

CHAPTER I

Establishment and General Justification of Judicial Review

The least dangerous branch of the American government is the most extraordinarily powerful court of law the world has ever known. The power which distinguishes the Supreme Court of the United States is that of constitutional review of actions of the other branches of government, federal and state. Curiously enough, this power of judicial review, as it is called, does not derive from any explicit constitutional command. The authority to determine the meaning and application of a written constitution is nowhere defined or even mentioned in the document itself. This is not to say that the power of judicial review cannot be placed in the Constitution; merely that it cannot be found there.

Marbury v. Madison

Congress was created very nearly full blown by the Constitution itself. The vast possibilities of the presidency were relatively easy to perceive and soon, inevitably, materialized. But the institution of the judiciary needed to be summoned up out of the constitutional vapors, shaped, and maintained; and the Great Chief Justice, John Marshall—not singlehanded, but first and foremost—was there to do it and did. If any social process can be said to have been “done” at a given time and by a given act, it is Marshall’s achievement. The time was 1803; the act was the decision in the case of *Marbury v. Madison*.

William Marbury’s law suit against Secretary of State Madison

was an incident in the peaceful but deep-cutting revolution signaled by Jefferson's accession to the presidency. The decision was both a reaction and an accommodation to the revolution. It was, indeed, as Professor Robert G. McCloskey has written, "a masterwork of indirection, a brilliant example of Marshall's capacity to sidestep danger while seeming to court it, to advance in one direction while his opponents are looking in another." The Court was "in the delightful position . . . of rejecting and assuming power in a single breath"; although Marshall's opinion "is justly celebrated," "not the least of its virtues is the fact that it is somewhat beside the point."¹

The opinion is very vulnerable. "It will not bear scrutiny," said the late Judge Learned Hand. And it has in fact ill borne it at the hands of Thomas Reed Powell and others. Marshall was one of the most remarkable figures in an astonishing generation of statesmen. He was not given, he at once created and seized, what Holmes called "perhaps the greatest place that ever was filled by a judge." In his superb brief *Life*, James Bradley Thayer made the just estimate that in constitutional law, Marshall was "preëminent—first, with no one second." But Thayer remarked also that the very common favorable view of the reasoning in *Marbury v. Madison* "is partly referable to the fallacy which Wordsworth once remarked upon when a friend mentioned 'The Happy Warrior' as being the greatest of his poems. 'No,' said the poet, 'you are mistaken; your judgment is affected by your moral approval of the lines.'"² It is necessary to analyze the reasoning and to abandon it where it fails us, however hallowed by age and incantation. For to rest the edifice on the foundation Marshall supplied is ultimately to weaken it, as opponents of the function of judicial review know well. There are sounder justifications of judicial review. And there is yet another purpose to be served by a hard analysis of the decision. Not only are the props it provides weak, and hence dangerous; they also support a structure that is not quite the one we see today. Marshall's proofs are not only frail, they are too strong; they prove too much. *Marbury v. Madison* in essence begs the question. What is more, it begs the wrong question.

William Marbury and some others sued Secretary Madison for delivery of their commissions as justices of the peace for the County

of Washington in the District of Columbia, an office to which they had been appointed in the last moments of the administration of President John Adams. Marshall held that Marbury and the others were entitled to their commissions, but that the Supreme Court was without power to order Madison to deliver, because the section of the Judiciary Act of 1789 that purported to authorize the Court to act in such a case as this was itself unconstitutional. Thus did Marshall assume for his Court what is nowhere made explicit in the Constitution—the ultimate power to apply the Constitution, acts of Congress to the contrary notwithstanding.

"The question," Marshall's opinion begins, "whether an act repugnant to the Constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest." Marshall's confidence that he could traverse the path ahead with ease is understandable, since he had already begged the question-in-chief, which was not whether an act repugnant to the Constitution could stand, but who should be empowered to decide that the act is repugnant. Marshall then posited the limited nature of the government established by the Constitution. It follows—and one may grant to Marshall that it follows as "a proposition too plain to be contested"—that the Constitution is a paramount law, and that ordinary legislative acts must conform to it. For Marshall it follows, further, that a legislative act contrary to the Constitution is not law and need not be given effect in court; else "written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable." If two laws conflict, a court must obey the superior one. But Marshall knew (and, indeed, it was true in this very case) that a statute's repugnancy to the Constitution is in most instances not self-evident; it is, rather, an issue of policy that someone must decide. The problem is who: the courts, the legislature itself, the President, perhaps juries for purposes of criminal trials, or ultimately and finally the people through the electoral process?

