THE ORIGINS OF JUDICIAL REVIEW

A Thesis

Presented to

the Faculty of the Department of Political Science

University of Houston

In Partial Fulfillment

of the Requirements for

Graduation with Honors

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by

M. H. Cersonsky

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ABSTRACT

While few people would question the authority of the courts to exercise the power of judicial review, there is considerable controversy over the question of how far a court should go in the exercise of that power. Polemicists are multiple on every side. Some argue that judicial review means and necessitates judicial supremacy; others argue that judicial review is restricted to cases and controversies where there is an irreconcilable variance with fundamental law; still others argue that while judicial review is an important component in the system of checks and balances, no court must be allowed to thwart popular majorities in the final analysis.

In virtually every instance, those who argue over the power of judicial review agree on one point: the "intention" of the framers is critical for a proper understanding of that power. The purpose of this thesis, then, is to explore the nature and origin of judicial review in an attempt to resolve some of the conflicts found in the secondary literature on the meaning and authority of judicial review. In doing so, it is my intention to examine some of the basic presumptions and convictions which controlled the fashioning of the American political system (more specifically, the concepts of higher law, limited government, and separation of powers), as well as the Constitutional Convention of 1787, the State Ratifying Conventions, and national and state case law. Let me say a word about each of these in turn before launching into the enterprise at hand.

In the case of the presumptions, higher law, limited government and

separation of powers, we will ascertain the manner and extent of the commitment of Americans to each concept. No definitive treatment is contemplated: the goal is merely to set the parameters of American thought on these matters at the time of our nation's founding. A cursory examination of these concepts suggests that these issues are critical components of the American mind.

Once aware of these influencial notions we will be prepared to examine carefully the primary material starting with the Constitutional Convention of 1787. There is no better place to start a search for the origins of a particular power in our political system than with the origins of the system itself. The specific debates and the positions taken by the delegates in these debates will bring an insight into how the men who constructed our political system sought to institutionalize the thought of Americans. Similar queries will be directed at the State Ratifying Conventions because here the Federalists pursued in more detail how the new Constitution was to operate. Finally, given the nature and multiple concerns of the framers, the judicial branch, like the other branches, played a critical role in defining the scope of its powers. In scrutinizing the cases not only will we be able to trace the path of judicial review, but also guage the reaction to the decisions, giving a greater understanding of the American attitude toward judicial review.

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THE THEORETICAL CONCEPTS

Theory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house.[1]

CHAPTER 1

A search into the origins of any institution must begin long before the articulation and construction of the institution itself, for ideas precede, not follow, reality. To understand fully the origin of any institution, then, one must understand the intellectual climate within which that institution was nurtured. It would be a presumptuous task to talk about universal suffrage in the nineteenth century unless one understood the notions of representative government and political equality or to discuss political equality unless one were familiar with the implications of social contract theory. Thus, the study of judicial review must start with a knowledge of the basic convictions and presumptions which controlled the fashioning of the American political tradition, one of the most important of which is the American concept of higher law.

A. Higher Law--Definition and Sources

1. Dr. Bonham's Case

"Higher law" was a complex term for Americans in the eighteenth century. For some Americans the higher law was natural law, while for others it was common law. God's law and fundamental law were also accepted as forms of this higher law in our colonial heritage. The fine distinctions between these notions is not relevant to this study because these distinctions did not prevent the commonality of the belief in higher law. Often these terms were interchanged with one another to keep up with what was in vogue. Charles Haines in his book, The Revival

of Natural Law Concepts, shows how the terms can be blended together. He has stated:

> Though natural law may be thought of with little relation to the notion involved in fundamental laws, and fundamental laws may be conceived unrelated to natural law, it is customary at various stages of such analyses for one idea to merge into the other.[2]

Across the Atlantic in England, the label of the higher law was also in a state of flux. It had been observed that

> [w]hen Roman and canon law doctrine came into disrepute in England . . . the law of nature terminology was frowned upon and gradually dropped, only to be restored in common law terminology in the words of "reason" and "reasonable."[3]

In essence higher law refers to a law which is superior to any man-made law and calls into account all men, whether it is a poor farmer or a member of the legislature. This separation of the higher law from man-made or legislative law is noted by Edward Corwin. He believed

> . . . the real paradox which judicial review has always presented in our system from the outset, [was] the paradox . . . of trying to keep a government based on public opinion within the metes and bounds of a formally unchangeable law.[4]

It is this "formally unchangeable law" which is the higher law.

With this vague notion of what is meant by higher law, we now turn to its sources in American thought. Perhaps the single most influential source is the famous "dictum in Dr. Bonham's Case." The impact of this decision on judicial decisions and opinions has few rivals in the annals of judicial history.[5]

The impact of this decision can be comprehended best in the context of prevailing English norms. "The dominant idea of medieval thinkers that law should be supreme, and superior to the state itself" took hold,

and from this "English judges evolved the peculiar English doctrine of the supremacy of the law, which bound even the King."[6] "The law" then:

> . . . was a rule of conduct which all members of the state, rulers and subjects alike, were bound to obey, the whole conduct of government consisted in the enforcement of the law, and in the maintenance of the rights and duties to which it gave rise.[7]

This supremacy of the law is the intellectual armor which Coke wore when he entered the courtroom in 1610. As Professor Holdsworth points out:

> The supremacy of the law was a theme on which Coke was never tired of dilating. In fact, it would not be going too far to say it was the view of all the leading lawyers, statesmen and publicists of the Tudor period.[8]

The battle in which Coke was engaged was against unlimited government and in particular the notion of divine right which James Stuart had taken up. The result was a reaction which Sir Benjamin Rudyard described as an effort "to make that good old, decrepit law of Magna Charta, which hath so long been kept in and bed-ridden . . . to walk again."[9]

The supremacy of the law was not the only weapon which Coke was to use. Coke also used the judge's sword--precedent, which he "bent to the selected end."[10]

No consideration of this case would be complete, however, without mention of the specifics of the case. In order for one to practice medicine in London at this time, one had to be certified by the College of Physicians, and it had long been custom that any one caught practicing medicine without proper certification was to be fined by the "College." In this instance the College had "amerced" Bonham and taken half the fine for themselves. Upon reviewing the situation Coke declared:

"The censors cannot be judges, ministers, and parties, judges to give sentence or judgements; ministers to make summons; and parties to have the moiety of the forfeiture. . . ." Thus Coke held "that the London College of Physicians was not entitled, under the act of Parliament which it invoked in justification, to punish Thomas Bonham for practicing medicine in the city without its license."[11]

Coke's announcement that the act of Parliament was void because it had violated "common right and reason" by having the College of Physicians judge and benefit in a case in which it was a party--the essence of which came to be labeled in history the "dictum" reads in part as follows:

> And it appears in our books, that in may cases, the common law will controul acts of parliament, and sometimes adjudge them to be utterly void: for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such act to be void.[12] (Emphasis mine.)

What Coke has done is to set up a law superior to the Parliament and King. He uses the term "common right and reason" to refer to this higher law. Coke, therefore, is an excellent example of the way the higher law concept changes its label. "Coke . . . believed in the overriding force of the law of nature," notes Raoul Berger,[13] yet the law of nature is not referred to in this opinion. Coke simply substituted "common right and reason" for the law of nature. Berger elaborates that

> [w]hether or not Coke and his fellows attached the label "fundamental" to the law of "nature" or "reason" or "natural equity" it was certainly so regarded in fact in the particular case. Coke left no doubt that Magna Charta was "fundamental," and presumably he felt no need to separate and ticket the various strands of fundamental law.[14]

However, the semantical value of the dictum is easily overshadowed by principles emanating from it. The dictum is important in three ways. First, the notion of a higher law was outlined clearly. Coke identified an act of Parliament, which was contrary to the higher law, "common right and reason," as void.[15] "At the very least," suggests one author,

> . . . we can assert that in Bonham's Case Coke deemed himself to be enforcing a rule of construction of statutes of higher intrinsic validity than any act of Parliament as such.[16]

Thus, the tenet of higher law is set forth firmly.

The second reason why this case is of historical value is its reference to written law, in particular Magna Charta. By frequently referring to this charter the public was led to believe that certain fundamental principles existed which constrained government. This helped to reaffirm the supremacy of the higher law.[17] This belief in a written law complements the concept of higher law as the following exerpt exemplifies:

> Coke came forward with . . . the doctrine of a law fundamental and binding Parliament and kings alike, a law, moreover embodied to great extent in a particular document and having a verifiable content in the customary procedure of everyday institutions.[18]

The first two ways in which this decision was significant were philosophic, namely helping to establish the ideas of higher law and written documents to embody that higher law. The third way in which this case is important is the effect of this decision on American political and constitutional thought. In other words, the case is of merit because it helped to give America those philosophic concepts previously mentioned. "Common right and reason," as we have seen, is a synonym for the higher

law concept.[19] Thus when the Americans accepted this decision they were also accepting the notions of higher law and that this higher law could be transcribed into a single written document. The message of Coke was carried by the legal books of the seventeenth and eighteenth centuries. These included Viner's Abridgment, "Statutes," Bacon's Abridgment, Comyn's Digest, among others.[20] Julius Goebel has noted that "A lot of American law came out of Bacon's and Viner's Abridgments.[21] The impact of the dictum via these legal works is described by Corwin:

> From Holt's time (1701) the dictum finds no place in important judicial opinion in England; but it does find its ways into Digests and Abridgments of the time. . . . Through these works, as well as Reports, it passed to America to join there the arsenal of weapons being accumulated against the Parliament's claims to sovereignity.[22]

Nor was Coke's influence limited to being cited in the writings of others. Thomas Jefferson stated that there was no "profounder learning in the orthodox doctrines of British liberties" than Coke on Littleton. Even Joseph Story in 1798 "breathed a purer air" and "acquired a new power" after reading the intricacies of Coke.[23] The temper of Americans by the 1760's fully endorsed the dictum. During the controversey over the Stamp Act Lieutenant-Governor Hutchinson of Massachusetts wrote that

> the prevailing reason (among the people) at this time, is that the Act of Parliament is against the Magna Charta and the natural rights of Englishmen and therefore according to Lord Coke null and void.[24]

With all these achievements, including setting up a higher law and declaring void acts contrary to it, one might presume that judicial review came into being at this time, but such was not the case. Dr. Bonham's case cannot be regarded as the authoritative source of judicial

review because of certain limitations inherent in the British governmental system. The major limitation being that Parliament itself was thought of in part as a judicial body. In fact during Coke's time and thereafter Parliament was considered to be the highest court and thus "its interpretation of the law necessarily bound all other courts."[25] Coke, who regarded the ordinary courts as capable of interpreting the law of reason or higher law, "recognized the superior claims of the Parliament as a law declaring body."[26] Thus the Achilles' heel of this decision may be said to be its lack of separation of powers. In all fairness it should be pointed out that such concepts as the separation of powers were unknown.[27] Nonetheless warns Corwin:

> While the dictum uncovers one of the indispensible premises of the doctrine of judicial review, the other, that which rests on the principle of separation of powers, he still lacks.[28]

To conclude this discussion of Coke it should be remembered that "the importance of Coke for judicial review does not . . . turn on whether he was 'right', but rather on the fact that at the time of the convention Americans believed he was, and proceeded to act on that belief."[29]

B. Other Sources--God's Law and the Common Law

Coke's decision was by no means the only source of the higher law to American political thought. In his book, English Common Law in the Early American Colonies, Paul Reinsch testifies to the great extent in which the concept of higher law was held in the very beginnings of colonial America. In his review of the colonies one can find higher law taking two main shapes: God's Law and Common Law. The former is clearly

seen in Massachusetts and Connecticut, while the latter was favored in New York, Maryland, Virginia and later in Massachusetts. Rhode Island and Pennsylvania had their own unique references to the higher law concept. We shall scan each of these individually.

Starting with Massachusetts we can find that "the word of God" was set up as the test for all legislation in 1636. Here in Massachusetts, "the government is . . . entreated to make a draft of laws 'agreeable to the word of God' to be the fundamental laws of the commonwealth," writes Reinsch.[30] In addition Magistrates were bound by God's law.

> Turning now to the practice of magistrates and courts in the actual conduct of cases we shall find the same principles universally acknowledged. Everywhere, the divine law, interpreted by the best discretion of the magistrates, is looked as the binding subsidiary law,[31]

explains Reisch. The significance of Massachusetts' tenets rests not only in announcing that those enactments violating the higher law were not laws but also in the impact of these notions on American thought. "From the time in 1646," notes Gordon Wood, "a belief in the morality of law had been a central part of the Americans' legal history."[32]

An example of Massachusetts' influence are the settlements of Connecticut and New Haven. Reinsch's analysis deserves quoting at length.

> In Connecticut and New Haven we find a development similar to that of Massachusetts. The Connecticut code of 1642 was copied from that of Massachusetts. The fundamental order of New Haven provides for the popular election of the magistrates, and for the punishment of criminals "according to the mind of God revealed in his word." The general court is also to proceed according to the scriptures, the rule of all righteous laws and sentences. In the fundamental agreement all freemen assent that the Scriptures hold forth a perfect rule for the direction and government of all men in all duties. The Scriptural laws of inheritance, dividing allotments,

> and all things of like nature are adopted, thus clearly founding the entire system of civil and criminal law on the word of God.[33]

Thus the "word of God" is established as the legally binding higher law in Connecticut and New Haven.

Although the early settlers in America, and in particular New England, attempted to erect a legal system based on the Bible, their efforts failed. The major reason for the collapse of this effort was the continued growth of the colonies both economically and politically. Theodore F. T. Plucknett, in his article, "Bonham's Case and Judicial Review," explains,

> With the economic and political growth of the colony, it became necessary to adopt a more refined system of law to meet the requirements of their prospering classes of landowners and merchants. Then it was that the common law began to revive, and its theoretical application to the colonies as laid down in their charters came to be something more than merely nominal.[34]

Massachusetts is a prime example of this trend. Plucknett continues:

> It is a significant sign of the new tendency that we find the General Court of Massachusetts in 1647 ordering two copies to be bought of Coke upon Littleton, Coke's Reports, Coke upon Magna Charta, the Book of Entries, the New Terms of the Law, and Dalton's Justice of the Peace, while in the year before they had set out in parallel columns their laws and the "fundamental and common lawes and customes of England. . . ."[35]

Not only was this done to set up a higher law on the footing of the common law but also "the charter provided that the colonists should make no laws repugnant to the laws of England,"[36] further establishing one type of law above another.

The trend to set up a higher law based on the common law continued in the Middle and Southern colonies. In New York the binding force of

the common law was not officially stated until 1761. Nonetheless the statement made by Governor Tryon that "the common law of England is the fundamental law of the province," leaves little doubt that a higher law is set-up. In Maryland the colonists "claimed that they were governed by the common law of England." In Virginia there was an appeal to Magna Charta. An act passed in 1657 forbade the practice of pleading or advising someone for pay. The governor and council opposed this act "but promised to consent to the proposition so far as it shall be agreeable to Magna Charta." Accordingly a committee was appointed and upon scrutinizing both the act and Magna Charta "reported that they did not discover any prohibition" within the Magna Charta.[37]

In other colonies the colonial charter served as the representative of the higher law. One example is Pennsylvania. In 1683 a set of laws was passed which "contained a chapter enumerating the fundamental provisions" which could be altered only by a six-sevenths vote of the colonial council and assembly. The worthiness of this provision is noted by Reinsch, who points out, ". . . this early attempt to separate the fundamental from the secondary provisions of the law is of great interest to students of American Constitutional development."[38] Another example is Rhode Island, here "[t]he charter is made the basis of government, by which legislative action is to be restricted."[39]

Overall we have seen in Dr. Bonham's Case the appeal to a higher law in the form of "common right and reason." Also this higher law was said to bind all lesser laws no matter their creator or executor, Parliament or King. The holdings of Coke in this case were transmitted to the New World through the legal texts of the age. In fact, one colony,

specifically ordered Coke's writings so as to set up a legal system based on the common law. However Coke's dictum and his other works were not the only sources of a higher law notion to early American thought. The colonies themselves adopted this notion whether it be "God's word" in pious New England; the common law in more mercantile colonies; or the colonial charter in Pennsylvania and Rhode Island. No matter the source, as Plucknett writes,

> It is a cardinal fact that to the eighteenth-century American the doctrine of a fundamental common law was familiar, and regarded as quite consistent with the scheme of things.[40]

C. The Maintenance of Higher Law

Many countries have been exposed to the concept of higher law yet judicial review is not to be found in them.[41] After all, Coke's dictum was delivered in the capital of England, but does the English legal tradition adhere to judicial review? "Whatever affects Coke's attempt to set up a superior and fundamental law may have had," answers Haines, "the Revolution of 1688 marked the abandonment of his doctrine as a practical principle of English politics."[42] The theoretical consequence of this revolution, in England, was the belief in legislative supremacy. This situation is aptly described by Gordon Wood:

> By the eighteenth century the growing sense of the omnipotence of Parliament had made the notion of a single written instrument of government creating and limiting the government decidedly obsolete. Although the idea of fundamental law or of natural law underlying all governmental actions and positive law was scarcely forgotten . . . All such moral and natural law limitations on the Parliament were strictly theoretical, without legal meaning and relevant only in so far as they impinged on the minds of the law makers.[43]

The situation in the American colonies was different. "We find from the very first," says Reinsch, "originality in legal conceptions, departing widely from the most settled theories of the common law, and even a total denial of the subsidiary character of English jurisprudence."[44] This American originality can be shown in two ways: first, in a resort to written constitutions, and second in regard to these written constitutions as law in sense of it being an interpretable law.

The use of written constitutions placed the higher law in a form which gave the higher law "an entirely new sort of validity."[45] One scholar points to the overwhelming acceptance of written constitutions. He writes, "It was clear to Americans in 1776 that all constitutions should be contained in some written charter; as their remarkable constitution-writing experience demonstrated."[46] The "major premise" in drafting written constitutions was a fear of legislative bodies. It was supposed that these assemblies "might interfere with the rights of property and contract and might not respect the liberties of mankind."[47] The consensus of Americans was increasingly becoming one of disgust with the arbitrary state legislatures. "Constitutional rights," noted James Cannon, a framer of the Pennsylvania Constitution,

> must be protected and defended as the apple of your eye from danger or they will be lost forever. They must be established as a foundation to be shaken never more, that is, they must be specified and written down in immutable documents.[48]

The result of this type of thinking is an original American notion, government under a written Constitution. As Gerald Stourzh remarked,

> The founders saw three different entities competing for the title of sovereign: the legislature, the community, and natural law. Sir Ernest Barker has aptly observed that the Americans chose a fourth--the sovereign constitution.[49]

The second innovation unique to the American experience was that this written constitution was interpretable. Berger suggests that "a constitution is itself a 'law' and that it is the function of the courts . . . to interpret the law, that a law which overlept constitutional bounds was void."[50] Corwin concurs with this analysis contending that the Founding Fathers' "acceptance of [the notion that the Constitution is law in the sense of being known and enforceable by the courts] is registered in the Constitution itself."[51] His argument is based on the language of the Constitution in particular Article VI. Corwin maintains that

> [t]he conclusion is unescapeable that when Article VI, paragraph 2, designates the Constitution--as law of the land in the same terms as it does acts of Congress made in pursuance of it, it does so by virtue of no inadvertence or inattention on the part of its framers.[52]

Thus one of the major assumptions of judicial review, that the Constitution is knowable and interpretable, is a part of the American conception of the higher law. In addition we have seen that the higher law notion, originating in Coke's dictum and within the colonies themselves, was different from the higher law concepts in England. This difference was due not only to the idea of an interpretable higher law, but also because in America the higher law was written into special documents. These differences with the English system were well pronounced by 1776. Gordon Wood surmizes the magnitude of these differences for Americans today as well as then, when he writes that

> [b]y 1776 the Americans had produced . . . a constitution very different from what eighteenth century Englishmen were used to--a notion of a constitution that has come to characterize the very distinctiveness

of American political thought. So enthralled have Americans become with their idea of a constitution as a written superior law set above the entire government against which all other law is to be measured that it is difficult to appreciate a contrary conception.[53]

FOOTNOTES

CHAPTER I

[1] Oliver Wendell Holmes, quoted in Edward Corwin's, The "Higher Law" Background of American Constitutional Law (Ithaca, New York: Cornell University Press, 1955; reprint ed., 1971), p. 1.

[2] Charles Grove Haines, The Revival of Natural Law Concepts, Harvard Studies in Jurisprudence, v. 4 (Cambridge, Massachusetts: Harvard University Press, 1930), p. vii.

[3] Ibid., pp. 39-40.

[4] Edward S. Corwin, The Doctrine of Judicial Review--Its Legal and Historical Basis and Other Essays (Princeton, New Jersey: Princeton University Press, 1914), p. 45.

[5] Corwin, The "Higher Law" Background of American Constitutional Law, pp. 43-44, Corwin's exact words were "no judicial utterance of Coke's--few indeed in language--can surpass in interest and importance his so-called dictim in Dr. Bonham's Case."

[6] Haines, The Revival of Natural Law Concepts, p. 32.

[7] William S. Holdsworth, History of English Law, IV (London, 1922-5) p. 169 in Haines, The Revival of Natural Law Concepts, p. 33.

[8] Ibid., p. 33, note 2.

[9] Corwin, The Doctrine of Judicial Review, p. 28.

[10] Corwin, The "Higher Law" Background of American Constitutional Law, p. 42.

[11] Ibid., p. 47 and 44.

[12] Dr. Bonham's Case, 8 Co. 107a (1610), p. 118a.

[13] Raoul Berger, Congress V. The Supreme Court (Cambridge, Massachusetts: Harvard University Press, 1969; reprint ed., New York: Bantam Books, 1975), p. 381.

[14] Ibid., p. 382, note 47. Expressing the same sentiment on page 375 of the text Berger writes:

> From Coke's citation of Doctor and Student, it may also be inferred that he employed "reason" as equivalent to the law of nature, for that Dialogue stated that "The law of nature . . . is also called the law of reason," and that English lawyers were

> accostumed to say that if anything "be prohibited by the law of nature" "it is against reason," precisely the words employed by Coke.

[15] Ibid., p. 383.

[16] Corwin, The "Higher Law" Background, p. 49. To those who argue that the higher law was to protect the people only against royal abuses and not legislative ones as well Berger responds by saying:

> Because fundamental law was invoked against existing tyranny it does not follow that unanticipated Parliamentary tyranny would be deemed to rise above fundamental law. To the contrary, both the law of nature and Magna Charta were considered to override all conflicting law so that an appeal to fundamental law against a statute was entirely logical.

Berger, Congress V. The Supreme Court, p. 382.

[17] Haines, The Revival of Natural Law Concepts, p. 38.

[18] Corwin, The "Higher Law" Background of American Constitutional Law, p. 57.

[19] Supra, text accompanying notes 14 and 15.

