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JUDICIAL REVIEW & PARLIAMENTARY SUPREMACY

The American version of judicial review stands alone — and almost never stood at all

BY DAVID COLLINS

If Chief Justice John Marshall could have been transported on Dr. Who's "Tardis" back to 1610 to the great hall of Westminster, he would have witnessed a case that seemed eerily familiar. In that year, the Court of Common Pleas, presided over by Chief Justice Edward Coke and four other judges, heard an action for false imprisonment brought by Dr. Thomas Bonham against the Royal College of Physicians.[1]

Dr. Bonham had obtained a doctorate in medicine from the University of Cambridge and set about practicing his profession in the city of London. This provoked the ire of the Royal College of Physicians, which had been granted by letters patent issued by King Henry VIII the power to fine any person who practiced as a physician in London and surrounding areas who had not been admitted into the College. The terms of the patent were confirmed by two statutes.[2] Half of the fine was payable to the College and half to the Sovereign. Those who defaulted in paying the fine could be imprisoned. This was the fate that befell Dr. Bonham, who appeared before the College for examination in 1606 and was found to be deficient in medical knowledge. Nevertheless, he continued to practice. The College fined him and then, when he refused to pay the fine, imprisoned him.

The Court found, 3–2, for Dr. Bonham. In his judgment, Chief Justice Coke reasoned that by benefitting from any fines it imposed, the College was acting not only as a judge, but also as a party in its own cause — contrary to an established maxim of common law. He wrote:

> And it appears in our books, that in many 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 or reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such Act to be void.[3]

Historical scholarship has questioned the accuracy of Chief Justice Coke's statement that there were authorities that supported his doctrine.[4] What is clear is that Chief Justice Coke was laying down a gauntlet to both the Crown and Parliament by striking down the charter and statutes relied upon by the Royal College of Physicians when it took the steps that led to Dr. Bonham's imprisonment.

Unlike some who followed in his footsteps, Chief Justice Coke did not refer to the Magna Carta as a justification for declaring the statutes and charter as null and void, nor could he refer to any other constitutional documents at that time. He reasoned instead that the statutes and charter relied upon by the Royal College of Physicians were null and void because they offended "common right," contravened "reason," or were "repugnant." A great deal could be written about what Chief Justice Coke meant by these words. His use of the adjective "repugnant" is particularly intriguing; it is a word that famously emerges in *Marbury v. Madison*. The earliest dictionaries suggest "repugnant" meant "contrary" to common law.[5]

Coke's doctrine anticipated by almost two centuries an essential aspect of the power of judicial review set out in *Marbury v. Madison*: the power of the Supreme Court to declare void unconstitutional statutes — as Marshall said, "A Law repugnant to the Constitution is void."

The *Bonham* case points to the beginnings of a version of judicial review that has flourished in the United States — and nowhere else. Why is this so?

The English Version of Judicial Review

Chief Justice Coke's star began to wane in 1616 when he was suspended from his then-office of Chief Justice of the King's Bench and was unceremoniously directed by King James I to "correct his law reports."

We can move more quickly through the next tumultuous phases of British constitutional history by simply noting three key developments. First: the prosecution, conviction, and execution of Charles I in 1649 for his conduct in the Second Civil War in which it was alleged he had effectively declared war upon Parliament. Second: England's flirtation with republicanism, which was soon followed by the restoration of Charles II in 1660. Third: The events ▸

of the Glorious Revolution, which saw James II flee to France; the election of the English Convention Parliament in 1689; and the ascension to the throne of William and Mary, who accepted that it was their duty to uphold the laws made by Parliament. Thereafter, Parliament passed the Bill of Rights Act of 1689, which established the supremacy of Parliament to sit and "make provision for the settlement of the . . . laws and liberties of [the] kingdom."

