

“9 LORDS OF THE UNIVERSE”: A RE-EXAMINATION OF THE ROLE OF THE SUPREME COURT OF THE UNITED STATES AS AN INSTRUMENT OF JUDICIAL REVIEW WITHIN THE CONTEXT OF A DEMOCRATIC FRAMEWORK

by

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Introduction

The question to which this paper addresses itself is summarised as follows:

In the context of the political and legal system of the United States of America, is the principle of “judicial review” as it is understood there, anti-democratic?

It is submitted that this issue is particularly relevant at present, given the ubiquitous nature of the “street-style” debate raging in the United States about whether the various governments within that country should be able to legislate to outlaw abortion.

Yet again it has fallen to the 9 Judges of the United States Supreme Court, to determine an issue which threatens to render asunder the very fabric of American society.

In a country so concerned about the individual’s “rights”, and which has for over 200 years held itself out as the shining beacon of democracy the question posed above is a poignant one.

In proposing an answer, it is necessary to begin by considering the present scope and limits of the principles of “democracy” and “judicial review”, as those terms are understood in the United States.

American Democracy

It is fair to say, that “democracy” may be defined as a system of government whereby “supreme political power” is vested in the people being governed.

In its purest form “democracy” is an ideal form of government, which has its origins in the city-states of the ancient Hellenic world. The concept of “democracy” was dealt with in the writings of Greek philosophers such as Socrates, Aristotle and chiefly Plato (principally “the Republic”) and its elder statesmen such as Democretes.

However, the concept of “majority rule” is realistically, difficult to implement in more complex societies; indeed in ancient Greece itself, the “ideal” was never fully implemented.¹

Various strains of “democracy” exist throughout the Western World. The so-called “Westminster System of Responsible Government”, a form of parliamentary democracy is the system operating in many Commonwealth nations including the United Kingdom, Australia, Canada and New Zealand.

It is submitted, that within the context of the United States, the system of government (at least at the federal level) can be more accurately described as a “representative constitutional democracy”.

The system of government in place in America, is **not** a purely democratic one, but one bound by a written and “rigid” constitution:

The Constitution establishes a limited republic, not a direct or pure democracy. Popular sentiment is filtered through a system of representation. The majority vote is limited by various restrictions in the Constitution: candidates must be a certain age, Presidents may not serve a third term – regardless of what the people want. Although the States range in

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¹ See discussion in Roebuck’s, *The World of Ancient Times*, McMillan Press (1966) at 250ff.

- population ... each State receives the same number of Senators ... Majority rule is further constrained by checks and balances, separation of powers, federalism and a bicameral system and the Bill of Rights.²

Within the very organ of the people's legislature – Congress – the upper house is inherently undemocratic in nature: each State within the Union has equal representation within the Senate even though some States have a population of a million people and others twenty million. Further, the Constitution provides no means of amending this provision.³

It is apparent that there exists at the very core of the American constitutional system “an inherent tension”⁴ between two conflicting principles, both obviously of great importance to the “framers” of the Constitution:

- (i) that of government by majority rule – of “popular sovereignty” (our notion of “democracy”)⁵; and
- (ii) the concept of the **rule of law** – by which the supreme law of the land (in this case the Constitution) bound everybody equally including the government itself.

This conflict has elsewhere been described as the “Madisonian dilemma”⁶ – that is the conflict between the principles of **majority rule** and **individual rights**.

There exists ample evidence from the writings of the framers of the Constitution and in particular the writings of Alexander Hamilton, James Madison and John Jay⁷, that this fear that an unchecked majority could subvert individual rights (no doubt due mainly from the colonists experience at the hands of Mother England), lead to the strict implementation of the “separation of powers doctrine”⁸, the inclusion of the Bill of Rights⁹ and the subsequent Civil War Amendment No.14¹⁰.

It is then, in the context of this realisation that we now turn to the concept of judicial review: that the American constitutional system is not **purely democratic**. It is clear by virtue of the inclusion of, inter alia, the concept of the doctrine of the separation of powers and the Bill of Rights in the Constitution, that the “framers” of the Constitution clearly indicated that they valued the protection

2 L Fisher, *American Constitutional Law – Constitutional Structures: Separated Powers and Federalism*; Vol.1; McGraw-Hill Publishing Company, New York (1990) at 52.

3 Article I, Section 3 of the Constitution sets out the entitlement of States to representation in the Senate. Article V stipulates “no State without its Consent shall be deprived of equal Suffrage in the Senate”. See the comments of the learned Judge John Gibbons in his keynote address to the 1981 New York University Constitutional Symposium entitled “Constitutional Adjudication and Democratic Theory” reproduced in the *New York University Law Review* (1981) 260 at 265 where he said:

How would the democratic theorists react to a statute that had been passed overwhelmingly and that gave each Senator voting power in the Senate in proportion to his State's population?

4 Seitz J, "Judicial Review in the American Constitution" (1987) 17 FLR.

5 *Ibid* at 2.

6 *Ibid* at 3.

7 See in particular *The Federalist – The New Constitution* (Every Man's Addition 1991) and *The Federalist Papers* and in particular Federalist No.48 by James Madison (1787). For a review of this material see RA Merrill, 'Separation of Powers of the U.S. Government: Co-operation and Competition Among the Branches' (1989) 18 FLR 1.