[20] Berger, Congress V. The Supreme Court, p. 25, n. 81. See also Edward S. Corwin, "The Establishment of Judicial Review," Michigan Law Review 9 (December, 1910): 105. "The law thus laid down finds statement in Bacon's Abridgement, first published in 1735; in Viner's Abridgement, published 1741-5, from which Otis later quoted; and in Comyn's Digest, 1762-7 but written some twenty years earlier.

[21] Julius Goebel, "Ex Parte Clio," Columbia Law Review 54 (December 1954): 455.

[22] Corwin, The "Higher Law" Background, p. 53.

[23] Gordon Wood, The Creation of the American Republic, 1776-1787 (Chapel Hill: The Univeristy of North Carolina Press, 1969; reprint edition, New York: W. W. Norton and Company, 1972), p. 299, n. 47.

[24] Theodore F. T. Plucknett, "Bonham's Case and Judicial Review," Harvard Law Review 40 (November 1926): 63. In addition Corwin in an early publication, 9 Michigan Law Review 104, saw that in the eyes of the Colonists "reiteration of the dictum by Coke's successors on the bench and by commentators had given to it, by the middle of the eighteenth century, all the character of established law."

[25] Corwin, The Doctrine of Judicial Review, p. 29.

[26] Corwin, The "Higher Law" Background, p. 51.

[27] Berger, Congress V. The Supreme Court, pp. 377-8 and 380-1.

[28] Corwin, The "Higher Law" Background of American Constitutional Law, p. 51.

[29] Berger, Congress V. The Supreme Court, p. 28.

[30] Paul Samuel Reinsch, English Common Law in the Early American Colonies, Da Capo Press Reprints in American Constitutional and Legal History (Madison, Wisconsin: Bulletin of the University of Wisconsin, 1899; reprint ed., New YOrk: Da Capo Press, 1970), p. 11.

[31] Ibid., p. 14.

[32] Wood, Creation of the American Republic, p. 295-6; also John Devotion, The Duty and Interest (Hartford, 1777), pp. 29-30, and Massachusetts General Court quoted in Richard B. Morris, Studies in the History of American Law (New York: 1930), p. 19.

[33] Reinsch, English Common Law in the Early American Colonies, p. 25.

[34] Plucknett, "Bonham's Case and Judicial Review," p. 61.

[35] Ibid., pp. 61-2.

[36] Reinsch, English Common Law in the American Colonies, p. 12.

[37] Ibid., New York, p. 34, Maryland, p. 41, and Virginia, p. 48.

[38] Ibid., pp. 37-8.

[39] Ibid., P. 28.

[40] Plucknett, "Bonham's Case and Judicial Review," pp. 69-70.

[41] Wood, The Creation of the American Republic, p. 292.

[42] Haines, The Revival of Natural Law Concepts, p. 36. On page 39 Haines tells of the fall of the higher law. He writes, "With the supremacy of Parliament generally accepted the references to natural laws become less frequent."

[43] Wood, The Creation of the American Republic, p. 260. See also Haines, The Revival . . . Concepts, p. 35.

[44] Reinsch, English Common Law in the Early American Colonies, p. 7.

[45] Corwin, The "Higher Law" Background of American Constitutional Law," p. 89.

[46] Wood, The Creation of the American Republic, p. 268.

[47] Haines, The Revival of Natural Law Concepts, p. 83.

[48] Wood, The Creation of the American Republic, p. 293. [James Cannon], "Cassandra," April 1776, Force, ed., American Archives, 4th Ser., V, 1094, quoting from [Hulme], Historical Essay, 143-44.

[49] For this piece of information, I am indebted to Dr. Donald Lutz, "The Self-Guiding Republic: Popular Consent and Popular Control, 1776-1789" (Yet to be published manuscript, University of Houston, 1975), p. 7. He in turn cites Gerald Stourzh, Alexander Hamilton and the Idea of Republican Government (Palo Alto, California: Stanford Univeristy Press, 1970), p. 47-50.

[50] Berger, Congress V. The Supreme Court, p. 29.

[51] Corwin, The Doctrine of Judicial Review, p. 27.

[52] Ibid., p. 43.

[53] Wood, Creation of the American Republic 1776-1787, p. 260.

CHAPTER II

LIMITED GOVERNMENT

A. The Relation to Higher Law

Laws are made to control specific types of action. In the last chapter Sir Edward Coke attempted to invoke a law to proscribe the action of certain government sanctioned proceedings. Coke referred to the higher law of "common right and reason" in his landmark decision--which invalidated a law passed by Parliament which had allowed the College of Physicians to benefit monetarily from cases in which it was both judge and prosecutor. On a broader scale, Coke, as we have seen, was battling unlimited government and his reference to "common right and reason" is a call to a higher law to restrain or limit government.[1] In this effort Coke was successful because the effect of the decision was to place a constraint on the powers of government, including the king and Parliament. The constraint was that the government could not make legal that which violated "common right and reason." Thus, in our daily activities when one hears the word law, one thinks quite correctly of prohibitions and limits. For example, someone may advise his friend, "Don't drive over fifty-five miles per hour because it's against the law." Similarly, when one hears the term higher law, one again should think of limits, but this time the limits apply to the day-to-day lawmaker itself, government.

The acceptance of limits on government, just like the acceptance of the notion of higher law, was pervasive throughout the revolutionary period.[2] In 1773 the Massachusetts Council announced that "all human authority is . . . and ought to be limited." Furthermore it was said that

"There had to be some restriction on the authority of Parliament some liberties protected by the constitution."[3] "John Adams, who was and would continue to be the most articulate and sophisticated whig theorist in the New World," comments Lutz, "was most prominent in arguing that republics were, by definition limited by the rule of law . . . or as he put it, a republic is 'a government of laws, not of men'."[4] From these statements arises the notion that government is limited. That this government is limited by a higher law is established by Haines, when he writes:

> Out of a state of nature and emanating from the laws of nature arose the familiar inalienable rights, which were superior to the state itself . . . The theory of natural rights, which is the characteristic American interpretation of natural law, became the foundation for the concept of limited government which gained such a strong foothold in the United States. It gave the theoretical basis for the American doctrine of civil liberty . . . and insisted on the formulation of limits on all forms of political authority.[5] (Emphasis mine.)

B. The Challenge of the Legislatures

An ominous threat soon appeared to the idea of limited government throughout America in the form of the state legislatures. One historian of the period has pointed out that "the politics and constitutionalism of the Confederation period" was dominated by the search for "a way to control and restrict the elected representatives."[6] Following the eviction of royal authority, the colonists created new governments which gave great latitude to the legislatures. The reason behind this was that the governor, as an officer of the king, had enforced unpopular royal legislation while the elected colonial assemblies had attempted to serve and protect the interests of the colonists. Consequently when the colonists

went about establishing new constitutions great leeway had been granted the legislature because it was assumed that the legislature would always look out for the best interest of the people. Lutz notes that "there is no getting around the fact that almost all early state constitutions permitted the legislature to abrogate rights if it was deemed necessary."[7] The friction arose, however, when the "legislatures frequently did so."[8] Take for instance the occurrences in the Carolinas of which Wood writes:

> The South Carolina legislature seemed especially flagrant in its repeated "irregularities" and suspensions of the Constitution, so much so, said Aedanus Burke in 1783, "that the very name of a democracy, or government of the people, now begins to be hateful and offensive." Under the exigencies of war many of the states were forced to set aside the constitution; an emergency act of the North Carolina legislature in 1780 . . . compelled the governor, who was without a veto, to resign rather than submit to an abrogation of his power over the military granted to him by the Constitution.[9]

Nor were such abuses limited to the South. In Vermont the Council of Censors charged that the legislature was striving for "uncontrolled dominion" over the administration of justice. The Council protested that the legislature was

> interfering in causes between parties, reversing court judgments, staying executions after judgments, and even prohibiting court actions in matters pertaining to land titles or private contracts involving bonds or debts, consequently stopping nine-tenths of all causes in the state.[10]

The Council further saw that there was no law to guide the legislature, hence the legislature was unlimited and allowed to govern "according to their sovereign will and pleasure."[11] Among the unpleasant surprises the rule of the legislatures provided were 1) confiscation of property; 2) the paper money schemes; 3) the tender laws; and 4) the suspension of the

ordinary means for debt recovery.[12] These actions prompted Thomas Jefferson to exclaim, "An elective despotism was not the government we fought for."[13]

The people thus sought a permanent reprieve from such despotism. One place to find such respite was the higher law, as suggested by Aedanus Burke. He noted that a popular assembly which was not regulated by fundamental laws was able to commit more excesses than a capricious monarch.[14] Further aiding this plea was the fact that the higher law was already present, or as Haines adds, "[i]n the armor of devices to set limits to legislative action the higher law philosophy was always available."[15] The next question is, did our forefathers use this alternative? The answer is yes, as seen in the following excerpt:

> The natural law philosophy [recall that natural law and higher law are synonomous for this thesis] which was extensively applied in the formative period of American law . . . became the most prolific source of limitations on the legislatures both of the states and of the nation.[16]

The repercussion of the legislative menace should not be taken lightly. One of the underlying principles of the American theory of a written constitution was this distrust of legislative power, and even the restrictive nature of our Constitution is attributable to this fear of the legislatures.[17] It is not a coincidence that the most advanced thinking was by those groups whose confidence in the legislatures was lowest and so their definition of a constitution which placed all governmental power, legislative and executive, under a set of fundamental rules was not dislike that which Americans would eventually live under.[18] The reason all Americans did not "comprehend" the need for a constitutionally limited government as a general rule at this time was their faith in the legislatures to

serve and protect them. It is only with the abuses by the legislatures themselves that Americans lose faith in government and by the late 1780's seek ways to limit government. The Federal Convention of 1787 was such an attempt to remedy the ills of the legislatures by restraining their power. Corwin describes the role of the legislatures in bringing the Convention into existence:

> The period of 1780-7 . . . was a period of "constitutional reaction," which mounting gradually till the outbreak of Shays' Rebellion in Massachusetts in the latter part of 1786, then leaped suddenly to its climax in the Philadelphia Convention . . . the point of attack . . . was the state legislature.

Without a doubt then, "one of the main motives that had brought the Convention together was a general disgust of the recent antics of the legislatures."[19]

C. America's Response to the Challenge--The People Are Sovereign

Although many Americans turned to the notion of higher law to limit government, and especially the legislatures, such efforts were doomed to failure within the then present framework of ideas. Why? Because an appeal to the higher law in the then accepted British political theory meant an appeal to the Parliament or the legislative branch. One explanation for this was that the Parliament was the highest court of the land, and as we have seen, this partially explained the failure of Coke to set up a higher law outside of Parliament in 1610.[20] However, a more accurate explanation would stem from the concept of sovereignty. It is reasonable to assume that a higher law, almost by definition alone, must originate from the highest source possible. For example, the law of nature

comes from nature itself, a source which man cannot change. God's law comes from the highest of sources, the Almighty himself. Accordingly in order for a higher law to be the higher law it must emanate from the all-powerful or sovereign force of the state. The term sovereign or sovereign force refers to the "supreme power and authority" in a state, or as James Wilson phrased it, "In all governments, whatever their form, however they may be constituted, there must be a power established from which there is no appeal."[21] In British theory and practice, then as now, Parliament "had in truth become the sovereign lawmaker of the realm."[22] Sir William Blackstone, whose influence would be hard to overestimate, agreed with this assessment when he wrote, "If the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it."[23] Therefore due to such events as the Revolution of 1688 and the great reverence for Blackstone Parliament, or in the American context the legislature, was thought to be the sovereign power of a state.

Despite being confronted by such a theoretical predicament the Americans refused to give up their attempt to restrain the legislatures. If they could not gain relief through the existing notions they would look to new ones, and in so doing find a solution. The solution they found was to do away with the conception that sovereignty rested with the legislature, and in tis stead they substituted the idea that sovereignty arises from the people. The events surrounding the Constitutional Convention can be seen as just such an attempt to take the sovereignty away from the state legislatures and place in the people. No, it was not the members of the Convention who possessed the sovereignty, and as a result

gave America that higher law known as the Constitution. Rather the true source of the higher law, hence the true sovereign, was the people. They exercised their sovereignty when they approved the proposed constitution, for only then did it become in fact the legitimate law of the land. For we know that had the people failed to ratify the Constitution it would not have become the law of the land and the United States of America as a single nation would not have been born until later, if ever.

What evidence exists to support such claims? To begin with, we can show that the Americans acknowledged the concept of sovereignty. This acknowledgment was so widespread that by the early 1770's the idea of sovereignty in any form of government "could no longer be contested."[24] Thus to solve the problem of the state legislature many Americans "rather than disavow the powerful conception of sovereignty when confronted with it . . . chose to relocate it."[25]

As asserted earlier, this relocation of sovereignty took place between the legislature and the people. The reasoning behind this relocation is explained this way:

> If sovereignty had to reside somewhere in the state--and the best political science of the eighteenth century said it did--then many Americans concluded that it must reside only in the people-at-large. . . . In the people alone "that plenary power rests and abides which all agree should rest somewhere."[26]

That "the legislatures could never be sovereign" is made explicit by Wood, who determined that the Americans of the 1780's directly confronted the notion of legislative sovereignty and intensified their claims so that eventually it was accepted that the "final and absolute lawmaking power lay not in any particular body of men but in the people-at-large."[27]

Not only was the sovereignty transferred but also were the limits on government that go along with it. Now that the people were sovereign the government had to conform to their wishes. Thomas Tucker, author of the pamphlet Concillary Hints, intimates these limits when he contended that: in a democratic government, such as the new American states were, there could be no place for omnipotent legislatures because "all authority is derived from the people" to be held only at their pleasure. Therefore he concludes the privileges and powers of the legislature "ought to be defined by the constitution," which should be constructed so as to be consistent with the people's wishes.[28] Even the Massachusetts Constitution of 1780 upheld the notion of the people's sovereignty and that the government and its officials were subject to the people. "All power residing originally in the people, and being derived from them," stated the new document, "the several magistrates and officers of government whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them.[29]

Publius, in Federalist #22, describes expertly the critical importance of the people's sovereignty to any government, whether it be the Articles of Confederation, or the future United States, when he writes:

> It has not a little contributed to the infirmities of the existing federal system that it never had a ratification by the PEOPLE. Resting on no better foundation than the consent of the several legislatures, it has been exposed to frequent and intricate questions concerning the validity of its powers, and has in some instances given birth to the enormous doctrine of a right of legislative repeal. Owing its ratification to the law of a State, it has been contended that the same authority might repeal the law by which it was ratified. . . . The possibility of a question of this nature proves the necessity of laying the foundations of our national government deeper than in the mere sanction

> of delegated authority. The fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority.[30]

D. Contributions to Judicial Review

The recognition of the people at large as the sovereign power within a state is noteworthy for two main reasons. First, the Constitution becomes the everyday sovereign because the people store their sovereignty in it. In simpler terms, the Constitution became the designated higher law for the United States. The pamphleteer Tucker suggests that the Constitution was fixed "on the firm and proper foundation of the express consent of the people, unalterable by the legislature, or any other authority but that by which it is to be framed." He later adds that only a constitution based on this "undeniable authority" of the collective people could be above "the will of the legislature."[31] Thomas Jefferson noted the limiting nature of this belief on government. He hypothesized that since all parts of government were derived from a common authority then "no peculiar prerogative should be allowed to one branch or particular rights to another.[32] Charles Beard in his book, The Supreme Court and the Constitution, provides another instance where the Constitution limits government. In this case it is the right to property. "This very system of checks and balances, which is undeniably the essential element of the Constitution," Beard maintains, "is built upon the doctrine that the popular branch of the government cannot be allowed full sway, and last of all in the enactment of laws touching the rights of property."[33]

Secondly this belief in the people's sovereignty allowed the higher

law to become an interpretable law. The key attribute of placing the sovereignty in the people was not "its passive sense" of being "the source of governing power," but instead is found in "its active sense" of being the highest governing authority. "The result of the latter development," states Corwin, "was to impart to the Constitution the character, not simply of an act of revolution, but of law, in the true sense of the term of a source of rules enforceable by the courts."[34]

This chapter began with the idea that Americans believed government ought to be limited. The belief in a higher law and its consequent limit of government, referred to in chapter one and section A of this chapter, remains the focal point of attention in that the state legislatures had come to challenge the concept of limited government altogether. This challenge had been nurtured by the notion that the sovereign authority of a state lay in the legislature itself. Realizing that as long as the legislature was regarded as sovereign no limitation could harness this branch of government, many Americans sought a new sovereign, one which would be above any legislature and thus be able to restrain it. They found such a sovereign in the people at large. The Constitution became the higher law when the people vested their sovereign power in it by actual vote. The significance of this event ought not to be overlooked. "This conception," remarks Wood, "of the sovereignty of the people used to create the new federal government had at last clarified the American idea of a constitution."[35] The fusing of these concepts: higher law, limited government and sovereignty of the people, in other words the American conception of a constitution, is accomplished brilliantly by Tucker, writing:

> The constitution should be the avowed act of the people at large. It should be the first and fundamental law of the State, and should prescribe the limits of all delegated power. It should be declared to be paramount to all acts of the Legislature, and irrepealable and unalterable by any authority but the express consent of a majority of the citizens collected by such regular mode as may be therein provided.[36]

This is "a conclusive statement that has not essentially changed in two hundred years."[37]

FOOTNOTES

CHAPTER II

[1] See chapter 1 text accompanying notes 9-11.

[2] This acceptance of the higher law has been noted in chapter 1 at page 6, n. 24 and page 7, section B.

[3] Wood, The Creation of the American Republic, 1776-1787, p. 344. The discussion from which this is taken is from Alden Bradford's Speeches of the Governors of Massachusetts from 1765-1775, (Boston, 1818).

[4] Lutz, The Self-Guiding Republic: Popular Consent and Popular Control, 1776-1789, p. 6.

[5] Haines, The Revival of Natural Law Concepts, p. 58.

[6] Wood, The Creation of the American Republic, 1776-1787, p. 376.

[7] Lutz, The Self-Guiding Republic: Popular Consent and Popular Control, 1776-1789, p. 7.

[8] Ibid., p. 7.

[9] Wood, The Creation of the American Republic, 1776-1787, p. 275.

[10] Ibid., p. 407. Wood's discussion is based on "Address of the Council of Censors," February 14, 1786, Slade Ed., Vermont State Papers, p. 537. In addition to Vermong another Northern Assembly, in this case Connecticut's, was attacked for "getting too involved in private controversies." See Wood, p. 407, n. 24.

[11] Ibid.,

[12] Ibid., p. 404.

[13] This particular quotation is taken from Raoul Berger's, Congress V. The Supreme Court, p. 11. It is originally from Thomas Jefferson, The Writings of Thomas Jefferson, ed. Paul Leicester Ford. (New York: G. P. Putnam's Sons, 1892-1899), pp. 222-224.

[14] Wood, The Creation of the American Republic, 1776-1787, p. 405. For the whole text see Aedanus Burke, "An Address to the Freemen of the State of South Carolina," (Philadelphia: 1783), p. 23.

[15] Haines, The Revival of Natural Law Concepts, p. 97. Also see note 2 of this chapter.

[16] Ibid., p. 79.

[17] Ibid., p. 82.

[18] Wood, The Creation of the American Republic, 1776-1787, pp. 267-8.

[19] Corwin, The Doctrine of Judicial Review, p. 37 and 62.

[20] This is developed more fully in chapter 1, pp. 6-7, text accompanying notes 25-28.

[21] James Wilson in Wood's oft-cited The Creation of the American Republic, 1776-1787, p. 530. Wilson goes on to point that this sovereignty "resides in the people."

[22] Wood, The Creation of the American Republic, 1776-1787, p. 265.

[23] Ibid., p. 264. Wood's source is Blackstone, Commentaries, V. 1, p. 91.

[24] Ibid., p. 350.

[25] Ibid., p. 382.

[26] Ibid., p. 382. Quoting the Hartford Connecticut Courant of August 12, 1783, Wood points out that one Connecticut town announced in 1783 that "there is an original, underived and incommunicable authority . . . in the collective body of the people to whom all delegated power must submit, and from whom there is no appeal." This of course substantiates the idea that the sovereignty rests within the people.

[27] Ibid., p. 363.

[28] Thomas Tucker, Concillary Hints, 1784, in Wood's Creation of the American Republic, 1776-1787, p. 281.

[29] Ibid., p. 448. Here Wood cites the Massachusetts Constitution of 1780, pt. i Article V.

[30] Alexander Hamilton, James Madison and John Jay, The Federalist Papers, with an Introduction by Clinton Rossiter, 10th ed. (New York: The New American Library, Inc., 1961) Federalist #22, p. 152. Also see James Wilson in Wood's Creation of the American Republic, pp. 530-1.

[31] Thomas Tucker, Concillary Hints, 1784, in Wood's Creation of the American Republic, 1776-1787, p. 281.

[32] Thomas Jefferson, Notes on Virginia, ed: Peden, p. 121.

[33] Charles A. Beard, The Supreme Court and the Constitution (New York: The MacMillan Company, 1912), pp. 95-6.

[34] Corwin, The Doctrine of Judicial Review, p. 62.

[35] Wood, The Creation of the American Republic, p. 600.

[36] Tucker, Concillary Hints, in Wood's book, p. 281.

[37] Wood, The Creation of the American Republic, p. 281.

CHAPTER III

THE SEPARATION OF POWERS

A. The Need for Separation of Powers

> The Americans' development of what came to be called judicial review was simply the product of their conception of a constitution as a higher law embodied in a written document. Other states since the eighteenth century have resorted to formal, rigid constitutions without at the same time allowing the judges of their courts to set aside legislative acts in conflict with the constitution. Different circumstances different ideas ultimately made the practice of judicial review possible and justifiable in America.[1]

The most prominant of these "different circumstances" was the threat posed by the state legislatures. The abuses and transgressions were so great that "whatever the new direction was to be, it seems plain that the point of departure was disenchantment with an all-powerful, uncurbed legislature."[2] The early state constitutions as we have seen, were written under the influence of Blackstone and therefore had allowed the legislatures to exercise all types of power.[3] These abuses included a variety of offenses. In North Carolina the constitutionally delegated authority of the Governor over military matters was usurped by the legislature. In Vermont the elected representatives of the people took over the administration of justice.[4] In other states the legislatures, like Parliament, acted as the final interpreters of the higher law. However, these bodies did not limit themselves merely to interpreting the law, rather, they saw fit to change it at will. For example, the "New Jersey legislature never questioned its ability to alter the fundamental law, in 1777 changing by simple act the very wording of the Constitution."