Fragments of Dr. Bonham's case can be found in the judgment of Chief Justice Sir John Holt in *City of London v. Wood*,[6] *King v. Inhabitants of Cumberland*,[7] and a smattering of other cases.[8] Nearly a century after Dr. Bonham's case, however, Sir William Blackstone said that if Parliament positively passed a statute that was unreasonable, there was "no power that would control it" and that any attempt to "seek judicial power above that of the legislature . . . would be subversive of all government."[9] Blackstone did acknowledge that acts of Parliament that are impossible to perform are invalid, and that if those acts produce absurd consequences and are manifestly contrary to common reason, any collateral consequences would be void. But these statements likely reference the early canon of statutory interpretation — that statutes be interpreted to avoid absurd consequences — rather than endorse Coke's doctrine.

From the time of the Glorious Revolution, Parliament has reigned supreme in England and most common law jurisdictions that have inherited the Westminster model of parliamentary democracy. As a result, when the English version of judicial review began to emerge, it was against the background of the superiority of Parliament.

OF COURSE, THE DISTINCTION BETWEEN THE LAWFULNESS OF AN ADMINISTRATIVE DECISION AND THE SUBSTANTIVE MERITS OF THE DECISION MAY NOT ALWAYS BE CLEAR.

Following the transition from government by monarchy to parliamentary supremacy, the courts of the King's Bench assumed a greater control over the interaction between agents of government and the citizens of England.

During the course of the 19th century, England saw a significant migration of administrative powers to elected local authorities. This corresponded with the courts' development of the doctrine of *ultra vires* and principles of natural justice. Central government through the departments of state began to develop in the latter half of the 19th century. As this executive system of government evolved, the rules of administrative review that had been applied to local body decision makers were extended to central government.

Over the course of the 20th century, central government continued to consolidate political and administrative power. The Second World War saw an understandable concentration of power in the hands of the executive, which continued well into the second half of the 20th century. One authority has described this period as one "marked by neglect of principle,"[10] as Parliament continued to bestow "blank-cheque" powers upon ministers.

A turning point occurred in 1963, however, when *Ridge v. Baldwin*[11] revived the principles of natural justice. Lord Diplock would later say that this decision made possible the rapid development in England of a rational and comprehensive system of administrative law based upon the *ultra vires* doctrine.[12]

Today, in England and other Westminster-styled common law jurisdictions, "judicial review" refers to the procedure where the higher courts of justice (those with an inherent jurisdiction) are empowered to review the lawfulness of administrative decisions, actions, or omissions regarding the exercise of public functions. But in contrast to its use in the United States, judicial review *cannot* be used as a mechanism to challenge the lawfulness of legislation passed by Parliament. The court's jurisdiction in a claim for judicial review is supervisory: Its task is to determine the lawfulness of decisions or actions of those in authority rather than repair the decision or substitute its own decision. As a consequence, judicial review should not be conflated with other appellate functions.[13]

Of course, the distinction between the lawfulness of an administrative decision and the substantive merits of the decision may not always be clear. Often, the substantive merits of the decision will have to be looked at in order to ascertain if the decision should be set aside on the grounds of unreasonableness, or whether the failure to take a particular step in the decision-making process would have made any difference. Judicial review can extend to inferior legislation such as regulations and local body bylaws and ordinances that breach the statutes from which they are derived.

Finally, courts in some jurisdictions have the statutory power to issue declarations of incompatibility or inconsistency. Legislation in the United Kingdom, Australia, and

(likely soon) New Zealand permits the higher courts of those jurisdictions to issue declarations of inconsistency or incompatibility with their respective charters or bills of rights.[14] This means the higher courts in those jurisdictions can declare legislation to be incompatible or inconsistent with the Bills of Rights Acts and, in the case of England and Wales, incompatible with the European Convention on Human Rights. A statute that has been declared to be incompatible with a Bill of Rights Act may be amended or repealed to bring it into line with the Bill of Rights Act, but such changes still require Parliament's approval. This practice indicates that Parliament in these jurisdictions is willing to relinquish its supremacy, but only to a very small degree. The power to issue declarations of incompatibility or inconsistency still falls well short of the American version of judicial review.

Coke Comes to America

Coke's impact can be seen in decisions even from colonial courts in the United States.[15] In 1761, his doctrine was cited by a Massachusetts court for the proposition that if an act of Parliament was contrary to the Magna Carta and "the natural rights of Englishmen," then it was "null and void."[16] About a decade later, it was again cited to find void a Virginia statute that enslaved several persons of Indian descent as contrary to the laws of nature and God.[17] (Blackstone was cited for the countervailing view, but the court was able to avoid determining if the statute was "null and void" when it was realized that the act in question had been repealed in 1705.)