8 First proposed by Montesque in 1748 in his work *De L'Esprit des Lois*. Particularly see the writings of Alexander Hamilton in the *Federalist Papers* (New American Library of World Literature, Inc, 1961)

The Executive ... holds the sword of the community. The Legislature ... commands the purse ... The Judiciary, on the contrary has no influence over either ... It may truly be said to have neither *FORCE* nor *WILL* but merely judgment ...

See also Brennan J "Courts Democracy and the Law" 65 ALJ 32 at 33.

9 Technically Amendments 1-10 of the Constitution ratified on December 15, 1791.

10 There have been in all 26 Amendments, the last being ratified on July 1st, 1971. However the 14th Amendment has received **special attention** here for its place in the development of judicial review under the Warren Court (the Court whilst under the stewardship of Chief Justice Earl Warren, 1953-1969), and later the Burger Court (the Court under the stewardship of Chief Justice Warren Burger, 1969-1979).

of the rights of the individual, at least as much as that of the principle of "majoritarian rule"¹¹.

Judicial Review – The American Way

As with the concept of "democracy", it is practically inarguable that "judicial review" as that term is understood in the United States, is distinctive from for example, the use of that term Australia or Canada.

"Judicial review" cases in the United States, can, it is submitted, be clearly divided up into three distinctive classes:

- (i) those cases where a law is examined by a court to determine whether in so enacting it, its maker – either Congress or a State legislature – has attempted to legislate in a field which is rightly within the authority of the other – in other words the case involves a question concerning the separation of spheres of legislative influence between the States and the Union as prescribed by the Constitution (hereafter referred to as a "federalist issue case");
- (ii) those cases where a law or an action is examined by a court to determine whether the arm of government responsible for it – the President ("the Executive"), Congress ("the Legislature") or the Courts ("the Judiciary") or a delegate or any of these – in doing that act or passing that law is usurping the power or role of either or both of the other two arms of government. This is of course an examination of the extent to which Montesque's theory is enshrined in the Constitution (hereafter referred to as a "separation of powers issue");
- (iii) those cases where a law or action of an organ of government, either state or federal, is "contra-constitutional" as opposed to "extra-constitutional", in that it is beyond the power of any government within the United States to pass that law or commit that act, it being "contrary" to the provisions of the Constitution (hereafter referred to as a "contra-constitutional issue" case).

The basis for the restriction placed upon governments referred to in the above three classes of cases is, as has already been discussed, the Constitution (including of course the Bill of Rights).

But what is the basis for the Courts to exercise this power of "judicial review"? While it is possible to delve into pre-constitutional sources of the power,¹² such examinations do not add much to the present work: the source of "judicial review" in the United States is, it is submitted, the Constitution itself.

Article III, Section 1 of the Constitution vests the Judicial Power of the United States in the Supreme Court "and in such other inferior Courts as the Congress may from time to time ordain and establish".

Next to this must be read the provisions of the so-called "supremacy clause" in Article VI which provides,

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... 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.

¹¹ It is submitted that this is what is at the centre of Professor R.M. Dworkins', theory as expressed in *Taking Rights Seriously* (especially Ch.5 at 272-273). In that work he considers that all individuals should be treated with "equal concern and respect". He seems to suggest this is the basic principle flowing through the Bill of Rights – see RM Dworkins, "The Forum of Principle" (1981) 56 NYULR 469.

See also DJ Galligan, "Judicial Review and Democratic Principles: Two Theories" (1983) 57 ALJ at 69.

¹² Chief Justice Coke in the infamous *Doctor Bonham's* case (1610) said that 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". See also *Day v. Savage* (1610) 80 ER 235 at 236 and *The City of London v. Wood* 88 ER 1592 at 1602.

Obviously however, the basis the judicial review in the United States is not that of the common law. In *Hurtardo v. California* (1884) 110 US 516 at 531 the majority of the Supreme Court noted: "notwithstanding what was attributed to Lord Coke in *Bonham's* case ... the omnipotence of Parliament over the common law was absolute, even against common right and reason".

It is the case then, that the Constitution and the incorporated Bill of Rights is placed above (in the legal hierarchy) and is superior to Congress, the President, the Judiciary and the equivalent organs of each State's government. The judges of the Supreme Court inter alia "are bound by Oath or Affirmation to support this Constitution"; paragraph 3, Article IV of the Constitution.

While it is apparent then, that the "framers" of the Constitution intended that there were to be limits on the actions of government, and that the Supreme Court (inter alia) was to wield the judicial power, this is still a far cry from enshrining and endorsing the wide scope of judicial review over all acts of government.

It is clear from the writings of the "framers" of the Constitution and those state delegates who attended the 1787 Philadelphia Constitutional Convention to ratify the Constitution, that the idea of judicial review was considered by them. However it is not clear to what extent they intended the judiciary to be able to void acts of the other two arms of government.¹³

Clearly judicial review was discussed by the Convention delegates "as a means of checking Congress and the States"¹⁴. Indeed Alexander Hamilton when writing *Federalist No.78* in 1787, discussed the limits of Congress' legislative power and said:

Limitations of this kind can be preserved in practice no other way than through the medium of the Courts of Justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.¹⁵

Indeed the surviving records of the Philadelphia Constitutional Convention of 1787 clearly show that at least eight ratifying state conventions "had expressly discussed and accepted the judicial power to pronounce legislative acts void: Virginia, Rhode Island, New York, Connecticut, Massachusetts, New Jersey, North Carolina and South Carolina.

