

1937

## Reviewing Judicial Review

Clarence Emmett Manion  
*Notre Dame Law School*

Follow this and additional works at: [https://scholarship.law.nd.edu/law\\_faculty\\_scholarship](https://scholarship.law.nd.edu/law_faculty_scholarship)



Part of the [Judges Commons](#), and the [Legal History Commons](#)

---

### Recommended Citation

Clarence E. Manion, *Reviewing Judicial Review*, 12 Ind. L.J. 167 (1936-1937).  
Available at: [https://scholarship.law.nd.edu/law\\_faculty\\_scholarship/1010](https://scholarship.law.nd.edu/law_faculty_scholarship/1010)

This Article is brought to you for free and open access by the Publications at NDLScholarship. It has been accepted for inclusion in Journal Articles by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

# INDIANA LAW JOURNAL

---

---

Volume XII

FEBRUARY, 1937

Number 3

---

---

## REVIEWING JUDICIAL REVIEW

By CLARENCE E. MANION\*

I am always very highly complimented to have it inferred that I have, or have had, things in common with our distinguished President, Mr. Cole. About the only pleasant recollection that I have with reference to the late lamented senatorial notion that we both shared is the fact that he, too, was mistaken about it, and for that reason there can be no great and grave reflection upon the immaturity of my judgment. Whether or not any good came of this abortive effort on both our parts is somewhat questionable, and the question may even be more seriously raised after I have finished here this afternoon, because it seems that the ambition and the manner in which we followed it up have had some indirect connection with my presence here in the role of a speech-maker.

I am really very seriously embarrassed here this afternoon because I lack proper equipment necessary to a speech before such an important and distinguished body.

Eddie Rickenbacker came here a couple of years ago and told us about a friend of his down in New York who was very seriously interested in the fanfare of publicity that at one time attended the establishment of nudism in the United States. The tabloids all played up these ladies and gentlemen in interesting poses and a great many people in the country heard a little something about it.

---

\* Address of Clarence E. Manion, Professor of Law at Notre Dame University School of Law, delivered at the mid-winter meeting of the Indiana State Bar Association January 16, 1937.

Well, Rickenbacker's friend was lunching in New York one day and brought the subject up, and his companion at lunch, somewhat diffidently confessed that he was a nudist, and he followed it up by the declaration that some of the best people in New York, both men and women, were nudists. He further stated that over on Long Island there was an establishment that flourished every summer, where these people met in the absolute-absolute, for thirty or sixty days. He added that these same distinguished ladies and gentlemen during the winter time convened periodically in the City of New York in some of the brown stone mansions of that city just to avoid any self-consciousness that might attend them the next summer. They sort of kept in practice, so to speak, at these dinners and bridge parties, in going without any clothes.

Well, this friend of Rickenbacker's expressed a great interest, an almost avid interest, in knowing who these distinguished ladies and gentlemen in New York were. Finally, his friend said, "Well, this is rather an exclusive company, but possibly I can get you an invitation to one of these winter parties. I don't know; I will attempt it."

In due course he called this chap on the telephone. He said, "You recall the subject-matter of our conversation the other day?"

"Yes."

"Well, you are going to get an invitation. It is going to look like any other invitation. It is going to call for your presence at such and such a number on Riverside Drive. Put on your dinner clothes and report at the time indicated, and by all means, evince no surprise or self-consciousness or fear, because I have promised these people that you were an experienced nudist, and that you take these things casually and philosophically as Nature intended they should be taken."

This young man was all a-twitter. He got himself ready, dressed meticulously, and was driven to the indicated address. The butler responded to his call—wearing merely a monocle and a loin cloth. He asked our friend to come in. In spite of all the injunctions about studied complacency he was turning his hat from side to side. He followed the butler down

the aisle and obeyed his instructions to step into the undressing room. In this room there were evidences that a great many men and women had undressed there recently. All sorts of clothing, intimate and otherwise, hung about with reckless abandon.