And in Georgia, despite the extensive provisions for constitutional change specified in the Constitution, "the Georgia legislature at least three times throughout the eighties assumed the authority to explain portions of the fundamental law."[5] In exasperation the New Hampshire Convention of 1781 warned "the love of Power is so alluring that few have ever been able to resist its bewitching influence." The Convention went on to add that power, wherever it is lodged, has a "propensity to enlarge its boundaries." Then in total disgust, the New Hampshire Convention asked, "Is it possible that Europe, or even Asia itself, can present a more perfect tyranny?"[6]

B. Another Innovation

When confronted by the practice of legislative abuses sanctioned by the theory of Blackstone the Americans turned to new ideas for redress. Among these ideas was the notion that the sovereign power of a state belonged to the people, rather than the legislature as had been presumed by Blackstone. This transfer of sovereignty was in effect an attempt to reinforce the concept of higher law as a restraint on the legislatures. But, as we have noticed, "the concept of the constitution, as fundamental law, was not by itself a sufficient check on legislative will."[7] The legislatures simply ignored the constitutions or else altered them to their collective whim. What was required then, was a theory not just that government was limited but one that provided a plan by which government could be limited. Such a plan was the separation of powers. In 1786 James Iredell, who was a member of both the Constitutional Convention of 1787 and later the Supreme Court, observed that the Americans

had rejected conventional British theory, including its belief in legislative supremacy, and instead were willing to conduct their government on principles best described by the doctrine of separation of powers.[8]

The appeal to separation of powers came "in fact only in the years after 1776, when the problems of politics seemed new and different from what had been expected." For only under these unexpected conditions did "the idea of separation of powers assume major significance." Although the concept of separation of powers had existed previous to this time, it was in their attempt to implement separation of powers in actual governments that Americans made their mark in political thought. Gordon Wood writes:

> Seizing upon this relatively minor eighteenth century maxim, the constitutional reformers in the years after 1776 exploited it with a sweeping intensity and eventually magnified it into the dominant principle of the American political system.[9]

Thomas Jefferson and James Madison are two of our better known Founding Fathers who embraced separation of powers. Jefferson thought that if a government was intent on promoting the happiness of its people then its legislative, executive and judicial powers "must be so divided and guarded as to prevent those given to one from being engrossed by the other."[10] As for Madison the first of his guiding principles "was the principle of the separation of powers, which he regarded as a prime essential of free government and the chief protection against tyranny."[11]

These sentiments of Jefferson and Madison concerning the separation of powers were to become fundamental to American political thought. These conceptions reached lasting fame in the one American work which is considered "among the classics of political theory," The Federalist

Papers.[12] It is in Federalist number 48 that Madison underlines the question facing America--whether the constitutions alone can constrain the popular assemblies. Replying in the negative, Madison asks

> Will it be sufficient to mark, with precision, the boundaries of these departments in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? This is the security which appears to have been principally relied on by the compilers of most of the American constitutions. But experience assures us that the efficacy of the provision has been greatly overrated; and that some more adequate defense is indispensably necessary . . . [For] the legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.[13]

This fear of legislative actions along with past memories of executive misconduct under colonial governments led Madison to a unique definition of tyranny, a definition which America may correctly count among her contributions to political theory. The distinguishing feature of this definition is its reliance on procedure. It is the "accumulation of all powers, legislative, executive and judiciary, in the same hands," writes Madison, that "may justly be pronounced the very definition of tyranny." It was of no concern whether the exercise of these powers was done by a monarch, oligarchy or democracy, elected or appointed officials, so long as these powers were assembled in the same hands, it was a tyranny.[14]

In support of this definition, as well as his assessment of the troublesome situation the legislatures had placed America, Madison quoted his fellow Virginian, Jefferson. So impressed was he with Jefferson's judgment that he found it "necessary to quote a passage of some length." In Jefferson's remarks we can find three points worthy of recognition. First is an affirmation of Madison's definition of tyranny.

Jefferson declared that "all the powers of government, legislative, executive and judiciary, result to the legislative body. The concentrating of these in the same hands is precisely the definition of despotic government." He goes on to say that "it will be no alleviation that these powers will be exercised by a plurality of hands." This strongly implicates the legislatures as a potential tyrant thus requiring control. Finally Jefferson contends that future governments in America must adopt the principle of separation of powers in order to protect liberty. Realizing that an "elective despotism was not the government we fought for," Jefferson explains that America wanted a government

> which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy as that no one could transcend their legal limits without being effectually checked and restrained by the others. For this reason . . . the legislative, executive, and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time.[15]

With such prestigious backing one could easily understand how Americans were converted to this new principle. However the writings of these two merely reflect what most Americans already believed. Indeed "by the 1780's separation of powers had emerged as such an imposing doctrine that both parties, Constitutionalists as well as Republicans, sought to use it against each other."[16] The separation of powers, which was formulated "upon a distrust of political institutions," and had sought "to organize government power in such a way as to safeguard popular liberty against the actions of public office" had thus become for America an "essential precaution in favor of liberty."[17]

C. Relation to Judicial Review

In the following chapters it will be seen that judicial review grew parallel to these concepts, and in fact, judicial review can be said to be based upon them in the following assumptions: 1) the acknowledgement that a higher law exists,[18] 2) the presumption that this higher law is interpretable, and 3) the requirement that the courts be the authoritative interpreter of this higher law because only in this way can the interpretation of the courts become binding on others, hence giving the courts their great power.

In America, at least on the theoretical level, these three assumptions were present. As for a belief in higher law this extended back to the very founding of the colonies. And so it is not surprising to hear Berger claim, "Thus the concept emerges that a constitution was a fundamental law to which other laws must conform."[19] The next assumption America already had granted concerned the notion of higher law as an interpretable law. The people by placing their sovereignty in the higher law or in American terminology, the constitution, not only reinforced the notion of limited government but also allowed the constitution to be interpreted.[20] So essential was this notion of the sovereignty of the people that one scholar has exclaimed, "The decisive assumption in the development of this judicial agency and authority was the real and ultimate sovereignty of the people."[21] Furthermore the fact that in America the constitution was written down no doubt aided its being an interpretable document.[22] The third assumption, that the courts ought to be the authoritative interpreter, is not so clear in American thought. However the belief in separation of powers provides a clue. Realizing the legislatures were to make law, the executive to enforce the law,

and the judiciary to interpret the law, it would seem quite logical to presume the judiciary was to interpret the Constitution because after all the Constitution was the highest law. Under separation of powers legislatures are to legislate and executives to execute, so why should these branches gain additional powers when it comes to the higher law? Certainly if the constitution is to keep the government in check by authority of the sovereign people, then mere law makers and executors should not decide what the constitution is, for then they would be exercising a judicial function.

Regardless of the foregoing analysis, the American Constitution did not specifically provide for judicial review of legislative or executive actions.[23] The most accurate description of the times suggests that

> Once the reaction to legislative supremacy had set in, once legislative interference in judicial matters had intensified as never before in the eighteenth century, a new appreciation of the role of the judiciary in American politics could begin to emerge.[24]

However the critical questions for this thesis still remain. When did this emerging "role of the judiciary" come to include the power of judicial review? And how was judicial review actually incorporated into American political thought?

FOOTNOTES

CHAPTER III

[1] Wood, The Creation of the American Republic, 1776-1787, p. 292.

[2] Berger, Congress V. The Supreme Court, p. 13.

[3] Chapter II text accompanying notes

[4] Ibid., text of Chapter II accompanying notes 9 and 10.

[5] Wood, The Creation of the American Republic, 1776-1787, p. 274.

[6] Here Wood at page 447 cites the "Address of the New Hampshire Convention" in the State Papers of New Hampshire, Vol. II, p. 846.

[7] Ibid., p. 304.

[8] This is taken from Iredell's speech entitled "To the Public," on August 17, 1786. See Wood at page 462.

[9] Ibid., p. 449.

[10] Thomas Jefferson, Notes on Virginia, p. 121, edited by Peden. See Wood, page 449.

[11] Edward Burns, James Madison, Philosopher of the Constitution (New York: Octagon Books, Inc., 1968), p. 189.

[12] Hamilton, Madison and Jay, The Federalist Papers, p. vii.

[13] Ibid., Federalist #48, p. 309.

[14] Ibid., Federalist #47, p. 301.

[15] Thomas Jefferson, Notes on the State of Virginia, p. 195, quoted by Madison in Federalist #48, pp. 310-311. Jefferson not only believed that the three powers ought to be separate but also noted that in America "all the functions of government, legislative, executive and judicial, were ending up in the legislative body." This points out Wood was in 1783. See Wood, The Creation of the American Republic, 1776-1787, p. 407.

[16] Wood, The Creation of the American Republic, 1776-1787, p. 451.

[17] Scigliano, The Supreme Court and the Presidency, p. 1. Also Wood at page 549 for the second phrase in quotation marks.

[18] Wood, The Creation of the American Republic, 1776-1787, p. 260.

[19] Berger, Congress V. The Supreme Court, pp. 28-9.

[20] See the first section of Chapter II, "Relation to Higher Law" and last section of Chapter I, p. 13 text accompanying notes 50-52.

[21] Wood, The Creation of the American Republic, 1776-1787, p. 453.

[22] See note 20.

[23] Edward C. Smith, The Constitution of the United States (New York: Barnes and Noble, Inc., 1936; reprint ed., New York: Harper and Row, 1972), p. 65. "One searches in vain in the Constitution for a statement granting the power of judicial review to the Supreme Court." Or Senator Breckenridge before the Senate in 1802 expressed a similar conclusion, noting that

> it is said that the different departments of Government are to be checks on each other and that the courts are to check the Legislature. If this be true, I would ask where they got that power . . . but I deny the power which is so pretended. If it is derived from the Constitution, I ask [the] gentlemen to point out the clause which grants it, I can find no such grant.

This is from the Annals of Congress, 7th Congress, 1st Session, pp. 178-9.

[24] Wood, The Creation of the American Republic, 1776-1787, p. 453.

CHAPTER IV

THE CONSTITUTIONAL CONVENTION

A. Awareness of Judicial Review

In debates and discussions about politics, Americans, in an attempt to give added weight to their position, often refer to the Constitution for support. However when both sides of a controversey refer to the Constitution the question arises, which side has the correct interpretation of the Constitution? To resolve such conflicts one ultimately ends up examining the Constitutional Convention of 1787 where the Constitution was formulated. It follows that if a specific institution or power is in question, then the debates and proceedings of this Convention must be referred to. It should not be so surprising, then, that in my quest to discover the origins of judicial review in the American mind that I should scrutinize the Constitutional Convention, or in the words of Senator Rutlege of South Carolina: "To this high authority I appeal--to the honest meaning of the instrument, the plain understanding of its framers."[1]

The investigation of the Convention should aim at determining in what manner and to what extent the concept of judicial review was held by the Founding Fathers. Easing our task somewhat is the fact that judicial review was indeed known as proven by a Mr. W. S. Carpenter who found from "contemporary newspapers" that the case of Bayard V. Singleton (1787) had been decided many days before the Convention actually met. Furthermore "the attorneys in the case who argued the unconstitutionality of the Legislative act" included William R. Davie, a delegate to the Convention from North Carolina, as well as James Fredell, a future

Supreme Court Justice.[2] Another example is that of Convention delegate John Blair who "was a member of the Virginia court of appeals which decided the case of Commonwealth V. Caton (1782)." In this case Blair and the other judges held "that the court had power to declare any resolution or act of the legislature or of either branch of it, to be unconstitutional and void."[3] Thus it is not hard to imagine that judicial review was known to the Founding Fathers. Easing our task even more is the clarity of the Convention's discussion of judicial review. On this topic Corwin claims

> that on no other feature of the Constitution with reference to which there has been any considerable debate is the view of the Convention itself better attested.[4]

B. Cause of the Convention--Legislative Misgovernment

In the previous chapters it was clearly suggested that following independence the new state governments which were dominated by the legislative assemblies, had governed miserably. Under these legislatures the citizens of the states suffered from constitutional abuses in regard to their property and inept economic regulation such as the infamous paper schemes. Such activities by 1787 led directly to creation of the Constitutional Convention.[5] For example, within the convention itself John Mercer inquired, "What led to the appointment of this Convention?" And he replied, "The corruption and mutability of the Legislative councils of the states."[6]

Nor was Mercer's appraisal of the legislatures unique among the delegates. On June eighth James Wilson declared, "[T]he Legislatures in

our own country deprive the citizens of Life, of Liberty, and Property, we have seen Attainders, Banishment, and Confiscations."[7] Others were also aware of the threat posed by the legislatures. We can find Governor Morris and James Madison concurring that "public liberty is in greater danger from Legislative usurpations than any other source."[8] The sentiment of the Convention is best summarized by one of the delegates from Massachusetts, Nathaniel Ghorum, who stated, "All agree that a check on the Legislatures is necessary."[9]

The recent legislative misdeeds had been seen often in the violation of the principle of separation of powers.[10] As early as the first week of the Convention James McHenry, on May 29, noted that the chief danger to constitutional government had been the democratic branch. The reason for this he asserted was that the "powers of government exercised by the people swallowed up the other branches" and that "none of the constitutions have provided sufficient checks" against this part of the government.[11] What had held back checks on the legislatures had been the doctrine of legislative sovereignty, yet by 1787 this doctrine was on the wane.[12] As a result of this fall of legislative sovereignty and hence legislative supremacy, the Constitutional Convention could and did conclude that legislative power was an "inherently limited power."[13] However the means by which the Convention planned to limit this power is presently unclear.

C. Separation of Powers at the Convention

The tenet upon which the Convention based its efforts to restrain the legislative branch was that of separation of powers. It was tenet first introduced on May 29, by Governor Randolph of Virginia. In a set

of fifteen resolutions, later known as the Virginia Plan, Randolph set forth the principle of separation of powers in resolutions three, seven and nine. In resolution three he proposed the establishment of a national legislature. This legislature was to have all the legislative prerogatives "vested in Congress by the Confederation" as well as the authority "to legislate in all cases to which the separate states are incompetent."[14] Randolph moved "that a National Executive be instituted" having "a general authority to execute the National laws" in resolution seven. And in resolution nine it was proposed that a National Judiciary be erected. Both the executive and judiciary were to receive a "fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution."[15] So clear was the message of these resolutions that one chronicler of the convention wrote, "Governor Randolph brought forward the principles of a federal government. The idea suggested was, a national Government to consist of three branches. Agreed."[16] Besides setting up the three distinct parts of government Randolph also can be viewed as implementing the first checks on the legislature. This is accomplished by the prohibition against altering the salaries of the executive and judiciary, an old tool of the legislature to influence the other branches in many states.

Just one week later, on and about June 4, the principle of separation of powers again was in the limelight. The issue before the Convention was that of the Council of Revision. The Council was to have been made up of the Executive and a certain number of the national judiciary. Its duty was both to revise legislation it thought detrimental to the

country and to veto any law passed by the legislative branch which it found to violate the Constitution. The purpose of the Council is clear enough--to allow the executive and judiciary branches to unite together so as to be an effectual check on the other branch of government.

In the debate that followed the Council's idea was defeated on two separate occasions, once in the first part of June and again in July. Both times the opponents argued that such a Council would violate the principle of separation of powers. On June 2 John Dickenson of Delaware "went into a discourse of some length, the sum of which was, that the Legislative, Executive, and Judiciary departments ought to be made as independent as possible." He was thus opposed to the Council of Revision because to him it was blending the national Judiciary with the Executive.[17] In the July debate Elbridge Gerry was most explicit. For this Massachusetts' delegate the Council

> was combining and mixing together the Legislative and other departments. It was establishing an improper coalition between the Executive and Judiciary departments. . . . It was making the expositors of the laws [the judges, act as] the Legislators which ought never to be done.[18]

What is most ironic about this debate is that even the proponents of the Council couched their arguments within the doctrine of separation of powers. What other explanation could be used to explain James Wilson's comment of June fourth, in which he maintained that if the three branches, legislative, executive and judicial were to be separate and independent, then the executive needed such a veto aided by the judiciary otherwise the legislature will "sink it [the executive] into non-existence."[19] Or how else would one explain Madison's lengthy statement in

July, when he tried to show there was no departure from separation of powers. Instead he found the proposed Council to be a precaution in favor of this guiding principle. He reasoned that distinctions written down had not provided sufficient security against legislative encroachments and in order to remedy this situation it was necessary "to add a defensive power to each branch "which should maintain the Theory in practice. In so doing," he continued, "we did not blend the departments together. We erected effectual barriers for keeping them separate."[20]

Never far from the great controversies of the Convention, the notion of separation of powers appears as an essential part of the New Jersey Plan which William Patterson laid before the Convention to replace that "proposed by Mr. Randolph."[21] Many differences did exist between the two plans and Wilson pointed out thirteen of these the very next day. Some of the more noticeable differences between the Virginia Plan and the New Jersey Plan were: 1) a bicameral versus unicameral legislature, 2) representation based on the people at large versus representation based on the states, 3) a single chief executive versus a plural executive and 4) ratification by the people versus ratification by the legislatures.[22]

Yet in other ways the two plans were quite compatible, especially over their common reliance on the separation of powers. Like the Virginia Plan, the New Jersey Plan provided for legislative branch with increased jurisdiction. This "Congress" was to have authority expanding on that granted in the Articles of Confederation, including such new power as "to pass acts for the regulation of trade and commerce" and to set penalties for transgressing such acts. Also an executive and judiciary were to be established both of which were to receive fixed compensation for their services without the possibility of increases or

decreases.[23] It is thus no sophistry when Patterson boasts that like Mr. Randolph's Plan "a distinct executive and judiciary also were equally provided by this plan."[24]

Returning to the matter at hand, namely the separation of powers at the Constitutional Convention, we now turn our attention to the work of the two main committees of the Convention, those of detail and style. On July 23 the Convention referred to the Committee of Detail a resolution calling for the Government of the United States "to consist of a Supreme Legislative, Judiciary and Executive."[25] The Committee adopted this notion and sent it back in Article II of its report which was approved by the Committee of the whole on August 7.[26] One month of discussion transpired before the report of the Committee of Detail was sent to the Committee of Style on September 10. Nonetheless the maxim of separation of powers remained untouched. The legislative power was placed in a Congress, the executive power in a "President," and the judicial power in "one Supreme Court."[27] And from the final draft of the Constitution, that which most of us are familiar with, this separation of powers still remains. Article I grants all legislative power to the Contress. Article II grants the executive power to the President. And Article III designates the judicial power to the Supreme Court and whatever inferior Courts Congress may create. It is little wonder then that such a great scholar as Corwin would conclude that our Founding Fathers "all agreed that the powers of the national government should be distributed among a legislative, an executive, and a judicial branch."[28]

D. Implications for the Judiciary-- The Independence of Judges

One necessary corollary of the notion of separation of powers is that the branches of government must be independent of each other so as to make their decisions free of any influence of the other branches. This deduction was uncovered by John Mercer, who told the Convention, "It is an axiom that the Judiciary ought to be separate from the Legislative: but equally so it ought to be independent of that department."[29] Indeed it is the independence of the three branches, not simply the distribution of functions which is the central feature of our system of separation of powers.[30]

Realizing the repercussions to a system of separation of powers without guaranteed independence of the branches the framers sought to isolate each branch from the other. The isolation of the judiciary is a case in point. As expected, the judiciary was set apart from the legislature. For it had been the usurpations of the state legislatures which had led to the Convention itself. In all three major documents of the Convention: the Virginia Plan, the New Jersey Plan and the proposed Constitution, the judiciary was to be protected from the Congress by stable salaries which were to be free from legislative tampering.[31] There was, of course, one fundamental difference and no mean one at that. The framers did not stop there, they also sought to isolate the judiciary from the executive "because they remembered how certain English Kings had used judges to punish enemies and reward friends.[32] In addition to the guarantee of salary, other checks are placed on the executive's ability to influence judges. The most telling of these checks is that of

removal from office. Once appointed, judges "shall hold their offices during good behavior" states the Constitution in Article III. And even though removal is provided for, the Executive has no part in such proceedings.[33] It is then not without little cause that Senator Rutlege observes, "They did establish an independent judiciary."[34]

At this point it is safe to say that the Founding Fathers wanted the judicial branch protected from executive and more primarily legislative pressures. Such protection, logically, had to be predicated upon the fear that the Courts, in the normal course of their duties, might do something to initiate action against they themselves from the other branches. Otherwise one would have to contend that the Congress and President assailed the Courts for no reason. Yet it remains to be seen exactly how and on what grounds the Courts could anger the other branches.

E. Exposition of the Laws-- A Clue to the Authoritative Interpreter

The fall of the Council of Revision had been due primarily to its violation of the separation of powers concept.[35] The major forays being one, an unacceptable alliance between the Executive and Judiciary, and two, the combining of legislative authority with that of Judicial authority. It is the latter point which is of concern here. It was believed by the Convention that the legislature was to make laws and that the judiciary was to expound the laws. Along this line of thought Nathan Ghorum told the Convention "that the judges ought to carry into the exposition of the laws no prepossessions with regard to them."[36] This is to say that the judges should not engage in revising and modifying laws before

statutes go into effect, for this is the legislature's duty. In the famous June fourth debate Rufus King of Massachusetts concurred with Ghorum, announcing "that the judges ought to be able to expound the law as it should come before them free from the bias of having participated in its formation."[37]

In the second major debate over the Council of Revision, which was held in July, Elbridge Gerry and Caleb Strong expressed sentiments similar to those of Ghorum and King. Gerry opposed the Council because "it was making the Expositors of the Laws, the Legislators which ought never to be done."[38] And "Mr. Strong thought with Mr. Gerry that the power of making ought to be kept distinct from that of expounding the laws." Strong concluded his speech saying "[N]o maxim was better established."[39]

What does this entail for judicial review? After an examination of the words exposition and expound some thought-provoking possibilities come into focus. The word expound means to set forth or to make clear the meaning of some thing. Synonyms would be such words as interpret and explain. Exposition refers to the setting forth of the meaning of a writing or discourse, like an interpretation.[40] Viewing the statements of Chorum, King, Gerry and Strong in light of this definition the notion that the Judges are "the expositors of the laws" assumes new ramifications. It now appears that when these delegates refer to the power of the Courts to expound the laws, they mean the power to set forth or interpret the meaning of these laws. Add to this the great reverence for separation of powers and this power to interpret the laws belongs exclusively to the Judiciary.

What is taking shape is essential to judicial review, namely the

designation of the Courts to be the sole expositor or interpreter of the Constitution. However all the evidence up to this stage alludes to the Judiciary as expositor of laws, not as expositor of the highest law, the Constitution. Yet the exposition of the Constitution by the Judiciary can be found. Mr. Gerry noted that the Judiciary did not need to be a part of the Council of Revision because in his words, "they will have a sufficient check against encroachments on their own by their exposition of the laws, which involved a power of deciding on their constitutionality."[41] (Emphasis mine.) That the notion of expounding the constitutionality of a law included the ability to halt enforcement of that law is testified to by Mr. King. He pointed out that since the Courts had the power to expound laws, then "they will no doubt stop the operation of such as shall appear repugnant to the Constitution."[42] Clearly, the Convention was aware that the power to be the expounder of the laws included the power to interpret Constitution. Thus the delegates frequently equated the function of judicial review with the power of the judges as expositors of the law.[43]

F. Explicit Acknowledgement of Judicial Review

Briefly judicial review refers to the process whereby the judges have the authority to strike down legislation which they believe to be contrary to the governing constitution.[44] And so Mr. Gerry certainly is referring to judicial review when he referred to the fact that "[i]n some states the judges had already set aside laws as against the Constitution." Nor should it be overlooked that this had been done "with general approbation."[45] In July we find Madison making reference to a

Rhode Island case where the judges had denied execution of an unconstitutional law.[46] It is not going too far to conclude that the Convention did comprehend the notion of judicial review.