Arguably, it also influenced the Superior Court of Rhode Island in *Trevett v. Weeden*,[18] in which, according to some contemporary reports, three judges declared null and void a Rhode Island statute that authorized paper money as legal tender. This irritated the General Assembly of Rhode Island, which summoned the judges to explain themselves. The explanation offered was that the case was decided on a point of jurisdiction. This appeased the General Assembly and the judges were released. Finally, in *Bowman v. Middleton*,[19] a South Carolina court held that a state statute was contrary to common right and the Magna Carta and, therefore, *ipso facto* void.[20]

Coke's doctrine neatly complemented Emerich de Vattels's influential analysis in *The Law of Nations*, published in 1758, which led to the notion that courts ought to guard written constitutions. The adoption of state constitutions — which had built-in checks on legislative powers that legislatures generally abided — meant that courts rarely needed to seek recourse to Coke's doctrine when developing the American version of judicial review. Prior to the Constitutional Convention in 1787, courts in at least seven of the 13 colonial states had invalidated state statutes on the grounds that they violated state constitutions.[21]

Although there does not appear to have been any specific reference to Chief Justice Coke in the Constitutional Convention debates, there were a number of references to the powers of the judiciary to determine the constitutionality of laws made by Congress. For example, James Madison noted that "a law violating a Constitution established by the people themselves, would be considered by the judges as null and void."[22] These references in all likelihood were the product of the experiences in some colonial states of early iterations of the American version of judicial review and are unlikely to have been the product of a direct appreciation of Coke's doctrine.

The American Version of Judicial Review

Students of *Marbury v. Madison* will recall that the decision was fraught with politics. John Marshall was the Secretary of State when the judicial commissions for the "midnight judges" were signed by John Adams in the final days of his presidency, and it was Marshall's responsibility to ensure that the commissions were delivered. He assigned the task to his brother, James Marshall, who delivered most — but not all — of the commissions before Thomas Jefferson was sworn in as president. One undelivered commission was for the appointment of William Marbury. When the new administration refused to recognize his appointment, Marbury applied for mandamus. Thus, but for John Marshall's (or, perhaps, his brother's) own omissions, the dispute in *Marbury v. Madison* would never have arisen.

It may not be entirely accurate to say that, by presiding, Chief Justice Marshall was acting as a judge in his own cause. Nevertheless, his conflict of interest was clear and would, at least today, create an expectation that he would recuse himself.[23] That Chief Justice Marshall appeared determined to sit on *Marbury v. Madison* underscores the suggestion that "politics were not far from Marshall's mind as he composed the *Marbury v. Madison* decision."[24]

The spectre of politics also loomed large after the decision was issued. In 1805, it seemed that Justice Chase — a very partisan Federalist and a member of the Supreme Court, who had endorsed Marshall's opinion in *Marbury v. Madison* — might be impeached. Chief Justice Marshall was understandably concerned at this prospect, since the move would have been likely to lead to his own impeachment and the demise ▸

of the Court. On the eve of the Senate vote in Chase's trial, Marshall wrote to the embattled judge. The relevant part of the letter reads:

> I think the modern doctrine of impeachment should yield to an appellate jurisdiction in the legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than [would] a removal of the judge who has rendered them unknowing of his fault.[25]

As it transpired, Marshall's suggestion to appease the President and Congress was unnecessary, as the Senate acquitted Justice Chase. As Professor Bruce Ackerman notes:

> Marshall was prepared to allow Congress to overrule the Court's constitutional interpretation in exchange for immunity from politicized impeachments. Since Chase escaped conviction, the chief justice was not obliged to publicly retreat from *Marbury*. But if it had been otherwise, his proposal for a legislative override of "legal opinions deemed unsound by the legislature" might well have served as the basis of a constitutional compromise — supposing that Marshall had somehow avoided impeachment himself.[26]

Chief Justice Marshall's proposed strategy to avoid Justice Chase's demise may simply have reflected a desperate measure by a chief justice facing very desperate times. At another level, it may reflect an insight into Chief Justice Marshall's appreciation that constitutional democracy did not hinge upon the American version of judicial review. The Chief Justice knew, perhaps better than most, that since the Glorious Revolution, England had demonstrated how sound democratic government could be achieved through constitutional arrangements that recognized parliamentary sovereignty.

