MARSHALL COKES (KOOKS) MARBURY--

GETS MIXED REVIEWS

Kit Kat Club
October 18, 1988
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On June 21, 1988, New Hampshire observed the 200th anniversary of its distinction of being the ninth state to ratify the United States Constitution. Until June 21, 1788, the document was only a four-page proposal for the creation of a new national government signed by 39 of the original 55 delegates to the Constitutional Convention in Philadelphia.

With the action of the New Hampshire ratifying convention, two-thirds of the 13 states had approved ratification and the vigorously debated proposal became the official charter of our government--the supreme law of the land. We continue, during this year of ratification, to observe the bicentennial of the most important secular document produced by man. As British Prime Minister William Gladstone observed in 1878, the United States Constitution is, "The most wonderful work ever struck off at a given time by the brain and purpose of man."

Today, vigorous debates scrutinize our ability as citizens to keep alive the legacy of the Philadelphia Convention. The viability of the document to withstand another 200 years is predicted by many and doubted by some. This paper will seek to place in a historical context and analyze one of the most important legal doctrines that has been given measurable

credit for the life of American constitutionalism. The fact alone that we are celebrating the 200th anniversary of the ratification of the Constitution gives us reason to hope that its existence and relevance will be celebrated 200 years from today.

Recently pushed to the front pages of newspapers and rolling off the glib tongues of TV and radio announcers are such terms as "judicial review," "activist judges" and "judicial restraint." Once again in the presidential debate last week and in the recent Senate confirmation hearings on the nominations of U.S. Supreme Court Justices, the issue of what America seeks from its judges was paramount.

The concept of judicial review has come to be accepted by most people as a traditional, historic function of the courts. But is it? The words "judicial review" are nowhere mentioned in the Constitution and apparently not even formally debated at the Constitutional Convention. To begin, a definition of "judicial review" is required. In its most simple context, it is the authority of a court, representing the judicial branch of government, to hold invalid an act of the legislative or executive branch of government because such act violates the Constitution.

Or, as stated by Alexander M. Bickel, writing in The Least Dangerous Branch, "Judicial review is the power of a court to construe and apply the Constitution in matters of the greatest

moment against the wishes of a legislative authority which is, in turn, helpless to affect the judicial decision."

It was not until 1803, 15 years after the ratification of the Constitution, that Chief Justice John Marshall declared in the landmark case of Marbury v. Madison that it is the province of the judiciary to review legislative acts for conformance with constitutional requirements.

How did Marshall find the constitutional authority for the Supreme Court to take on such an important role? What are the roots of the doctrine of judicial review now so readily accepted? How did the doctrine evolve? And, finally, what does the idea of judicial review hold for the future of democratic government?

The answers justify their pursuit because the United States Supreme Court, in large measure as a result of judicial review, has been described by commentators as the most powerful judicial body in the world.

We begin by tracing the theory of judicial review far into early English common law. In the Thirteenth Century, Judge Henry Bracton regarded the law as being supreme and limiting the authority of the king. But the chief proponent that fundamental law is superior to the laws of the king was Sir Edward Coke who lived from 1552 to 1634. A prominent English jurist, Coke wrote an opinion in the case known as Dr. Bonham's Case (1610), 2

Brownl. (C.P. 1610), when he was Chief Justice of the Court of Common Pleas. In the case he stated that, "*** it appears in our books that in many cases the common law will control acts of parliament and sometimes adjudge them to be utterly void; for when an act of parliament is against common right or reason, or repugnant or impossible to be performed, the common law will control it and adjudge such act to be void."

Coke's opinions suggest that he drew from the theories of John Locke who, of course, believed in the social compact theory under which man in his free state has certain natural or fundamental rights, such as the right to life, liberty, property and happiness; that to preserve those natural rights, which Coke refers to as common law, man forms a community from which rules and written codes of conduct are produced.

Coke believed that the common law, or the unwritten law, was so fundamental that the acts of the king were inferior to them. He further believed that because the judiciary applied the common law, it was the judiciary that had the authority to tell the king or the parliament when their acts violated the common law.

The authority for Coke's view of judicial supremacy has not been unanimously accepted. Among others, Professor Charles G. Haines suggests that Coke's theory of judicial supremacy, that a court could strike down an executive or legislative act repugnant

to the common law, was a convenient product of the political struggle of the times in which Coke lived.