In three different issues discussed do we find evidence that judicial review was to be part of the system. In each instance judicial review is presented as an assumption of the system. For example, Madison, in regard to the prohibition of ex post facto laws, points up the obligation of judges to declare violations of this prohibition null and void.[47] More than one authority has seen this statement as Madison's acquiescence of judicial review.[48] Also in connection with this ex post facto law prohibition the position of Hugh Williamson came to light. Noting that the judges of his home state of North Carolina had used the Constitution to check legislation, Williamson told the Convention that a clause similar to the prohibition in North Carolina's Constitution would be worthwhile for the American Constitution because the judges could "take hold of it." He further informed the Convention that such review by the judges had done good for his state and would probably do the same for the nation.[49] These comments definitely place Williamson in the pro-judicial review camp.

The second major issue in which the Convention's attitude toward judicial review manifests itself is the earlier examined Council of Revision. Besides Gerry and King, who together reasoned that the Courts would decide the Constitutionality of laws as a result of the power to expound the laws, other delegates' opinions can be found.[50] Among the opponents of the Council is Luther Martin of Maryland. In denouncing the Council Martin argued that it "could not produce the particular

advantage expected from it." The reason he gave was that as for

> the Constitutionality of laws, that point will come before the Judges in their proper official character. In this character they have a negative on the laws. Join them with the Executive in the Revision and they will have a double negative.[51]

While Martin and others believed that the existence of judicial review was more than adequate to meet the problem of a power lusting Congress others were not. Madison thought the Council of great importance to Constitution because it would allow the Judiciary "additional opportunity of defending itself against Legislative encroachments."[52] The phrase "additional opportunity" is noteworthy. The words suggest strongly that the Courts already have another alternative to check the legislature. Is this existing alternative judicial review? George Mason, another supporter of the Council, answers this question affirmatively, but maintains that judicial review based on the Constitutionality of a law will not in and of itself prevent bad laws. He complains,

> They could declare an unconstitutional law void. But with regard to every law however unjust, oppressive or pernicious, which did not come plainly under this description, they would be under the necessity as Judges to give it a free course.[53]

James Wilson, who was commonly accepted as the most learned legal scholar of his time, is another who saw judicial review as inadequate to meet the menace of bad laws.[54] For him the power of Courts as then comprehended "did not go far enough. Laws may be unjust, may be unwise, may be dangerous, may be destructive," exclaimed Wilson, "yet not be so unconstitutional as to justify the Judges in refusing to give them effect."[55] And one month later in August his position remained unchanged. This time his argument was that it is better to stop an improper proposal before

it becomes law rather than "to declare it void when passed."[56] In both of these passages Wilson expresses apprehension over the effectiveness of judicial review. Never does he or Mason or Martin call into question the existence of judicial review but rather the focal point of concern would be on the proper structure of the legislature.

The third and final issue which helps to illuminate the Convention's opinion in regard to judicial review is that of a veto by the national legislature over state legislation. Once again, judicial review is clearly assumed to be a part of the system. Gouverneur Morris opposed such a legislative veto because, as he says himself, "A law that ought to be negatived will be set aside in the Judiciary department."[57] Madison also intimated a belief in judicial review of state laws which are in conflict with the efficacy and security of the national government. His exact wording is that the states "can pass laws which will accomplish their injurious objects before they can be repealed by the General Legislature or be set aside by the National Tribunals."[58] (Emphasis added.) For argument's sake it seems clear that when the Convention voted down a national legislative veto that Madison would have kept his stance on the need for control of state laws and rest his faith in the Judiciary to do the job he portrayed as so essential. And that this is the case is substantiated by Roger Sherman of Connecticutt who thought any law contravening the authority of the Union would not be considered valid by any court.[59]

Overall, then, the Convention was aware of what judicial review signified and how it operated. Evidence to this effect is provided by Gerry, Madison and Williamson. The discussions of the ex post facto law

prohibition indicate it was the Courts who were to enforce the prohibition. In the lengthy controversey over a Council of Revision, supporters and opponents alike recognized judicial review of legislation. The difference between the two sides arose over the efficacy of this power. Supporters of the Council believed judicial review would be inadequate to meet the threat of unjust legislation because judicial review was too limited since it dealt only with the constitutionality of laws. Opponents of the Council held that the power of judicial review was all that the notion of separation of powers would allow, granting the Judiciary any further prerogative would thus violate the principle held so dear by the Convention.[60] The names of Gerry, King, Martin, Madison, Mason and Wilson are in the limelight here. And in the debate over a national legislative veto against state laws we see proof again that the framers assumed judicial review to be part of the governmental process they were creating. In this instance Morris and Sherman along with Madison are the main contributors. To say the least, it cannot be presumed that the delegates were unknowledgeable that the Judiciary's power might hold a considerable control over legislation and that this control would be exercised in the everyday course of events.[61]

FOOTNOTES

CHAPTER IV

[1] Jonathan Elliot, ed., Debates in the Several State Conventions on the Adoption of the Federal Constitution, Vol. 4, 2nd ed. (Philadelphia: J. B. Lippincott, 1941), p. 446.

[2] Corwin, Doctrine Judicial Review, p. 39.

[3] Beard, The Supreme Court and the Constitution, pp. 18-19.

[4] Corwin, Doctrine Judicial Review, pp. 12-13.

[5] See p. 23, note 19 of Chapter II, some of the abuses are listed on pages 33 and 34 of Chapter III, section A.

[6] Max Farrand, ed., The Records of the Federal Convention of 1787, Vol. 2, revised ed. (New Haven, Connecticut: Yale University Press, 1966) p. 288.

[7] Ibid., 1: 172.

[8] Ibid., 2: 76. And in September he reiterated this view "considering the Legislative tyranny the great danger to be apprehended," this at 2: 551.

[9] Ibid., 2: 79. Morris concurred, stating at p. 75 that "[s]ome check [is] necessary on the Legislature."

[10] See Section A, Chapter III for a more elaborate discussion.

[11] Farrand, Records, 1: 26-7.

[12] See Section C, Chapter II and Section A, Chapter III.

[13] Corwin, Doctrine Judicial Review, p. 42.

[14] Farrand, Records, 1: 20-1. Resolution three merely claimed to set up a bicameral legislative, but in Resolution six the power to originate Acts was given to both branches thus a law-making branch established.

[15] Ibid., 1: 21-2. The other two branches of government were found in resolutions seven and nine. The former read, "Resolved that a National Executive be instituted," and the latter, "Resolved that a National Judiciary be established. . . ."

[16] Ibid., 1: 57.

[17] Ibid., 1: 86. Dickenson expressed a similar belief later when he noted "you must separate the Legislative, Judiciary, and Executive" because the judiciary's power was to interpret the law and the executive only to administer it. This at Ferrand, 1: 108.

[18] Ibid., 2: 75. Earlier Gerry had observed that the Council of Revision would have made the judiciary judges of public policy which violated separation of powers. 1: 97-8.

[19] Ibid., 1: 98.

[20] Ibid., 2: 77.

[21] Ibid., 1: 242.

[22] Ibid., 1: 251-2.

[23] Patterson's Plan established an executive branch in Resolution Four and a federal judiciary in Resolution Five. Farrand, Records, 1: 244.

[24] Ibid., 1: 251.

[25] Ibid., 2: 129.

[26] Ibid., 2: 193.

[27] For the legislative power being placed in Congress, see 2: 565; for the executive power, see 2: 572, and for the judicial power, see 2: 575. All are in reference to Farrand's Records.

[28] J. W. Peltason, Corwin and Peltason's Understanding the Constitution, 6th ed. (Hinsdale, Illinois: Dryden Press, 1973), p. 15.

[29] Farrand, Records, 2: 298.

[30] Peltason, Understanding the Constitution, p. 23.

[31] The Virginia Plan protected the Judiciary in Resolution Nine and the Executive in Resolution Seven, Farrand, Records, 1: 21-22. The New Jersey Plan did likewise in Resolution Five for the Judiciary and Four for the Executive, Ibid., 1: 244. And the Constitution does os in Article III, section one for the Judiciary and Article II, section one, paragraph six.

[32] Peltason, Understanding the Constitution, p. 25.

[33] United States Constitution, Article III, section one.

[34] Elliot, Elliot's Debates, 4: 445.

[35] See text accompanying notes 17 and 18 of this chapter.

[36] Farrand, Records, 2: 79.

[37] Ibid., 1: 98.

[38] Ibid., 2: 75.

[39] Ibid., 2: 75.

[40] Webster's International Dictionary Unabridged, 3rd ed. (1966), s.v. "expound."

[41] Farrand, Records, 1: 97.

[42] Ibid., 1: 109.

[43] Berger, Congress V. The Supreme Court, p. 58.

[44] For example, Robert G. McCloskey in The American Supreme Court, (Chicago: University of Chicago Press, 1960), p. 30, defines "judicial review [as] the power to refuse to enforce an unconstitutional act of either the state or national government." Berger, on page vii of his book, Congress V. The Supreme Court, agrees, noting, "judicial review--that is the power to set aside legislative acts."

[45] Farrand, Records, 1: 97.

[46] Ibid., 2: 28.

[47] Ibid., 2: 440.

[48] Burns, James Madison. on page 180 concludes that this remark in regard to the prohibition against ex post facto laws "appears to have been a definite recognition of the power of the judiciary to hold an act of the national legislature unconstitutional and void." Raoul Berger also came to this conclusion. He wrote that Madison's remark makes a "tacit assumption that judicial machinery exists for such a purpose and that judges are obliged to nullify infractions of constitutional prohibitions," Congress V. The Supreme Court, pp. 79-80.

[49] Farrand, Records, 2: 376.

[50] Please see notes 41-43 of this chapter and the text accompanying them.

[51] Farrand, Records, 2: 76.

[52] Ibid., 2: 74.

[53] Ibid., 2: 78. Upon this evidence Berger, on page 61 of Congress V. The Supreme Court, declares that "Unmistakably . . . Mason did recognize an existing judicial power to declare laws unconstitutional, and it is precisely that power that is in issue."

[54] Berger, Congress V. The Supreme Court, p. 56. Berger is citing McCloskey from the Introduction to the 1967 edition of Wilson's Works, p. 2.

[55] Farrand, Records, 2: 73.

[56] Ibid., 2: 391.

[57] Ibid., 2: 28.

[58] Ibid., 2: 27.

[59] Ibid., 2: 27.

[60] See Section C of this chapter.

[61] Beard, The Supreme Court and the Constitution, p. 63. His summary is

> In view of these discussions and evidence adduced above, it cannot be assumed that the Convention was unaware that the judicial power might be held to embrace a very considerable control over legislation and that there was a high degree of probability that such control would be exercised in the ordinary course of events.

CHAPTER V

THE STATE RATIFYING CONVENTIONS

A. Theoretical Concepts--Sovereignty of the People

Before becoming the law of the land the proposed document of the Constitutional Convention had to be ratified by the people. The process chosen to accomplish this task was a series of conventions--later commonly referred to as the State Ratifying Conventions--to be held in each state. Although approval was needed by only nine of the thirteen states for ratification, after much heated debate all thirteen states did ratify the Constitution. Because the particular conventions in North Carolina, Pennsylvania, Virginia, and New York discussed the notions of judicial review most thoroughly, it is thus from these conventions from which most of the material is drawn.

Yet before specifically reviewing judicial review in these conventions, we should first focus our discussion on the broader theoretical concepts upon which the system was constructed. One of these concepts was the crowning of the people, not the legislature, as the sovereign power in all American government.[1] In the North Carolina Convention, for example, William MacLaine reported, "The people here are the origin of all power."[2] And in Pennsylvania James Wilson, a former delegate to the Convention in Philadelphia, announced, "My position is, sir, that, in this country, the supreme, absolute, and uncontrollable power resides in the people at large."[3] And it is worth noting that this idea of the people as sovereign was viewed as a distinctly American innovation.[4]

An innovation which was arrived at by thought and reason, as MacLaine explains:

> There is no people on earth so well acquainted with the nature of government as the people of America generally are. We know now that it is agreed upon by most writers, and men of judgment and reflection, that all power is in the people, and immediately derives from them.[5]

This notion of the sovereignty resting with the people had another equally far-reaching effect besides destruction of legislative supremacy. This other effect was the pushing aside of individual state sovereignty. Wilson reminded the Pennsylvania Convention that the "Constitution was not framed merely for the states; it was framed for the people also."[6] The assumption for this argument was made not in Pennsylvania but in Virginia where the President of that state's convention, Edmund Pendleton, maintained that "the happiness of the people is the object of this government, and the people are therefore made the fountain of all power."[7] The resulting view is that:

> the states are made <u>for</u> the people, as well as by them, and not the people made for the states; the people, therefore, have a right, whilst enjoying the undeniable powers of sovereignty, to form either a general government, or state governments, in what manner they please."[8]

Similar expressions are found in the North Carolina Convention where it was believed that all power is derived from the people and therefore the people are "competent to form this or any other government."[9] The result of the people's sovereignty was that the federal government had a theoretical justification for controlling state action wherever the need might arise.

B. Theoretical Concepts--Limited Government

Another concept prevalent at the state conventions was that of limited government. This concept which is based on the notion of higher law is reinforced by the sovereignty of the people which put all government action under the people's sovereign will.[10] In particular it was held that the legislative branch ought to be restrained. In order to establish a stable and secure government Wilson conceived it to be of "essential importance" that the legislature should be restricted because this despotism was feared as the most dreadful and most difficult to correct.[11] And James Fredell is known to have said "we decisively gave our sentiments against the theory of the necessity of the legislature being absolute in all cases."[12]

Meanwhile many of the opponents of the Constitution concurred with this notion of limited government. Melancton Smith, leader of the opposition in New York, acted with shock upon hearing that Congress ought to have unlimited powers.[13] Perhaps the best known of the opponents of the Constitution at any state convention was Patrick Henry. Yet he too feared an all-powerful Congress which would not be confined to its enumerated powers.[14] Hiw apprehensions were founded upon the necessary and proper clause which provided that Congress could make any law which would be necessary to carry their other laws into execution. Henry inquired, "If they think any law necessary for their personal safety, after perpetrating the most tyrannical and oppressive deeds, cannot they make it by this sweeping clause?" Continuing his assault he asked, "Can you say that you will be safe when you give such unlimited powers?" Not satisfied

with mere intimation Henry pointedly warns that no matter how cautious the selection of representatives may be, it is "dangerous to trust them with such unbounded powers." Suggesting that it is inconsistent with good policy to grant unlimited authority, he shares his belief and fears not just in regard to the Congress but any unlimited government when he says, "The experience of the world teaches me the jeopardy of giving enormous power."[15]

The response of the Constitution's supporters was unanimous--the Constitution does not grant to Congress or any other branch of government unrestricted power. Pendleton responded to Henry in the Virginia Convention by pointing out that the necessary and proper clause did not grant Congress the authority "to impede the operation of any part of the Constitution."[16] In Pennsylvania Judge McKean declared that the supremacy clause of article VI "gives Congress no further powers than those already enumerated."[17] And in a broader sense, the Constitution as a whole was regarded as a check on Congress. "If Congress should make a law beyond the powers and the spirit of the Constitution," said MacLaine,

> should we not say to Congress, "You have no authority to make this law. There are limits beyond which you cannot go. You cannot exceed the power prescribed by the Constitution. You are amenable to us for your conduct. This act is unconstitutional. We will disregard it. . . ."[18]

C. Theoretical Concepts--A Sovereign Constitution

Up to this point it has been established that the supreme power in government, at least as far as the majority of Americans was concerned, was the people and consequently all governments were to be limited by this power. This is to say that no governmental authority may contradict

the will of the sovereign power. But how was the will of the sovereign people to be discovered? In America the will of the sovereign people was laid in written constitutions. As for the idea that government is restricted by the specific enumeration of its powers Wilson has maintained "that nothing more is intended to be given than what is so enumerated."[19] That this specific enumeration of powers is in the proposed Constitution was acknowledged in the North Carolina Convention where a constitution was defined as a delegation of particular powers by the people to their representatives for specific purposes. Under such a definition no power could be exercised but what had been expressly given.[20]

In the first section of this chapter Wilson in Pennsylvania and MacLaine in North Carolina asserted that the sovereignty of the people subjugated the individual states.[21] And if the people's sovereign will is placed in constitutions would not the national Constitution with the will of all the people be superior to that will of a single state? To supporters and opponents of the Constitution the reply to this question was the same--yes. William Davie, a former delegate at the Philadelphia Convention, told the North Carolina ratifying Convention, for example, that prohibitions in the Constitution "ought to supersede the laws of particular states."[22] Without the supremacy clause, which provided that the Constitution was to be "the supreme law of the land," Governor Johnston thought "the whole Constitution would be a piece of blank paper." His worry was that one or more states might counteract national laws, giving an individual state veto power over the rest of the nation.[23]

Nor was the intended effect of the proposed Constitution lost on the minds of its opponents. It was precisely this subordination of the state

governments which initiated their opposition to the Constitution. Samuel Spencer objected that the state governments were not adequately protected from the national government and feared the states would be "swallowed up."[24] Another opponent of the Constitution, William Goudy, remarked "That the Constitution has a tendency to destroy the state governments."[25] Thus for opponent and supporter alike, the new Constutition clearly spelled the end of complete and unchecked independence for the individual State governments.

If the first section of this chapter saw the groundwork laid for control of State governments, then the second section saw the foundation laid for control of the national government and in particular the legislative branch. In the unlimited government section, Patrick Henry and Melancton Smith to a lesser extent voiced fears of an unrestrained Congress which might pass any law it wanted.[26] Defenders of the Constitution responded by 1) claiming that the enumerated powers were all that the Constitution allowed and 2) claiming that the people could also reprimand Congress.

Neither of these responses proved satisfactory to the opposition and their rebuttal to these supposed checks on Congress is found once again in the North Carolina proceedings. David Caldwell presented the opponents' contention by drawing a parallel between the English Parliament and the proposed American Congress. Caldwell called attention to the fact that members of Parliament had formerly been elected for only three year terms and that Parliament on its own initiative had upped the terms of office to seven years. Caldwell rationalized that since the proposed Constitution allowed Congress to adjust the time, manner and

place of elections then Congress might duplicate the actions of Parliament and extend its term of office for possibly twenty years or even life.[27]

William MacLaine was the first supporter of the Constitution to refute Caldwell's hypothesis. The thrust of MacLaine's refutation was that the British and the proposed American system were not comparable. He pointed out that in England there was no written constitution, only the Magna Carta and the bill of rights. Furthermore MacLaine, citing Blackstone's Commentaries, argued that in England Parliament's power was "transcendent and absolute and can do and undo every thing that is not naturally impossible."[28] Thus he concluded that the action which Caldwell had referred to could not happen under the American system because Congress was constrained by the Constitution whereas in England Parliament was not restrained by any such constitution.

Immediately succeeding MacLaine on the convention floor was another proponent of the Constitution, Governor Johnston. Johnston too stressed the differences between the two political systems. However he not only announced the weak points of the British system in the contemporary American mind, such as the lack of a written constitution and the unbounded power of Parliament, but also added how the American system was to work, at least in part. Johnston spoke to the restrictions placed upon Congressional powers, pointing out that these powers were "circumscribed, defined and clearly laid down" and that in particular these powers did not include any authority to alter the Constitution.[29]

Obviously there was a pattern of thought emerging which was uniquely American. The comments of MacLaine and Johnston show the great reverence

held in America for a higher law--in this case a written higher law called the Constitution. Also these remarks clearly denote the tenet of the people being sovereign, not the legislature as exists in England today as well as one hundred eighty-nine years ago.

It would be impressive enough to show that Americans were no longer merely stating their belief in such concepts but actually beginning to think and argue in these terms as accepted principles of good government. There was, however, yet another American innovation coming to the forefront, the sovereign constitution. Realizing that the people could not exercise their sovereign power over government on a daily basis, some storing place for this sovereignty was necessary, and the Constitution was thought of as this storing place. Two syllogisms will help illustrate matters. The first shows the power of the people in regard to government and the second shows the effect of the transfer, on a non-permanent basis from the people to the Constitution.

I

1. The sovereign in any state limits all governmental authority,
2. In America the people are sovereign,
3. Therefore in America the people may declare any and all limits on government, both state and national, that they wish.

II

1. The people in America are sovereign,
2. The people in America transfer their sovereignty, subject to recall by them, to the Constitution,
3. Therefore the Constitution is vested with the sovereign authority in America which no governmental entity may alter.

With this second syllogism the power of the Constitution to overcome attacks from a power-hungry federal branch or an intransigent state government is firmly set in the highest power--the people. A fine example of this new thought in America that the Constitution is sovereign occurs in the Virginia Convention when Governor Edmund Randolph discusses freedom of habeaus corpus in the new federal government. Randolph contended that protection of "habeaus corpus is at least on as secure and good a footing as it is in England." He reasoned that in "that country, it depends on the will of the legislature," while in America this privilege is secured by the Constitution.[30] The difference is obvious: in England the Parliament ensures the right of habeous corpus and Parliament also possesses the sovereign power, whereas in America it is the Constitution which guarantees the right of habeous corpus and therefore must have the same sovereign power. But while we have a sovereign Constitution with the authority to limit both federal and state government action, it is still unknown how the Constitution is to enforce these limits.