It is clear however that not all members of Congress or state delegates voting on the new Constitution shared that view or that faith in the Courts,¹⁶ and it seems fair to say that "giving the Courts the final say over Congressional Acts was an extremely radical notion".¹⁷

Prior to the celebrated case of *Marbury v. Madison*¹⁸ the federal courts had examined both state and federal legislation¹⁹ and in *Hylton v. United States*²⁰ and *Hollingsworth v. Virginia*²¹ the Supreme Court upheld the constitutional validity of Congressional Acts.

In *Lessee v. Dorrance*²² a Federal Circuit Court declared a Pennsylvanian law unconstitutional and void, while in *Calder v. Bull*²³ the Supreme Court considered by way of obiter dicta the theoretical basis for judicial review.

Finally in *Cooper v. Telfair*²⁴ Chase J said:

The general opinion is that the Supreme Court could declare an act of Congress unconstitutional but there is no adjudication of the Supreme Court itself upon the point.²⁵

Finally in the *Marbury* decision the Supreme Court struck down s.13 of the Judiciary Act of 1789 – an Act of Congress – as unconstitutional in that it attempted to expand the original

13 For an extremely thorough consideration of the relevant historical material, see *Supra* n.2 at 44. See in particular the extract of Alexander Hamilton's *Federalist No.78* reproduced at 59 thereof – part of *The Federalist Papers*.

14 *Ibid* at 44.

15 *Ibid* at 59 – extract of *Federalist No.78*.

16 For example *Five Writings of James Madison* (Hunt ed 1904) at 274. Mr Madison's objections, amongst others, are explored elsewhere at *Supra* n.2 at 43-46.

17 *Supra* n.2 at 44.

18 (1803) 1 Cranch 137, 2 Law Ed 135.

19 See *United States v. Yale Todd* (1851) 13 How 51. In this case however the Court gave an opinion on the validity of certain sections of an Act of Congress **after** they were repealed.

20 (1796) 3 Dall 171 at 175.

21 (1798) 3 Dall 375.

22 (1795) 2 Dall 304.

23 (1798) 3 Dall 386.

24 (1800) 4 Dall 14

25 *Ibid* at 19.

jurisdiction of the Supreme Court in violation of Article III of the Constitution. In the first full Judicial expression of the particular place of importance held by the Supreme Court in the constitutional order of the United States, Chief Justice Marshall said in part:

... 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 the courts, as well as other departments, are bound by that instrument.²⁶

Further, he said "The Constitution vests the whole judicial power of the United States in one Supreme Court".²⁷

and further that:

it is emphatically the power and duty of the judicial department to say what the law is ... if two laws conflict with each other the Courts must decide on the operation of each ...²⁸

Establishing then that it is the duty of the courts to decide between conflicting laws, and that when an ordinary law is in conflict with the Constitution it is void, the Supreme Court had established its power to review legislation, actions and decisions of the other two arms of government – to the **exclusion** of those other arms.

While it was not until *Dred Scott v. Sandford*²⁹ that the Supreme Court again struck down unconstitutional acts of the other arms of the federal government, it did, prior to this, solidify its power to review state legislation and state judicial decisions: *United States v. Peters*³⁰, *Fletcher v. Peck*³¹, *Martin v. Hunter's Lessee*³², *Cohens v. Virginia*³³.

It is submitted that it is most appropriate for our discussion to be focussed on judicial review by the Supreme Court, even though it is not the only court in the United States to exercise this power. This is for two reasons:

- (i) the judicial power as we have seen is focussed on the Supreme Court primarily, and without possible interference from the other two arms of government. By contrast the inferior courts only wield such "Judicial Power" "as the Congress may from time to time ordain and establish", and
- (ii) due to the principle of "*stare decisis*", the Supreme Court as the head of the appellant structure of courts within the United States, binds all other courts with its judicial pronouncements. Indeed, sooner or later most threshold constitutional questions arising before the courts are placed before the Supreme Court, if only to allow it to determine if it will hear the case³⁴.

At this point it is convenient to note the comments of Gibbons J when he said:

Perhaps what is undemocratic in our system is *stare decisis*. Perhaps we could make the

26 *Supra* n.18 at 180.

27 *Ibid* at 173.

28 *Ibid* at 177.

29 60 US (19 How) 393. In *Dred Scott* the Court declared that Congress was not able to grant full citizenship to Negroes or to regulate slavery in the territories – both were powers not granted to Congress by the Constitution, so the Court said.

30 A case where the Supreme Court by the issue of a writ of mandamus forced the Pennsylvanian Legislature to enforce a decision of Judge Peters, a Federal Judge in Pennsylvania.

31 (1810) 10 US (6 Cranch) 87, 136-139 where the Supreme Court struck down legislation passed by the Georgia Legislature revoking a grant of land which had already been on-sold to a third party as unconstitutional under Article I, Section 10 of the Constitution.

32 (1816) 1 Wheat 304 where it was established that the Court could review state court's decisions involving Federal questions.

33 (1821) 6 Wheat 264 – as above, but where one party to the dispute before the State Court was the State itself.

34 The "Judges Bill" enacted in 1925 gave the Supreme Court the absolute discretionary power to choose those cases it wishes to hear by writ of *certiari*. This writ is granted in the absolute discretion of the Court, and only if at least four Judges agree. Of the 5,000 or so petitions each year, about 2% are granted the writ. Even the so-called "as of right" appeal cases are within the discretion of the Court, as it only takes those matters of a "substantial federal nature". Since *Marbury* the Courts original jurisdiction has not grown, and is so small as to be of little significance.