The Stuart kings, James I and Charles I, had claimed extensive prerogatives to rule. Lord Coke, among others, sought to limit this claimed extensive authority by arguing that the common law, as the supreme law, controlled over laws passed by parliament and the king. Thus, it was the responsibility of the courts of common pleas and the judges who were to decide whether a law was acceptable to the holdings of the common law.

Indeed, it is said by some that Coke and his supporters formulated the "myth of Magna Carta." They argued, in support of constitutional reform, that the great charter supported limitations on the authority of the king and parliament.

It is important to note that England today is one of only six countries in the world that does not have or has not attempted to adopt a written constitution.

Coke's view, however, did not survive his fall from grace with the king. In 1613 he was demoted to the Court of King's Bench by James I. He thereafter served in the House of Commons and retired shortly before his death. Charles I was so worried about the possible political impact of Coke's writings that he had Coke's papers seized soon after Coke's death.

The English Revolution of 1688 and the ascendancy of Parliament resulted in a repudiation of Coke's ideas. In

England, legislative supremacy was and is the cornerstone of democratic government.

The English tradition is best stated by Sir William Blackstone in his Commentaries on the Laws of England written in 1770 where he stated, "True it is, that what the Parliament doeth, no authority upon earth can undo."

Many colonial leaders in this country were attracted to the idea that there was a higher law. John Locke and Montesquieu, as students of Coke, believed that government, as a tool of the people, answered to a higher authority, whether it was identified as common law or natural law, which evolved from man's place in the world. This natural or common law was the ultimate defense of man's liberty.

It is important for us to remember that many of those who drafted and led the fight for ratification of the United States Constitution as well as some of those who opposed its ratification, such as Patrick Henry, were well read. They understood, and indeed applied, the theories found in the works of the great thinkers of the world.

Because the colonists were determined to defend themselves against the oppression of the English Parliament, it was not surprising that Benjamin Franklin, James Madison, Alexander Hamilton and Thomas Jefferson, writing from France during the period of the Constitutional Convention, asserted the theories afforded them by Coke, Locke, and Montesquieu.

In addition to Coke's theories of a higher common law, American colonists also were familiar with another type of review of legislation. Legislation passed by the colonial state assemblies was subject to review for compliance with English law by the Privy Council of London. Hundreds of pieces of legislation were disallowed by the Council. Thus, colonial America was familiar with an analogous method of reviewing legislation for compliance with a "higher" law.

On the eve of the signing of the Declaration of Independence, Judge Cushing, later a Supreme Court Justice, charged a Massachusetts jury in a civil case that they must ignore certain acts of Parliament as void and inoperative.

Thus, it can be concluded in the general sense that colonial Americans were familiar with the broad concept of judicial review. Indeed, they were able to use the notion of a "higher law," whether natural or common law, striking down repugnant laws to justify the American Revolution. They were not disobeying the laws of England. Rather, they were defending the natural, common law against repugnant parliamentary laws. They were defending the basic liberties guaranteed by the natural, common law against the assault of an oppressive government.

Yet it is an irony that the doctrine of judicial review was not formally established in this country until 1803 by the United States Supreme Court itself. The task was left to that remarkable individual--John Marshall. With the stroke of a pen,

and some rationale that has been questioned, John Marshall established a fundamental principle of constitutional law and launched a debate which continues today.

Marshall's importance in American history has been underestimated.

The prologue to Marbury v. Madison was written on June 25, 1788 at the Virginia Ratification Convention. Although the required two-thirds of the states had already ratified the Constitution, ratification by Virginia and New York was deemed to be essential if the new strong central government provided by the Constitution was to, in fact, function. The outcome at the Virginia Convention was in doubt. The last article to be debated was Article III--the judiciary article. Federalists and anti-Federalists seemed evenly divided. Patrick Henry argued that the Constitution gave the judiciary too much authority. Marshall was called upon to defend the Article and he argued, "To what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the judiciary? There is no other body that can afford such *** protection."

The question before the Convention was not whether an act repugnant to the Constitution could stand, but who should be empowered to decide that the act is repugnant. Marshall spoke eloquently and persuasively, emphasizing the limited nature of the proposed government and the supremacy of the Constitution.

At the end of the debate, the delegates to the Convention ratified the Constitution by a margin of ten votes.