This is the real question. Marshall addressed himself to it only partially and slightly. To leave the decision with the legislature, he said, is to allow those whose power is supposed to be limited themselves to set the limits—an absurd invitation to consistent abuse. Perhaps so, but the Constitution does not limit the power of the legislature alone. It limits that of the courts as well, and it

may be equally absurd, therefore, to allow courts to set the limits. It is, indeed, more absurd, because courts are not subject to electoral control. (It may be argued that to leave the matter to the legislature is to leave it ultimately to the people at the polls. In this view the people as the principal would set the limits of the power that they have delegated to their agent.)

The case can be constructed where the conflict between a statute and the Constitution is self-evident in accordance with Marshall's general assumption. Even so, Marshall offers no real reason that the Court should have the power to nullify the statute. The function in such a case could as well be confided to the President, or ultimately to the electorate. Other controls over the legislature, which may be deemed equally important, are so confided. Courts do not pass on the validity of statutes by inquiring into election returns or into the qualifications of legislators. They will entertain no suggestion that a statute whose authenticity is attested by the signatures of the Speaker of the House and the President of the Senate, and which is approved by the President, may be at variance with the bill actually passed by both Houses.³ Marshall himself, in *Fletcher v. Peck*,⁴ the Yazoo Frauds case, declined to inquire into the "motives" of a legislature, having been invited to do so in order to upset a statute whose passage had been procured by fraud. Why must courts control self-corruption through power, a condition difficult of certain diagnosis, when they rely on other agencies to control corruption by money or like inducements, which is no less dangerous and can be objectively established?

So far Marshall's argument proceeded on the basis of a single textual reliance: namely, the fact itself of a written Constitution. But Marshall did go on to some more specific textual references. His first was to Article III of the Constitution, which establishes the judiciary and reads in relevant part as follows:

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, or other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Could it be, Marshall asked, that those who granted the judicial power and extended it to all cases arising under the Constitution, laws, and treaties meant that cases arising under the Constitution should be decided without examination and application of the document itself? This was for Marshall "too extravagant to be maintained." Note well, however, that what the Constitution extends to cases arising under it is "the judicial Power." Whether this power reaches as far as Marshall wanted it to go—namely, to reviewing acts of the legislature—is the question to be decided. What are the nature and extent of the function of the Court—the judicial power? Is the Court empowered, when it decides a case, to declare that a duly enacted statute violates the Constitution, and to invalidate the statute? Article III does not purport to describe the function of the Court; it subsumes whatever questions may exist as to that in the phrase "the judicial Power." It does not purport to tell the Court how to decide cases; it only specifies which kinds of case the Court shall have jurisdiction to deal with at all. Thus, in giving jurisdiction in cases "arising under . . . the Laws" or "under . . . Treaties," the clause is not read as prescribing the process of decision to be followed. The process varies. In

cases "under . . . the Laws" courts often leave determination of issues of fact and even issues that may be thought to be "of law" to administrative agencies. And under both "the Laws . . . and Treaties," much of the decision concerning meaning and applicability may be received ready-made from the Congress and the President. In some cases of all three descriptions, judicial decision may be withheld altogether—and it is for this reason that it will not do to place reliance on the word "all" in the phrase "all cases . . . arising. . . ." To the extent that the Constitution speaks to such matters, it does so in the tightly packed phrase "judicial Power."

Nevertheless, if it were impossible to conceive a case "arising under the Constitution" which would not require the Court to pass on the constitutionality of congressional legislation, then the analysis of the text of Article III made above might be found unsatisfactory, for it would render this clause quite senseless. But there are such cases which may call into question the constitutional validity of judicial, administrative, or military actions without attacking legislative or even presidential acts as well, or which call upon the Court, under appropriate statutory authorization, to apply the Constitution to acts of the states. Any reading but his own was for Marshall "too extravagant to be maintained." His own, although out of line with the general scheme of Article III, may be possible; but it is optional. This is the strongest bit of textual evidence in support of Marshall's view, but it is merely a hint. And nothing more explicit will be found.

Marshall then listed one or two of the limitations imposed by the Constitution upon legislative power and asked whether no one should enforce them. This amounts to no more than a repetition of his previous main argument, based on the very fact of limited government established by a written Constitution. He then quoted the clause (significantly constituting Section 3 of Article III, the Judiciary Article) which provides that no person "shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." If the legislature were to change that rule, he asked, and declare that one witness or a confession out of court was sufficient for conviction, would the courts be required to enforce such a statute? In one aspect, this is but another restatement of the argument proceeding from