During the period of America's greatest struggle between its three branches of government, Marshall was willing to contemplate surrendering his newly devised American concept of judicial review in favor of a form of legislative supremacy.

And he no doubt appreciated that an alternative approach to that which he laid out in *Marbury v. Madison* was to allow Congress itself to judge the constitutionality of its enactments.

"Under such a system," explains Professor Laurence Tribe, "courts would not ignore the Constitution; rather, they would simply treat the legislative interpretation as definitive, and thus leave to Congress the task of resolving apparent conflicts between statute and Constitution."[27]

Perhaps Marshall knew that his new American brand of judicial review was radically different from the constitutional arrangements that were proving to be quite satisfactory in England — and that a compromise that saw America adopt a form of parliamentary sovereignty would not be a bad thing if it ensured his and the Court's survival.

We will of course never know what might have happened if Chase had been convicted and Marshall's behind-the-scenes willingness to acknowledge an American form of parliamentary supremacy had been pursued. What can be said is that, during the period of America's greatest struggle between its three branches of government, Marshall was willing to contemplate surrendering his newly devised American concept of judicial review in favor of a form of legislative supremacy.

From its questionable beginnings, the American version of judicial review became firmly ensconced and is today taken for granted as a bulwark of America's constitutional arrangements.

Marshall's political mastery helped ensure that *Marbury v. Madison* was accepted at the time of its publishing in 1803. The opinion appeased his Federalist colleagues by making it clear that Jefferson and Madison should have delivered Marbury the judicial commission to which he was lawfully entitled. By addressing the constitutionality of the act on which Marbury relied, it also avoided the risk that an order of mandamus would be ignored. Thus, superficially at least, both sides of the political divide could point to success in Chief Justice Marshall's opinion. As a consequence, *Marbury v. Madison* was "more ignored than attacked" when it was handed down.[28]

Judicial review went on to survive in its initial years in large part because it was not again used to invalidate an act of Congress until 1857.[29] By remaining below parapets and away from political attack, the American version of judicial review was able to consolidate.

Moreover, Jefferson and his administration could see the advantages in allowing Marshall's doctrine to go unchallenged — provided, of course,

that Jefferson and the Democratic-Republicans could control who exercised the new powers of judicial review. They were able to do just that: Between 1804 and 1811, Jefferson appointed five jurists, ensuring that the Democratic-Republicans had a majority of the appointees on the Court, with only Marshall and Justice Washington surviving from the Federalist era.

Judicial review was also appealing to the federal government because it provided an opportunity for the federal government to assert its authority over the states. *Martin v. Hunter's Lessee*,[30] in which the Court used judicial review as a mechanism to assert its authority over the Virginia Supreme Court's interpretation of federal law, is a classic example.

Judicial review also may have flourished in the United States because, for the most part, it was used sparingly. Those judges entrusted with the power to strike down congressional statutes on the grounds that they offend the Constitution have done so carefully, knowing that their decisions must be respected. This approach has ensured that the public generally maintained a substantial degree of confidence in the federal judiciary and, therefore, in the legitimacy of judicial review.[31]

Support for the distinctly American style of judicial review may also be due to several landmark cases that have used the tool of judicial review to protect the constitutional rights of individuals. *Brown v. Board of Education* and *Obergefell v. Hodges* epitomize decisions that have reinforced for Americans the great value that can be derived from this country's version of judicial review.

Conclusions

The Stuart monarchs who preceded the Glorious Revolution were despotic and tyrannical. Their assaults upon freedoms and their inability to work with successive Parliaments led ultimately to the passing of the Bill of Rights Act in 1689, which ensured parliamentary supremacy. That measure meant that Coke's doctrine could never gain much traction in England. As a consequence, the paramountcy of Parliament in the United Kingdom, and in most other common law jurisdictions, constrains the English version of judicial review.

