

“CONSTITUTIONAL JURISDICTION” AND JUDICIAL REVIEW:
THE EXPERIENCE OF THE UNITED STATES*

by Robert S. Barker

Last year, a professor of Constitutional Law in a Latin American country informed me that he was going to organize and edit a book devoted to the topic of “*la jurisdicción constitucional*,” and he asked me to contribute a chapter on “constitutional jurisdiction in the United States.” Shortly after accepting the invitation, I asked myself if there existed in the United States such a thing as “constitutional jurisdiction.” The term is not part of our judicial vocabulary; our law dictionaries, judicial opinions, and legal treatises do not identify “constitutional jurisdiction” as a category of “jurisdiction.”

As we know, “constitutional jurisdiction” is a concept of great importance in countries of the Civil Law tradition, and many of the most respected constitutionalists of those countries have written books and articles on the topic. Interestingly, those same Latin American and European jurists are divided over whether there exists a “constitutional jurisdiction” in the United States. Some say “yes,” others, “no,” and still others say that the question simply makes no sense in the context of United States constitutionalism.

The purpose of this brief paper is to present a summary of the origin, history, and basic characteristics of judicial control of the constitutionality of statutes and other governmental actions in the United States. I hope that you, jurists of the Civil Law tradition, will help me to

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decide what relevance the concept of “constitutional jurisdiction” has in and for the United States.

Let’s begin in the Eleventh Century:

The Common Law Tradition

With the Norman conquest of England in 1066, King William (“the Conqueror”) began to strengthen royal authority throughout the kingdom. He established the king as the ultimate owner of all lands in the country, and sent his agents to every part of England to collect royal taxes and impose “the king’s justice.” William’s practice of reinforcing royal authority through the establishment of royal courts was continued with even greater force and sophistication during the reign of King Henry II (r. 1154-1189), who increased the number and jurisdiction of his itinerant royal judges.

An important aspect of this expansion of royal authority was the utilization, and subsequent growth, of “writs,” or mandates, by means of which royal judges commanded defendants to appear before the court to defend themselves. Among those writs were the “*quo warranto*,” which required a public official to justify his actions, and the “*mandamus*,” which required officials, including the king’s own agents, to perform their non-discretionary duties. In the same era there developed in England the system known as “equity,” separate from but supplementary to the strictly “legal” tribunals. In equity, the Chancellor could, in appropriate cases, issue orders directing defendants to perform, or refrain from performing, specified acts, so that the injured plaintiff would receive an adequate remedy for wrongs done to him. Thus, during the High Middle Ages there was developed a nationwide system that permitted judges,

under certain circumstances, to control the conduct of governmental officers and functionaries. Perhaps the most dramatic expression of this principle is the declaration in the Magna Carta of 1215, in which the king promised:

“No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.
...To no one will we sell, to no one deny or delay right or justice.”

Throughout the centuries, the power of the judges to order royal agents to obey and enforce the laws continued to grow, albeit with occasional lapses and reverses. There were, at times, even judicial opinions that asserted that judicial tribunals had the power to declare unconstitutional laws that contradicted the principles of the Common Law of the country. The most famous of those opinions is that of Lord Edward Coke in 1610 in *Dr. Bonham's Case*. Coke declared:

“And it appears in our books, that in many cases, the common law will control Acts of Parliament; and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void....”

However, the English Revolution of 1688 (sometimes mischaracterized as “Glorious”) established definitively the supremacy of Parliament, thereby putting an end to judicial of the constitutionality of laws in England.

The Colonial Period, Independence, and the Constitution of 1789

Paradoxically, parliamentary supremacy in England helped to produce an opposite phenomenon in England's North American colonies. It meant that the acts of Parliament and the

charters granted to the respective colonies by the English government limited the prerogatives of the colonies' own legislative assemblies, thus producing a hierarchy of laws -- in essence a *constitutional* hierarchy.

Upon gaining independence from Great Britain, the United States retained the English Common Law tradition. In the words of Joseph Story, Justice of the United States Supreme Court (1811-1845) and Professor of Law at Harvard University:

“The universal principle (and the practice has conformed to it) has been, that the common law is our birthright and inheritance, and that our ancestors brought hither with them upon their emigration all of it, which was applicable to their situation. The whole structure of our present jurisprudence stands upon the original foundations of the common law.”