the existence of limitations embodied in the written Constitution. But even if it were admitted that a court, in the treason case Marshall put, should apply the Constitution and not the contrary statute, this may mean only that it is the judiciary's duty to enforce the Constitution within its own sphere, when the Constitution addresses itself with fair specificity to the judiciary branch itself. The same might be true as well of other clauses prescribing procedures to be followed upon a trial in court and also of the provisions of Article III setting forth the jurisdiction of the courts. Such a provision was in question in *Marbury v. Madison* itself, and perhaps the result there might be supported in this fashion. The upshot would be that each branch of the government would construe the Constitution for itself as concerns its own functions, and that this construction would be final, not subject to revision by any of the other branches. Marshall himself, at this point in his argument, drew only the following conclusion: "From these, and many other selections [from the Constitution] which might be made, it is apparent that the Framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature." And of the legislature as well as of courts, so that when the Constitution addresses itself to the legislature, or to the President, or to the states, for that matter, each may be the final arbiter of the meaning of the constitutional commands addressed to it. The distinction would lie between such provisions as those empowering Congress "to regulate Commerce" or "to coin Money," on the one hand, and, on the other, such commands as that of the Sixth Amendment that, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." To find such an arrangement textually permissible is not, of course, to advocate it or to vouch for its workability. I should make plain my disavowal of an analysis by Professor William Winslow Crosskey, which is in some respects similar but which is also quite different, having regard to its context and supports and to the purposes it is made to serve.⁵

But, Marshall continued, the judges, under Article VI of the Constitution, are "bound by Oath or Affirmation, to support this Constitution." Would it not be immoral to impose this oath upon them while at the same time expecting them, in upholding laws

they deem repugnant to the Constitution, to violate what they are sworn to support? This same oath, however, is also required of "Senators and Representatives. . . . Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States. . . ." Far from supporting Marshall, the oath is perhaps the strongest textual argument against him. For it would seem to obligate each of these officers, in the performance of his own function, to support the Constitution. On one reading, the consequence might be utter chaos—everyone at every juncture interprets and applies the Constitution for himself. Or, as we have seen, it may be deduced that everyone is to construe the Constitution with finality insofar as it addresses itself to the performance of his own peculiar function. Surely the language lends itself more readily to this interpretation than to Marshall's apparent conclusion, that everyone's oath to support the Constitution is qualified by the judiciary's oath to do the same, and that every official of government is sworn to support the Constitution as the judges, in pursuance of the same oath, have construed it, rather than as his own conscience may dictate.

Only in the end, and then very lightly, does Marshall come to rest on the Supremacy Clause of Article VI, which in later times has seemed to many the most persuasive textual support.⁶ The Supremacy Clause is as follows:

This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

"It is also not entirely unworthy of observation," Marshall wrote—and this was all he had to say on the point—that in declaring what is to be the supreme law of the land, this clause mentions the Constitution first and then not the laws of the United States generally but only those which shall be made in pursuance of the Constitution. Marshall left it at that, and what is to be concluded from this remark? First, it must be noted that nothing here is addressed to federal courts. Any command to them will have to be

inferred, if there is to be one at all. Only as a forensic amusement can the phrase "Judges in every State" be taken to include federal judges, on the ground that some of them sit in the states. After all, the Supreme Court does not. The clause speaks to the constituent states of the federation and tells them that federal law will supersede any contrary state law. Further, it goes over the heads of the state governments and speaks to state judges directly, telling them that it will be their duty to enforce the supreme federal law above any contrary state law. State judges need enforce, however, only such federal law as is made in pursuance of the Constitution. Conceivably the reference here might be to more than just the mechanical provisions that describe how a federal law is to be enacted—by the concurrence of both Houses and with the signature of the President. Conceivably state judges were to be authorized to measure federal law against the federal Constitution and uphold it or strike it down in accordance with their understanding of the relevant constitutional provision. But such an arrangement, standing alone, would have been extraordinary, and it would have been self-destructive.

It is perfectly evident that the purpose of the clause is to make federal authority supreme over state. It is also certain that if state judges were to have final power to strike down federal statutes, the opposite effect would have been achieved, even though the authority of the state judges was drawn from the federal Constitution. The result is possible on the language, and there have been those who have contended for it precisely because it is destructive. The argument, known as interposition, is grounded in the oath provision discussed above as well as in the Supremacy Clause. And it is easily met. There is no call thus to upend the plain purpose of the clause. State judges must apply supreme federal law, statutory and constitutional, and must do it faithfully on their oaths. So much is unavoidable. But it fully meets all else that is compelling in the language of the clause simply to conclude that the proviso that only those federal statutes are to be supreme which are made in pursuance of the Constitution means that the statutes must carry the outer indicia of validity lent them by enactment in accordance with the constitutional forms. If so enacted, a federal statute is constitutional. That is to be taken as a given fact

by state courts, on the authority and responsibility of the federal Congress and President who enacted the statute. No obstacle is thus raised to the exercise of the state judicial function. A court can just as well uphold the Constitution, thus performing its duty under the Supremacy Clause, by taking the meaning of the Constitution to have been settled by another authority and going on from there as by going to the trouble of parsing out the meaning of the document for itself.