The butler told our friend to "Proceed." He proceeded and finally got himself all dressed for the nudist party. Incidentally he was a little late. He could hear the music and the tinkling of glasses down the hall, and when he was all finished and quite ready, he followed the butler down the hall to the living room. The butler said, "You will step behind me onto the balcony and take your bow, and then you will walk down the steps into the well of the living room."

So the butler stepped out and announced, "Mr. John Brown, of New York." Whereupon there was a roll of drums, and Mr. John Brown of New York stepped out and took his bow, and was received by an assembly of 150 ladies and gentlemen, all fully and completely dressed.

I have verified the truth of that story, and now I know exactly how the gentlemen felt because here I am, announced in the role of a speech-maker and nude of anything that would be of value or interest to the aristocracy of Indiana's legal profession.

Nevertheless, I am going to speak for a very few minutes about a subject that I would not have had the temerity to broach a month ago. I would have hesitated to discourse about this topic because it appeared to me to be so elemental and so axiomatic that almost anybody, and certainly lawyers, would have a complete and clearcut understanding of it. It appeared to me that if anyone rose in front of a learned gathering like this and talked about it, he would simply be asking too much of their indulgence.

But about two weeks ago, during the Christmas vacation, I had the honor to read a paper before the Jurisprudence Section of what is known as the American Association of Law Schools in Chicago. There were about a hundred law professors present at that section and these representatives teach at law schools scattered all over the United States. I was

very much surprised to find some of these simple things that I want to mention to you, categorically denied and expounded against by these very learned gentlemen who are teaching in a great many of our best schools.

Either I am all wrong or something very serious has happened to our country, and particularly to the law of it, in the last ten or fifteen years. I do not make these remarks in any spirit of criticism for those who were present, those who entered into the discussion or those who discussed the thing with me privately after it was over. I refer to the incident merely to emphasize the seriousness with which I make this rather brief observation.

I gave Mr. Batchelor a title for this speech. I called it, "Reviewing Judicial Review." It was the question of judicial review, that is, the right of judges to review the laws of our government for their constitutionality, to review the acts of our executives for their consistency with the constitution and to review even the acts of the judges themselves, for possible breach of constitutional limits, that was under fire in our discussion at Chicago. The professors were strongly against judicial review and could see no reason for it.

Now, hearing this viewpoint presented and hearing these elemental facts denied was as startling to me as if learned professors of literature had suddenly risen up and denied the existence of such a thing as an alphabet. Nevertheless, the view was put forward seriously and most earnestly. Perhaps there are many gentlemen here who agree with the professors who talked to me and *at* me in Chicago. A great many people may believe that our courts are holding back the progress of our country without any reasonable or constitutional justification but their arrogance.

I am convinced now that unless this general impression or misapprehension about judicial review is promptly reversed and corrected, the day will soon come when no court in the United States will be permitted to set aside the act of any legislature in the United States, State or Federal.

I believe that this hostile attitude with reference to judicial review is traceable to the perspective that has been taken by

people who have looked at it critically. One reason why many people now write books about nine old men sitting on the lid of our constitutional opportunities, and otherwise hold the principle of judicial review up to ridicule, is the misapprehension of the judges themselves with reference to the character of the thing they are doing when they test a law for its constitutionality.

Let me illustrate the point by giving you an illustration that happened in the classroom. I teach Constitutional Law in Notre Dame—at least I preside over the classes.

One day a chap came to me and said, "Mr. Manion, I have looked through our new Constitutional law case book and find that there are no English cases cited in it. I have English cases in my sales book and my property case book is cluttered with English citations. All my other case books have English authorities, but I don't find any English cases in this Constitutional Law case book, and I wonder for that reason, if it is a good book. I wonder if it goes back far enough."

Now, that question brings our discussion into focus.