Clearly, if Marshall was given the opportunity, there was no question to whom he would give the power to protect the Constitution from infringement. His opportunity came.

In the elections of 1800, the Federalists lost control of both the Presidency and Congress to Thomas Jefferson and his Republicans. During the closing weeks of his administration, President John Adams appointed numerous Federalists to judicial positions newly created by an act of the Federalist lame duck Congress. Marshall was the Secretary of State in the Adams administration. Naturally, the incoming Republicans were none too pleased at the appointment of these "midnight" judges and determined to challenge the validity of the appointments. They seized upon the appointment of an obscure gentleman, William Marbury, to the unimportant position of justice of the peace in the District of Columbia.

The appointment of Marbury was clearly proper under the Act. President Adams had appointed Marbury in accordance with a constitutional statute and Marbury had been confirmed by the Senate. However, Marbury's commission had not been delivered to him by the Secretary of State, John Marshall. Ironically, the commission was found in Marshall's desk after he had left office and been succeeded by James Madison. Why Marshall failed to deliver the commission remains a mystery. Did he anticipate his

appointment as Chief Justice to the Supreme Court, thereby creating the facts that would give him his opportunity to establish judicial review? That may be a farfetched question but the irony of the circumstances is too important to go unnoticed.

Madison, as the new Secretary of State, felt no obligation to deliver the commission to Marbury and saw an opportunity to thwart the political antics of "the other party." He did not deliver the commission to Marbury and Marbury could not take office without it.

Marbury, determined to receive his appointment, sued for a writ of mandamus under a provision of the Judiciary Act. A writ of mandamus is an order from a court directing a public official to perform an act which the official is legally required to perform. Thus, Marbury was seeking an order from the Supreme Court directing Madison to deliver to Marbury his appointment as justice of the peace.

As the new Chief Justice, Marshall was clearly in the middle of a political maelstrom. Jefferson and the Republicans were ready for political battle over the issue. This was not an appealing prospect to Marshall, inasmuch as his political opponents controlled both the legislative and executive branches. Yet Marshall could not shrink from the challenge without harming the status of the judiciary as a co-equal branch of government.

Marshall's solution, firmly establishing the courts as the final authority to review the constitutionality of statutes, enraged the Republicans and set off a debate which continues to this day. Just what was Marshall's ingenious solution?

Marshall's opinion held that Marbury was not entitled to his commission, not because, as the Jeffersonians or Republicans had argued, that one branch of government could not require something from a co-equal branch of government; but, rather, that the statute which allowed Marbury to sue was unconstitutional because it attempted to grant the court original jurisdiction. Marshall reasoned that only the Constitution could give the Supreme Court original jurisdiction, so the Judiciary Act was void. Marshall declared:

> "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 an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? *** This *** would seem *** an absurdity too gross to be insisted on. ***

He then concluded:

> "***
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> "It is emphatically the province and duty of the judicial department to say what the law is ***."

Thus, Marshall succeeded where Sir Edward Coke had failed. There was a higher law, the Constitution, which superseded the authority of the executive and legislative branches of government. And it was the judiciary, the interpreters of the law, that was to determine when a law exceeded the bounds of the Constitution.

When Marshall said:

> "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the Constitution, is void,"

he was stating precisely what Coke believed but was unable to make a permanent part of English law. Marshall then cited examples of conflicts between the Constitution and laws that answered his question of who should interpret the law. He noted

that the Constitution provides that no tax or duty shall be laid on articles exported from any state. He raised the rhetorical question, suppose a duty on exported cotton or tobacco is enacted. Should the judges close their eyes to the Constitution and only see the law?

The holding of Marbury v. Madison elicited much response from Marshall's contemporaries. The Constitution did not mention judicial review; Marshall cited very few sources for his conclusion and he relied principally upon the judiciary clause of the Constitution itself, to conclude that judicial review is the cornerstone of constitutional law.

Yet many reading the decision might well recall the words of Edmund Randolph, a member of the Constitutional Convention, who, after reading a Marshall opinion, said: "All wrong, all wrong, but no man in the United States can tell why or wherein." A few years later, Justice Robert Jackson observed, "We are not final because we are infallible. We are infallible because we are final." Thomas Jefferson was opposed to judicial review because he believed that each branch of government determined the constitutionality of its own acts. And there were, of course, those who thought that the legislative branch should determine the boundaries of constitutional limitations.