Different considerations, however, govern the function (with which the state courts are also charged under the Supremacy Clause) of applying, not the federal Constitution against other federal laws, but federal statute and treaty law itself. Here, when a question of meaning arises, there will be no ready answer emanating from the fact of enactment or ratification. If a federal statute is said to conflict with the Constitution, and the question thus raised is, what is the meaning of the Constitution, that question can be said to have been answered by Congress and the President in favor of the validity of the statute which they enacted. But if the question is, what is the meaning of a statute or of a treaty as applied to a given situation, then there can be no similar, complete prior answer. Partial solution of, or guides to, the problem of interpretation and applicability may exist ready-made. But, barring the intervention of some other agency, the state court will in some measure have to construe the statute or the treaty for itself. The Supremacy Clause does not tell it to do otherwise, and it refers it nowhere else. Yet there is an obvious interest, if for no other reason than uniformity of application, in having federal law construed as well as declared by an institution of the general government. No single state should be empowered to lay down a uniform interpretation; only the federal government represents and can bind all. And a court is, in the very nature of things, the only agency that can be used to perform, in behalf of the general government, the ultimate task of lending uniformity and national authority to the construction and application of federal law in specific cases.

The option was open to set up a lower federal court system and to withdraw into it cases arising in the state courts which involved issues of the construction of federal law; or perhaps to withdraw into it only those issues themselves and remand the cases back to

the state system once the issues had been decided. Another option was to set up in one Supreme Court appellate jurisdiction over state courts, again for the purposes of such cases or such issues. Is there anything in the Supremacy Clause to prevent either solution? Its drift, if anything, is equally in favor of either, and certainly not against. Article III, in turn, is also open to either solution. And Congress has in fact adopted a bit of both, although the chief reliance in the early days was on the appellate jurisdiction of the Supreme Court.

So much is reasonably clear. But from this starting point, many modern commentators take the Supremacy Clause on a giant leap. It would be just as absurd and destructive, it is said, for state courts to be authorized to render final constructions of the federal Constitution, in cases of alleged conflict with a federal statute, as it would be for them to have the last word on the meaning of such a statute itself, or of a treaty; indeed, more absurd. State courts are subjected to the reviewing authority of federal courts in their construction of statutes and treaties. By the same token, they ought to be subjected to the reviewing authority of federal courts when they construe the Constitution. Moreover, it would be silly to empower state judges, as courts of first instance, to construe and apply the Constitution in passing on the validity of federal statutes without so empowering federal judges also, in cases coming directly to them. What sense is there in allowing federal judges to function as spokesmen of the Constitution in cases coming from state courts but not in cases originating in the federal system itself? It follows that the Supremacy Clause addresses itself specifically to state judges only, because as to them there might have been some doubt, whereas it was regarded as obvious that the federal Constitution would bind, and would be construed and applied by, federal judges.

But this is all quite circular. Why is the power to declare federal statutes unconstitutional conceded to state courts? In order to enable one to lodge it in the federal courts also, and for no other reason. We have seen the need for judicial authority to construe federal statutes and treaties, and the reasons for subjecting state courts to federal appellate jurisdiction when they do so. We have also seen, however, that there is no similar exigency dictating sim-

ilar judicial authority and similar appellate jurisdiction when the validity of a federal statute under the Constitution is in question, because neither state nor federal courts need to decide that for themselves in the first instance; they can take it as settled for them by the federal legislature and President. The ends of uniformity and of the vindication of federal authority are served in this fashion, without recourse to any power in the federal judiciary to lay down the meaning of the Constitution.

"Thus," the opinion in *Marbury v. Madison* concludes, "the particular phraseology of the Constitution of the United States confirms and strengthens the principle supposed to be essential to all written constitutions, that a law repugnant to the constitution is void," and that it is for the federal courts to declare it so. I have attempted to show that the principle must indeed be "supposed," and that the "phraseology of the Constitution" itself neither supports nor disavows it. I have suggested that it is of value to be aware that this is so, both for the sake of the security of the principle against attack and, as we shall see, for the sake of a true understanding of the nature and reach of the principle. Of course, the document must be read as a whole, and any particular phraseology is informed by the purpose of the whole. But I have tried to show that the purpose around which Marshall organized his argument does not necessarily emerge from the text.

Our discussion has centered on the claim actually staked out in *Marbury v. Madison*—that is, that a federal court has the power to strike down a duly enacted federal statute on the ground that it is repugnant to the Constitution. Of necessity, I have dealt also with the power, if any, of state judges to do the same. Marshall elsewhere established as well the separate, though of course closely connected, power of the federal courts to strike down state statutes and other actions for repugnancy to the federal Constitution. The bare text of Article III and of the Supremacy Clause is again equivocal. The Supremacy Clause, addressing itself to state judges alone, does put them on a different plane than state legislators and other officials. Yet it says nothing of federal judges, and hence it would not foreclose a system in which the sole reliance for the integrity and supremacy of the federal Constitution as against contravening state enactments would be on the conscien-

