THE LEAST DANGEROUS BRANCH

The Supreme Court at the Bar of Politics

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said that the intentions of the Framers cannot be ascertained with finality; that there were some who thought this and some that, and that it will never be entirely clear just exactly where the collective judgment—which alone is decisive—came to rest. In any debate over the force of the tradition, such is the most that can be said against the claims of judicial review.

Continuity with the past, said Holmes, is not a duty; it is merely a necessity. But Holmes also told us that it is "revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."[12] Judicial review is a present instrument of government. It represents a choice that men have made, and ultimately we must justify it as a choice in our own time. What are the elements of choice?

The Counter-Majoritarian Difficulty

The root difficulty is that judicial review is a counter-majoritarian force in our system. There are various ways of sliding over this ineluctable reality. Marshall did so when he spoke of enforcing, in behalf of "the people," the limits that they have ordained for the institutions of a limited government. And it has been done ever since in much the same fashion by all too many commentators. Marshall himself followed Hamilton, who in the 78th *Federalist* denied that judicial review implied a superiority of the judicial over the legislative power—denied, in other words, that judicial review constituted control by an unrepresentative minority of an elected majority. "It only supposes," Hamilton went on, "that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former." But the word "people" so used is an abstraction. Not necessarily a meaningless or a pernicious one by any means; always charged with emotion, but nonrepresentational—an abstraction obscuring the reality that when the Supreme Court declares unconstitutional

a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it. That, without mystic overtones, is what actually happens. It is an altogether different kettle of fish, and it is the reason the charge can be made that judicial review is undemocratic.

Most assuredly, no democracy operates by taking continuous nose counts on the broad range of daily governmental activities. Representative democracies—that is to say, all working democracies—function by electing certain men for certain periods of time, then passing judgment periodically on their conduct of public office. It is a matter of a laying on of hands, followed in time by a process of holding to account—all through the exercise of the franchise. The elected officials, however, are expected to delegate some of their tasks to men of their own appointment, who are not directly accountable at the polls. The whole operates under public scrutiny and criticism—but not at all times or in all parts. What we mean by democracy, therefore, is much more sophisticated and complex than the making of decisions in town meeting by a show of hands. It is true also that even decisions that have been submitted to the electoral process in some fashion are not continually resubmitted, and they are certainly not continually unmade. Once run through the process, once rendered by "the people" (using the term now in its mystic sense, because the reference is to the people in the past), myriad decisions remain to govern the present and the future despite what may well be fluctuating majorities against them at any given time. A high value is put on stability, and that is also a counter-majoritarian factor. Nevertheless, although democracy does not mean constant reconsideration of decisions once made, it does mean that a representative majority has the power to accomplish a reversal. This power is of the essence, and no less so because it is often merely held in reserve.

I am aware that this timid assault on the complexities of the American democratic system has yet left us with a highly simplistic statement, and I shall briefly rehearse some of the reasons. But nothing in the further complexities and perplexities of the system, which modern political science has explored with admirable

and ingenious industry, and some of which it has tended to multiply with a fertility that passes the mere zeal of the discoverer—nothing in these complexities can alter the essential reality that judicial review is a deviant institution in the American democracy.

It is true, of course, that the process of reflecting the will of a popular majority in the legislature is deflected by various inequalities of representation and by all sorts of institutional habits and characteristics, which perhaps tend most often in favor of inertia. Yet it must be remembered that statutes are the product of the legislature and the executive acting in concert, and that the executive represents a very different constituency and thus tends to cure inequities of over- and underrepresentation. Reflecting a balance of forces in society for purposes of stable and effective government is more intricate and less certain than merely assuring each citizen his equal vote. Moreover, impurities and imperfections, if such they be, in one part of the system are no argument for total departure from the desired norm in another part. A much more important complicating factor—first adumbrated by Madison in the 10th *Federalist* and lately emphasized by Professor David B. Truman and others[13]—is the proliferation and power of what Madison foresaw as "faction," what Mr. Truman calls "groups," and what in popular parlance has always been deprecated as the "interests" or the "pressure groups."