The principle of judicial review as we well know, or ought to know, is a distinctly American institution. There is no other country in the world where you may have such a thing as an unconstitutional law. When that fact is isolated and laid out for examination it becomes somewhat startling. We generally assume that all of our law is of Anglo-Saxon origin, that it was channeled into this country from Great Britain, that it is the exemplification of democratic ideals, and that it naturally finds its counterparts and its parallels in other so-called democratic countries. But let me reassert that only here can there be such a thing as an unconstitutional law. Only here can an individual citizen walk into a court and say, "Nay" to the vast majority or even the unanimous declaration of State and Federal Legislatures. Such a procedure is unthinkable to the political scientists of the rest of the world. Why is this revolutionary procedure permitted in America? Precisely because this is the only practical method by which the individual citizen can force his government to protect his individual God-given rights. In no country, outside of the

United States, not even excluding England, does any citizen have any rights which his government is bound to respect.

My professional compatriots object to judicial review because they see it merely as an impediment to Democracy. They overlook the fact that it is an indispensable method of protecting natural individual rights. When this fact was pointed out to them they denied the existence of any individual right that is important enough to set aside the will of a majority of the people as expressed in a law of the land. If the rights of individuals stand in the way of what is termed, for the time being at least, as "progress," they would sweep the individual rights aside—as is done in other countries of the world.

Now, I think it is high time for us to scrape our feet a little and see what is under them. We have been taking our legal foundations for granted for a great number of years. Those of you who have lived some time in Indianapolis will remember that a number of years ago the eight-story Telephone Building then on Meridian Street was moved onto an adjoining lot and faced in another direction. The telephone service in and through the City of Indianapolis was not even interrupted while that work was going on. One man employed in the building at the time told me at lunch the other day that he had to go outside occasionally to make sure that the building was really moving.

I wonder if much the same thing may not be said of the law of our land in America today. I wonder if the superstructure is not being shifted over to another foundation while our service in and through the building continues to distract our attention from the basic change that is taking place.

But what, after all, is the basic foundation of our American Law and Government? How many of us are prepared to locate and describe that foundation?

I have heard and you have heard a great many stentorian defenses of our "American fundamental principles," and they usually resolve themselves into a bombast of denunciation against Communism, Fascism, Socialism and Anarchy ending with a peroration extolling our democratic traditions. Now,

just how much firm substance can we find in our "democratic traditions," so-called? It is just as possible to have a democratic dictatorship as it is to have a fascist dictatorship or a communistic dictatorship of the proletariat. What kind of a dictatorship you have is merely a matter of *form*. It may be a democratic form, a fascist form, or soviet form. We have been concerned too much in this country with our American *form* of government and have not concerned ourselves sufficiently about the American *substance* of government. The *substance* and not the *form* of our government is the thing that differentiates the United States from all other countries of the world. Unless the *substance* of American government is unique and different from that of any other country in the world, then the procedure of judicial review is merely an antiquated impediment to progressive democratic tendencies and ought to be abolished.

Nobody regretted any more sincerely than I did many of the decisions of the United States Supreme Court, but because the Supreme Court of the United States decided a case your way instead of mine, certainly does not mean that I must abandon my faith in judicial processes. By the same token, when the court reverses as unconstitutional some act in which I believe and am seriously interested, it does not by that fact give me a good reason for deserting my faith in the principle of judicial review. Let me ask you gentlemen this question, what possible protection could the individual have in a country where judicial review is not permitted?

What is the fundamental American principle? Principle comes from the Latin work "Principium" meaning beginning, and a good place to look for the principle of American Government, it seems to me, is at the beginning of American Government, namely, 1776.

If I may believe what I heard at this Chicago symposium, there were not over half a dozen men there out of the one hundred present, who would have signed the American Declaration of Independence if it had been submitted to them, for the reason that if one believes what is said in the Declaration of Independence he must acknowledge the existence of

individual natural rights and must therefore insist upon judicial review as a means for their protection. Here is what the Declaration says:

"We hold these truths to be self-evident that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness."

Now, hearken to what comes next:

"To secure these rights, governments are instituted amongst men."