Constitution as law more democratic by making every Judge a king in interpreting it, rather than concentrating the ultimate power of judicial review in the Supreme Court.³⁵

It will be recalled that we have attempted to categorise cases of constitutional judicial review into three types:

- (i) federalist issue cases;
- (ii) separation of powers issue cases;
- (iii) contra-constitutional issue cases.

The first category of cases closely reflects the sort of constitutional cases which the Australian High Court is most often asked to adjudicate.

However, in the United States, as some commentators have suggested "The nation – state relationship no longer plays a central role in American constitutional development ...".³⁶

It is submitted that these sort of cases have not often been the subject of the plethora of learned works contributing to the debate over whether or not judicial review is undemocratic.

It is submitted that this is simply because in these types of cases, the Supreme Court is not deciding whether a majority decision on an issue is to prevail over a minority position, but rather within which "community" it is appropriate to seek to establish a majority: that of a state or of the wider community of the United States. The question is not one of majoritarian rule, but of **which** majoritarian rule.

As has been succinctly put elsewhere,

A major difficulty with identifying enforcement of majority will as the object of all government, however is the impossibility, in the real world, of determining that will at any moment in history, in any possible organisation larger than a family.³⁷

In a country of some 260 million people of diverse cultures and ways of life, spread throughout 50 states, it is impossible to see how, other than by reference to the Constitution, such reference being conducted by an independent judicial body, that the "relevant community [within the United States] for determining majority will" can be determined.³⁸

The Court in any event, has been prepared to uphold the statutory supremacy of Congress over that of local institutions in a number of cases including *Perez v. Campbell*³⁹, *Hines v. Davidowitz*⁴⁰, and *Gibbons v. Ogden*⁴¹.

In this latter case, Chief Justice Marshall said:

The Court will enter upon the enquiry, whether the laws of New York, as expounded by the highest tribunal of that state, have, in their application to this case, come into collision with an Act of Congress, and deprived a citizen of a right to which that Act entitles him.⁴²

In any event, where it is a case of a concurrent power – one specifically given to both the states and the federal government – if Congress feels that the Supreme Court has incorrectly interpreted the Congressional law so as to find a collision with a State law or alternatively to find that there is no collision where Congress has attempted to "cover the field", Congress is free to exert the will of the majority and overrule it.⁴³

35 *Supra* n.3 at 269.

36 *Supra* n.4 at 3.

37 *Supra* n.3 at 260.

38 *Ibid* at 261.

39 (1971) 402 US 637 at 652.

40 (1941) 312 US 52 at 67.

41 (1824) 22 US (9 Wheat) 1 at 211.

42 *Ibid* at 209.

43 *General Electric Company v. Gilbert* (1976) 429 US 125 at 145-146. Following this case Congress amended a law to ensure that it "covered the field" which the Court had in that decision found that it did not. Title VII of the Civil Rights Act of 1964. See also *Supra* n.3 for reference to Judge Gibbon's address in which he examines the whole range of such cases dealing with the invalidating by the Supreme Court of state legislation. He finds that there are three categories of such cases:

It is submitted therefore, that for all these reasons the exercise by the Supreme Court of its power of "judicial review" in these types of cases are not undemocratic.

The latter two categories of cases are not so easily dismissed as examples of judicial review being conducted in a manner which is consistent with democracy: the question in these two categories is not simply one of "choosing between majorities".

In searching for a democratically sound basis for judicial review the leading scholars⁴⁴ have sought to divide all cases of constitutional judicial review into:

- (a) "interpretist" and
- (b) "non-interpretist".

"Interpretist judicial review" is simply a constitutional decision based "upon norms that are stated or clearly implicit in the written Constitution"⁴⁵.

Put another way, it is a decision supported by a "value judgment the framers constitutionalised at some point in the past"⁴⁶. This type of judicial review then is simply the applying of the test of the very words of the Constitution to some legislation or action of one of the arms of government. This approach is clearly that employed in federalist issue cases.

If the argument as to the adulterated, and particular nature of democracy in the United States advanced earlier is accepted, then this type of judicial review is not by definition undemocratic: it is simply applying to the system of limited democracy in place, those limitations placed upon the system by the very thing which created it and to which it is subordinate – the Constitution. It was a strict adherence to this form of judicial review that led to the Court's decision in *Dred Scott*⁴⁷. This approach to judicial review is also referred to as "literalist"⁴⁸ and led Taney CJ in *Dred Scott* to say:

No-one, we presume, supposes that any change in public opinion or feeling in relation to this unfortunate race [of blacks], in the civilised nations of Europe or in this Country, should induce the Court to give to the Constitution a more liberal construction in their favour than they were intended to bear when the instrument was framed and adopted ...⁴⁹

It is also largely this type of judicial review that has led to the decisions of the Supreme Court in the separation of powers issue cases.