Marshall's bold, historic action begs us to explore again whether the framers of the Constitution considered or supported the concept of judicial review. Professor Charles

Beard has studied the writings and statements of those who signed the Constitution and concludes that probably a majority of the framers supported judicial review. But a reading of the Federalist Papers leaves no doubt that at least Alexander Hamilton believed strongly that it was the judicial branch of government that must resolve conflicts between acts of the legislature and the executive and the Constitution. His theory is extremely interesting. Hamilton believed that the judiciary, because of the nature of its functions, will always be the least dangerous of the political institutions because it has the least capacity to annoy or injure rights provided by the Constitution. The executive has the sword and the legislature controls the money. The judiciary has no influence over either. It does not direct the strength or the wealth of the society. It has neither force nor will but merely judgment. That opinion of Hamilton is perhaps the most important premise upon which judicial review is founded. It is that judges do not determine the law based upon what they will it to be but that they find the law by exercising their judgment.

Hamilton further argued in Federalist No. 78 that since the Constitution reflects the will of the people, it could not be supposed that the people would intend that their representatives be able to substitute their will. The Constitution is, in fact, and must be regarded by judges as a fundamental law. It therefore belongs to judges to ascertain its meaning as well as

the meaning of any particular act proceeding from the legislative body. If there is an irreconcilable variance between the two, that which has the superior obligation and validity ought to be preferred or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Hamilton saw the courts as an intermediate body between the people and the legislature that would keep the legislature within the limits assigned to it. He believed that the judicial branch of government is "truly distinct from both the legislature and the executive." He strongly believed that liberty can have nothing to fear from the judiciary alone but would have everything to fear if it joined with the executive or the legislative branches of government.

Hamilton disposed of the arguments of the Jeffersonians and of Madison that no branch should be superior to the other branch of government by stating that the power of the people is superior to all branches and that where the will of the legislature stands in opposition to that of the people declared in the Constitution, the judges should be governed by the Constitution because it is the fundamental law. Finally, in Federalist No. 81, Hamilton acknowledged that the doctrine of judicial review is not deducible from any circumstance peculiar to the plan of convention, but from the general theory of a limited Constitution.

It is perhaps ironic that the Federalists and Jeffersonians or Republicans both had reasons for favoring the doctrine of judicial review. The Federalists, fearful that popularly elected legislatures might not respect property rights, saw judicial supremacy as a way to escape or curb legislative excesses of mass democracy.

Many Republicans, albeit without the support of their leader Jefferson, saw the rule of the majority as a threat to minority rights. They believed that judicial review would protect the individual liberties guaranteed by the Constitution in the Bill of Rights which was adopted in 1791.

We have reviewed the eloquently stated reasons in support of judicial review. What are the alternatives? We begin with Madison. He recommended at the Constitutional Convention that a council of revision be created composed of a convenient number of members from the executive and judicial departments with authority to veto acts of Congress. His proposal received little support. He and Jefferson later recommended that each branch may interpret the Constitution for itself in questions properly before it. Both rely upon the silence in the Constitution giving any branch supremacy over the other. They observed that nothing prevents a legislator considering a law or a president considering a veto based upon their own interpretation of the Constitution.

However, it was Judge John B. Gibson, writing in 1825 as a Judge of the Supreme Court of Pennsylvania, who has given the most comprehensive counterargument to judicial review. First, the concept of checks and balances does not include the idea of a judicial veto. Legislation passes through a long legislative process with two houses approving it. If the framers of the Constitution intended the court to be able to void such an act, the Constitution would say so. Second, Marshall had used the judges' oath of office to uphold the Constitution as one of his reasons for giving them the power. Gibson asks, if the court fails to declare an act unconstitutional if it actually is, does the judge violate his oath of office? Third, historically the ordinary and essential powers of the judiciary do not include annulling the acts of the legislature. The ordinary duties of a court are to interpret legislation. Fourth, what is good for one co-equal branch of government should be good for the others. If the Supreme Court can declare an act of the legislature void, cannot the legislature declare a decision of the Supreme Court to be void? In fact, a version of such a legislative power is demonstrated when a legislature rewrites a statute after a Supreme Court has declared it to be unconstitutional. Finally, people's redress to an unconstitutional law is to petition the legislators to repeal it. If the judiciary makes a mistake, a Constitutional amendment is required. The legislative remedy is preferable to the difficult process of amending the Constitution.