This is why government functions in the United States. We habitually and too much concern ourselves with *what* the government is doing and *how* it is doing it and not sufficiently with *why* Government is called upon to act at all. I challenge you to look at the decisions of the United States Supreme Court handed down during the last twenty years. You will find that the court in sitting in judgment upon the acts of Congress as well as when it considers the acts of the State Legislatures, in nine cases out of ten, determines the propriety of the Statute in question with exclusive reference to *how* it was done, never seriously considering *why* it was done. *How* a thing is accomplished is a mere matter of method but "why" it is done is a matter of principle. I could go back to South Bend tonight in one of a half dozen ways. I might go by air, by rail or by motor. I might even skate up north of Road 30, but the important thing is that I am going to South Bend. South Bend is my objective. South Bend is primary and fundamental. The method that I adopt in order to get there is a secondary thing. The method and form of American Government are secondary considerations—the aim and objective of our government is what I regard as fundamental American principles.

The aim and objective of government in this country is the protection of God-given natural rights. That principle obtains no place else in the world. There is no other government on earth that has erected its superstructure of law upon that basic premise, and it is precisely because of this peculiar foundation of our government that our courts have the temerity to review laws of the legislature, acts of Presidents and Governors, and acts of courts as well. That is the

reason why our courts now take that type of jurisdiction. While all our courts still take jurisdiction in such cases, many of them have forgotten the reason why they do so.

If judicial review is unpopular it is precisely because judges have focussed their attention upon the letter of constitutional restraint and have allowed that letter to eclipse the spirit of our entire governmental institution. In spite of what Shakespeare said about a rose, I insist that the name by which a thing is called eventually changes public psychology with reference to it. Our Courts have built the impression that constitutional limitations are fences keeping our liberties imprisoned rather than barriers keeping our trespassers upon our rights. A generation of such impressions will make the unpopularity of the constitution second only to that of the judges.

Suppose we were in the habit of referring to our homes not as a shelter for our protection and our security, but as a jail for our confinement. How long would we have to tell the youngsters to "go to jail" when we intended that they should go home before we changed the home into the most distasteful institution in America?

Yet, we have been content to call our Constitution a limitation upon the functions of government without ever mentioning *why* Government is called upon to function in the first place.

You would never think of describing your automobile solely in the language of the traffic cop who slows you down. You seldom think of your car as a thing that can go only 90 miles an hour. You do not visualize it in terms of what it cannot do. On the contrary, you think of it properly as a vehicle that is intended to bring you from place to place. You think of it as a vehicle that has a positive and serviceable job to do for you. Why do we not think of our Constitution and our Government in the same positive way? Courts leave us with the impression that the Constitution is a series of barbed wire fences, arbitrarily placed in the path of Progress. Why do they not give space in their decisions to the reason for the broad field of governmental activity which the constitutional

fences properly enclose? Why are we not reminded that an unlimited government would be tyranny while a properly limited governmental agency is the best and only protection for all your rights?

Government began in America in 1776, and was given its direction and its objective at that time. It is not sufficient merely to say that in this country an individual has rights which his government is bound to respect. That is a negative way of approaching the unique principle of our American system. A better way of approaching it is to say that in America government has power only for the protection of individual citizens. That is why our government functions. It is a protective agency and yet how do we traditionally refer to our Statutes? We talk about laws that regulate public utilities. Those laws do not regulate public utilities; they protect the consumers of light and power. We speak of "speed limits" and laws which regulate our conduct on the streets and highways. But these laws are not regulations of our speed and conduct; on the contrary they are protections for pedestrians and others who may use the same streets and highways that we are using.

Our courts for years have talked about reasonable regulation of the police power, when they might better have referred to it as reasonable and adequate protection for the individual. The repetition of that protective phraseology would have given us a different psychology. We would now regard our government for what it is, for what the Declaration of Independence says it is, namely, a protection for our rights.

Now, strangely enough, in your practice of the law, you recognize that protective fact is elemental. A man is sued for violating the rights of another. My liberty lets me go just so far and beyond that is the field of my neighbors' rights. If I invade that field, I am a trespasser and I am consequently hailed into court. Yet while practicing law day in and day out upon that theory, a lawyer will get up at the Rotary Club or some other place and talk about the necessity for liberty giving way before the common good.

That is what I heard in Chicago, namely, that liberty must give way before the common good.

