



Judicial Review—A Regulator of American Society

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Abstract

Judicial review of the American Supreme Court plays an unexampled role in the political life of the United States. For the system of separation of powers, it is an important method for the Supreme Court to check the Congress and the President. For the American public, it helps build public values and plays an important role in protecting human rights and dealing with big disputes. It is exaggerated to say that the history of the United States can be written by the judgments of the federal courts. However, it is reasonable to say that without the history recorded by the judgments of the Supreme Court, the history of the United States will not be complete. Therefore, judicial review is an important adjuster for the American society.

Keywords: Judicial review, Regulator, the Supreme Court, Checks and balances, American public

1. Introduction

In America, the Supreme Court's main power is the so-called "judicial review"—the right to declare laws unconstitutional. Although it is not explicitly given by the U.S. Constitution, the Supreme Court has developed the authority to review any executive and legislative action or law passed by any level government (if challenged in a court case) and can declare it unconstitutional if it is found incompatible with the U.S. Constitution. Such authority has enabled the Court to exert a great influence on many aspects of the American society. So the judicial review is by any means a regulator of the American society.

This article mainly discusses two basic aspects of America's judicial review, namely origin of judicial review, which consists of two parts—political background and theoretical basis, and role of judicial review, which consists of role in the system of Checks and Balances and role in the public. These basic aspects illustrate judicial review explicitly and wholly.

2. Origin of judicial review

2.1 Political background

Just as George Washington helped to shape the actual form of the executive branch in the US, the third Chief Justice, John Marshall, helped to shape the role that the courts would play. That is, he established judicial review in 1803, when he dealt with the case of *Marbury vs. Madison*.

The story began in 1800, when Republican Jefferson won the presidential election and defeated the incumbent Federalist president John Adams. This election made Jefferson the first Republican president. But although the Republicans controlled the presidency and the Congress, the Jeffersonians found that the Federalists still dominated the judiciary. So, one of the first acts of the new administration was to abolish the Judiciary Act of 1789, which had just created a number of new Federalist judgeships. Although President Adams had tried to fill the courts with members of his party before he left the office, a number of commissions had not been delivered, and one of the appointees, William Marbury, sued Secretary of State James Madison to force him to deliver his commission as a justice of the peace.

The new Chief Justice, John Marshall, understood that if the Court awarded Marbury a writ of mandamus (an order to force Madison to deliver the commission to Marbury) the Jefferson administration would ignore it, and thus would significantly destroy the authority of the Court. However, if the Court denied Marbury's appeal, it might well appear that the justices had acted out of fear. Either case would be harmful to the basic principle of the supremacy of the law.

Marshall's decision in this case has been seen as a judicial tour de force. Firstly, he declared that Madison should have delivered the commission to Marbury, but then he declared that the power of the Supreme Court, which was given by section 13 of the Judiciary Act of 1789, to issue writs of mandamus, exceeded the authority allotted to the Supreme Court by Article III of the Constitution, and therefore section 13 of the Judiciary Act was null and void. Thus he was able to chastise the Jeffersonians and yet not create a situation in which a court order would be flouted.

The critical importance of Marbury's case is that the Supreme Court gained several powers, one of which was the

authority to declare acts of the Congress and implication acts of the president unconstitutional if they exceeded the power granted by the Constitution. Therefore, the Supreme Court became an actually equal partner of the government and the Congress, and it has played that role ever since.

2.2 Theoretical basis

In the theoretical view, Marshall deduced the necessity of such a power from the purpose and procedure of the Constitution. He reasoned that judicial review is necessary to carry on the Constitution's substantive and procedural limits on the government. If the Court could not strike down a law that conflicted with the Constitution, Marshall said, the legislature would have a "real and practical omnipotence." (Wu Yun, 2002, p.208) In his opinion, "certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void." (Wu Yun, 2002, p.300) Marshall declared that it was definitely the right and duty of the Court to say what the law means. Furthermore, if both law and the Constitution apply to the same case and they conflict, the Court must determine which of the conflicting rules governs the case. Because the Constitution is superior to any ordinary act of the legislature, the Constitution must govern the case. In other words, the Court is obligated to reject any law that violates the Constitution.