D. The North Carolina Convention

In this convention the predominant trend was to look to the judiciary for enforcement of the Constitution's provisions. As was the case elsewhere, the Constitution was seen as the supreme law of the land. Yet it was also maintained that laws or powers exercised without being granted in the Constitution did not constitute supreme laws. Consequently the major concern facing Americans was, who is to decide which laws or powers were properly granted.[31] William Davie observed "that the judiciary ought to be competent to the decision of <u>any</u> question arising out

of the Constitution itself."[32] His claim was based on the logic that the Courts would be enforcing the Constitution, like any other law, when they determined if a specific law qualified to be a superior law backed by the Constitution's authority. He therefore acknowledged but two ways "in which the laws can be executed by any government." One mode of execution was coercion by military force and the other was coercion through a judiciary. For any civilian government, monarchy, republic, or democracy, Davie understood "that there is no way of enforcing the laws but by the instrumentality of the judiciary."[33]

What Davie had in mind was for the Courts to keep an eye on the state governments which might try to undermine parts of the Constitution. In the Constitution there are certain fundamental principles which "ought not to be violated" by any state's future legislation. He, as a North Carolinean, was especially interested in the upkeep of the principle which prohibited any impost or duty being laid by an individual state. His fear was that the importing states, like Virginia, would pass laws laying such import taxes, thus violating the Constitution and making North Carolineans poorer because rival goods produced within Virginia would be cheaper and so get a larger share of the lucrative Virginia market. Yet in the judicial branch Davie and others saw a power "to correct and counteract such laws. . . ." This restriction "would have been a dead letter, were there no judiciary constituted to enforce obedience to it." Thus in regard to state laws the Constitution was presumed to be enforced by the judiciary, otherwise the injunctions and regulations contained therein could be disobeyed, neglected or contravened.[34]

Whereas Davie was concerned with free-acting states other members

of this convention were engaged with the controversey over the powers of Congress. William MacLaine asked, "Has any man said that the legislature can deviate from this Constitution? The Legislature," he responded, "cannot travel beyond its bounds."[35] The bounds which were to thwart legislative ambition were found in the Constitution thus the supposed omnipotence of the legislative branch, which some feared, was absurd and unconstitutional.[36] It was apparent that a judgment could be made as to what was consistent with the Constitution and what was not. We see MacLaine saying that "such an act, sir, would be a palpable violation of the Constitution"[37]; and James Fredell stating, "If the Congress should claim any power not given them, it would be as bare a usurpation as making a King in America."[38]

What is the result of distinguishing laws which violate or contradict the Constitution and those that do not? The result is that the former do not possess the authority of law while the latter do. Governor Johnston insisted that laws repugnant to the Constitution "will be nugatory and void."[39] Comparing the new Constitution with the old Articles of Confederation, John Steele suggests that the Judiciary is to make the judgment on what is against the Constitution and therefore void. Steele reminded his fellow delegates that

> The judicial power of [this] government is so well constructed as to be a check. There was no check in the old Confederation. Their power was, in principle and theory, transcendent. If the Congress makes laws inconsistent with the Constitution, independent judges will not uphold them.[40]

In fact, never was a word spoken to deny Steele's assertion.[41] The implication of this silence is clear, judicial review of Congressional legislation to discover any contradictions between it and the Constitution

is the process by which the Constitution is to be defended. In addition, the judiciary is also to rule on the acceptability of State legislation to the Constitution when the need arises as contended by Davie. Judicial review thus appears to have gained a fast footing in North Carolina.

E. The Pennsylvania Convention

This convention also had to confront the problem of keeping the Constitution intact. On whose shoulders was this burden to lie? James Wilson answered the judiciary, basing his argument on Article III, section 2 of the Constitution, which reads "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, [and] the laws of the United States."[42]

The prime suspect for abuses of the Constitution, in the Pennsylvania Convention, was the Congress. The chief justice of the Pennsylvania Supreme Court urged that "in order to secure liberty and the Constitution, it is absolutely necessary that the legislature should be restrained." He went on to suggest that this restraint could be achieved "by the judges deciding against the Legislatures in favor of the Constitution."[43] Wilson elaborates:

> If a law should be made inconsistent with those powers vested by this instrument in Congress, the judges, as a consequence of their independence and the particular powers of government being defined, will declare such law to be null and void; for the power of the Constitution predominates.[44]

Nor was this mentioned once and dropped, Wilson would not leave it at that. On December 1, 1787, we find Wilson relating that if the legislature overstepped its bounds in passing a certain law it would be the duty of the judges to pronounce such an act void.[45] Three days later

he repeated his conviction in ridiculing speculation that the judges might be impeached by Congress if they were to frustrate the will of Congress. He challenges his opposition, "What House of Representatives would dare to impeach, or Senate to commit; judges for the performance of their duty?[46] The message of Wilson, contributor of over ninety per cent of the record published in Elliot's Debates, was not lost on the opposition. Robert Whitehill testified that granting such power to the judges was dangerous.[47] Nonetheless the Pennsylvania Convention ratified the Constitution and therefore must be seen as ratifying the beliefs of its eloquent defender, James Wilson.

F. The Virginia Convention

In no other convention was the existence of judicial review more pronounced than Virginia's. In their discussions the Virginia delegates: 1) gave the judiciary a wide jurisdiction; 2) perceived the judges as a bulwark against tyranny, whether in executive or legislative branch; 3) saw the Courts as guardians of the Constitution; and 4) approved the process known as judicial review. Studying each of these actions separately will help to inform us of the workings of the Constitution as understood by the framers and people alike, and the role judicial review was intended to play in these workings.

The wide latitude of the Courts' jurisdiction is attested to by no less than four of this convention's leaders, George Mason, James Madison, Edmund Pendleton and Edmund Randolph. Mason reflected,

> that the general description of the judiciary involves the most extensive jurisdiction. Its cognizance in all cases arising under the system [Article III, section 2

> of the Constitution] and the laws of Congress, may be said to be unlimited.[48]

Madison expressed the opinion "that the judicial power should correspond with the legslative." He thought this being "so necessary and expedient" that it was not objected to.[49] If Mason articulated the Courts' jurisdiction vis a vis the Constitution, Madison in regard to the Congress, then Pendleton, the President of the Virginia Convention, may be regarded as pushing the Courts' jurisdiction into the area of state law when he noted that the Courts must prevent any effort by the states to impede the implementation of federal laws.[50] The judiciary thus had jurisdiction in matters concerning the Constitution, the Congress and the states.

If the convention handed the judiciary a wide jurisdiction, it gave it an equally wide mandate--extirpate governmental abuses. Patrick Henry stated his belief that "the judiciary are the sole protection against a tyrannical execution of the laws."[51] Edmund Randolph, Governor of Virginia, voiced agreement with Henry, noting that before cruel punishments could be carried out the judges would have to judge "contrary to justice."[52] More specifically, both the Congress and executive were thought to be checked by the Courts. In connection with the former, Randolph exclaimed, "If Congress wish to aggrandize themselves by oppressing the people, the judiciary must first be corrupted!"[53] And as for the executive branch, John Marshall assured the delegates that the federal courts would prohibit any federal officer from beating a poor man or abusing that poor man's family. In fact, Marshall remarks, "Were a law made to authorize them, it would be void."[54] In this last phrase we have not only the order to prevent excesses and misconduct by government but also a method to accomplish the task, voiding laws.

Putting together one, jurisdiction over the Constitution, with two, the power to void laws, the result is judicial review. In William Grayson's statement that Congress may not make a law contrary to the Constitution or one which would abridge it, he also says that the judges are to defend the Constitution. And the judges too are restrained, for they "can neither abridge nor extend it."[55] The mandate to the court is clear, protect the Constitution. George Nicolas came to a similar conclusion, adding that any attempt to exceed the enumerated powers will be void.[56] In fact, the voiding of usurpations was thought to be within the judiciary's scope of powers, as can be seen in Mason's comment on ex post facto laws. He said, "an express power is given to the court to take cognizance of such controversies, and to declare null all ex post facto laws."[57]

That the above statements accurately reflect the perception of the new Constitution by the Convention as a whole is verified by leaders of the convention like Henry, Pendleton and Marshall. Henry, as shown previously, was an ardent opponent of the proposal being debated. Yet it should not be overlooked that he was also an ardent supporter of the notion of judicial review. With great pride did Henry expound his approbation of judicial review.

> The honorable gentleman did our judiciary honor in saying that they had firmness to counteract the legislature in some cases. Yes, sir, our judges opposed the acts of the legislature. We have this landmark to guide us. They had fortitude to declare that they were the judiciary, and would oppose unconstitutional acts.

He went on to add, "I take it as the highest encomium on this country, that the acts of the legislature, if unconstitutional, are liable to be

opposed by the judiciary."[58] As he presented the federal Constitution, Congress could not depart from it and those laws in opposition to the Constitution would be declared void by the Courts. For example, if Congress tried to restructure the appeals process, as specified in the Constitution. Henry foresaw the federal judges, "if they spoke the sentiments of independent men," would declare such tampering "nugatory and void."[59] While the statements of Henry so far point towards judicial review of Congressional activities, he also was aware of judicial review of state actions because of the supremacy of federal law to state law. He impressed upon his audience that "[t]he laws of Congress being paramount to those of the states, and to their constitutions also, whenever they come in competition, the judges must decide in favor of the former."[60] With such overwhelming evidence it is easy to classify Henry as a supporter of judicial review.

Edmund Pendleton, too, would properly fall into the category of recognizing judicial review as inherent in the new system. He realized that in the past the judiciary "had prevented" the operation of unconstitutional enactments.[61] Like others before him, he maintained that "the judicial powers extend to enforce the federal laws, govern its own officers, and confine them to the line of their duty." In other words, the Courts are a check on the other branches, and they will not admit oppressive laws to be carried into practice.[62]

The last principle figure of the Virginia Convention to be examined in any detail is John Marshall, future author of the renowned decision in Marbury V. Madison. Marshall described how judicial review was to operate in the following manner:

> Has the government of the United States power to make laws on every subject? . . . Can they go beyond the delegated powers? If they were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. . . . They would declare it void.[63]

He further gave two arguments why judicial review was part of the Constitution. One I've labeled the default argument. This is because Marshall pondered "To what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the judiciary?" And answering his own question, he contended that there was "no other body that can afford such a protection."[64] Thus for Marshall the Constitution and its limitations were to be maintained by the judiciary because no other entity existed to do the job.

The other rationale applicable to judicial review concerned the problem of rights not written in the Constitution itself. The specific issue which Marshall was addressing was the right to challenge jurors, which because it had not been written, was thought by some not to be part of the Constitution. Marshall insisted that since in Virginia this privilege was not mentioned in the state constitution and yet was secure, why would this not be the case in the federal Constitution?[65] Marshall is really arguing that a right or power does not necessarily have to be written down in the new Constitution to be part of the system of government under that document.

To sum up this convention, we have encountered not only the understanding of judicial review but also its advocacy. Besides being seen in the comments of many delegates, judicial review was supported indirectly in the wide jurisdiction given the Courts and the assignment to

obviate all abuses under the Constitution by federal branch or state government. To quantify the impact of the supporters of judicial review as part of the Constitution, an examination of their names: Grayson, Henry, Madison, Marshall, Mason, Nicolas, Pendleton and Randolph, in the index of the Virginia Convention, reveals that these men as a group contributed five-sixths of all comments and statements made therein. Truly these were the most articulate spokesmen not just on judicial review but the other topics as well.

G. The New York Convention

The major worry for the New York Convention was the protection of the people from tyrannic governments. Earlier Melancton Smith was shown to have expressed apprehension over the powers granted Congress.[66] Speaking the mind of the whole convention, Governor George Clinton said, "If the gentleman can show me that the proposed Constitution is a safe one, I will drop all opposition."[67]

The "gentleman" who accepted Governor Clinton's challenge was none other than Alexander Hamilton, former member of the Philadelphia Constitutional Convention and future Secretary of the Treasury. In the New York discussions Hamilton pointed out that only laws made in compliance with the Constitution would be binding on individuals and state governments. And in an attempt to meet the skeptics' demand he stressed that "the laws of Congress are restricted to a certain sphere and when they depart from this sphere they are no longer supreme or binding."[68]

However Hamilton's most forceful response was given outside the Convention in a series of newspaper letters which we know today as The

Federalist Papers. Charles Beard, for one, has surmized that the New York delegates "must have known the clear and cogent argument for judicial control" because of Federalist number 78, where Hamilton gave a full exposition of how he thought the new system was to operate.[69] Within a short time these papers written by John Jay and James Madison in addition to Hamilton were seen as "explaining the true meaning of its framers."[70] Thus an analysis of the paper dealing with judicial review will help portray the framers' picture of how the Constitution was to operate as well as tell what the New York Convention had in mind when it came to vote on ratification.

As just mentioned, Federalist number 78 addressed itself to the question of judicial review. Hamilton's presentation neatly proceeds on a line parallel to the definition of judicial review. First the jurisdiction of the Courts over the Constitution is established. Hamilton wrote:

> The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body.[71]

Second the power to declare void acts which are perceived to violate the Constitution is pronounced. "There is no position which depends on clearer principles," continues Hamilton, "than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void." More succinctly, "no legislative act," which is contrary to the Constitution, "can be valid."[72]

Third the courts' prohibitions are binding on the other levels of

government. Without the judiciary's power to declare unconstitutional acts void and the acceptance of these rulings the Constitution "would amount to nothing."[73] From Hamilton's remarks on judicial review the values of higher law, limited government and separation of powers are made clear. Higher law and limited government in the sense of a constitution which limits governmental action because such action contrary to the constitution is void. Separation of powers is evident by naming one branch--the judicial--as the sole possessor of such nullifying powers.

H. Some Other Conventions

In only three other conventions was judicial review highlighted. The reason for this varied, some conventions never got around to discussing it; after all, the New Hampshire Convention filled only two pages of print while Maryland's was good for only nine pages. Yet despite such brevity one can find statements in regard to judicial review. For example, in the Connecticut Convention Oliver Ellsworth, who fills up thirteen of the seventeen pages recorded in Elliot's Debates, saw the Courts as controlling both the Congress and the states. Ellsworth explained that if Congress should overstep its bounds and enact a law unauthorized by the Constitution the judges in executing their duty will declare such action void. And at the same time, if the states surpass their limits and pass an act which is a usurpation, that too will be void and "upright independent judges will declare it to be so."[74]

In Delaware and Maryland, like New York, the more worthwhile statements occurred outside the convention. John Dickenson made it clear in Delaware that the Courts were to be "concerned in the execution of the

laws and in the determination of their constitutionality."[75] Another delegate to his state's convention who made it clear that judicial review was to be part of the operating procedure of the new Constitution was A. C. Hanson of Maryland. He assured the people of Maryland that any judge "will have a right to reject any act, handed to him as a law, which he may conceive repugnant to t he Constitution."[76] And fellow Marylander, Luther Martin, reported to the state legislature that the determination of any acts of Congress, or actions of the Executive and other officers were contrary to the Constitution was the responsibility of the Judiciary. He further explained that "every state must be bound" by these determinations.[77]

To conclude, then, the new concepts which were coming into American thought like the people's sovereignty and a sovereign constitution were readily accepted at these conventions. Fear of excessive government, be it a state legislature or the national Congress, was also prevalent. It should not be overlooked that in order to soothe these fears the proponents of the Constitution throughout the States turned to the power of judicial review. Of equal importance was the approval judicial review met, even among the Constitution's opponents like Patrick Henry. Judicial review because it was complimentary to the theoretical concepts dominating contemporary American thought and was thought to be necessary to the proper working of the new Constitution can be said by the end of the ratifying period to be well on its way to becoming entrenched in American thought.

FOOTNOTES

CHAPTER V

[1] Chapter II and rise of sovereignty of the people, p. , Chapter IV, notes 4 and 5.

[2] Elliot's Debates, 4: 10.

[3] Ibid., 2: 457-8. Later Wilson was to add "that, in the United States, the people retain the supreme power," Vol. 2, p. 478.

[4] Wilson announced that "the truth is, that the supreme, absolute, and uncontrollable authority remains with the people. I mentioned, also, that the practical recognition of this truth was reserved for the honor of this country. I recollect no constitution founded on this principle; but we have witnessed the improvement," Ibid., 2: 456.

[5] Ibid., 4: 161.

[6] Ibid., 2: 446-7.

[7] Ibid., 3: 297.

[8] Ibid., 2: 456

[9] Ibid., 4: 160-1. This excerpt was taken from MacLaine's statement that the people "are the only proper authority to form a government. They, sir, have formed their state governments, and can alter them at pleasure." He then exclaimed "[t]heir transcendent power is competent to form this or any other government which they think promotive of their happiness."

[10] The development of limits on government from a belief in higher law is shown in Section A, Chapter II. As for the notion of a sovereign constitution it is predicated on the belief in the sovereignty of the people.

[11] Elliot's Debates, 2: 445.

[12] Berger, Congress V. The Supreme Court, pp. 36-7.

[13] Smith's exact words were "[t]he idea that Congress ought to have unlimited powers is entirely novel. I never heard it till the meeting of this convention." Elliot's Debates, 2:337. From this Berger has noted, "The opponents were thus not so much intent on placing Congress beyong review as [they were] critical of the Congressional threat to state power." Congress V. The Supreme Court, p. 136.

[14] Elliot's Debates, 3: 439.

[15] Ibid., 3: 436-7.

[16] Pendleton stated "this clause [necessary and proper] does not give Congress power to impede the operation of any part of the constitution," rather it secures federal officers "from any interruption in their proceedings." Elliot's Debates, 3: 439.

[17] Ibid., 2: 537.

[18] Ibid., 4: 161-2.

[19] Wilson made this remark as he explained that there are two types of government: 1) in which the general power is given to the legislature and 2) where the government's powers are clearly enumerated. In the second type, notes Wilson, the people never give up their power and the government is limited to its enumerated powers. Such a government was that which was in proposed Constitution, Elliot's Debates, 2: 454.

[20] Iredell likened a constitution to the power of attorney in that no power could be exercised but what was expressly given. Thus he said a constitution is "a declaration of particular powers by the people for particular purposes. Elliot's Debates, 4: 148. Please compare the similarity of Iredell's comments with Wilson's in note 19 above. It shows that the framers were thinking along the same wave length.

[21] Supra notes 6-9 and the text accompanying them.

[22] Davie was actually referring to the restrictions contained in the Constitution. "These restrictions ought to supercede the laws of particular states" were his exact words. Elliot's Debates, 4: 156.

[23] Elliot's Debates, 4: 187-8.

[24] Spencer warned "that the state governments are not sufficiently secured, and that they may be swallowed up by the great mass of power given to Congress." Ibid., 4: 51.

[25] Ibid., 4: 93.

[26] Supra notes 13, 14 and 15.

[27] Elliot's Debates, 4: 62-3.

[28] Ibid., 4: 63. At this stage the differences between the American and British systems such as a written constitution versus an unwritten constitution, and people's sovereignty versus Parliaments should be becoming clear. See note 29 infra.

[29] Governor Johnston's comparison of the different Anglo and American system is presented in full here.

> A parallel has been shown between the British Parliament and Congress. The powers of Congress are all circumscribed, defined and clearly laid down. So far they may go, but no farther. But sir, what are the powers of the British Parliament? They have no written constitution in Britain. . . . Their Parliament can, at any time, alter the whole or any part of it [their constitution]. In short, it is no more binding on the people than any other act which has passed. The power of Parliament is, therefore, unbounded. But, sir, can Congress alter the Constitution? They have no such power. They are bound to act by the Constitution. They dare not recede from it. The British Parliament can do everything they please. Their bill of rights is only an act of Parliament, which may be, at any time, altered or modified, without a violation of the constitution. The people of Great Britain have no constitution to control their legislature.

[30] Elliot's Debates, 3: 203.

[31] Ibid., 4: 182, here William Davie accepted the Constitution as the Supreme law of the land and that it should be adhered to without contradiction by any state law or constitution, yet it was supreme only when the power exercised is granted by the Constitution not in usurpations. Thus he declared that the "only rational inquiry is, whether those powers are necessary, and whether they are properly granted."

[32] Ibid., 4: 156.

[33] Ibid., 4: 155.

[34] Ibid., 4: 156-7. In regard to tarriffs Davie thought "[i]f the Virginians were to continue to oppress us by laying duties, we can be relieved by a recurrence to the general judiciary." Immediately prior to this he warned, "Without a judiciary the injunctions of the Constitution may be disobeyed, and the positive regulations neglected or contravened."

[35] Ibid., 4: 63.

[36] Berger, Congress V. The Supreme Court, p. 35, citing Sparks, Life of Gouverneur Morris, 1832, p. 438.

[37] Elliot's Debates, 4: 63.

[38] Ibid., 4: 172. He later explains that "if Congress, under pretense of executing one power, should, in fact usurp another, they will violate the Constitution." 4: 179.

[39] Ibid., 4: 188.

[40] Ibid., 4: 71.

[41] Berger, Congress V. The Supreme Court, p. 143. "But never was there a word to rebut Steele's assurance that courts would check federal laws which were inconsistent with the Constitution."

[42] United States Constitution, Article III, Section 2.

[43] Berger, Congress V. The Supreme Court, p. 133.

[44] Elliot's Debates, 2: 489. He concludes "that anything enacted by Congress contrary to the Constitution "will not have the force of law."

[45] Ibid., 2: 445-6.

[46] Ibid., 2: 478.

[47] Ibid., 2: 489.

[48] Ibid., 3: 523. Earlier Mason observed:

> I am greatly mistaken if there be any limitation whatsoever, with respect to the nature or jurisdiction of these courts . . . and I believe on a dispassionate discussion, it will be found that there is [not] any check.

[49] Ibid., 3: 532.

[50] Ibid., 3: 548. The effect of this was not lost on Mason who feared that since the federal judges will have the only power to control the federal government then the "effect will be utterly to destroy the state governments." Elliot's Debates, pp. 521-2, volume 3.

[51] Ibid., 3: 539.

[52] Ibid., 3: 467-8.

[53] Ibid., 3: 205.

[54] Ibid., 3: 554.

[55] Ibid., 3: 567.

[56] Ibid., 3: 443. Nicolas' statement was in reply to the question who is to determine the extent of the legislature's power. He answered, "the same power which, in all well-regulated communities, determines the extent of legislative powers. If they exceed these powers, the judiciary will declare it void."

[57] Ibid., 3: 479-80.

[58] Ibid., 3: 324-5.

[59] Ibid., 3: 541. His full statement was

> If Congress, under the specious pretense of pursuing this clause [dealing with appellate jurisdiction], altered it, and prohibited appeals as to fact, the federal judges, if they spoke the sentiments of independent men, would declare their prohibition nugatory and void.

It should be pointed out in fairness to Patrick Henry that his desire was for judicial review by the state judges, not federal. Nonetheless "with judicial review conceded in principle by the leader of the opposition, there was no need to constantly harp on it," writes Berger. Congress V. The Supreme Court, p. 145.

[60] Elliot's Debates, 3: 539.

[61] Ibid., 3: 298-9.

[62] Ibid., 3: 548 in regard to confiding federal officers to their duty was phrased as a rhetorical question.

[63] Ibid., 3: 553.

[64] Ibid., 3: 554.

[65] Ibid., 3: 558-9.

[66] See note 13 of this chapter.

[67] Elliot's Debates, 2: 359.

[68] Ibid., 2: 362.

[69] Beard, The Supreme Court and the Constitution, p. 71.

[70] Senator Rutledge made this comment in 1802: Elliot's Debates, 4: 446.

> I, like Mr. Jefferson, appeal to the opinions of those who were friends of the constitution at the time it was submitted to the states. Three of our most distinguished statesmen, who had much agency in framing this constitution, finding that objections had been raised against its adoption, and that much of the hostility produced against it had resulted from a misunderstanding of some of its provisions, united in

> the patriotic work of explaining the true meaning of its framers. They published a series of papers, under the signature of Publius, which were afterwards republished in a book called the Federalist. This contemporaneous exposition is what Mr. Jefferson must have adverted to when he speaks of the publication of Mr. Time.

[71] Madison, Jay and Hamilton, The Federalist Papers, Federalist #78, p. 467.

[72] Ibid., p. 467.

[73] Hamilton ties together the concepts of higher law and limited government into the Constitution in the following passage. He also brings in the idea of separation of powers in naming the courts as the sole possessor of the power to declare unconstitutional acts void as he states:

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such for instance, as that it shall pass no bills of attainder, no ex post facto laws and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

[74] Elliot's Debates, 2: 196. Ellsworth's complete statement reads as follows:

> This constitution defines the extent of the powers of the general government. If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges . . . will declare it to be void.