tious performance of duty by state judges, subject to no other control. There is surely, however, a strong interest, to which we have alluded in connection with federal statute and treaty law, in the uniform construction and application of the Constitution as against inconsistent state law throughout the country. This is an interest fairly to be imputed to states which formed a federal union, and it is an interest that can be vindicated only by a federal institution. Congress can and in fact does from time to time perform this function, both as to statute and as to constitutional law; but, if for no other reason than that the instances in which performance of this function is necessary are extremely numerous, it is obviously sensible to lodge the function as well, and indeed chiefly, in the federal judiciary. This is not compelled by the language of the Constitution; it is implied from desirable ends that are attributed to the entire scheme. But most assuredly there is nothing in the language that forbids it. And Congress has so provided—consistently, from the first Judiciary Act of the first Congress onward—and it has done so unambiguously.

Judiciary acts have, from the beginning, also given the Supreme Court jurisdiction to review state court cases in which is drawn in question the validity of a treaty or statute of the United States, presumably under the federal Constitution. If that was a grant to the Supreme Court of final authority to construe the Constitution as against acts of Congress, why, then, well and good. Nothing in the text prevents such a gesture of congressional abnegation, although in that event, what Congress can give away, Congress can, at least in theory, take back. But it is question-begging so to understand this provision of the first Judiciary Act. Reading no presuppositions into it, one may as easily conclude that the Supreme Court was meant only to enforce against state courts a rule that duly enacted federal statutes are constitutional by virtue of their due enactment. There is no similar ambiguity, however, in the first Judiciary Act's grant to the Supreme Court of jurisdiction to review cases which draw in question the validity of a statute of, or an authority exercised under, any state, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States. This provision would be senseless unless it was intended to authorize the Court, in these circumstances, to construe and apply

the federal Constitution as well as federal statute and treaty law. Only thus could this provision serve the interest of uniformity and of the superiority of federal power—and what other purpose could it have? As we have seen, the Supremacy Clause itself does not compel, although it permits and no doubt invites, this arrangement. This being so, Congress could change it all tomorrow. And perhaps it could, if textual considerations were all that governed the matter, just as it could change the course of the Mississippi River, if all we had to indicate the location of its bed were some general description by a traveler of a body of water traversing the middle of the country from north to south.

The Moral Approval of the Lines:⁷ History

The analogy to the Mississippi may be a trifle fetched; yet, I am prepared to defend it as we come to examine foundations for the doctrine of judicial review other than textual exegesis. *Marbury v. Madison*, relating to the power to hold federal statutes unconstitutional, and *Martin v. Hunter's Lessee*⁸ and *Cohens v. Virginia*,⁹ which assumed the power of judicial review of state actions, were decided, respectively, in 1803, 1816, and 1821. They met with controversy, to be sure, which has also recurred sporadically since. But their doctrines have held sway for roughly a century and a half. So long have they been among the realities of our national existence. Settled expectations have formed around them. The life of a nation that now encompasses 185 million people spread over a continent and more depends upon them in a hundred different aspects of its organization and coherence. It is late for radical changes. Perhaps *Marbury v. Madison* is a historical accident attributable to the political configuration of the earliest years, to Marshall's political antecedents, and to the force and statesmanlike deviousness of his personality. It was a half century before the power to strike down an act of Congress was again exercised, and at that time, in the *Dred Scott Case* of exceedingly bad odor, it was asserted in a fashion that would have assured its evanescence rather than permanence. But *Marbury v. Madison* did occur, and if it was an accident, it was not the first to play an im-

portant role in the permanent shaping of a government. One of the reasons that the "accident" has endured is that Marshall's own view of the scope of legislative power had grandeur. He undertook to expound the Constitution with finality, but it was Marshall himself who enjoined his posterity never to forget "that it is a *constitution* we are expounding," a living charter, embodying implied as well as expressed powers, "adapted to the various *crises* of human affairs," open to change, capable of growth. This was the Marshall of *McCulloch v. Maryland*,¹⁰ decided in 1819. If assumption of the power was accident, the vision and wisdom with which it was exercised in the early years cannot have been. And if it was accident, it had nevertheless been somewhat arranged; if *Marbury v. Madison* was *ex tempore*, it had nonetheless been well prepared. For, although the Framers of the Constitution had failed to be explicit about the function of judicial review, the evidence of their deliberations demonstrates that they foresaw—indeed, invited—it.