However, having said that, it is interesting to note that not infrequently the Supreme Court has given decisions in constitutional cases in which the central issue is one of the enshrined doctrine of the separation of powers, and which it is arguable **cannot** be readily sustained on the strict wording on the Constitution, or is in respect of an issue on which the Constitution is silent⁵⁰. Typically these cases involve one of the plethora of "unelected officials who ... would necessarily

(i) state laws covering topics already covered by federal laws (at 263);

(ii) state laws set aside under the "commerce clause" in Article I Section 8 of the Constitution. It has been held that Congress is also entitled to legislate to validate a state law held unconstitutional by the Supreme Court under this power: see *Prudential Insurance Company v. Benjamin* (1946) 328 US 408 at 425; *In re Rahrer* (1891) 140 US 545 at 562;

(iii) where the Court holds one state law as unconstitutional because it interferes with the interests of another state: again a question of which "majority" is relevant. See *All State Insurance Company v. Hague* (1981) 449 US 302

⁴⁴ JH Ely's *Democracy and Mistrust* (1981) 1; Review Essay, Samuel Estreicher, "Platonic Guardians of Democracy: John Hart Ely's role for the Supreme Court in the Constitution's Open Texture" (1981) NYULR at 547; M Perry's, *The Constitution, the Courts and Human Rights: An Enquiry into the Legitimacy of Constitutional Policy Making by the Judiciary*; Laurence G Sager's Review Essay "What's a Nice Court Like You Doing in a Democracy Like This?" [1984] SLR Vol.36 at 1087.

⁴⁵ *Ibid.* See Ely's work at 1.

⁴⁶ *Ibid.* See M Perry's work referred to above at 10-11.

⁴⁷ *Supra* n.29.

⁴⁸ *Supra* n.2 at 53.

⁴⁹ *Supra* n.29 at 206.

⁵⁰ See the article by Professor Merrill, "Separation of Powers in the US Government: Co-operation and Competition Among the Branches" [1989] 18 FLR 1 at 2-4.

perform the bulk of the government's work" and in respect of which "one scanning the constitution for a sense of the overall structure of the federal government is immediately struck by its silence".⁵¹

It is submitted that it is a matter of near inevitability that at some point the Court will have to make a choice between two opposing views that may not accord with what the majority, as represented by either the Congress or President desire.

Whether one argues that by some legal fiction the Constitution represents the will of the majority, or that alternatively the Constitution is the outer boundary, which under the American system the majority cannot go beyond, the fact remains that at some point the Court will be required to make a choice not referable to the will of the majority.

The framers clearly intended to enshrine the doctrine of the separation of powers, but equally clearly they did not foresee, or arguably intend, to legislate in respect of every possible application of that doctrine.

As has been said elsewhere:

the existing apparatus [of federal governments] is vastly larger than the tiny workforce that served the first Presidents. ... Whilst the framers appear to have been worried chiefly about the relationships, amongst the Presidents, members of Congress, and Judges of the Supreme Court, those that now matter most are the relationships amongst lesser officers, and between these officers and the President or Congress.⁵²

To quote Professor Merrill "no successful theory of the separation of powers can threaten 200 years of history".⁵³

The fact that these inevitable "choices" made by the Court are just that – choices – and not the discovery of some higher meaning within the Constitution, is illustrated by a number of decisions which despite attempts to argue to the contrary, are clearly inconsistent.

In *Myers v. United States*⁵⁴ the Supreme Court found that an attempt by Congress to reserve for itself a place in the process of removing an "executive officer" was an unconstitutional usurping of the President's executive function.

However, nine years later in *Humphrey's Executor v. United States*⁵⁵ the Court withdrew from the broad statements in *Myer's* case and found that Congress could validly veto the President's attempt to remove, without reason, members of the Federal Trade Commission. The Court found the FTC was one of a number of "independent agencies" which Congress had created to perform functions from all three arms of government – legislative, adjudicatory and executive – but which Congress was entitled to ensure remained free from political influence.⁵⁶

Nevertheless the Court reiterated the view in *Myer's* case that there was a necessity under the Constitution "of maintaining each of the three general departments of the government entirely free from the control of coercive influence, direct or indirect, of either of the others ...".⁵⁷

Accordingly the Court found that in this case the FTC was exercising only an "executive **function**" as opposed to "executive **power**", and it was the latter to which the separationist doctrine was addressed: Congress could intervene in the process.

It is submitted that the two cases are clearly inconsistent; indeed it is arguable that the Court in making the distinction between executive **power** and executive **function** found a distinction not provided for in the Constitution.

51 P Strauss, "The Place of Agencies in Government: Separation of Powers and the Fourth Branch" (1984) 84 Columbia L. Rev. 573 at 597.

52 *Supra* n.50 at 4.

53 *Ibid.*

54 (1926) 272 US 52. This case concerned the removal by the President of a Post Master under a Statute requiring Senatorial consent to both his appointment and removal.

55 (1935) 295 US 602.

56 *Ibid* at 628-629.

57 *Ibid* at 629.

In *Immigration and Naturalization Service v. Chadha*⁵⁸ the Supreme Court reverted to its strict separationist views in *Myers* and struck down Congressional legislation which allowed the Congress to veto on the grounds of hardship, decisions by members of the Immigration and Naturalisation Service to deport illegal aliens. The Court equated Congress' action with the passing of legislation, and as the Constitution provides that all legislation has to be presented to the President for his *veto*, the Congress had acted unconstitutionally. It is submitted that, whether or not this case is correct, the views expressed in it diverge substantially from those set out in *Humphrey's* case.

It is even more difficult to reconcile these types of decisions as being interpretist in nature, when some, such as *Humphrey's*, are clearly decisions of expediency, while others such as *Chadha's* case, are the antithesis of expediency: the striking down of the "legislative *veto*" in *Chadha's* decision jeopardised nearly 200 federal statutes (as at 1983).⁵⁹

Perhaps the most glaring example of the Court "reasoning" its way out of the strict provisions of the Constitution, is provided in the relatively recent case *Morrison v. Olsen*.⁶⁰

In that decision the Supreme Court (almost casually) upheld⁶¹ legislation which allowed a "special court" made up of judges provided for in Article III of the Constitution, to appoint an "independent counsel" to investigate corruption within the government, and which independent counsel performed all the functions of the Attorney-General (clearly executive in nature).