3. Role of judicial review

3.1 Role in the system of Checks and Balances

The judicial review serves as a regulator in the American society. In the system of Checks and Balances, judicial review is a magic weapon against the Congress and the government, which makes the three branches—legislative, executive and judicial—more regulative and stable. In the United States, if the Supreme Court is deprived of the authority of judicial review, the power of judicature will be significantly weakened. That is because, on the one hand, according to the Constitution, all the chief justice in the U.S. should be appointed by the president, and then be approved by the Congress, that is to say, the Supreme Court is under the check of the president and the Congress. On the other hand, the executive, together with the legislative, governs the American military and financial affairs, and also has a great influence on public interests and the wealth of society, they can make active actions to deal with these issues. On the contrary, the judicature hardly has anything to do with these matters; it is only on the duty of making judgments. This unbalance between legislation, executive and judicature would definitely do great harm to the principle of rule by law. But with the judicial review, things become quite different, for the Court has the right to interpret the Constitution. It can shape laws of the Congress and government actions by deciding whether they conform to the Constitution or not. Therefore, judicial review helps to build a sound system of Checks and Balances in the United States.

3.1.1 A weapon against the Congress

Judicial review is a weapon against the Congress, since the Supreme Court has the right to review the bill passed by the Congress and decides whether the bill is unconstitutional or not. This situation has a famous precedent to go by. In the case of *Marbury vs. Madison* (1803), the Supreme Court has for the first time invalidated an act of the Congress—Article 13 of the Judiciary Act of 1789. According to Article 13 of the Judiciary Act of 1789, the Supreme Court was authorized to issue writ of mandamus to American officials. But John Marshall insisted that the Supreme Court had no power to issue such a writ of mandamus, for Article 13 of the Judiciary Act of 1789 was contrary to Article III, Section 2 of the Constitution, which gave the Supreme Court original jurisdiction only in cases concerning ambassadors or foreign ministers or in cases in which a state was a party. Thus Article 13 of the Judiciary Act of 1789 was unconstitutional and invalid. John Marshall remarked that a legislative act contrary to the Constitution is not law.

This decision has chastised the Republican-governed Congress. It told the Republicans that although they controlled the government and the Congress, they must abide by the Constitution and the principles of rule by law and separation of powers. So it is the judicial review that prevents a ruling party from autocracy.

In the first 75 years since the United States has been founded, only 2 federal acts passed by the Congress have been invalidated by the Supreme Court; while in the next 75 years, 71 federal unconstitutional acts have been struck down, only in the 1880s, there were 5 federal acts and 48 state acts that were declared unconstitutional. From January, 1935 to April, 1936, among 10 appeals concerning the New Deal which was sued in the Supreme Court, 8 federal acts were struck down. From 1937 to 1979, the Supreme Court declared 49 federal acts unconstitutional. These decisions have greatly battered the Congress' deviant actions and defended the system of Checks and Balances and the principle of separation of powers.

3.1.2 A weapon against the president

Judicial review is a check on the government, especially on the president, although the federal judges are appointed by the president. According to the US Constitution, all the chief judges should be appointed by the president, while it doesn't suggest that the incumbent chief judges will conform to the president who has appointed him or her. For

example, President Nixon has in his term appointed Warren E. Burger, Harry A. Blackmun and Lewis F. Powell as chief judges, while in the case of *the United States vs. Nixon*, all the three chief judges were unanimous in denial of Nixon's demanding that he should hold executive privilege in withholding tapes of White House conversations dealing with Watergate.

Thanks to the judicial review, the Supreme Court has the sole right to interpret the Constitution. Thus it can enlarge or limit the president's constitutional power by giving new interpretations and meanings of the Constitution. When the system of Checks and Balances is challenged by the growth of executive power, the Supreme Court would be in its attempt to restrain the president. The typical example came in the 1930s. When Franklin D. Roosevelt (FDR) came into office in the depth of the Depression, he started the New Deal by pushing through an urgent package of reforms to get the nation back on its feet. In the process, he centralized so much power in his hands that critics accused him of seeking to become a dictator. The Supreme Court, under the principle of judicial review, had to restrain the president. So it invalidated a host of laws in 13 decisions between 1934 and 1936. On May 27, 1935, the famous "Black Monday" of the New Deal, the Court declared the entire National Industrial Recovery Act as unconstitutional. It was an attack on the very heart of FDR's program. A great uproar broke out, and President Franklin D. Roosevelt even proposed legislation to force older justices to resign and to expend the number of the Court so that he could appoint more liberal members. The Court survived this presidential onslaught and so did the judicial system.