This has frequently been denied, whenever the impulse to radical change has come upon people. And *Marbury v. Madison* has been attacked, not merely for its apparent frailties, but as an act of "usurpation." Yet, as Professor Felix Frankfurter wrote in 1924: "Lack of historical scholarship, combined with fierce prepossessions, can alone account for the persistence of this talk. One would suppose that, at least, after the publication of Beard, *The Supreme Court and the Constitution*, there would be an end to this empty controversy."¹¹ Beard wrote in 1912; Farrand published *The Records of the Federal Convention* in 1911 and *The Framing of the Constitution* in 1913. There have been some further accessions to our knowledge since, to be sure, and the books of history are never closed. Nor are historical hypotheses provable with mathematical precision. But it is as clear as such matters can be that the Framers of the Constitution specifically, if tacitly, expected that the federal courts would assume a power—of whatever exact dimensions—to pass on the constitutionality of actions of the Congress and the President, as well as of the several states. Moreover, not even a colorable showing of decisive historical evidence to the contrary can be made. Nor can it be maintained that the language of the Constitution is compelling the other way. At worst it may be

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 others¹³—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 suggested¹⁷ 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-

tutionally do they may do,—as if honor and fair dealing and common honesty were not relevant to their inquiries. The people, all this while, become careless as to whom they send to the legislature; too often they cheerfully vote for men whom they would not trust with an important private affair, and when these unfit persons are found to pass foolish and bad laws, and the courts step in and disregard them, the people are glad that these few wiser gentlemen on the bench are so ready to protect them against their more immediate representatives. . . . [I]t should be remembered that the exercise of it [the power of judicial review], even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors. The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility. It is no light thing to do that.¹⁸

To this day, in how many hundreds of occasions does Congress enact a measure that it deems expedient, having essayed consideration of its constitutionality (that is to say, of its acceptability on principle), only to abandon the attempt in the declared confidence that the Court will correct errors of principle, if any? It may well be, as has been suggested,¹⁹ that any lowering of the level of legislative performance is attributable to many factors other than judicial review. Yet there is no doubt that what Thayer observed remains observable. It seemed rather a puzzle, for example, to a scholar who recently compared British and American practices of legislative investigation. Professor Herman Finer wrote, with what might have seemed to Thayer charming ingenuousness:

Is it not a truly extraordinary phenomenon that in the United States, where Congress is not a sovereign body, but subordinate to a constitution, there appear to be less restraints upon the arbitrary behavior of members in their . . . rough handling of the civil rights of the citizen during investigations. . . ? Though Parliament is sovereign and can legally do anything it likes, its practices are kinder, more restrained, and less invasive of the rights of those who come under its investigative attention. The student is forced to pause and reflect upon this remarkable reversal of demeanor and status.²⁰

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. Ros-tow has written, "of Browningsque 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.

Thus, as Professor Henry M. Hart, Jr., has written, and as surely most of the profession and of informed laity believe; for if not this, what and why?—thus the Court appears "predestined in the long run, not only by the thrilling tradition of Anglo-American law but also by the hard facts of its position in the structure of American institutions, to be a voice of reason, charged with the creative function of discerning afresh and of articulating and developing impersonal and durable principles. . . ."²⁹ This line of thought may perhaps blunt, if it does not meet, the force of all the arguments on the other side. No doubt full consistency with democratic theory has not been established. The heart of the democratic faith is government by the consent of the governed. The further premise is not incompatible that the good society not only will want to satisfy the immediate needs of the greatest number but also will strive to support and maintain enduring general values. I have followed the view that the elected institutions are ill fitted, or not so well fitted as the courts, to perform the latter task. This rests on the assumption that the people themselves, by direct action at the ballot box, are surely incapable of sustaining a working system of general values specifically applied. But that much we assume throughout, being a representative, deliberative democracy. Matters of expediency are not generally submitted to direct referendum. Nor should matters of principle, which require even more intensive deliberation, be so submitted. Reference of specific policies to the people for initial decision is, with few exceptions, the fallacy of the misplaced mystics, or the way of those who would use the forms of democracy to undemocratic ends. It is not the way in which working democracies live. But democracies do live by the idea, central to the process of gaining the consent of the governed, that the majority has the ultimate power to displace the decision-makers and to reject any part of their policy. With that idea, judicial review must achieve some measure of consonance.

Democratic government under law—the slogan pulls in two opposed directions, but that does not keep it from being applicable to an operative polity. If it carries the elements of explosion, it doesn't contain a critical mass of them. Yet if the critical mass is not to be reached, there must be an accommodation, a degree of

concord between the diverging elements. Having been checked, should the people persist; having been educated, should the people insist, must they not win over every fundamental principle save one—which is the principle that they must win? Are we sufficiently certain of the permanent validity of any other principle to be ready to impose it against a consistent and determined majority, and could we do so for long? Have not the people the right of peaceable revolution, as assuredly, over time, they possess the capacity for a bloody one?