Furthermore the "special court" was charged with the overseeing of the counsel in the performance of his duties.

Justice Scalia in his dissent stated: "If to describe this case is not to decide it, the concept of a government of separate and co-ordinated powers no longer has meaning".⁶²

These types of decisions are clearly more than the mere applying of rules and limitations set out in the Constitution, to a particular action of government; they are "non-interpretist" in nature.

"Non-interpretist" judicial review then, is the making of decisions by the Court on the basis of principle "beyond that set of references" set out in the Constitution and which results in the enforcing of "norms that cannot be discovered within the four corners of the document".⁶³

It is submitted that this type of judicial review is clearly undemocratic in nature. This conclusion is inevitably reached from the following facts:

- (i) that the nine justices of the Supreme Court are appointed by the President after his nomination of a candidate is advised upon and accepted by the Senate. While the process of appointment then is arguably "democratic" in the sense that democratically elected officials make the appointment, that democratic process is at least "once removed" from the majority of the relevant community. Further, the appointment survives until the death or retirement of the justice – on the other hand, the President and Congress will be changed often and regularly following that appointment;
- (ii) the President and Congress are elected by the wider community; and
- (iii) the decision of the Supreme Court, it being the exclusive wielder of the judicial power, is capable at some point at being at odds with the views of the President and Congress, and therefore the majority.

"Interpretist" judicial review is at least arguably not anti-democratic in that the Court is not deciding an issue but simply explaining the limits of the democratic process; not so a "non-interpretist" decision.

It is the third category of cases – the contra-constitutional cases – which give the most clear

58 (1983) 462 US 919.

59 *Ibid.* See the dissent of Justice White at 967ff.

60 (1988) 108 SCt 2597.

61 *Supra* n.50 at 21.

62 *Supra* n.58 at 2625.

63 *Supra* n.44 and particularly Ely's book at 1 and Estreicher's article at 549.

illustration of non-interpretist judicial process in operation.

One of the most dramatic examples of the Court acting to the contrary of the popular will, and perhaps the popular good, was the striking down of major portions of President Franklin D Roosevelt's New Deal legislation by the Court on "constitutional grounds".

During this arch-reactionary period, the Court struck down large portions of state and federal legislation designed to deal with the Great Depression of the 1920's.

This legislation dealt with inter alia, monopolies, prices, minimum wages, maximum working hours and organised labour. In *United States v. Butler*,⁶⁴ one of the many such cases, legislation was struck down as being inconsistent with the constitutional right of "liberty to contract".⁶⁵ Justice Stone⁶⁶ in dissent said:

Courts are not the only agency of government that must be assumed to have the capacity to govern.⁶⁷

This blatant antagonism to the New Deal legislative program by the Court, led an exasperated President Roosevelt to present to the Congress the infamous "Court packing" plan under which he planned appoint extra Justices to the Supreme Court until he had secured a majority on the bench to support his legislation.

Perhaps it is in light of this period of the Court's history, that it can be said that while the Court may not be bound by popular opinion, it is nevertheless cognisant of it: the opposition of the New Deal Court to the program (mainly on the ground of so-called "economic due process") ended with a radical about face by the Court in *National Labour Relations Board v. James and Lauchlin Steel Corporation*.⁶⁸

This however did not spell the end of the "non-interpretist" judicial review decisions of the Supreme Court. Rather the Court under the guidance of Chief Justice Warren (1953-1969) switched its concern from **economic due process** to questions of **individual rights**.⁶⁹ This switch in emphasis, no doubt caused in part by the criticism of the Court by Congress, the President and the public during the era of the New Deal Court, was marked by Chief Justice Stone's famous footnote in *United States v. Carolene Products*.⁷⁰

The Warren Court and later the Burger Court⁷¹ emphasised the "balance of individual and state interests, and degrees of state power took precedence over questions about the kinds of power constitutionalised by the framers".⁷²

In particular the 14th Amendment was used as the means of applying heretofore "unidentified" substantive rights in the Bill of Rights Amendments, to strike down state legislation: "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law⁷³; nor deny to any person within its jurisdiction **the equal protection of the**

64 (1936) 297 US 1.

65 As such, this right is enumerated nowhere in the Constitution.

66 Later Chief Justice Harlan Fiske Stone. This decision declared unconstitutional and invalid the Agricultural Adjustment Act.

67 *Supra* n.64 at 87.

68 (1937) 301 US 1.

69 Emphasis provided by the writer.

70 (1938) 304 US 144 at 152 n.4. Essentially the footnote lay the foundation for what became known as the "judicial double-standard". The Court was to approach cases involving constitutional questions on two different basis:

1. In respect of state or federal economic regulation cases, the Court would give to the legislation a presumption of constitutional validity. Parties opposing its validity would bear the onus of proving that unconstitutionality.
2. On the other hand, legislation or acts concerning of affecting civil liberties or rights would come under special scrutiny from the Court.

71 Chief Justice Burger was appointed in 1969.

72 See KL Hall "The Supreme Court and Judicial Review of American History" printed in *Bicentennial Essays on the Constitution* American Historical Association 1985 at 38.