He goes on to say that state laws which violate the general government's powers are also void.

[75] This statement by Dickinson is taken from Beard's, The Supreme Court and the Constitution, pp. 19-20. It is originally taken from Ford's Pamphlets on the Constitution of the United States, p. 184.

[76] Berger, Congress V. The Supreme Court, p. 134. Berger too, bases his comments on Ford's Pamphlets, p. 221 and 234.

[77] Elliot's Debates 1: 380.

CHAPTER VI

AMERICAN CASE LAW

A. The Colonial Period

In both the Federal Constitutional Convention and the State Ratifying Conventions references were made to cases where judges had refused to enforce laws because they violated a constitution. Men like James Madison and Patrick Henry had made such references.[1] However a shadow of doubt over the purpose and effect of these cases in regard to judicial review has been brought to the attention of constitutional scholars first by William Crosskey and more recently by L. Brent Bozzell.[2] It therefore becomes necessary to review these state cases for ourselves to determine if judicial review was intended or implied otherwise the reference to these cases in the Conventions may simply have been a ploy for debating purposes.

This chapter, in addition to the state cases, will survey the federal cases from 1790 till 1803, searching for hints of judicial review that might lead one to expect the doctrine of judicial review spelled out by John Marshall in Marbury V. Madison. If none is found, we shall have to give credence to the claim of critics that Marshall usurped this power without any basis in American political thought up to that time.

The state cases to be studied in this chapter are grouped into two periods: one, the colonial period, or those cases up to July 4, 1776, and two, the state period, or those cases adjudicated after the aforementioned date including cases under both the Articles of Confederation and the Constitution. Four cases will be examined in the colonial period

and seven in the state period.

The only case of the seventeenth century of which we have adequate record is Giddings V. Brown, decided in 1657. Recall that in 1646 the Massachusetts General Court had decided that any action or law which was inconsistent with the law of God and right reason was an error and not legally binding.[3] Thus when Giddings' goods were confiscated for refusing to pay a tax which was levied to pay for a house for the town minister it is not surprising that the judge would refer to "the fundamental law which God and nature has given to the people" to decide the case.[4] After acknowledging that property is a fundamental right, Magistrate Symonds believed that this tax, "to take from Peter and give it to Paul," is opposed to fundamental law.[5] Consequently he ruled in favor of Giddings, arguing that since the tax was against fundamental law, it is void and the confiscation of the property was not justifiable.[6]

While Giddings V. Brown was perhaps the earliest American instance when the power was claimed for the courts to control legislative action when such action opposed the fundamental law, it certainly was not the most influencial case.[7] In fact, it would be over one hundred years before the notion of the courts voiding legislation came into the limelight of American thought. The case which finally did bring this issue out also occurred in Massachusetts, it is known as the Writs of Assistance Case of 1761. The question at hand was "whether the British customs officials should be furnished with general search warrants enabling them to search for smuggled goods."[8] This measure was opposed by some Boston merchants. Although two attorneys presented arguments for the merchants only those of James Otis are of concern here. Otis contended that it

was of no significance whether these writs were warranted by an act of Parliament as his colleague had intimated; rather he maintained that such an act would be "against the constitution" and natural equity and as a result void.[9] That the courts should be the authority to make such a declaration, he left no doubt, citing Dr. Bonham's case from Viner's Abridgement, he noted that

> If an act of Parliament should be made in the very words of this petition, it would be void. The executive courts must pass such acts into disuse.[10]

This argument was an instant success, at least insofar as it made a permanent impression on the minds of the time--so much of an impression it has been labeled the "inaugural event in the history of American Constitutional Law."[11]

Nonetheless this argument had its weaknesses. One problem was that Otis himself always stated a belief in the "legal supremacy of Parliament."[12] Otis never realized a need to separate fundamental principles and rights from the institutions of government (like Parliament) and its oridinarty statutes.[13] Thus Otis' thought lacks such later accepted tenets as written higher law, limited government and separation of powers.

The next legal battle between the colonies and Parliament was decided by the supreme court of Virginia in 1766. In this case the clerk and other officers for the Court of Hustings in Northhampton County inquired whether the Stamp Act was binding on Virginia, and whether "officers of the law," incur any penalty by not using stamped paper?[14] In an unanimous opinion the judges held that the law was not applicable to the people of Virginia, "inasmuch as they conceived the said act to be

unconstitutional."[15] Just what constitution is being transgressed is not said but the crucial thing is that a court refused to carry out a legislative act, thus giving it no force of law and making the act null and void.

The last case of the colonial period included in this paper is Robin V. Hardaway,[16] occurring in Virginia in 1772. The plaintiffs in this case were decendents of Indian women who had been brought into Virginia and sold as slaves under an Assembly act of 1682. George Mason was the attorney for the plaintiffs and in the course of his presentation proposed to prove that the 1682 statute which made Indians brought into Virginia slaves was void "because it was contrary to natural right." Turning to the notion of a higher law above government, Mason stated:

> Now all acts of legislature apparently contrary to natural right and justice, are in our laws, and must be in the nature of things, considered void. The laws of nature are the laws of God, whose authority can be superceded by no power on earth.

And, like Otis before him, Mason cited Dr. Bonham's case when he declared that laws at odds with the higher law are to be disobeyed because "such have been the adjudication of our courts of justice."[17] Before counting this case as a precedent for judicial review it must be remembered that the court's decision avoided this issue and found for the plaintiffs on the ground that the 1682 act had been repealed by another act of 1705. "Nevertheless," states Professor Plucknett, "the arguments throw considerable light upon the legal thought of the period."[18]

B. The State Cases

Although only seven cases are contained in this section, this does

not purport to be a list of all cases which dealt with the question of judicially imposed restraint on the legislatures. Rather these cases were chosen because they have been published and thus are accessible on a first-hand basis in either court reporters or legal textbooks. Allow me to illustrate, Holmes V. Walton, the Case of Josiah Philips, the "Lost" Massachusetts Precedent and the New Hampshire "Occurrences" are all cited, by one authority or another, as precedents for judicial review, but are unrecorded. One explanation for the lack of court reporters is that only the most talented men were capable. For example, the Writs of Assistance Case was recorded by John Adams, destined to be the second President of the United States and Robin V. Hardaway was preserved by Thomas Jefferson, who just happened to be Adams' successor to the Presidency.

We begin, therefore, our probe in 1782, with Commonwealth V. Caton et al., found in volume four of Call's Reports. Here John Caton and two other men had been condemned for treason under a 1776 act which denied the executive the power to grant pardons in treason cases. The lower house of the Virginia legislature pardoned the trio but the Senate refused. The state then moved for the completion of the sentence. The key issue, contended the defendents, was that the act under which they had been convicted "was contrary to the plain declaration of the Constitution; and therefore void." The state held an opposing view, namely that the act was in pursuance of the Constitution but whether it was or not, "the court were not authorized to declare it void."[19]

Two of the judges opinions are worth looking at in particular--Judges Wythe and Pendleton. Wythe began his opinion by paying heed to

the notion that separation of powers was necessary to stop tyranny and that the "tribunals," who possess neither the sword or the purse, are "to declare the law impartially." So that the boundaries of authority may be peaceably obtained. Put more forcefully, we see the courts as restricting the legislature. Wythe's own words are:

> if the whole legislature . . . should attempt to overleap the bounds prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers in this tribunal, and pointing to the Constitution, will say to them, here is the limit of your authority, and hither shall you go but no further.[20]

Thus he is asserting the courts are the defenders of the constitution of a society.

Edmund Pendleton in his opinion struck new ground in legal writings by noting the novelty of written constitutions in America. "The constitution of other governments, in Europe or elsewhere, seem to throw little light upon this question," remarked Pendleton, "since we have a written record of that which the citizens of this state have adopted as their social compact." This written constitution, he maintained, directed that the three branches of government should be kept separate and distinct. This concurs with Wythe's thesis as well.[21]

Although the court ruled against the defendents, it did not reject their contention that laws contrary to the Constitution were void, rather, the act in question was ruled not unconstitutional. Put another way, the state's argument that the act did not violate the constitution was accepted, but the other half, that the courts didn't have the power to annul legislative acts was rejected. For

> Chancellor Blair and the rest of the judges were of opinion that the court had power to declare any resolution or Act of the Legislature, or of either

> branch of it, to be unconstitutional and void,

writes the outstanding scholar, James B. Thayer.[22]

The next case of concern took place in 1784 in New York. Known as Rutgers V. Waddington,[23] this case was adjudicated in the Mayor's Court of New York City. In it Elizabeth Rutgers, who had abandoned her brewery and malt house when the British occupied the city in 1778, claimed 8000 pounds of damages from Joshua Waddington, a British subject who had received permission from the British commander to use the premises. Rutgers was demanding compensation under a 1783 statute of the New York Legislature which made allowance for patriots who fled their "places of abode" during the British invasion to bring suit for trespass against those who occupied the abandoned property under British auspices.[24]

Waddington's defense, which was headed by Alexander Hamilton, resisted the charges on the grounds that under the law of nations a military commander, in this case the British commander in New York, had a right to license for use abandoned property in wartime. Thus the two laws were set in opposition to each other. Yet underlying this was the crucial question of

> whether the court had the right at all to refer to any source of law in order to control the authority of the legislature which was supposedly the supreme lawgiving body of the state.[25]

The decision of the court, presumably written by Chief Judge Duane, is a superb example of misdirection and "subterfuge." On the one hand Duane announces, "the supremacy of the legislature need not be called into question." He goes on to say that if the legislature enacts a law there is no power which can control them and specifically mentions that the judges cannot reject law if it appears to them merely "to be

unreasonable."[26] This is the loophole, laws which the judges think unreasonable can't be struck down, but nowhere does the decision prohibit setting aside legislative enactments which violate a higher law. Therefore, while paying a false homage to the legislature the court proceeded to disregard one of its acts because it was inconsistent with that law which binds all countries, including the then sovereign state of New York, the law of nations. This had the effect of judicial review.

Nor should one think this analysis stands alone. The often harsh critic Bozzell acknowledges that "the court stretched Blackstone's doctrine to the point of meaninglessness."[27] Even the New Yorkers of the day realized the implications of the decision. We can see an address, "To the People of the States," which bitterly complained of the decision. The writers of this document thought it absurd that there should be a power vested in the courts which might control the legislature's power. They went on to express their fears for the survival of liberty if courts when they deemed a law unreasonable, "may set it aside." Of course they ignored the opinion's rationale that a law must violate a higher law to be void. The New York legislature joined the chorus of protest suggesting that this judgment would see "legislatures become useless."[28]

If Rutgers V. Waddington upset the New York legislature, Trevett V. Weeden (1786)[29] totally enraged the state legislature of New Jersey. The Superior Court of Judicature in the state had refused to enforce the state's paper money law against butcher John Weeden, who was accused of not accepting paper money in commercial transactions. In his defense Weeden argued that the act, under which he was charged, did not provide for a jury trial and so the act "is unconstitutional and void." The

court in its decision did not adopt Weeden's language but made the act unenforceable which nonetheless led to the state legislature calling the justices before that body "to render their reasons for adjudging an Act of the General Assembly unconstitutional, and so void."[30] Later a motion was heard and seconded to dismiss the judges from office, but this failed when no criminal activity was associated with the giving of such a decision, implying the legislature could find no violation of law or statute pertaining to court's action.

But what did the justices really say? At the trial itself Judge Howell thought the case not cognizable by the court because the law underwhich the charges were brought was "repugnant and unconstitutional." What of the others? Well we know

> Judge Devol was of the same opinion. Judge Tillinghast took notice of the striking repugnancy of the expressions of the act--Without trial by jury, according to the laws of the land--and on that ground gave his judgment the same way. Judge Hazard voted against taking cognizance.[31]

The Chief Justice abstained.

Some critics have tried to deny the obvious sentiments of the judges by reference to the word cognizable. It is true that Justice Howell, when testifying before the legislature as chief spokesman for the judges, suggested that the court did not declare the legislature's act unconstitutional and hence, void, but simply "that the information is not cognizable before them."[32] Although the ruling actually said "not cognizable," the rationale behind this ruling, a rationale never denied by any justice, was that they believed the act to be unconstitutional.

In still yet another case we find the legislature of a state calling a set of judges before it on charges of insubordination, this time it is in North Carolina in the case of Bayard V. Singleton (1787). The specific

legislative act involved had been introduced in 1785 to facilitate the transfer of confiscated Tory property. It provided that if a wartime confiscation should be challenged all that the defendent need do is file an affadavit which claimed that the property in dispute had been obtained from a "commissioner of forefeited estates." Once this had been done the court was required to dismiss the case without even examining the merits of the case.[34] In particular Mr. and Mrs. Bayard sought to recover some family property which was confiscated furing the war. Singleton responded by filing the appointed affadavit.

The court heard this case in two different terms. In the 1786 term the court did not reach a conclusion but did observe some fundamental principles of North Carolina's government. First it was made clear that the government and Constitution were derived from the people. And second it noted that the Constitution of North Carolina had divided the government's powers into three distinct branches: the legislative, the judicial and the executive, and assigned to each its own separate powers and prescribing the limits and boundaries of these powers.[35]

Just this small action got the judges called before the legislature for not enforcing the summary provisions of the act. A committee found the judges guilty on the facts yet the legislature as a whole decided against punitive actions since in their eyes the judges' conduct was not equal to malpractice.[36]

Despite these proceedings the court took up the case again in May of 1787. After attempts at compromise, like getting the defendent Singleton to accept a jury trial, had failed the court announced, through its reporter, that

> after every reasonable endeavor had been used in vain for avoiding a disagreeable difference between the legislature and the judicial powers of the state, at length with much apparent reluctance, but with great deliberation and firmness, gave their opinion separately, but unanimously, for overruling the aforementioned motion for the dismission of the said suits.[37]

Here then the court rejects the provision of the law providing for the defendent to win merely by showing certain affadavits of sale. The court was not satisfied with this alone but went on to state publicly that the legislature was constrained by the Constitution. Therefore the Act of the legislature which was against the Constitution must "stand as abrogated and without any effect."[38] Even the critics acclaim this case as an excellent example of judicial review. One writes,

> [W]e must resist any temptation to play it down. For all the mitigating circumstances, it remains that a judicial court formally proclaimed that a legislative act must, for constitutional reasons, "stand as abrogated."[39]

After the Constitutional Convention of 1787 three cases pertaining to judicial review were adjudicated. The first of these is known as the Remonstrance of the Court of Appeals, to the General Assembly (1788).[40] At issue was an act of the assembly which had provided that a new set of district courts be erected. The Court of Appeals concluded that "clerks ought not now to be appointed" thus halting the establishment of the courts and the legislature's will at the same time.[41] The Court of Appeals made this ruling consciously on constitutional grounds.

The judges, in the course of deliberations, "found it unavoidable to consider more important questions, viz: whether the principles of this act do not violate those of the constitution." This was based on their assumption that in the three-way division of government it was the judiciary's duty to protect that form of government. Consequently the Court

had to "declare that the constitution and act are in opposition and cannot exist together, and that the former must control the operation of the latter."[42] The judges bolstered their position by arguing the "supremacy of the constitution" which they claimed had been agreed to by the legislature itself, in prescribing limitations on all departments of government. Going a step further the Court noted the sovereignty of the people was placed in the Constitution and this is why the legislative act must fall. Tying together this concept of the people's sovereignty and the court's obligation to defend that concept, embedded as it was in the constitution of Virginia, we find the judges presumed,

> that when they decide between an act of the people and an act of the legislature they are within the line of their duty, declaring what the law is, and not making a new law.[43]

The last two state cases to be examined here both took place in 1793. The first of these is Bowman and other Devisees of Cattel V. Middleton,[44] henceforth known as Bowman V. Middleton. Bowman and the others brought suit to recover land transferred from Roger Nicolls and his heirs to John Cattel and in particular his second son, William, by an act passed by the Assembly of South Carolina in 1712.

In their brief opinion, the judges adopted the defense's stance that the act in question was void because it violated such high laws as common right and Magna Carta. Specifically the court said that

> the plaintiffs could claim no title under the act in question, as it was against common right, as well as against Magna Charta, to take away the freehold of one man and vest it in another.

The Court concluded, "[t]hat the act was, therefore, ipso facto, void."[45]

The final case in this section is Kamper V. Hawkins (1793).[46] Peter

Kamper, under authority of a 1792 act of the Virginia Assembly, had filed a motion in the district court at Dumfries to stay a judgment rendered against him by this same court. The case was soon to focus on section eleven of the 1792 act which gave the district courts the power to grant injunctions to stay any proceedings on any judgment and to hear all suits commencing with such injunctions. With such power the districts can be seen as an appeals court. However friction arose because these same powers granted by the legislature to the district courts had been ceded to the high court of chancery by the Constitution. Realizing the vast difficulty and constitutional potential of Kamper's motion, the district judge adjourned the case to the General Court in the capital city of Richmond where a five judge panel heard the arguments.

Although each judge gave his opinion separately, or in seriatim, as was the common practice of the day, we can still elucidate six major areas of agreement. First, was the acknowledgement that this case was concerned with constitutional questions. Judge Henry, the only pronounced supporter of legislative supremacy, summarized the situation thusly,

> It is important as it brings in question of the rights of the legislature on one of the particular subjects committed to them by the plan of government: it is delicate, as the judges are compelled to examine their power [and] their duties.[47]

Second, was adherence to the notion that in government the people were sovereign. No less than four of the judges, Tucker, Roane, Henry and Tyler, concurred on this point. Tucker wrote that the constitution derived its authority "from a higher source," a source which could "supercede all law," the people. Roane put it more bluntly, "I consider the people of this country as the only sovereign power." Henry and Tyler took this notion one step further by investing this sovereign power

in the constitution. Henry saw the permanent will of people as expressed in the constitution, meanwhile Tyler thought the constitution to be the "great contract of the people."[48]

As suggested in Chapter II of this thesis, a belief in higher law logically implies a belief in limited government.[49] The same is true here. Again four of the five judges agreed that the constitution, or higher law of the state, limited government. For example, Judge Nelson tells us that a "constitution is that by which the powers of government are limited." That all powers were subordinate to the "great constitutional charter" was stressed by Roane.

Nor was the fact that this higher law was written down lost on the minds of the tribunal. "The judiciary, having no written constitution to refer to, explains Tucker,

> were obliged to receive whatever exposition of it the legislature might think proper . . . But with us, the constitution is not an "ideal thing, but a real existence: it can be produced in a visable form:" its principles can be ascertained from the living letter . . . . The governemnt, therefore, and all its branches must be governed by the constitution.

"Hence the utility of a written constitution," remarks Nelson.[50]

The next or fourth main point is that the legislature cannot alter the constitution. This of course implies a rejection of judicial supremacy or "omnipotence" as Judge Tyler phrased it. He believed the sugtested "omnipotence of Parliament" was an "abominable insult upon the honour and good sense of our country." Tucker provides the reasoning behind this stance when he reiterates that the constitution is sovereign. He notes that the legislatures were given certain powers, yet the fundamental laws, or constitution, were exempt from legislative tampering.

"In short these legislatures derive their power from the constitution," Tucker comments, "how then can they change it, without destroying the foundation of their authority?" The assumption of Tucker is that the sovereign nature of the Constitution is subject only to the desires of the ultimate sovereign, the people. Who, then, can change the Constitution? "I answer the people alone," was Nelson's reply. And Judge Roane denied to all except "the people the power to change it." "It is conceived, for the reasons above mentioned," concludes Roane, "that the legislature have not power to change the fundamental laws."[51]

If the legislature can't alter the constitution and the constitution is to limit the legislature's activities, then would it not be appropriate for legislative activities, such as laws which do not adhere to the constitution's restraints, to be invalid and unenforceable, indeed void? The majority of judges involved here did in fact believe that laws violating the constitution were not laws and so were void. Judge Tucker wrote that whatsoever contradicts the constitution "is not the law of the land." Also Judge Nelson stated "that a law contrary to the constitution is void."[52] But one may ask who is to make such declarations about legislative acts. The judges, at least four out of five of them, intimated this task belonged to the judiciary alone. This suggests the last major area of agreement--separation of powers.

The ideas of the judges on separation of powers is exemplified best through their statements which specifically mentioned that the judiciary is to void laws. For instance, Judge Roane reflected "that the judiciary may and ought to adjudge a law unconstitutional and void," if such a law was repugnant to the constitution. Yet the assumption which underlies

Roane's message is that the courts alone are to interpret or expound the laws. Or as Tucker put it:

> Now since it is the province of the legislature to make, and of the executive to enforce obedience to the laws, the duty of expounding must be exclusively vested in the judiciary. (Emphasis added.)

Writing on a more personal level, Judge Tyler emphasized that if he heard a case in which the constitutionality of a law arose, he would not shrink from a comparison of the two and pronounce sentence based on constitutionality alone. The acceptability of this judicial power to void laws is expressed by Nelson, who observed that it was not a novelty "for the judiciary to declare, whether an act of the legislature be in force or not in force," in other words whether it is a law or not.[53]

The court in its decision as a whole, rejected Kamper's motion for an injunction because the act under which it was filed was unconstitutional. "I concur therefore most heartly with my brothers, who have gone before me, commented Tyler, "that the law is unconstitutional and ought not to be executed."[54] This last phrase, I have tried to point out, was founded upon five major tenets besides the agreement that the constitutionality of the act was the issue before the court. Those five tenets were: 1) that the sovereign power of a state rested with the people, and their sovereign will was expressed in the constitution; 2) that this constitution set specific boundaries on the prerogatives of government, and these limits were entrenched in a written constitution; 3) that as a result of number 2, the legislature was limited by the constitution and could in no way on its own initiative alter the constitution, thus the explicit rejection of legislative supremacy; 4) that any legislative enactments which were contrary to the provisions

of the constitution were not law, could not be enforced by the courts and for these reasons can be considered void; and 5) due to the maxim of separation of powers it is the duty of the judiciary to expound what the constitution is and what laws violate that constitution, thus making those laws void.

C. Trends of the Period

The meticulous analysis of Kamper V. Hawkins was constructed to articulate the manner and extent to which the concept of judicial review had matured. In a real sense this case represents the culmination of prior colonial and state thoughts on this subject. Therefore it would be quite useful for the student of judicial review to take careful note of how judicial thought evolved to this mature level. Accordingly a review at this point of the cases relating to judicial review does not seem inappropriate.

The first case discussed, Giddings V. Brown, 1657, establishes two main ideas: 1) the notion that a higher law exists (in this case the higher law was God's law), and 2) laws violating God's law were void. The court not only asserted these principles but actually put them to use in voiding a town council law.

One hundred and four years later the famous Writs of Assistance Case was adjudicated. James Otis, who was responsible for the constitutional considerations of the case, made reference to a different type of higher than used in Giddings V. Brown. Otis referred to a "constitution and natural equity" rather than God's law. Furthermore, citing Dr. Bonham's Case, he intimates that the courts were to decide the constitutionality of laws.