The premise of democracy is egalitarian, and, as Professor Herbert J. Muller has written, every bright sophomore knows how to punch holes in it. Yet, as Mr. Muller goes on to say, there is “no universal standard of superiority,” there are no sure scales in which to weigh all the relevant virtues and capacities of men, and many a little man may rightly claim to be a better citizen than the expert or the genius. Moreover, and most significantly, “all men are in fact equal in respect of their common structure and their common destiny.” Hence, to repeat the insight of Judge Hand, government must be their common venture. Who will think it moral ultimately to direct the lives of men against the will of the greater number of them? Or wise? “Man’s historical experience should sober the revolutionaries who know the certain solution to our problems, and sober as well the traditionalists whose solution is a return to the ancient faiths, which have always failed in the past.”³⁰

To bring judicial review into concord with such presuppositions requires a closer analysis of the actual operation of the process in various circumstances. The preliminary suggestions may be advanced that the rule of principle imposed by the Court is seldom rigid, that the Court has ways of persuading before it attempts to coerce, and that, over time, sustained opinion running counter to the Court’s constitutional law can achieve its nullification, directly or by desuetude. It may further be that if the process is properly carried out, an aspect of the current—not only the timeless, mystic—popular will finds expression in constitutional adjudication. The result may be a tolerable accommodation with the theory and practice of democracy.

The Mystic Function

This inquiry into a general justification of judicial review cannot end without taking account of a most suggestive and perceptive argument recently advanced by Professor Charles L. Black, Jr.³¹ It begins by emphasizing that the Court performs not only a checking function but also a legitimating one, as Mr. Black well calls it. Judicial review means not only that the Court may strike down a legislative action as unconstitutional but also that it may validate it as within constitutionally granted powers and as not violating constitutional limitations. Mr. Black contends, further, that the legitimating function would be impossible of performance if the checking function did not exist as well: what is the good of a declaration of validity from an institution which is by hypothesis required to validate everything that is brought before it? This is plainly so, though it is oddly stated. The picture is accurate, but it is stood on its head. The truth is that the legitimating function is an inescapable, even if unintended, by-product of the checking power. But what follows? What is the nature of this legitimating function, and what the need for it?

With a relish one can readily share, Mr. Black cites the story of the French intellectual who, upon arrival in New York harbor, exclaims: “It is wonderful to breathe the sweet air of legitimacy!” He contends essentially that what filled the Frenchman’s lungs, what smelled to him so different from the succession of short-lived empires and republics endemic to his homeland, was the sweet odor of the Supreme Court of the United States. But I think it much simpler and nearer the reality of both the American and the French experience to begin with the proposition that legitimacy comes to a regime that is felt to be good and to have proven itself as such to generations past as well as in the present. Such a government must be principled as well as responsible; but it must be felt to be the one without having ceased to be the other, and unless it is responsible it cannot in fact be stable, and is not in my view morally supportable. Quite possibly, there have been governments that were electorally responsible and yet failed to attain stability.

But that is not to say that they would have attained it by rendering themselves less responsible—that is, by divorcing the keepers of their principles from the electoral process. Legitimacy, being the stability of a good government over time, is the fruit of consent to specific actions or to the authority to act; the consent to the exercise of authority, whether or not approved in each instance, of as unified a population as possible, but most importantly, of a present majority.

Very probably, the stability of the American Republic is due in large part, as Professor Louis Hartz has eloquently argued, to the remarkable Lockeian consensus of a society that has never known a feudal regime; to a “moral unity” that was seriously broken only once, over the extension of slavery. This unity makes possible a society that accepts its principles from on high, without fighting about them. But the Lockeian consensus is also a limitation on the sort of principles that will be accepted. It is putting the cart before the horse to attribute the American sense of legitimacy to the institution of judicial review. The latter is more nearly the fruit of the former, although the “moral unity” must be made manifest, it must be renewed and sharpened and brought to bear—and this is an office that judicial review can discharge.³²

No doubt it is in the interest of the majority to obtain the acquiescence of the minority as often and in as great a degree as possible. And no doubt the Court can help bring about acquiescence by assuring those who have lost a political fight that merely momentary interest, not fundamental principle, was in play. Yet is it reasonable to assume that the majority would wish to see itself checked from time to time just to have an institution which, when it chooses to go along with the majority’s will, is capable of helping to assuage the defeated minority? That is too much of an indirection. The checking power must find its own justification, particularly in a system which, in a number of important ways, (e.g., the Senate’s reflection of the federal structure, practices of legislative apportionment), offers prodigious political safeguards to the minority.

Thus the legitimating function of judicial review cannot be accepted as an independent justification for it. Yet it exists. Not only is the Supreme Court capable of generating consent for hotly

controverted legislative or executive measures; it has the subtler power of adding a certain impetus to measures that the majority enacts rather tentatively. There are times when the majority might, because of strong minority feelings, be inclined in the end to deny itself, but when it comes to embrace a measure more firmly, and the minority comes to accept it, because the Court—intending perhaps no such consequence—has declared it consistent with constitutional principle. This tendency touches on Thayer’s anxiety that judicial review will “dwarf the political capacity of the people” and “deaden its sense of moral responsibility.” We shall return to it as a consideration that should cause the Court to stay its hand from time to time.