73 Emphasis provided by the writer.

laws".⁷⁴ As with the "separationalist issue", the Court's decisions in this area of civil rights, are inconsistent with each other, and clearly indicate that the Court has in some of these decisions made a choice which is inconsistent with the public will.

For example, in *Plessy v. Ferguson*⁷⁵ the Supreme Court had found that racial segregation, as organised by a State was valid; a Louisiana law that permitted segregation in public places was constitutional so long as the facilities for each were equal.

However, in *Brown v. Board of Education of Topeka*⁷⁶ the Court suddenly found that the "equal protection of the laws" clause of the 14th Amendment meant that separate educational institutions for blacks and whites were unconstitutional. The extraction of such a wide principle as "a right to equal and unseparated educational facilities", from the "equal protections clause", while obviously laudable in itself, is nevertheless obviously an example of the Court imposing its own moral values upon the majority of – in the case of *Brown's* case – the communities of the Southern States.

It is to this extent arguable that such cases can be labelled as examples of the exercise of judicial power in an undemocratic fashion.

Indeed Justice Jackson himself noted during the course of a debate in the hearing of *Brown's* case, as to whether or not the Court had power to outlaw segregation:

I suppose realistically the reason the case is here is that action couldn't be obtained from Congress.

These civil rights decisions are, it is submitted, based on what has been termed "preferred freedoms".⁷⁷ These "preferred freedoms" are based on broad notions of equality which cannot be traced to specific provisions of the Constitution.

In *Brown's* case the Court examined the Constitution's specific provisions and history to justify its decision, and finding none, said:

We cannot turn the clock back to 1868 when the Amendment [the 14th] was adopted ... We must consider public education **in the light of its full development and present place in American life**⁷⁸ throughout the Nation.⁷⁹

While the Court found that equal education was a "right" that had to be "made available to all on equal terms"⁸⁰ it did so without the express sanction of the framers of the Constitution, and in a community where the black population was perhaps at that stage, only about 12% of the total.

This "choice" by the Court between arguments before and against the extension of the 14th Amendment to the question of segregation – was a matter of subjective judgment, not necessarily supported by the majority.

This type of judicial action has not gone uncriticised on the bench itself. In *Harper v. Virginia Board of Education*⁸¹ the Court struck down legislation which required a poll tax to be paid *before* a citizen had the right to vote in State elections. In dissent Justice Harlan said

... [I]t is wrong in my view for the Court to adopt the political doctrine popularly accepted at a particular point of our history and to declare all others to be irrelevant and invidious ... The due process of the 14th Amendment does not enact the laissez faire theory of society ... The equal protection clause of the Amendment [the 14th] does not rightly impose upon America an ideology of unrestrained egalitarianism.⁸²

74 The Constitution 1901 (Cth), Amendment 14, Section 1.

75 (1896) 163 US 537.

76 (1954) 347 US 492 at 493.

77 RH Williams, *The Politics of the US Supreme Court*, George Allen and Unwin, London (1980) at 171. Hodder-Williams argues that the foundation of the notion of "preferred freedoms" is the *Carolene Products* footnote.

78 Emphasis provided by the writer.

79 *Supra* n.74 at 493.

80 *Supra* n.74 at 493.

81 (1966) 303 US 663.

82 *Ibid* at 686.

It is submitted, even more to the point, that the “political doctrines popularly accepted” that his Honour refers to, may not have been popularly accepted at the time, in the state of Virginia. Similarly in *Shapiro v. Thompson*⁸³ Harlan JIII declared:

[W]hen a statute affects only matters not mentioned in the Federal Constitution and is not arbitrary or irrelevant, I must reiterate that I know of nothing which entitles this Court ... to pick out particular human activities, characterise them as “fundamental” and give them added protection under an unusually stringent equal protection test.⁸⁴

He summarised by saying:

Today’s decision, it seems to me, reflects to an unusual degree the current notion that this Court possesses a particular wisdom all its own whose capacity to lead this Nation out of its present trouble is contained only by the limits of judicial ingenuity in contriving new constitutional principles to meet each problem as it arises.⁸⁵

The countervailing view, that being of the majority of the Warren Court, is best summed up by Justice Jackson in *West Virginia State Board of Education v. Barnett*⁸⁶ where he said:

The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the Courts. One’s right to life, liberty and property ... and other fundamental rights may not be submitted to the vote; they depend on the outcome of no elections.

Perhaps the most dramatic recent illustration of this non-interpretism (which it is submitted is nothing more than judicial creativity) is provided by cases concerning the abortion issue referred to in this paper’s introduction, of which the most famous are *Roe v. Wade* and *Roe v. Bolton*.⁸⁷

In the first case, the Court struck down a Texas statute that made abortion a criminal offence, on the basis that the 14th Amendment gave a woman throughout the first and second “trimesters” of pregnancy a right to an abortion – a “right to privacy” in respect of her own body – superior to that of the State’s right to legislate against abortion for the protection of “maternal health” and “potential human life”.

This “right to an abortion” was one clearly not addressed by the framers of the Constitution and not one which, presumably, the Legislature of Texas as the representative of the majority in that state’s community, agreed with.

Conclusion

Is the process of “judicial review” by the United States Supreme Court “undemocratic”?

This question has been the subject of literally millions of words written by legal scholars in the United States. This paper will not attempt to canvass in full the various theories on the place of “judicial review” in the American Constitutional System.

However it is helpful just to list a few of those theorems.