Under the first constitution of the United States, called the Articles of Confederation, there was no permanent national judiciary, and questions of “constitutionality” did not rise to the national level. The Philadelphia Convention of 1787, called for the purpose of recommending amendments to the Articles of Confederation, expanded its mission and proposed to replace the Articles with an entirely new document called the “Constitution of the United States,” which was approved by the Congress (which functioned under the Articles and itself had convoked the Philadelphia Convention) and ratified by the States. The new Constitution declared, in Article VI, its own supremacy, and established a federal judiciary whose jurisdiction would extend to “all cases...arising under this Constitution...” But the Constitution did not speak of “control of constitutionality” or of a “constitutional jurisdiction.”

Alexander Hamilton, a delegate from New York and an influential member of the Philadelphia Convention, asserted that the structure of government created by the Constitution, and the logic underlying that structure, meant that judges would have the power and the duty to

refuse to apply laws that were incompatible with the Constitution. In 1788, during the debates in the States over the ratification of the Constitution, Hamilton wrote:

“The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

“Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes 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. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.”

In 1794, five years after the ratification of the Constitution, James Kent, Chancellor of the State of New York, gave a series of law lectures at Columbia College (now Columbia University) on the new Constitution. In his introductory lecture, he observed:

“...there is one consideration, which places in a strong point of view, the importance of a knowledge of our constitutional principles, as a part of the education of an American Lawyer; and this arises from the uncommon efficacy of our Courts of Justice, in being authorized to bring the validity of a law to the test of the Constitution....

The doctrine I have suggested, is peculiar to the United States.... in this country we have found it expedient to establish certain rights, to be deemed paramount to the power of the ordinary Legislature....

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The Courts of Justice which are organized with peculiar advantages to exempt them from the baneful influence of Faction, and to secure at the same time, a steady, firm and impartial interpretation of the Law, are therefore the most proper power in the Government to keep the Legislature within the limits of its duty and to maintain the Authority of the Constitution.”

Marbury v. Madison

The decisive step that brought together the Common Law tradition, the text and structure of the Constitution, and the aforementioned arguments, thereby establishing the system of judicial control of constitutionality in the United States, was the opinion of the Supreme Court of the United States in the case of *Marbury v. Madison* in 1803.

The plaintiffs in the case were William Marbury and others who had been appointed by President John Adams as justices of the peace in the District of Columbia. Although Adams had nominated them, and the Senate had approved the nominations, the Secretary of State failed to deliver the commissions to the nominees. Adam’s presidential term expired, and the new President, Thomas Jefferson, directed his Secretary of State, James Madison, not to deliver the commissions to Marbury and sixteen others. Marbury and three of his colleagues commenced an action of *mandamus* in the Supreme Court of the United States against Madison to order the Secretary of State to deliver the commissions to Marbury and the other three nominees. The *mandamus* petition invoked the original jurisdiction of the Supreme Court on the basis of a federal statute that, as construed by Marbury and the Supreme Court, gave the Court original jurisdiction of *mandamus* actions against officials of the United States government.

However, Article III of the Constitution, which establishes and defines the Judicial Power of the United States, limits the original jurisdiction of the Supreme Court to cases involving foreign diplomatic and consular personnel, and cases in which a State is a party. The Court,

comparing the texts of the statute and the Constitution concluded that there was a conflict between the statute, which purported to give the Court original jurisdiction over Marbury's mandamus suit, and the Constitution, which denied the Court such jurisdiction. In an opinion written by Chief Justice John Marshall, the Court declared:

“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide the case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

“If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.”

This is the intellectual process that, since 1803, has been the foundation of what in the United States is called “judicial review;” that is, the power of the courts of justice to control the constitutionality of statutes and other governmental actions. In its essence, judicial review is inherent in the power and duty of judges and judicial tribunals to resolve controversies between adversary litigants. Therefore, judicial review may be exercised only *incidentally*, as a necessary step in the resolution of a concrete case. It follows that, in any type of case -- be it civil, criminal, commercial, or of any other kind -- any party may invoke a constitutional norm or principle, and raise a constitutional question as part of his claim or defense before whatever judge or tribunal may hear the case. If, in the opinion of that judge or tribunal, there is a conflict between the constitutional norm or principle applicable to the case, and any other norm or

governmental activity also relevant to the case, the judge must exercise “judicial review” to resolve the case. Thus, judicial review does not depend on any special actions, appeals, procedures, or tribunals. As one constitutionalist explained:

“The Constitutional Fathers did not invent new constitutional machinery to protect the Bill of Rights. Instead, they used the old machinery of the Common Law for this purpose; as lawyers brought up in the Common Law tradition and as disciples of Blackstone, they did not deem it necessary to implement the new constitutional ideology with new apparatus. In other words, the historic methods used for centuries in England to dispose of litigated disputes between private individuals were borrowed to provide protection to the Bill of Rights and other constitutional guarantees.”