But the Supreme Court as a legitimating force in society also casts a less palpable yet larger spell. With us the symbol of nationhood, of continuity, of unity and common purpose, is, of course, the Constitution, without particular reference to what exactly it means in this or that application. The utility of such a symbol is a commonplace. Britain—the United Kingdom, and perhaps even the Commonwealth—is the most potent historical demonstration of the efficaciousness of a symbol, made concrete in the person of the Crown. The President in our system serves the function somewhat, but only very marginally, because the personification of unity must be above the political battle, and no President can fulfill his office while remaining above the battle. The effective Presidents have of necessity been men of power, and so it has in large part been left to the Supreme Court to concretize the symbol of the Constitution. Keeping in mind that this is offered as an observation, not as justification, it is surely true that the Court has been able to play the role partly—but only partly—by virtue of its power of judicial review.

The Court is seen as a continuum. It is never, like other institutions, renewed at a single stroke. No one or two changes on the Court, not even if they include the advent of a new Chief Justice, are apt to be as immediately momentous as a turnover in the presidency. To the extent that they are instruments of decisive change, Justices are time bombs, not warheads that explode on impact. There are exceptions, to be sure. In 1870, President Grant made two appointments that promptly resulted in the reversal of

a quite crucial recent decision concerning the monetary powers of the federal government.³³ And it may seem that strong new doctrine became ascendant soon after the first of President Roosevelt's appointees, Mr. Justice Black, came on the Bench in 1937. But on the whole, the movements of the Court are not sudden and not suddenly affected by new appointments. Continuity is a chief concern of the Court, as it is the main reason for the Court's place in the hearts of its countrymen.

No doubt, the Court's symbolic—or, if you will, mystic—function would not have been possible, would not have reached the stage at which we now see it, if the Court did not exercise the power of judicial review. It could scarcely personify the Constitution unless it had the authority finally to speak of it. But as the symbol manifests itself today, it seems not always to depend on judicial review. It seems at times to have as much to do with the life tenure of the Court's members and with the fact of the long government service of some of them, not only on the Court; in short, with the total impression of continuity personified. Here the human chain goes back unbroken in a small, intimate group to the earliest beginnings. Take two recent retirements. Mr. Justice Minton, who left in October 1956, was a fire-eating New Deal Senator, and when he retired from the Court men no doubt remembered his stance in the 'thirties and thought, perhaps a little self-deprecatingly, of the emotions it had aroused. Mr. Justice Reed, who retired early in 1957, had, some twenty years earlier, when he was Solicitor General, argued a number of celebrated New Deal cases. His was the second of President Franklin Roosevelt's appointments, and he sat with Hughes and Brandeis and McReynolds. When McReynolds went, in 1941, a remembrance of the Wilson era and of trust-busting in the early 1900's went with him. Justice Van Devanter, a contemporary of McReynolds who retired in 1937, had been appointed by Taft, had held office under McKinley, and had sat with appointees of Cleveland and of Hayes. And so on back.

Senior members of the Court are witnesses to the reality and validity of our present—distracted, improbable, illegitimate as it often appears—because in their persons they assure us of its link to the past which they also witnessed and in which they were

themselves once the harbingers of something outrageously new. This is true not only of those who are constructive and creative; it is true of Justices who oppose all that is not as they knew it. Say what they will, their very existence among us reassures us. When the great Holmes, who was wounded at Ball's Bluff and at Antietam, retired in 1932, being past ninety, the emotional public response was not due wholly to his undoubted greatness. It was also that his years, his years alone, fulfilled one of the functions of the Supreme Court.

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The foregoing discussion of the origin and justification of judicial review has dealt for the most part indiscriminately with the power of the federal courts to strike down federal legislation and the power of those courts to pass on actions of the states. There are, of course, differences. Many judges and commentators who have questioned the power of judicial review of federal legislation have freely conceded the same power when exercised with respect to state actions. It is vital, as we have seen, that some federal agency have power authoritatively to declare and apply federal law to the member states of the federation. Clearly, for the sake of full effectiveness, a substantial portion of this power must be exercised by a judicial body. Yet it remains true that when the Court invalidates the action of a state legislature, it is acting against the majority will within the given jurisdiction; what is more, it also promises to foreclose majority action on the matter in issue throughout the country. The Court represents the national will against local particularism; but it does not represent it, as the Congress does, through electoral responsibility. The need to effectuate the superiority of federal over state law is not a sufficient justification for judicial review of state actions in those instances in which the federal law in question is constitutional and hence judge-made. In this respect also, therefore, the function must be supported by the other reasons we have surveyed. This is not to say, however, that there will not be instances when it seems justifiable to exercise judicial review more vigorously against the states than against the federal legislature or executive, and instances calling for less vigor as well.