There are those scholars who hold that “interpretist” judicial review is the only acceptable form – all others are undemocratic by their nature.⁸⁸

Professor Ely⁸⁹ would hold that all the decisions of the Supreme Court on the so-called non-

83 (1969) 394 US 618. In this case the Court declared that public welfare assistance was not a privilege but a right confirmed by the Constitution. In fact one would venture that it was not an issue that would even have occurred to the framers of the Constitution.

84 *Ibid* at 662.

85 *Ibid* at 677.

86 (1943) 319 US 624.

87 (1973) 410 US 133 and (1973) 410 US 479 respectively.

88 See R Berger, *The Government by Judiciary: The Transformation of the 14th Amendment*, Harvard University Press (1977).

89 *Supra* n.44.

interpretist or non-textual basis are decisions simply regarding the Constitutional process: decisions such as *Brown* are based on the need to ensure that all citizens are included within the democratic process and therefore, that the Court in making such decisions is not dealing with substantive rights but ensuring the political process remains in fact democratic. Ely would hold that the process of democracy itself will fail when:

the opportunity to participate either in the political process by which values are appropriately identified and accommodated, or the accommodation those processes have reached, has been unduly restricted.⁹⁰

With respect such arguments are unconvincing: the declaration of for example – a “right to an abortion” – is clearly a matter of substance not process.

Professor RM Dworkin⁹¹ attempts to call “non-interpretist” judicial review democratic by distinguishing between “principles” and “policies” and between “rights” and “goals”. The democratic process he says deals with policies and goals, whereas principles and rights are not within the domain of democracy: the Bill of Rights makes the issues of principles and rights, questions of law for the Courts to decide.

Again, with respect, this approach is unconvincing: surely whether a particular “right” or “principle” is to be accepted in any particular society is still a matter of subjective choice? There is no “right” that is the subject of an empirical, universal law. “Rights” and “principles” obviously vary from culture to culture and society to society – the majority whether consciously, or implicitly by acceptance through usage, adopts some principles and rights and discards others. Perhaps if Professor Dworkin was to go further and suggest that the Bill of Rights in containing these rights and principles, limited the extent to which the majority had a choice to make, then his argument would sustain validity.

Professor E Rostow appeals to some ill-defined higher, and perhaps “supernatural” concept of democracy.⁹²

Professor Perry⁹³ seems to assume that the “non-interpretist” decisions are undemocratic, but that they are nevertheless justifiable on the basis of his “functional theory”.

If these theories are to be discarded – what do we replace them with?

It is submitted that the question must be directed at each decision on a case by case basis: the question of whether “judicial review” as a concept is non-democratic, is not, it is submitted, capable of an answer.

However, it is possible to determine whether a particular decision or example of the exercise of judicial review is non-democratic.

Those decisions which rely on an “interpretist” approach to the Constitution, it is submitted, are not inconsistent with democracy or majoritarian rule by virtue of the fact that democracy as it operates in the United States today, does not mean unfettered, unrestricted or unlimited majoritarian rules.

As was argued in the first half of this paper, the American system is either:

- (i) only partially democratic; or
- (ii) is an example of a particular type of democracy.

It is the view of the writer that the second characterisation is the more accurate. This view is based in part on an acceptance that democracy itself is not a firm concept, but a vague, indeterminate and ambiguous one.

Interpretist decisions simply plum the outer depths of the limits of the democratic system as it operates in the United States. These sort of decisions include in main, the federalist issue uses.

90 *Supra* n.44 at 77.

91 *Supra* n.44 *Taking Rights Seriously* Harvard University Press (1977).

92 "The Democratic Character of Judicial Reviews" (1952) 66 HLR 193.

93 *Supra* n.44.

Non-interpretist decisions however, cannot claim to find their basis directly within the four corners of the Constitution.

However, arguably, the Constitution itself, like all such documents was intended to serve those successive generations who inherited it, for eternity. It is therefore itself vague and indeterminate so as not to lose its flexibility, and by necessity appeals to “higher” but ill-defined notions or ideals, the limits of which are intended to be interpreted in any given age in light of the contemporary conditions of that period. The framers spoke of “liberty”, “freedom” and discussed the concept of “judicial review” but made no attempt to define these concepts with any specificity: as lawyers they were clearly capable of doing so.

Why didn't they?

It is submitted that the framers deliberately intended successive generations of Judges – in whom they vested the judicial power – to make choices about the application of the enshrined principles of “liberty” and “equality” to circumstances as they came before the Court. The Constitution was intended to be interpreted by Judges, with an eclectic approach.

Arguably then, these cases too are not undemocratic in that they place limits on the democratic system, which limits arise from broad notions expressed in the Constitution and which the framers intended to be explored on a case by case basis.

However it is submitted that there remains some decisions such as *Roe v. Wade* which clearly demonstrate that the Court has made a choice between competing moral standpoints which the framers of the Constitution could never have intended that document to address. Even broad notions of liberty, life and equality cannot be ever-expanding. At some point the outer limits of those concepts must be reached. If a “right to liberty” is to be extended to include a “right to social security” as in *Shapiro v. Thompson*, what stops it from also including a “right to a motor car”.

The simple answer is, it is submitted, that the right to social security, is on the very fringes of any right subscribed in the Bill of Rights, if referable to such rights at all.

Once a notional right becomes too broad, to the extent that it is no longer capable of definition, it ceases to be a meaningful notion at all.

In respect of these cases, it is submitted, we can argue the judicial review has become judicial legislation and is to that extent undemocratic.

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