Other examples occurred:

After the Second World War, in the notable steel seizure case of 1952 (*Youngston Sheet and Tube Company vs. Sawyer*), the Supreme Court denied President Truman the power to take control of a steel plant during the Korean War. In *New York Times vs. U.S.* (1971), the Court ruled against Richard Nixon's efforts to block publication of the Pentagon Papers, declaring that such a prior restraint was a particularly disgusting restriction on freedom of speech. And in the case of *the United States vs. Nixon*, the Supreme Court, by an 8:0 ruling, denied Mr. Nixon's claim of executive privilege in withholding tapes of White House conversations dealing with Watergate and thus paved the way for Nixon's downfall. (Yan Weiming, Han Zhenrong, Le Ruifu & Wang Honglin, 2000, p.68)

So the judicial review is a check on the president.

3.2 Role in the public

3.2.1 Influence on the general value of the people

Judicial review is also a regulator of the public, for it helps to cultivate and shape the general value of the people, although it could not govern the public opinion.

Every notable decision of the Supreme Court would automatically exert a great influence on the public opinion, and then affect the public value. In the landmark case of *Plessy vs. Ferguson* (1896), the Supreme Court supported the legality of racial segregation. Before the ruling, segregation between blacks and whites had already existed in some schools, restaurants, and other public facilities in the southern America. But in people's opinion, it was not the mainstream of the American society, for the public hadn't yet known whether it was constitutional or not. It was waiting for the Supreme Court's interpretation. In the *Plessy* decision, the Supreme Court ruled that such segregation did not violate the 14th Amendment of the Constitution. Because the Court held that racial segregation was legal as long as the segregation facilities for blacks and whites were "equal." This "separate but equal" doctrine was only partially implemented after the decision. But since the Supreme Court determined it as constitutional, the public could hold this opinion at large. They made separations throughout the country in most public facilities—schools, street cars, railroads, hotels, restaurants, sports arenas, telephone booths, and elevators—just within a few years. The doctrine of "separate but equal" has been cultivated in the minds of most people. The public value has been significantly influenced by the decision.

Nearly 60 years passed, the Supreme Court ruled in *Brown vs. Board of Education of Topeka* (1954) that the "separate but equal" doctrine was unconstitutional. Two years later, in *Gayle vs. Browder* (1956), the Supreme Court struck down segregation in public transportation—the same kind of segregation upheld in *Plessy*. By then the South had not only built a sound racial segregation system in the society, but also built it deeply in people's minds. To invalidate a system is easy, but to change people's value that the system has cultivated in people's minds is by no means an easy thing. It took numerous lawsuits, much federal legislation, and persistent efforts of civil rights protesters in the 1950s and 1960s to finally get rid of the system of segregation. Finally, the system of segregation was cleared off from the American society in that it had no place in the Constitution, and most importantly, it had no place in people's minds.

Another famous case, *Roe vs. Wade* (1973), in which the Supreme Court ruled that a woman has a constitutional right to do an abortion during the first six months of pregnancy, has also changed people's minds. Before the Court's ruling, a majority of states prohibited abortion, for most people thought abortion was inhumane and unconstitutional. However, the Court declared these state prohibitions unconstitutional and overturned them in *Roe vs. Wade*, ruling that states could restrict abortion only during the final three months of pregnancy, which aroused a heated dispute in the public.

But unfamiliar with the situation before the Supreme Court's decision, more than 80 percent of adults believed abortion should be legal under some circumstances after the decision.

In a 1997 Gallup Poll, about 15 percent of Americans said they opposed abortion under all circumstances, including cases where the pregnancy resulted from rape or incest or where the pregnancy might lead to the death of the pregnant woman. On the other hand, 22 percent said abortion should be legal under any circumstances. Most Americans—60 percent—believed in a compromised position, declaring that abortion should be legal under some circumstances but not others. (Wu Yun, 2002, p.354)

It was just the Supreme Court's opinion in the *Roe* decision.