Turning southward we find in Virginia a court ruling that the Stamp Act was not applicable in that state because it was unconstitutional. Due to the brevity of the record we can say only that a higher law was thought to have existed, but what it was or said is unknown. It should be noted, however, that the court did not void the Stamp Act, but only refused to enforce it--thereby distinguishing this case from the previous two.

The last case in this set of colonial cases was Robin V. Hardaway (1772). This is a good case to conclude the period because the plaintiff's case summarizes the principles established earlier. A higher law, both in the form of God's law and "natural right" was used. Counsel further added that violations of this higher law was void and that the task of voiding legislation belonged to the judiciary, citing Bonham's case again. While this case heard the arguments on which judicial review was based, it also shows the shortcomings of the arguments from our twentieth century viewpoint. The main weaknesses are: 1) no written constitution, 2) no denial of legislative supremacy as was believed in that time by Blackstone and others, and 3) no firm base from which to assert the courts had the power of judicial review since in all constitutions the legislature was considered supreme. This last thought of legislative supremacy may be construed to be a need for separation of powers.

We turn now to the cases after Independence. The first case we meet is Commonwealth V. Caton, 1782. One of the shortcomings of the colonial cases is immediately overcome by Judge Wythe who recognizes the principle of separation of powers and more importantly, the obligation of the judiciary to maintain that separation. Judge Pendleton added

weight to Wythe's contention by introducing the role of written constitutions as the base from which the courts may be said to derive their authority. This written constitution thus became the new higher law. Also this court considered any violation of this constitution, by the legislature or anyone, to be void. The written constitution therefore, can be seen as replacing the sovereing legislature as the day to day sovereign in the state.

Rutgers V. Waddington (1784) can be seen as a retreat from the principles of Caton, except that this court actually stopped enforcement of a legislative act as had the Virginia Court in 1766 with the Stamp Act. The key principle here was that a higher law, the law of nations, was seen as overruling the legislature's laws. Also the separation of powers was claimed to be essential to liberty.[55] Nonetheless, the notions of written constitutions and the voiding of laws are missing.

The next case is Trevett V. Weeden (1786). This case is similar to Rutgers in that no law is voided, rather the law in question was found to be unenforceable by the courts. Also there is no written constitution or system of separation of powers noted. In fact, this case resembles the less mature cases in that the higher law or constitution referred to is nebulous and that the judges believed themselves responsible to God alone and his law.[56]

With Bayard V. Singleton (1787), a return is made to the principles of Caton, only this time the court used these principles to void a law. This was the first case to void a law because of a written constitution. It also was the first time that the sovereign power of a state was seen in the people, and that the people vested their sovereignty in a written

constitution. This is obviously no small coincidence. Also separation of powers is seen in the constitution and so the courts see themselves as expounding this higher law.

The Remonstrance Case (1788) maintained the aforementioned principles such as the sovereignty of the people is placed in the Constitution and that the Courts are to interpret the constitution. However Bowman V. Middleton (1793) was more similar to the earlier colonial period. There is no mention of a written constitution or separation of powers. The higher law for this case is the vague common right and/or Magna Carta. Yet the court does announce the act in question to be void.

Lastly we studied Kamper V. Hawkins which has been asserted to be the reservoir of mature thought. It is classified like this because there is 1) a written constitution, reinforced by the people's sovereignty; 2) separation of powers which implies a) limits on the legislature's prerogatives and b) that the courts are to expound the constitution without contradiction; and 3) violations of constitution thought to be void.

What trends, if any, can be observed? An examination of the following chart summarizes the three main principles of judicial review and the relation of each case to those principles.

Colonial Cases	Higher Law	The Enforcement of Limited Government (Voiding Laws)	Separation of Powers (Courts to Void Laws)
Giddings V. Brown (1657)	Vague--God's Law	Yes	No
Writs of Assistance (1761)	Vague--God's Law and natural equity	Yes*	Not precise because Otis believes in Legislative sovereignty

Virginia Stamp Act case (1766)	Vague--some undefined constitution	No, "not applicable"	No
Robin V. Hardaway (1772)	Vague--God's law and natural right	Yes*	None, except for the cite of Dr. Bonham's Case
State Cases			
Commonwealth V. Caton (1782)	Written state constitution	Yes*	Yes
Rutgers V. Waddington (1784)	Law of nations	No, only stopped enforcement of	Yes
Trevett V. Weeden (1786)	Imprecise, ultimate authority God's law	No, only not cognizable	Implied but not stated proforma
Bayard V. Singleton (1787)	Written state constitution	Yes	Yes
Remonstrance (1788)	Written state constitution	Not clear	Yes
Bowman V. Middleton (1793)	Vague--common right and/or Magna Carta	Yes	No
Kamper V. Hawkins (1793)	Written State constitution	Yes	Yes

* Those cases where voiding of laws asserted to be within court's power, but was not actually applied to the act involved. The other yes answers did in fact void legislative acts.

Three trends arise from this evidence: 1) a turn to written constitutions, 2) the actual voiding of laws, whereas in the first five cases studied the power was claimed and not exercised, the exception being over one hundred years before the others, and 3) a trend toward separation of powers, which seems to be correlated with the growth of written constitutions.

I would suggest one factor explains all these trends--disenchantment with the state legislatures. The turn to these constitutions and

the specifying of separation of powers within them is a direct attempt to limit the legislatures. Why else would the Americans develop the concept that sovereignty lies with the people, who in turn vest in the constitution, not the legislature? How else would one explain the actual voiding of laws rather than merely arguing for it? Some might argue that Rutgers and Trevett did not openly void laws of the legislature, but it should be noted that no other cases prior to them in the eighteenth century did either. Furthermore, the displeasure of the state legislatures in both cases, in large part because the legislators believed that a shift of power was taking place and that shift was away from themselves. Rutgers and Trevett, therefore, are transition cases, only awaiting the great disillusionment with the legislatures which was to take place in 1787, which coincides with the people's decision to end the sovereignty of the state legislatures permanently. Thus in 1787, with Bayard we see the formal voiding of a state law based on a written constitution. Notice also that the majority of published cases and a vast majority of the unpublished ones as well, occur after 1776 and in particular 1780 and thereafter, giving credence to the earlier presumption that prior to Independence the state legislatures were viewed as the defenders of the people's rights, whereas after Independence the legislatures lost this good will through their erratic and sometimes tyrannical behavior.[57]

D. The Federal Cases

Prior to the landmark decision of Marbury V. Madison in 1803, only six federal cases concerned the constitutionality of the statutory law of either Congress or the state legislatures. Further, in none of these

cases was any law actually voided, although discussion of this power was present. A review of these cases, therefore, may shed some light on what Americans perceived as their political process and the role, if any, judicial review was to have in that process.

The first federal case concerning judicial review was heard by the Supreme Court in 1792. Known as Hayburn's Case,[58] this case was initiated by William Hayburn who filed a motion in federal court to have himself put on the United States pension list as an invalid pensioner. He filed this motion under a Congressional Act which gave the courts the job of regulating claims of persons to receive war pension benefits. No actual decision was handed down by the Court because it placed the motion under advisement until the next term, and the Congress, meanwhile "provided, in another way, for the relief of pensioners." The change in the law was brought about to overcome the objections of the judicial branch which had been filed with the President, who then sent these objections to Congress.[59] These objections were made by the Circuit Courts, which at this time each included two Supreme Court Justices.

In particular, three such courts addressed the question of the pension act. They agreed on the following: 1) the government of the United States is divided, by the Constitution, into three separate and distinct branches; 2) the courts are to exercise the judicial power of the United States exclusively, and they may exercise no other power; and 3) this pension act violates the separation of powers and asks the judiciary to perform a non-judicial task, consequently the courts will refrain from executing this act. On the first point the North Carolina circuit wrote:

> That the legislative, executive and judicial departments are each formed in a separate and independent manner; and that the ultimate basis of each is the constitution only, within the limits of which each department can alone justify any act of authority.[60]

In addition note that the Constitution is seen as limiting each branch of government in its activities.[61] Secondly, that the courts are assigned the judicial power exclusively is attested to by the New York circuit court, which declared, "That neither the legislature nor executive branches, can constitutionally assign to the judicial any duties, but such as are properly judicial, and to be performed in a judicial manner."[62] Thirdly, the courts refusal to enforce the act is best depicted in the Pennsylvania Circuit Court. The judges there held "the business directed by this act is not a judicial nature," and so the district was prevented from hearing cases under the act.[63]

Equally important is the perspective in which the Pennsylvania Court viewed the case, namely as preferring the Constitution to a legislative enactment. The judges pondered the gravity of the situation, noting

> To be obliged to act contrary either to the obvious directions of congress, or to a constitutional principle, in our judgment equally obvious, excited feelings in us, we hope never to experience again.

The cardinal premise of the case was that the judiciary could disregard legislative acts which it thought unconstitutional. In fact, one New Jersey paper reported that never had the word impeachment been so "hackneyed" since the judgment by our judges on an unconstitutional law. Yet, reminded Corwin, the "high-fliers" in and out of Congress were speedily silenced.[64]

The cardinal premise <u>Hayburn's Case</u> found itself repeated in Van

Horne's Lessee V. Dorance (1795).[65] In order to help the jury form its verdict Justice William Patterson gave the jury a short discourse on how the Constitution operates in regard to legislative acts. He distinguished the British system where Parliament's power was supreme and could alter the English constitution at will. In America, Patterson delineated, "the case is widely different: every state has its constitution reduced to written exactitude and precision." In our system the Constitution contained the sovereign will of the people and thus was paramount to the will of the legislature. And he went on to add that all laws must conform to the Constitution "or else they will be void." And finally, he left no doubt who was to declare such acts void--the judiciary. His words were: "it will be the duty of the court to adhere to the Constitution and to declare the Act null and void."[66] (Emphasis added.)

In 1795 we have the first of the two cases involving one Daniel Hylton. The case, U.S. V. Hylton,[67] was argued solely on constitutional grounds.[68] At issue was a 1794 Congressional act which levied a tax on carriages. Hylton refused to pay the tax, alleging that "the said law was unconstitutional and void." Of the four justices who heard the case, three were members of the Constitutional Convention: Iredell, Wilson and Patterson, with the first approving of judicial review there and Patterson agreeing in Van Horne's Lessee V. Dorance. All four agreed the tax did not violate the Constitution and Chase saw the implications of the case and said he was not sure if the court had the power to void laws but if it did he would exercise it in only very clear cases.[69] Yet "neither side challenged the power of the court" to make

such a ruling on constitutionality.[70]

Hylton again appeared before the Court later that year in Ware V. Hylton (1796).[71] This time Hylton was being sued for defaulting on a bond he twok out in 1774 to a British subject. Due to an act of the Virginia state legislature Hylton had paid the sum owed to the state because all British property had been sequestered. The court ruled against Hylton by citing the Fourth article of the Treaty of Peace which, they said, nullified the law of Virginia of 1774 and thus revived the debt owed.

Among the principles stated in the case was that the people were the genuine source of all power; that such power was invested in the constitution and therefore "laws should not be repugnant to the constitution or fundamental law." The court went on to say that the courts could not question "laws made in pursuance of the constitution."[72] These notions are summarized clearly by Iredell who announced:

> The power of the legislatures is limited; of the state legislatures by their own constitutions and that of the United States; of the Legislatures of the Union by the constitution of the Union. By these limitations, I have no doubt their acts are void, because they are not warranted by the authority given.[73]

Compare the above-mentioned statement with one of Iredell's just one year later, when he said:

> It has been the policy . . . of the people of the United States, when they framed the federal constitution, to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. If any act of Congress, or of the legislature of a state, violates those constitutional provisions, it is unquestionably void.[74]

The difference between the meaning of the two passages is minimal, the key principles of limited power to the legislatures and beyond those limits thier acts are void is unchanged. The only major difference is that the latter was stated in Calder V. Bull (1798).[75] The point is that the philosophy of judicial review was not simply a flash in one decision to be forgotton at the next, rather it was becoming established, theoretically, in American thought. Even Justice Chase, who earlier showed misgivings about declaring laws void, showed no misgivings in this case. Noting the sovereignty of the people he rejected "the omnipotence of a state legislature" and believed acts contrary to the fundamental laws were prohibited.[76] Yet as in the preceding cases, the court did not find the act in question to violate the federal Constitution because the clause under discussion, the ex post facto clause, was found to apply to criminal statutes only.

The final case in this section is Cooper V. Telfair (1800).[77] Plaintiff brought suit to recover money lent on a loan. Telfair, now Governor of Georgia, responded by arguing that Cooper had been banished from Georgia and that the legislature confiscated Cooper's property, thus no cause for action against defendent existed. Cooper replied that the act expelling him and confiscating his property were unconstitutional and thus void.

Although Cooper's suit was denied, the Court did not believe it lacked the power to declare such acts void. Justice Washington stated, "There is no ground on which I could be prepared to say that the law is void." For him the presumption was always in favor of the validity of laws, "if the contrary is not clearly demonstrated." Justice Chase

maintained his new stance, writing

> It is, indeed, a general opinion, it is expressly admitted by all this Bar, and some of the judges have, individually, in the cricuits, decided that the Supreme Court can declare an Act of Congress to be unconstitutional, and, therefore, invalid; . . . I concur, however, in the general sentiment with reference to the period when the existing Constitution came into operation.

Justice Patterson thought "to authorize this court to pronounce any law void, it must be a clear and unequivocal breach of the Constitution." And expressing the sentiments of the Court overall, Justice Cushing exclaimed,

> Although I am of opinion that this court has the same power that a court of the State of Georgia would possess, to declare the law void, I do not thank that the occasion would warrant an exercise of the power.[78]

These federal cases possess all the elements of the state cases. All the elements except one. Despite the presence of such notions as the Constitution as the higher law made by the sovereign people which limits the actions of government and that acts contrary to this Constitution would be void, the Supreme Court had not set aside a legislative act. Or in the words of Justice Chase, "[T]here is no adjudication of the Supreme Court itself upon the point."[79] Within three years this situation would be remedied.

FOOTNOTES

CHAPTER VI

[1] For example, Hugh Williamson of North Carolina, on page 53 of Chapter IV, in regard to the Constitutional Convention. And Patrick Henry expressed similar approbation in the Virginia Convention, text accompanying notes 58-60, Chapter V.

[2] L. Brent Bozell, The Warren Revolution--Reflections on the Consensus Society (New Rochelle, New York: Arlington House, 1966), and William W. Crosskey, Politics and the Constitution in the History of the United States (Chicago: University of Chicago Press, 1953).

[3] See Chapter I, page 8, notes 31-32.

[4] Reinsch, English Common Law in the Early American Colonies p. 16.

[5] Corwin, The "Higher Law" Background of American Constitutional Law, p. 73.

[6] Reinsch, English Common Law in the Early American Colonies, p. 16.

[7] Ibid., p. 66, Reinsch points out that this decision is perhaps "the earliest American instance where the power is claimed for the courts to control legislative action when opposed to fundamental law."

[8] Corwin, The Doctrine of Judicial Review, p. 29.

[9] Ibid., p. 30.

[10] Ibid., p. 30.

[11] Ibid., p. 29.

[12] Wood, The Creation of the American Republic, p. 263. Wood writes that "Otis could see no need to deny the obvious legal supremacy of Parliament."

[13] Ibid., p. 263.

[14] John B. McMaster, A History of the People of the United States, Vol. 5 (New York: D. Appleton and Co., 1927), p. 394.

[15] Ibid., p. 395.

[16] Robin et al. V. Hardaway, Jefferson's Virginia Reports 109, 1772.

[17] Ibid., p. 115.

[18] Plucknett, Bonham's Case and Judicial Review, p. 65.

[19] Commonwealth V. Caton et al., 4 Call, 5 1782 in Thayer's Cases, p. 55.

[20] Thayer's Cases, pp. 57-8.

[21] Ibid., p. 60.

[22] Ibid., p. 62.

[23] Rutgers V. Waddington, Mayor's Court, City of New York, 1784 in Thayer's Cases, p. 63.

[24] Bozzell, The Warren Revolution, p. 180.

[25] Wood, The Creation of the American Republic, p. 458.

[26] Thayer's Cases, pp. 69-70.

[27] Bozzell, The Warren Revolution, p. 184.

[28] Thayer's Cases, pp. 72-3, note 1.

[29] Trevett V. Weeden, Superior Court of Judicature of Rhode Island, 1786 in Thayer's Cases, p. 73.

[30] Thayer's Cases, p. 75. The report reads "the court is not, by said Act, authorized and empowered to impanel a jury to try the facts charged . . . and so . . . is unconstitutional and void."

[31] Ibid., p. 74.

[32] Ibid., p. 76.

[33] Bayard V. Singleton, 1 Martin, N.C. 42 in Thayer's Cases, p. 78.

[34] Bozell, The Warren Revolution, p. 204.

[35] Thayer's Cases, Justice Ashe on p. 79.

[36] Bozell, The Warren Revolution, pp. 204-5.

[37] Thayer's Cases, pp. 79-80.

[38] Ibid., p. 80. The opinion reads

> that no Act they could pass, could by any means repeal or alter the Constitution, because, if they could do this, they would at the same instant of time destroy their own existence as a legislature, and dissolve the government thereby established. Consequently the Constitution . . . standing in full force as the fundamental law of the land, not withstanding the Act on

> which the present motion was grounded, [because] the same act must of course, in that instance, stand as abrogated and without any effect.

[39] Bozell, The Warren Revolution, p. 206.

[40] The Respectful Remonstrance of the Court of Appeals, 1 Virginia Cases, 99 (1788).

[41] Kamper V. Hawkins, 1 Virginia Cases 20, 1793, p. 99. The reason footnotes 40 and 41 overlap is that the Remonstrance is entered into the Court record in the decision of Kamper V. Hawkins by one of the judges.

[42] Ibid., p. 100 and 101-102.

[43] Ibid., p. 102 for legislative acquiescence and p. 107 in regard to the power of the courts to declare what the law is.

[44] Bowman and other Devisees of Cattel V. Middleton, 1 Bay 252, (1793).

[45] Ibid., p. 254.

[46] Peter Kamper V. Mary Hawkins, 1 Virginia cases 20, (1793).

[47] Ibid., Judge Henry pp. 45-6, and Judge Nelson on p. 23, commented that "it has been decided by the judges of the court of appeals [the Remonstrance case is no doubt what he is referring to] that a law contrary to the constitution is void."

[48] Ibid., Judge Tucker p. 74; Judge Roane p. 36; Judge Henry p. 49; and Judge Tyler p. 59. Tyler explained that the Constitution was a "system of fundamental principles, the violation of which must be considered as a crime of the highest magnitude [and] this great and paramount law should be faithfully and rightfully executed."

[49] See Section A, Chapter II.

[50] Kamper V. Hawkins, 1 Virginia Cases, pp. 23-4 for Judge Nelson, who further explained that calling "this instrument the constitution or form of government, shows that the framers intended to have this effect." Judge Roane on page 36 concurs, observing that the legislature is "subordinate to the great constitutional charter, which the people have established as a fundamental law." Tucker agrees on pages 77-78 and Tyler does in note 48 of this chapter.

[51] Ibid., Tyler p. 60; Tucker p. 76; Roane on the power of the people to alter the constitution, pp. 38-9; Judge Nelson's concurrence pp. 28-9; and Roane's last statement is found on p. 38.

[52] Ibid., Tucker p. 81. He goes on to say on p. 82 "that every act of a delegated authority contrary to the tenor of the commission under which it is exercised, is void. No legislative act therefore, contrary to the constitution can be valid." Nelson expressed similar sentiments on p. 23, please see note 47 above.

[53] Ibid., Tucker p. 79, Tyler p. 61. Roane agrees on p. 40, writing, "I conclude that the judiciary may and ought to adjudge a law unconstitutional and void, if it be plainly repugnant to the letter of the Constitution, or the fundamental principles thereof."

[54] Ibid., p. 66.

[55] Rutgers V. Waddington in Thayer's Cases, p. 70 reads: "That the legislative, judicial and executive powers of government should be independent of each other, is essential to liberty.

[56] Thayer's Cases, p. 77. Two of the Judges made it clear that they were responsible to God and no one else. For example, Judge Tillinghast told the legislature that,

> the opinion he had given resulted from mature reflection and the clearest conviction . . . and he was happy in the persuasion, that his conduct met the approbation of his god!

Judge Hazard was more emphatic announcing "we derived our understanding from the Almighty, and to Him only are we accountable for our judgment."

[57] This legislative misgovernment is documented in Chapter II, Section B, Chapter III, Section A and Chapter IV Section B.

[58] Hayburn's Case, 2 Dallas 409, (1792).

[59] Corwin, The Doctrine of Judicial Review, p. 50.

[60] Hayburn's Case, The North Carolina circuit court on p. 412. The New York circuit on p. 410 observed:

> [t]hat by the constitution of the United States, the government thereof is divided into three distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either.

And the Pennsylvania circuit court on p. 411 noted that all legislative power was vested in Congress and the judicial power in the supreme court and future inferior courts.

[61] Ibid., p. 411. Here the Pennsylvania tribunal, noting that the people exercised great power because they "ordained and established the constitution" which was afterall, the "supreme law of the land."

[62] Ibid., the New York circuit at p. 410. In agreement with this notion that the judicial power can be exercised by the courts alone, we find the Pennsylvania court emphasizing: "It is a principle important to freedom, that in government, the judicial should be distinct from, and independent of, the legislative department." Also see note 60 above in regard to the Pennsylvania court. The North Carolina court made this sentiment unanimous on page 412.

[63] Ibid., Pennsylvania Circuit see p. 411. In addition the New Yrok Cricuit mentioned that "the business assigned to this court, by the act, is not judicial," and went on to construe the act as appointing the judges to be commisioners to enforce the act rather than as judges in their judicial capacity, p. 410. The North Carolina judges were more blunt, saying "that this circuit court cannot be justified in the execution of . . . the act." Yet they too, said that they would serve as commisioners to enforce the act but not as judges.

[64] Ibid., p. 411. See also McCloskey, The American Supreme Court, p. 33 and Corwin, The Doctrine of Judicial Review, p. 50 for the remark concerning "high-fliers."

[65] Van Horne's Lessee V. Dorrance, 2 Dallas 304, (1795) in Thayer's Cases, p. 94.

[66] Ibid., p. 96 of Thayer's Cases. On page 97 he reiterates "[w]hatever may be the case in other countries, yet in this there can be no doubt, that every Act of the Legislature, repugnant to the Constitution, is absolutely void."

[67] U.S. V. Hylton, 3 Dallas 171, (1796).

[68] Justice Chase, at p. 172 of this case, notes "only one question is submitted to the opinion of this court, whether the 1794 act . . . is unconstitutional and void." In his Doctrine of Judicial Review, on p. 51, Corwin concurred with this assessment when he wrote, "The only question argued before the court was that of the unconstitutionality of the act involved."

[69] U.S. V. Hylton, p. 175.

[70] Corwin, The Doctrine of Judicial Review, p. 51.

[71] Ware V. Hylton, 3 Dallas 199, (1796).