It can be said that constitutional jurisdiction in the United States is broad, in the sense that it is diffuse, capable of being exercised by any judge or tribunal in any type of action. However, in another sense judicial review is limited. In reality, the same combination of Common Law tradition and constitutional text that led naturally to the exercise of judicial review, operate to limit that exercise. A basic principle of the Common Law is *stare decisis*, or binding precedent, which requires that inferior courts and judges follow (that is, apply) the jurisprudence created by superior tribunals. In addition, the Constitution, in Article VI, establishes the supremacy of the Constitution itself, federal statutes, and national treaties over state constitutions and state laws, and binds judges in all of the States to respect that supremacy. This “Supremacy Clause,” together with *stare decisis*, means that the jurisprudence of the Supreme Court of the United States in constitutional matters is binding on all other courts and judges, federal and state, in the country. Thus while all judicial bodies have the power of judicial review, they must exercise that power in accordance with the jurisprudence of the Supreme

Court of the United States. If they should depart from Supreme Court jurisprudence, their decisions are very likely to be reversed on appeal.

Another important limitation on judicial review is that it may be exercised only when necessary to resolve actual, concrete controversies between litigants. The Constitution of the United States limits the jurisdiction of federal courts (including the United States Supreme Court) to specified classes of “cases” and “controversies.” The constitutions and laws of the several States contain similar limitations on their respective tribunals. This means that courts do not have power to act *ex officio* to seek-out or suppress violations of the Constitution. Indeed, the Supreme Court in *Marbury* justified its exercise of judicial review on its need to resolve the case at hand. Any opinion by any court, state or federal, on any constitutional questions that is irrelevant or hypothetical would have no binding force.

Judicial Supremacy

There is no disagreement that judicial decisions on constitutional questions, as on all other matters in litigation, are binding on the parties to the case, and constitute precedent that is binding on inferior courts. However, from time to time in the history of the United States, the question has arisen whether judicial decisions on constitutional questions are binding on the President, the Congress, and the States in future situations. Several Presidents (including Lincoln), and various States (North and South) have said, “No!”

In 1958, in the case of *Cooper v. Aaron*, the United States Supreme Court declared unconstitutional an attempt by the State of Arkansas to impede the implementation of an order of a United States District Court (a federal court of first instance) requiring the racial integration of a public high school in the city of Little Rock. The Supreme Court declared:

“...the federal judiciary is supreme in the exposition of the law of the Constitution.... It follows that the interpretation

of [the constitutional provision in question] enunciated by this Court...is the supreme law of the land.”

In 1997, in the case of *City of Boerne v. Flores*, where the United States Congress attempted to impose, by statute, its own interpretation of the constitutional guarantee of religious liberty, an interpretation that differed from that made shortly before by the Supreme Court, the Court declared the federal statute unconstitutional and proclaimed that its own precedents were binding upon *all* branches of government. The Court said:

When the [Supreme] Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is.... When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed....it is this Court’s precedent, not [the federal statute], which must control.”

Justice Sandra Day O’Connor, in her separate opinion, proclaimed judicial supremacy in even stronger terms:

“...when it enacts legislation in furtherance of its delegated powers, Congress must make its judgments consistent with this Court’s exposition of the Constitution....”

Thus, constitutional jurisprudence, in addition to its force within the judicial system, also produces long-term effects for the other branches of government.

Speaking in terms of Comparative Law, it may be said that judicial control of the constitutionality of statutes and other governmental acts in the United States is incidental, diffuse, and implicit -- implicit in the structure of government established by the Constitution and by our Common Law tradition. Its effects are *inter partes*, but because of *stare decisis*, its results are, practically, *erga omnes*.

Do we have, then, a “constitutional jurisdiction”? I would say no. But my opinion should not be the last word.

Thank you.