No doubt groups operate forcefully on the electoral process, and no doubt they seek and gain access to and an effective share in the legislative and executive decisional process. Perhaps they constitute also, in some measure, an impurity or imperfection. But no one has claimed that they have been able to capture the governmental process except by combining in some fashion, and thus capturing or constituting (are not the two verbs synonymous?) a majority. They often tend themselves to be majoritarian in composition and to be subject to broader majoritarian influences. And the price of what they sell or buy in the legislature is determined in the biennial or quadrennial electoral marketplace. It may be, as Professor Robert A. Dahl has written, that elections themselves, and the political competition that renders them meaningful, "do not make for government by majorities in any very significant way," for they do not establish a great many policy preferences.

However, "they are a crucial device for controlling leaders." And if the control is exercised by "groups of various types and sizes, all seeking in various ways to advance their goals," so that we have "minorities rule" rather than majority rule, it remains true nevertheless that only those minorities rule which can command the votes of a majority of individuals in the legislature who can command the votes of a majority of individuals in the electorate. In one fashion or another, both in the legislative process and at elections, the minorities must coalesce into a majority. Although, as Mr. Dahl says, "it is fashionable in some quarters to suggest that everything believed about democratic politics prior to World War I, and perhaps World War II, was nonsense," he makes no bones about his own belief that "the radical democrats who, unlike Madison, insist upon the decisive importance of the election process in the whole grand strategy of democracy are essentially correct."[14]

The insights of Professor Truman and other writers into the role that groups play in our society and our politics have a bearing on judicial review. They indicate that there are other means than the electoral process, though subordinate and subsidiary ones, of making institutions of government responsive to the needs and wishes of the governed. Hence one may infer that judicial review, although not responsible, may have ways of being responsive. But nothing can finally depreciate the central function that is assigned in democratic theory and practice to the electoral process; nor can it be denied that the policy-making power of representative institutions, born of the electoral process, is the distinguishing characteristic of the system. Judicial review works counter to this characteristic.

It therefore does not follow from the complex nature of a democratic system that, because admirals and generals and the members, say, of the Federal Reserve Board or of this or that administrative agency are not electorally responsible, judges who exercise the power of judicial review need not be responsible either, and in neither case is there a serious conflict with democratic theory.[15] For admirals and generals and the like are most often responsible to officials who are themselves elected and through whom the line runs directly to a majority. What is more significant, the policies

they make are or should be interstitial or technical only and are reversible by legislative majorities. Thus, so long as there has been a meaningful delegation by the legislature to administrators, which is kept within proper bounds, the essential majority power is there, and it is felt to be there—a fact of great consequence. Nor will it do to liken judicial review to the general lawmaking function of judges. In the latter aspect, judges are indeed something like administrative officials, for their decisions are also reversible by any legislative majority—and not infrequently they are reversed. Judicial review, however, is the power to apply and construe the Constitution, in matters of the greatest moment, against the wishes of a legislative majority, which is, in turn, powerless to affect the judicial decision."

"For myself," said the late Judge Learned Hand,

> it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs. Of course I know how illusory would be the belief that my vote determined anything; but nevertheless when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture. If you retort that a sheep in the flock may feel something like it; I reply, following Saint Francis, "My brother, the Sheep."[16]

This suggests not only the democratic value that inheres in obtaining the broad judgment of a majority of the people in the community and thus tending to produce better decisions. Judge Hand, if anything, rather deprecated the notion that the decisions will be better, or are affected at all. Some might think that he deprecated it beyond what is either just or realistic when he said that the belief that his vote determined anything was illusory. Hardly altogether. But the strong emphasis is on the related idea that coherent, stable—and *morally supportable*—government is possible only on the basis of consent, and that the secret of consent is the sense of common venture fostered by institutions that reflect and represent us and that we can call to account.