3.2.2 Safeguard of human rights

Judicial review helps to protect and regulate human rights. It serves as a shelter of the people. Although the initial American Constitution gave no article concerning human rights, the first ten amendments to the Constitution, the Bill of Rights, granted a wide range of human rights protections. It defines the scope of individual freedom and establishes basic American civil liberties that the government cannot violate. Originally the Bill of Rights only applied to the federal government, but in a series of 20th century cases, the Supreme Court found many state-level bills have clearly violated the Bill of Rights and infringed on citizens. So it must protect human rights with its judicial review.

In the case of *Gitlow vs. New York* (1925), the Supreme Court firstly applied the Bill of Rights to the state level. In this decision, the Court said that freedom of speech and of the press was fundamental personal liberties "protected by the Due Process Clause of the 14th Amendment from impairment by the states." (Wu Yun, 2002, p.89) This application of the Bill of Rights through the 14th Amendment is sometimes called the doctrine of "incorporation". By the end of the 1960s, the Court had decided to apply nearly all of the Bill of Rights to the state level.

Gideon vs. Wainwright was an important court case of 1963 in which the Supreme Court ruled unanimously that defendants in all felony cases have the right to have legal counsels. Justice Hugo Black wrote the majority opinion (to write explanation of the decision) of the Court, that if a defendant charged with a serious crime cannot afford an attorney, the government is required to provide one. It is the government's constitutional obligation to do so. As a result of the *Gideon* decision, most large cities and some states now keep a staff of attorneys known as public defenders who provide counsel for poor defendants in criminal cases. In other areas, trial court judges appoint private attorneys to represent poor defendants and the government pays the fees. Some areas combine these two systems. This decision provided important protection to the rights of criminal defendants.

Just as the decision of *Gideon vs. Wainwright* gave the criminal defendant the right of attorney help, the decision of *Miranda vs. Arizona* (1966) granted the criminal suspect the right of "keeping silence". That is, the Supreme Court ruled in this case that police officers must advise suspects of certain legal rights before arrest and questing. In *Miranda* the Court described a four-part warning police officers must give to a suspect who is arrested or otherwise detained. The warning is designed to inform suspects of their rights not to incriminate themselves and to have the assistance of the counsel. Under the *Miranda* decision, if the police failed to provide the necessary warning, the prosecution could not use any statements of the suspect as evidence in a criminal proceeding. Any evidence of such statements should be void.

4. Conclusion

As judicial review regulates the American society, the Supreme Court must invalidate all kinds of unconstitutional acts or actions, no matter how today's people see these decisions. It sometimes made "incorrect and irrational decisions"—in today's people's view. In the case of *Dred Scott vs. Sandford* (1857), the Supreme Court, in order to defend the supremacy of the Constitution, has struck down the Compromise of 1820, which banned slavery in US territories north and west of the state of Missouri. In this case, slave Dred Scott had been taken to the free state Illinois and the northern part of the Louisiana Purchase by his master Dr. Emerson, then he was made free by the Missouri Compromise of 1820. But when he was taken back to hometown by his master, he became a slave again. A few years later, Scott claimed for his freedom in the Supreme Court on the ground that he had once lived in the free territory. The Supreme Court ruled that Scott was a Negro and not a citizen of the United States; hence he could not sue in a federal court. And most importantly, the Court declared that the Missouri Compromise of 1820 was unconstitutional in that it deprived southerners of their property without due process of law. This decision has aroused a heated argument for a long time, and what is most important, it has aggravated the breakout of the Civil War. But as to the Supreme Court, it certainly defended the Constitution with its power of judicial review.

Judicial review is a powerful and controversial regulator of the American society because it allows the Supreme Court to have the ultimate word on what the Constitution means. This permits justices, who are appointed rather than elected, to overrule decisions already made by the Congress and the president throughout the country. It underscored the importance of the power of the Supreme Court.

Since 1803 the Supreme Court has cited *Marbury* more than 250 times. It has been used to support the outcomes in

many major constitutional cases involving the power of the president [*Clinton vs. Jones* (1997) and *United States vs. Nixon* (1974)]; the death penalty [*Furman vs. Georgia*]; reproductive rights [*Griswold vs. Connecticut* (1965) and *Webster vs. Reproductive Health Services* (1989)]; relations between state and federal government [*Baker vs. Carr* (1962) and *Garcia vs. San Antonio Metropolitan Transit Authority* (1985)]; and civil rights [*Cooper vs. Aaron* (1958)]. (Wu Yun, 2002, pp.301-302)

To sum up, the American regulator—judicial review—plays a very important role in American society.

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