The American version is different. Marshall's tactical nous ensured that it was firmly transplanted into the rich soils of America's Constitution. It has grown in a way that possibly not even Marshall could have anticipated, even though, as history has shown, its creator contemplated cutting the new concept off at its roots. Nevertheless, the American version of judicial review has flourished and is now an integral component of America's constitutional arrangements.

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1 Dr. Bonham's Case (1610) 77 Eng. Rep 646.
2 *See* 15 Hen. VIII c5, 1 Mar. C9.
3 Dr. Bonham's Case, *supra* note 1.
4 *See, e.g.*, Harold J. Cook, *Against Common Right and Reason: The College of Physicians Versus Dr. Thomas Bonham*, 29 Am. J. Legal Hist. 301, 322 (1985); Theodore F.T. Plucknett, *Bonham's Case and Judicial Review*, 40 Harv. L. Rev. 30, 70 (1926).
5 Repugnant, A Dictionary of the English Language (1755) (By Samuel Johnson).
6 *City of London v. Wood* 88 Eng. Rep. 1592 (1702) (Lord Holt, C.J.).
7 *King v. Inhabitants of Cumberland* (1795) 6 TR 194 (Lord Holt, C.J.).
8 *See, e.g.*, *Stewart v. Lawton* 1 Bing. 374 (1823); The Duchess of Hamilton Case 10 Mod. 115 (1712).
9 Sir William Blackstone Commentaries on the Laws of England, Vol. 1: A Facsimile of the First Edition at 91 (The University of Chicago Press, Chicago, 1979).
10 Sir William Wade & Christopher Forsythe, Administrative Law 12 (11th ed. 2014).
11 *Ridge v. Baldwin*, [1964] AC 40.
12 *See O'Riley v. Mackman*, [1983] 2 AC 237 at 279; *Mahon v. Air N.Z.*, [1984] AC 808 at 816.
13 *See R v. Sec'y of State for the Home Dep't*, [1995] 2 AC 513; *ex parte* Brind, [1991] 1 AC 296 (HL); *Reid v. Sec'y of State for Scotland* [1999] 2 AC 512.
14 Hon. Andrew Little & Hon. David Parker, *Government to ProvideGreater Protection of Rights Under the NZ Bill of Rights Act 1990*, New Zealand Gov't (Feb. 26, 2018), https://www.beehive.govt.nz/release/government-provide-greater-protection-rights-under-nz-bill-rights-act-1990. See the recent declaration of inconsistency made in the New Zealand Courts: *Taylor v. Att'y-General*, [2018] NZSC 104, [2019] 1 NZLR 213.
15 Historians regard the Massachusetts case of *Giddings v. Browne* as "the first clear example of an act of legislature being invalidated by the judiciary in America." Plucknett, *supra* note 4, at 62.
16 Josiah Quincy, Jr., *Paxton's Case of the Writ of Assistance*, *in* Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay Between 1761 and 1772 at 51 (Josiah Quincy, Jr. ed. 1865).
17 *Robin v. Hardaway*, 1 Jeff. 109 (Va. Gen. Ct. 1772).
18 *Trevett v. Weeden* (R.I. 1786). P.W. Chandler, Am. Criminal Trials 269 (1844).
19 *Bowman v. Middleton*, 1 Bay 252 (S.C. 1792).
20 *Id.*
21 Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 17 U. Chi. L. Rev. 887, 933 (2003).
22 The Records of the Federal Convention of 1787 (Max Farrand, ed., 1911).
23 Erwin Chemerinsky, Constitutional Law: Principles and Policies 39 (5th ed. 2015).
24 Donald O. Dewey, Marshall v. Jefferson: The Political Background of *Marbury v. Madison* 117 (1920).
25 Robert Jackson, The Struggle for Judicial Supremacy 26 (1941).
26 Bruce Ackerman, The Failure of the Founding Fathers 220 (2005).
27 Laurence H. Tribe, American Constitutional Law 210 (3d ed. 2000).
28 Daniel A. Farber & Neil S. Siegel, United States Constitutional Law (2019).
29 *See Dred Scott v. Sanford*, 60 U.S. 293 (1857).
30 *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816).
31 *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).