It has been suggested[17] that the Congress, the President, the states, and the people (in the sense of current majorities) have from the beginning and in each generation acquiesced in, and

thus consented to, the exercise of judicial review by the Supreme Court. In the first place, it is said that the Amending Clause of the Constitution has been employed to reverse the work of the Court only twice, perhaps three times; and it has never been used to take away or diminish the Court's power. But the Amending Clause itself incorporates an extreme minority veto. The argument then proceeds to draw on the first Judiciary Act, whose provisions regarding the jurisdiction of the federal courts have been continued in effect to this day. Yet we have seen that the Judiciary Act can be read as a grant of the power to declare federal statutes unconstitutional only on the basis of a previously and independently reached conclusion that such a power must exist. And even if the Judiciary Act did grant this power, as it surely granted the power to declare state actions unconstitutional, it amounted to an expression of the opinion of the first Congress that the Constitution implies judicial review. It is, in fact, extremely likely that the first Congress thought so. That is important; but it merely adds to the historical evidence on the point, which, as we have seen, is in any event quite strong. Future Congresses and future generations can only be said to have acquiesced in the belief of the first Congress that the Constitution implies this power. And they can be said to have become resigned to what follows, which is that the power can be taken away only by constitutional amendment. That is a very far cry from consent to the power on its merits, as a power freely continued by the decision or acquiescence of a majority in each generation. The argument advances not a step toward justification of the power on other than historical grounds.

A further, crucial difficulty must also be faced. Besides being a counter-majoritarian check on the legislature and the executive, judicial review may, in a larger sense, have a tendency over time seriously to weaken the democratic process. Judicial review expresses, of course, a form of distrust of the legislature. "The legislatures," wrote James Bradley Thayer at the turn of the century,

> are growing accustomed to this distrust and more and more readily inclined to justify it, and to shed the considerations of constitutional restraints,—certainly as concerning the exact extent of these restrictions,—turning that subject over to the courts; and what is worse, they insensibly fall into a habit of assuming that whatever they could consti-

Finally, another, though related, contention has been put forward. It is that judicial review runs so fundamentally counter to democratic theory that in a society which in all other respects rests on that theory, judicial review cannot ultimately be effective. We pay the price of a grave inner contradiction in the basic principle of our government, which is an inconvenience and a dangerous one; and in the end to no good purpose, for when the great test comes, judicial review will be unequal to it. The most arresting expression of this thought is in a famous passage from a speech of Judge Learned Hand, a passage, Dean Eugene V. Rostow has written, "of Browningesque passion and obscurity," voicing a "gloomy and apocalyptic view."[21] Absent the institution of judicial review, Judge Hand said:

> I do not think that anyone can say what will be left of those [fundamental principles of equity and fair play which our constitutions enshrine]; I do not know whether they will serve only as counsels; but this much I think I do know—that a society so riven that the spirit of moderation is gone, no court *can* save; that a society where that spirit flourishes, no court *need* save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.[22]

Over a century before Judge Hand spoke, Judge Gibson of Pennsylvania, in his day perhaps the ablest opponent of the establishment of judicial review, wrote: "Once let public opinion be so corrupt as to sanction every misconstruction of the Constitution and abuse of power which the temptation of the moment may dictate, and the party which may happen to be predominant will laugh at the puny efforts of a dependent power to arrest it in its course."[23] And Thayer also believed that "under no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere."[24]

The Moral Approval of the Lines:[25] *Principle*

Such, in outline, are the chief doubts that must be met if the doctrine of judicial review is to be justified on principle. Of course, these doubts will apply with lesser or greater force to various

forms of the exercise of the power. For the moment the discussion is at wholesale, and we are seeking a justification on principle, quite aside from supports in history and the continuity of practice. The search must be for a function which might (indeed, must) involve the making of policy, yet which differs from the legislative and executive functions; which is peculiarly suited to the capabilities of the courts; which will not likely be performed elsewhere if the courts do not assume it; which can be so exercised as to be acceptable in a society that generally shares Judge Hand's satisfaction in a "sense of common venture"; which will be effective when needed; and whose discharge by the courts will not lower the quality of the other departments' performance by denuding them of the dignity and burden of their own responsibility. It will not be possible fully to meet all that is said against judicial review. Such is not the way with questions of government. We can only fill the other side of the scales with countervailing judgments on the real needs and the actual workings of our society and, of course, with our own portions of faith and hope. Then we may estimate how far the needle has moved.