A reasonable question to ask at this point in our discussion is how many times or how often has the power to declare an act in conflict with the Constitution been used. Is this discussion academic or is it real? In a recently published book, Constitutional Law and Judicial Policymaking, the author stated that the United States Supreme Court has overturned 122 federal laws in whole or in part since 1803 when Marbury v. Madison was decided. Nearly 1100 state laws and local ordinances have been overturned. I could find no statistics indicating the number of times state courts have held state laws or local ordinances unconstitutional but the number would be substantial.

One thing is clear. The courts have used several rules of interpretation to restrain their use of the power. Justice William Brandeis answered the question raised by Alexander Bickel in the The Least Dangerous Branch, "How and whence do nine lawyers, holding lifetime appointments, devise or derive principles which they are prepared to impose without recourse upon a democratic society?" In his concurring opinion in Ashwander v. Valley Authority, Brandeis set forth in 1935 the rules that are still most commonly used by courts of last resort in passing upon the constitutionality of legislation. I will state them briefly:

1. The court will not determine constitutionality in a friendly, nonadversary proceeding. Brandeis observed that it never was the thought that by means of a friendly suit, a party

beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.

2. A court will not anticipate a question of constitutional law in advance of the necessity of deciding it. That is, a court decides a question of constitutionality only when it is absolutely necessary to a decision in the case.

3. A court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.

4. Closely related to number 2, is the practice of deciding an issue upon a nonconstitutional ground if it can be disposed of in that manner. Thus, it is common to find that a court will decide a case on a question of statutory construction rather than deciding the constitutional issue.

5. The person seeking to have a statute declared unconstitutional must show that he has been injured by operation of the statute. Thus, the challenge by a public official interested only in the performance of his official duty has not been entertained.

The topic of activist judging versus judicial restraint is a topic upon which another paper could be written.

Finally, some thoughts about compatibility-judicial review with democratic government. There is time for only a brief discussion, but a discussion that is highly relevant to our future. Neither the anti-Federalists led by Robert Yates, a

judge of the New York Supreme Court, nor the Federalists, led by Alexander Hamilton, believed judicial review is democratic.

Yates spoke against Article III(A), the judiciary article, because there was no limit on the amount of power the court could imply from the Constitution and because the court was not held accountable to the people or their representatives. As such, Yates argued the court constituted a will independent of society which could be "controlled" only by an appeal to the sword. He believed the Constitution contained the power of judicial review; that the court would be autonomous from democratic tendencies of a free people but that since America would not have a despotic king, there was no need for such independence. Hamilton supported judicial review because he saw it as a necessary check on the majority.

Eugene Rostow, former Dean of the Yale Law School, argues that judicial review is democratic. He observes that other unelected officers, such as generals and independent regulatory officials, are not perceived to be acting undemocratically. Why then should judges be considered such? Rostow says, "The final responsibility of the people is appropriately guaranteed by the provisions for amending the Constitution itself and by the benign influence of time which changes the personnel of courts." He argues that the Supreme Court has contributed to democracy by helping maintain a pluralistic equilibrium in society. It mediates conflicts

between political institutions to ensure maintenance of rights for all citizens. Democracy entails more than procedural majority rule; it also entails the protection of minority rights.

And, finally, another view is expressed by Albert P. Malone and George Mace writing in a recent edition of "Judicature." Their view is that judicial review is antidemocratic and it is precisely that character that imparts a major and beneficial contribution to our democratic system. A good democracy is directed to the interest of the whole people including majorities and minorities. The Supreme Court must resist the other branches or divisions of government when they act tyrannically whether against majorities or minorities. When the court exercises a check against a tyrannical majority, it acts in an antidemocratic fashion but it is precisely this antidemocratic feature known as judicial review that makes our governmental system a "good democracy" in the terms expressed by Aristotle.

It is not necessary to reject or embrace all or any of the foregoing theories. But we can conclude that judicial review is so well established in American jurisprudence that it will not be dislodged. My own view is consistent with Professor A. C. McLaughlin, one of the most eminent constitutional historians. I believe the doctrine of judicial review is the last word logically and historically speaking in an attempt of a free people to establish and maintain a nonautocratic government that

is the culmination of the essentials of revolutionary thinking and the thinking of all those who called for a government of laws and not of men.

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