[72] Ibid., p. 223. They went on to explain, "The legislative power of every nation can only be restrained by its own constitution and it is the duty of its courts of justice not to question the validity of any law made in pursuance of the constitution."

[73] Ibid., p. 266.

[74] Justice Iredell in Calder V. Bull, 3 Dallas 386, (1798), as found on p. 303 of Lockhart, Kamisar and Choper's The American Constitution.

[75] Ibid.

[76] Ibid., p. 302. Chase's major points were presented as follows: 1) "I cannot subscribe to the omnipotence of a State legislature"; 2) "There are acts which the federal, or state, legislature cannot do, without exceeding their authority"; 3) "An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact, [i.e., the constitution] cannot be considered a rightful exercise of legislative authority." He goes on to say that "the genius, the nature and the spirit, of our State governments, amount to a prohibition of such acts of legislation."

[77] Cooper V. Telfair, 4 Dallas 14, (1800) found in Thayer's Cases, p. 105.

[78] Ibid., Justices Washington and Chase, p. 106. Justices Patterson and Cushing, p. 107.

[79] Ibid., Justice Chase on p. 106.

CHAPTER VII

A. Marbury V. Madison and the Establishment of Judicial Review

After Cooper V. Telfair only a case which actually set aside a legislative act was needed to make judicial review a viable part of American government, and Marbury V. Madison was that case. A complete understanding of Marbury V. Madison, however, requires an understanding of the political climate of the late 1790's and the passage of the Alien and Sedition Acts of 1798. These acts had been passed by a Federalist Congress due to its fears about France and more importantly, its inability to maintain the electorate's support. The courts involved themselves by vigorously enforcing these laws against anti-federalists. In the Presidential campaign of 1800 one Supreme Court Justice actively campaigned against the Anti-Federalist candidate Thomas Jefferson. In the elections that Fall the Federalists were soundly beaten, yet the victors could not take office until March 4, 1801.

During this time the Federalists hoped to maintain a position of power by entrenching themselves in the judiciary, and in February of 1801 the lame-duck Congress passed the Judiciary Act of 1801. Its provisions included the creation of sixteen new circuit judgeships, and the provision that upon the death of the next Supreme Court Justice the number of Justices should be reduced from six to five. Obviously all these judicial posts were to be filled with loyal Federalists.

Though the Adams administration had tried its best to place its appointees in office by March 4, the commission of William Marbury for Justice of the Peace in the District of Columbia had not been delivered although it had been signed and sealed in time. Not surprisingly,

Jefferson refused to give Marbury his commission. Failing to get his commission, Marbury sought redress through the Supreme Court under Section 13 of the Judiciary Act of 1789, which stated that the Supreme Court had the power to issue writs of mandamus to officers of the United States.[1]

The Anti-Federalist Congress saw the foreboding signs. They had recognized the Federalist plan to rule through the courts and now that plan appeared ready to go into action. After all who was now the Chief Justice of the Supreme Court? None other than John Marshall, the Secretary of State who had failed to deliver Marbury's commission in time in the first place. Not liking what they saw the new Congress suspended the 1802 term of the Court so that the decision could not be announced until 1803, even though the arguments were heard in 1801.

The stage was set for a showdown between the Judiciary and Congress, supported by the President. If the Court granted Marbury his commission it was quite probable the executive would refuse to execute the grant, thus undermining the Court's future place in American government. If the Court denied Marbury's motion, it might also lose stature and appear to be yielding to pressure from the other branches.

In a seemingly miraculous opinion, Marshall avoided both pitfalls. In a nine-thousand word foray he admonished the Jefferson administration for denying Marbury his commission. Nevertheless, Marshall avoided a direct confrontation with the President or the Congress by ruling that the Supreme Court did not have jurisdiction in this case because section 13 of the Judiciary Act of 1789 violated the Constitution. Specifically it violated Article III, section two, paragraph two, which restricts the original jurisdiction of the Court to cases "affecting

ambassadors, other public ministers and consuls, and those in which a State shall be party."[2]

In this pronouncement Marshall set forth the doctrine of judicial review, which in essence holds "that a law repugnant to the Constitution is void."[3] This doctrine was based upon certain clearly recognizable principles.[4] Among these principles was: 1) the sovereignty of the people; 2) limited government; 3) written constitutions; and 4) higher law.

As for the sovereignty of the people, he declared:

> That the people have an original right to establish . . . their future government . . . is the basis on which the whole American fabric has been erected. . . . The principles, therefore, so established, are fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.[5]

The second notion, limited government, is derived from the people's wishes. Marshall maintained that the people in establishing this government not only assigned to the departments their differing powers, but also "establish[ed] certain limits not to be transcended by those departments."[6] He adds "that those limits may not be mistaken, or forgotten, the Constitution is written."[7]

From this equation of written constitutions and higher law Marshall went on to say that all acts contrary to the Constitution are invalid:

> 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.[8]

It is the judiciary which is to determine what is and what is not "repugnant to the Constitution." "It is emphatically the province and

duty of the judicial department to say what the law is," noted Marshall, for "If two laws conflict with each other, the courts must decide on the operation of each."[9]

Why was it necessary for Marshall to single out the judiciary to declare unconstitutional acts void? It was necessary to complete the four questions asked in the introduction: What was to be judicially reviewed? Why was there to be judicial review? When was there to be judicial review? And how was judicial review to be conducted? Marshall answers all four questions when he delivered the court's opinion. What was to be reviewed?--actions of the government, in particular acts of the legislature. Why was there judicial review?--to ensure that the will of the people, as expressed in the Constitution, was not altered or usurped. When was the review to take place?--whenever such actions came into question before the proper body. Lastly, how was judicial review to take place?--when the challenged act came before the Jucicia-ary, the proper tribunal for such questions, and this body determining that the alleged act was indeed contrary to the Constitution pronounced that act null and void. This is the doctrine of judicial review.

Opponents of the Court have claimed that Marshall's opinion was an unwarranted assertion of power, totally opposed to the principles of government adhered to Americans at that time. Others have contended that Marshall's opinion was a stroke of brilliance, if not genius. I would suggest both are wrong. To the critics I say that the principles on which this opinion rests can in no way be considered radical or out-side the mainstream of American thought. Look first at the concept that the sovereignty of the state lay with the people. Marshall did

not originate this idea, he was simply repeating a notion which gained formal standing thirteen years earlier when the Constitution was ratified by the people, not the states.[10] Limits on government contained in a higher law were also well accepted traditions in American political thought.[11] That Americans placed their sovereignty in a written constitution had ceased to be an issue when the sovereignty of the people was accepted. In essence, the principles Marshall laid out were not wild-eyed claims but simply what the majority of Americans in the late eighteenth century held to be true.

Well if the principles were not innovations, what about the power to declare laws void? No, this was not new either, because it had been exercised in state courts and had been asserted in the Supreme Court only three years before. Nonetheless we should give the new Chief Justice credit for being the first to declare an act, more precisely, a section of an act, void in the Supreme Court. But to label such action a great diversion from American political thought, cannot be accurate.

The admirers of this decision as an intellectual masterpiece do not stand much better. They point with glee to the apparent cleverness of Marshall. But look at what he argued. In order to give the courts the power "to say what the law is," Marshall insisted that it is the province of the courts to "expound and interpret" the law. Yet this was the very argument of some of the framers at the Constitutional Convention.[12] Furthermore he uses the examples of ex post facto laws and duties placed on goods from one state by another state. Both of these examples were discussed previously, ex post facto laws by Madison and Williamson at the Constitutional Convention, and state duties in the

Virginia and North Carolina conventions.[13]

The aforementioned points, expounding the laws, ex post facto laws, and state imposts, might be minor in their impact on the decision, yet such is not the case with the next two arguments. The first point is Marshall's rationalization of why section 13 is void. His argument was that Congress had altered the original jurisdiction of the Supreme Court which had been set by the Constitution and therefore this act, like any other act, which is contrary to the Constitution, must be void; otherwise the Constitution would be meaningless. His own words were:

> If Congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the Constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance . . . therefore, such a construction is inadmissible.[14]

Compare this statement with that of Patrick Henry's in the Virginia Ratifying Convention, when Henry spoke on the question of the Court's jurisdiction:

> Congress cannot, by any act of theirs alter this jurisdiction as established. It appears to me that no law of Congress can alter or arrange it. . . . . If Congress alter this part, they will repeal the Constitution.

He goes on to say that "If you are obliged to do certain business, you are to do it under such modifications as were originally designed." He concludes, as did Marshall, "their laws in opposition to the Constitution would be void."[15] Marshall then did not originate this scheme to control the Anti-Federalists, rather, he was only repeating the argument of a great Anti-Federalist.

This criticism is even more significant in that Marshall was almost

certainly aware of this statement, for he himself addressed the Convention almost immediately after Henry finished and reassured the delegates that any law not warranted by the Constitution would be declared void by federal judges.[16] In 1787 Marshall did not fundamentally disagree with Henry, and in 1803 we find him adopting Henry's specific line of reasoning, in this Supreme Court case.

The second major point in which Marshall's admirers are too free with their praise is in regard to the famous "misdirection" of the case. What the Chief Justice had done was to allow the Jefferson administration's refusal to give Marbury his commission stand while in the same breath he announced that the courts had the power to declare unconstitutional statutes of the Congress void. On the one hand he handed the judiciary's enemies a victory, while on the other hand he undermined the power of those very enemies. This tactic of misdirection, was not a new one for the courts of America, especially in regard to judicial review. Recall the cases of Rutgers V. Waddington and Trevett V. Weeden.[17] In Rutgers the judge was gracious enough to pay lip service to the doctrine of legislative supremacy while disregarding a legislative act. And in Trevett the judges denied to the legislature that they voided a law because of unconstitutionality, indeed that was so, but in their refusal to hear the case they made the law void in a practical sense. In short, the courts of America therefore, had a history of appeasing its adversaries on the surface while in reality delivering staggering blows.

My interpretation of the case, at this point, may appear to be contradictory. I have indeed attacked both critics and defenders of

this decision simultaneously. Yet I believe there is a logical explanation, and taht explanation holds that Marshall's opinion in Marbury V. Madison was merely the culmination and in some areas, a recapitulation, of previous arguments, beliefs and styles. In the critics, who claim the decision was a radical departure from American thought, we know the opposite is true. The principles upon which the decision was based had arisen and been incorporated into American thought many years before, as seen earlier in this chapter. That the courts could declare laws void which were unconstitutional had not only been asserted in convention debates and judicial opinions but actually practiced in the state courts. Marshall was just the first to implement judicial review from the highest court of the land. Thus, the Marshall worshippers' conception must fall. The decision was not the stroke of original genius because the arguments used had been thoroughly discussed in the Federal and state conventions; the rationale to nullify section 13 had been stated plainly by Patrick Henry years before; and the discreet style used had been practiced earlier by courts confronted with similar hostility. The assumption of both critic and defender, namely that the decision is one of originality, is false condemning both sides' positions to falsehood as well. It is for these reasons that I previously used the phrase "seemingly miraculous" to describe this famous decision. The word seemingly was intentionally used because to those now familiar with the true background of judicial review the word miraculous is too grandiose for a succinct rendition of established ideas and lesser-known arguments.

B. The Default Hypothesis--An Explanation of the Founding Fathers' Attitude

That judicial review had by 1803 become a well-developed idea cannot be doubted. Yes there might be a question of whether a majority of Americans liked it or not, but there was no question as to what judicial review entailed. Marshall had seen to that. Therefore one singularly significant inquiry remains--what were its origins?

One definite place to investigate is the Constitutional Convention, for that is where our system of government was formulated. Already we have seen what the delegates had to say in particular about judicial review and from this evidence deductions could be made to what those men desired. Rather than merely dealing with specific statements, it may be more rewarding to step back and ask are the ideas incorporated into the Constitution "logically sufficient" to provide for judicial review; in other words, did the framers plant the necessary ingredients from which judicial review might flourish?[18] In so doing, the actions rather than words of the framers will be judged.

The answer as to whether the Constitution logically allows for judicial review is resoundingly, yes, because without it the Constitution wouldn't work. I have labeled this the default argument, for as McClosky observed, the courts "fell heir almost by default to the guardianship of the fundamental law."[19] The new system needed some institution to ensure that the Constitution was not ignored or abused. In addition, some arbiter is indispensable when power is so widely divided as it was under the Constitution between the states and the national government as well as between the different branches of the national government, itself.[20]

"Surely there should be somewhere a constitutional authority for carrying into execution constitutional provisions," commented William Davie, "otherwise, as I have already said, they would be a dead letter."[21]

Another proof of the default argument is the lack of any viable alternatives to judicial review. Recall that at the Constitutional question John Dickinson was impressed by statements opposing judicial review, yet "[h]e was at the same time at a loss what expedient to substitute."[22] If there was no judicial review then perhaps the decision of the first department before which an issue arose should be binding. However this set-up coupled with Congress' control of the purse would have made Congress "substantially omnipotent" because of the greater number of issues which would necessarily depend on its action.[23] Such legislative omnipotence clearly runs counter to the purpose of the Constitution, which was to limit and constrain the state legislatures. The sovereign power of the government was to rest in the Constitution and it clearly follows that the legislative could not alter it, after all this is what Patrick Henry and Marshall both said. The other alternative was executive interpretation and this too was unacceptable.[24] Therefore to whom did the Constitution give final authority to interpret it? "The Supreme Court," replies Robert Scigliano, "There is no practical alternative if the constitutional plan is to be followed."[25]

If no logical alternative to judicial review existed, then should not the Constitution function properly with it? In regard to implementing the idea of limited government this is certainly the case as Robert Haines explains:

> In the hands of American judges natural law ideas

> [for our purposes higher law] were a favorite refuge for giving sanction to the negative and restrictive ideas of the eighteenth century that governmental functions should be confined to a narrow sphere.[26]

Extending this analysis one step further, the whole workability of the new system became dependent on the courts. "Otherwise," points out Learned Hand, "the government could not have proceeded as planned."[27] Thus the framers not only provided a "logically sufficient" foundation for judicial review but went on to make a system in which judicial review was a vital part.

C. An Overall View--The Evolution of Ideas

Chief Justice Berger has remarked:

> The seductive plausibility of single steps in a chain of evolutionary development is not perceived until a third, fourth or fifth 'logical' extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the . . . end result is one that would never have been seriously considered in the first place.[28]

This statement is true not only in connection with judicial review but American political thought as well. Judicial review did not just leap into American thought or government, rather it materialized gradually, building itself on earlier notions and precedents prior to its formal announcement in 1803.

Higher law, limited government and separation of powers, ideas widely adhered to at the time of our government's formation, followed a parallel path. It is not possible for men all at once to cut "themselves loose from a system of thought or action under which they have lived."[29] Even if they were to move to totally new conditions their

ideas and institutions would undoubtedly be swayed by their former experience; such was the case of the Americans.

The concept of higher law was not new to the world because Americans brought this concept with them from Europe. For example, New Englanders adhered to God's law while to the South the common law was thought supreme, and still others believed in natural law. New conditions forced the Americans to adapt, and far and away the most important of these was the abusive state legislature. It sparked new ideas like popular sovereignty, separation of powers and written constitutions, when the older notions of higher law, in their more simple original forms, failed to guarantee the treasured values of personal freedom and property. Nor was this evolution of ideas a clearly linear movement affecting all parts of America simultaneously, rather it grew only as fast as the environment in which it flourished--legislative misgovernment. Thus some parts of America became aware of the need for such mature institutions as a written constitution as early as 1776 while others did not reach this level until the 1780's as the following statement explains:

> It was difficult for many in 1776 . . . to envision the constitutions they were drafting, fundamental as they may have been in theory, as any sort of 'check on the Representatives of the people" . . . while Orange and Mecklenburg counties in North Carolina had by 1776 already worked out a sophisticated conception of a constitution designed to limit the entire government, representatives included.[30]

Yet by 1787 most all of the states had had some taste of legislative misgovernment and they were as eager to put controls on the legislatures as had North Carolina in 1776. The result of this eagerness was the Constitutional Convention held in Philadelphia where a written

constitution for all America was made into a reality.

Judicial review likewise evolved. It did not appear in its final form all at once but grew and changed with incoming ideas as exemplified by the court cases. In the eighteenth century prior to 1776 the power of judicial review had been asserted mainly upon the concept of fundamental law. Also up to 1776 no law in this century had been nullified by a court of law, only one Virginia court had refused to enforce a law. The power and prestige of the legislature was still beyond question.

However in the 1780's a slow, but definite, trend appears. In 1784 Rutgers V. Waddington witnessed a court pay lip-service to legislative supremacy but in reality disregarded a legislative act based on a higher law. Two years later a New Jersey tribunal accomplished a similar maneuver, not enforcing a law because it was unconstitutional. And in 1787 a court formally proclaimed a legislative statute null and void in Bayard V. Singleton.

I do not think it was mere coincidence that both the first mature declaration of judicial review and the Federal Constitutional Convention occurred in the same year--1787. These two events accurately reflect the shift in American thought; a shift away from legislative dominance to one of constitutional supremacy. Nor can it be doubted that judicial review was part of this new thought. At Philadelphia, "no less than fourteen [members] believed that the judicial power included the right and duty of passing upon the constitutionality of acts of Congress." And Professor Beard adds the vote of three other members on the Judiciary Act of 1789 as evidence that they too approved of judicial review.[31] Many other outstanding scholars have concurred in this assessment of the

convention, including Raoul Berger, Max Farrand, Charles Warren, among others.[32] At tge State Ratifying Conventions judicial review was equally well received, for as Berger observed, "No voices were raised in opposition to judicial review, after the manner of Mercer in the federal convention, in any State convention."[33] Judicial review, then, was theoretically becoming entrenched.

In summation, judicial review had its origins in the early beliefs of Americans, who when confronted by a new environment and new problems, were not afraid to accept fresh ideas to meet the new challenges. In seeking to preserve their freedom and property the Americans looked first to the more established ideas like higher law and limited government but when these were found to be lacking the focus shifted to modifications of these ideas, like a precise written constitution to serve as the higher law instead of vague unwritten concepts. And when the written constitutions came under attack the Americans looked for a power to preserve and protect the written constitution and found such a power in judicial review.

FOOTNOTES

CHAPTER VII

[1] Peltason, Understanding the Constitution, p. 26.

[2] United States Constitution, Article III, section 2, paragraph 2.

[3] Thayer, Cases on Constitutional Law, p. 114. Marbury V. Madison is found originally in volume 1 of Cranch, p. 137. It is McCloskey, The American Supreme Court, p. 42, who notes that Marshall "set forth the doctrine of judicial review."

[4] Thayer's Cases, p. 111. Here Marshall wrote that to answer "[w]hether an Act repugnant to the Constitution can become the law of the land. . . . It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it." Corwin emphasizes this on p. 17 of The Doctrine of Judicial Review.

[5] Ibid.

[6] Ibid.

[7] Ibid.

[8] Ibid., p. 112.

[9] Ibid.

[10] Any doubt on the acceptance of the people's sovereignty should be quickly squelched by reviewing pp. 24-27 in Chapter II and section A of Chapter V.

[11] For acknowledgement of the notion of limited government please see section A, Chapter II, section B, Chapter IV and section B of Chapter V. In regards to the adherence to the concept of higher law see Chapter I, section B.

[12] See section E, Chapter IV.

[13] Ex post facto laws are discussed by Madison and Williamson at the Constitutional Convention on page 53. State imposts were an issue at the North Carolina Convention, see text accompanying notes 34-8, Chapter V.

[14] This from Marbury V. Madison as found in Lockhart, Kamisar and Choper's The American Constitution, 3rd ed., American Casebook Series, (St. Paul: West Publishing Co.), 1970.

[15] Elliot's Debates, 3: 540-541.

[16] Ibid., 3: 553. Notice that Marshall is speaking just two turns after Henry.

[17] Rutgers V. Waddington and Trevett V. Weeden are analyzed in depth in Chapter VI in the text accompanying notes 23-32.

[18] Corwin on pp. 2-3 of his Doctrine of Judicial Review phrased the task in this manner

> For the question is not, what did the framers of the Constitution hope or desire with reference to judicial review but what did they do with reference to it; and before ideas contemporary with the framing of the Constitution can be regarded as furnishing the legal basis of judicial review, it must be shown that they were, by contemporary understanding, incorporated in the Constitution for that purpose and that they were logically sufficient for it.

[19] McCloskey, The American Supreme Court, p. 13.

[20] Jackson, The Struggle for Judicial Supremacy, p. 9.

[21] Elliot's Debates, 4: 158.

> I thought, if there were any political axiom under the sun, it must be, that the judicial power ought to be coextensive with the legislative. The federal government ought to possess the means of carrying the laws into execution. This position will not be disputed. A government would be a felo de se to put the execution of its laws under the control of any other body. If laws are not to be carried into execution by the interposition of the judiciary, how is it to be done?

[22] Farrand's Records, 2: 299. Farrand notes:

> Mr. Dickenson was strongly impressed with the remark of Mr. Mercer as to the power of the Judges to set aside the law. He thought no such power ought to exist. He was at the same time at a loss what expediant to substitute. (Emphasis added.)

[23] Learned Hand in Lockhart, Karisar and Choper's The American Constitution, p. 11.

[24] Scigliano, The Supreme Court and the Presidency, p. 17. He writes:

> The power to determine the constitutionality of the political branches acts finally must rest with

> the Supreme Court, and those political branches must accept that determination as a rule governing their conduct. The alternatives to this conclusion lead to legislative or executive supremacy. (Emphasis added.)

[25] Ibid.

[26] Haines, The Revival of Natural Concepts, p. 217.

[27] Lockhart, Kamisar and Choper, The American Constitution, p. 11.

[28] U.S. V. 12 200-Foot Reels of Super 8mm. Film, 413 US 123, p. 127 (1973).

Corwin, Doctrine of Judicial Review, p. 64, explains,

> the philosophy of Evolution has introduced a distinction of palpable serviceability to our constitutional theory in its present exigency, the distinction between growth by gradual accretion and change by leaps and bounds.

[29] Reinsch, English Common Law in the American Colonies, pp. 6-7.

[30] Wood, The Creation of the American Republic, p. 273.

[31] Beard, The Constitution and The Supreme Court, p. 50. Corwin, Doctrine of Judicial Review, p. 10. Lists of the delegates counted in favor of judicial review:

> Gerry and King of Massachusetts, Wilson and Gouverneur Morris of Pennsylvania, Martin of Maryland, Randolph, Madison and Mason of Virginia, Dickinson of Delaware, Yates and Hamilton of New York, Rutledge and Charles Pinckney of South Carolina, Davie and Williamson of North Carolina, Sherman and Ellsworth of Connecticut.

[32] Burns, James Madison: Philosopher of the Constitution, p. 182.

[33] Berger, Congress V. The Supreme Court, p. 130. Berger elaborates on p. 149, note 37, that his study of the Ratification Convention records confirmed Warren's claim that "so far as reported, there was no challenge, in any convention, of the existence of the power of the court with reference to Acts of Congress." This statement is from Warren's book, Congress, the Constitution and the Supreme Court (Boston: Little, Brown), 1925, p. 68.

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