The point of departure is a truism; perhaps it even rises to the unassailability of a platitude. It is that many actions of government have two aspects: their immediate, necessarily intended, practical effects, and their perhaps unintended or unappreciated bearing on values we hold to have more general and permanent interest. It is a premise we deduce not merely from the fact of a written constitution but from the history of the race, and ultimately as a moral judgment of the good society, that government should serve not only what we conceive from time to time to be our immediate material needs but also certain enduring values. This in part is what is meant by government under law. But such values do not present themselves ready-made. They have a past always, to be sure, but they must be continually derived, enunciated, and seen in relevant application. And it remains to ask which institution of our government—if any single one in particular—should be the pronouncer and guardian of such values.

Men in all walks of public life are able occasionally to perceive this second aspect of public questions. Sometimes they are also

able to base their decisions on it; that is one of the things we like to call acting on principle. Often they do not do so, however, particularly when they sit in legislative assemblies. There, when the pressure for immediate results is strong enough and emotions ride high enough, men will ordinarily prefer to act on expediency rather than take the long view. Possibly legislators—everything else being equal—are as capable as other men of following the path of principle, where the path is clear or at any rate discernible. Our system, however, like all secular systems, calls for the evolution of principle in novel circumstances, rather than only for its mechanical application. Not merely respect for the rule of established principles but the creative establishment and renewal of a coherent body of principled rules—that is what our legislatures have proven themselves ill equipped to give us.

Initially, great reliance for principled decision was placed in the Senators and the President, who have more extended terms of office and were meant to be elected only indirectly. Yet the Senate and the President were conceived of as less closely tied to, not as divorced from, electoral responsibility and the political marketplace. And so even then the need might have been felt for an institution which stands altogether aside from the current clash of interests, and which, insofar as is humanly possible, is concerned only with principle. We cannot know whether, as Thayer believed, our legislatures are what they are because we have judicial review, or whether we have judicial review and consider it necessary because legislatures are what they are. Yet it is arguable also that the partial separation of the legislative and judicial functions—and it is not meant to be absolute—is beneficial in any event, because it makes it possible for the desires of various groups and interests concerning immediate results to be heard clearly and unrestrainedly in one place. It may be thought fitting that somewhere in government, at some stage in the process of law-making, such felt needs should find unambiguous expression. Moreover, and more importantly, courts have certain capacities for dealing with matters of principle that legislatures and executives do not possess. Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the

ends of government. This is crucial in sorting out the enduring values of a society, and it is not something that institutions can do well occasionally, while operating for the most part with a different set of gears. It calls for a habit of mind, and for undeviating institutional customs. Another advantage that courts have is that questions of principle never carry the same aspect for them as they did for the legislature or the executive. Statutes, after all, deal typically with abstract or dimly foreseen problems. The courts are concerned with the flesh and blood of an actual case. This tends to modify, perhaps to lengthen, everyone's view. It also provides an extremely salutary proving ground for all abstractions; it is conducive, in a phrase of Holmes, to thinking things, not words, and thus to the evolution of principle by a process that tests as it creates.

Their insulation and the marvelous mystery of time give courts the capacity to appeal to men's better natures, to call forth their aspirations, which may have been forgotten in the moment's hue and cry. This is what Justice Stone called the opportunity for "the sober second thought."[26] Hence it is that the courts, although they may somewhat dampen the people's and the legislatures' efforts to educate themselves, are also a great and highly effective educational institution. Judge Gibson, in the very opinion mentioned earlier (p. 23), highly critical as he was, took account of this. "In the business of government," he wrote, "a recurrence to first principles answers the end of an observation at sea with a view to correct the dead reckoning; and, for this purpose, a written constitution is an instrument of inestimable value. It is of inestimable value also, in rendering its principles familiar to the mass of the people. . . ."[27] The educational institution that both takes the observation to correct the dead reckoning and makes it known is the voice of the Constitution: the Supreme Court exercising judicial review. The Justices, in Dean Rostow's phrase, "are inevitably teachers in a vital national seminar."[28] No other branch of the American government is nearly so well equipped to conduct one. And such a seminar can do a great deal to keep our society from becoming so riven that no court will be able to save it. Of course, we have never quite been that society in which the spirit of moderation is so richly in flower that no court need save it.