol. CXVIII, pp. 559-566 (May 14, 1924).

ocratic form of government have hesitated to accept in the past and will probably refrain from accepting in the future.

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105 Charles G. Haines a careful student of the subject expresses the opinion that the principle of judicial review will not take root completely: (1) In those countries in the continental system of government, whose legal foundations have been largely based upon the influence and traditions of the Roman Law, where governmental authority emanates from the executive and not the legislative as in Anglo-American countries; (2) in countries where constitutions are frequently revised and readily amendable; (3) in countries which have adopted written constitutions, and have not inserted extensive bills of individual rights, or have not included such general phrases as "due process of law," or the "equal protection of the law" clause, by which legislation is tested. "Shall We Remake the Supreme Court? The Practice of Other Countries," Nation, CXVIII, pp. 526, 527 (May 7, 1924).