But liberty does not give way before the common good. To say that is to embrace the theory of a system that used to be attributed to the Hottentots, in which a young male member of the tribe could demonstrate his complete manhood, only by beating his own mother.

We have never had and we can never expect to have any real and general welfare as a result of the destruction of individual rights. Such general welfare as we have comes about because of the protection of individual rights and not because of the destruction of those rights or any of them.

This misplacement of perspective is destroying the foundation of American Government. The reason why a thing is done is just as important, often even more important, than the thing itself. Not merely what our government does, but the theory upon which it does it is vital to the preservation of our distinctively American principles. What government does in the United States is or should be justified if it is done in the interest of protection for each and all of our citizens who have appointed American Government as their protective agency for the preservation of their rights.

Now, ninety-nine per cent of the Statutes that we have in Indiana and the United States today could be justified by approaching their constitutionality from the protective angle. At the same time many progressive statutes that have been rejected as "unreasonable" regulations could have been justified as necessary and modern protections for rights that are jeopardized by modern conditions. Compulsory safety and fire protections; minimum wages; maximum hours; prohibition of child labor; sweat shops; sale of fraudulent securities, and countless other measures are literally commanded by the spirit of our American Government objective. Whether the immediate proposal for the accomplishment of these things is interstate or intrastate commerce, or whether it involves a delegation of powers to the Executive is a mere question of constitutional form and not one of constitutional substance.

The spirit of our institutions calls for an up-to-date mod-

ern protection for the rights which each individual or groups of individuals has to be immune from attack by other individuals or groups of individuals, and that has been and still is the genius of our system. That is the sole reason why our courts have always upon the petition of some aggrieved individual, sat in judgment upon the propriety of a law of Congress or of the State Legislature.

Our courts have no other excuse for entertaining such a petition. It is not that the court has a veto power over the Legislature. It is simply that the court is and always has been the place where an individual goes when his rights are violated, either by Citizen A or Citizen B *or his government*.

The Constitution of the United States, it is true, does not say the courts can reverse the laws of Congress; it does not need to. Authority in the letter of the Constitution for this procedure would not add one jot to the court's power in this respect. By the very nature of our government, rights are reserved in each individual. According to American theory there is a private right of sanctuary in each person into which no other person, not even government, may go. When that individual's rights are violated, he naturally goes to court, either to sue A or B, to get an injunction against A or B, or to get an injunction against his government, because when government proceeds without authority the governmental agent proceeds merely as a private individual, and consequently, the natural place to go with this complaint about ultra vires act on the part of government, is the court.

Now, these considerations, which I have always regarded as very fundamental and thoroughly axiomatic, are not being held any more because we have confused the issue with certain catch phrases about "democracy." I saw a pamphlet the other night which pictured the Spirit of '76, the three fellows with the flag, the fife, and the drum over the inscription:

"Communism is Twentieth Century Democracy."

That is purely an emotional appeal to the susceptible. It shows that Democracy can be represented to mean anything. As I said at the outset, mere democracy is not the foundation of our American system. Let's go back to the Declara-

tion of Independence again. "To secure these rights, governments are instituted amongst men, deriving their just powers from the consent of the governed."

How the governmental agent is to function is to be determined by majority vote, but why he is hired is definitely settled long before the Declaration of Independence ever mentions democracy or the consent of the governed. How your agent may achieve your purpose is a thing you put into your contract with him. You may hire him to sell real estate. How he is to sell it, prices, limitations upon the character of his vendees, extent of his commission: those are things that go into the written terms of your contract, but the purpose for which he is hired, is completely understood at the time you begin your original negotiations. The governmental agent in this country was hired to preserve rights and our successive American constitutions, State and Federal, told how the agent was to proceed in the preservation of this fundamental purpose. We have put the cart before the horse, the means before the end. As a people we have come to think of the constitution as a source of rights rather than a protection for rights which existed long before the Constitution was made. Nine out of ten Americans now regard majority rule as the underlying principle of our American system, but it is not, and reference to the elemental document which underlies our American system will prove that it is not.

When you step out of that door this afternoon, some burly fellow may push you into a corner and take your pocketbook from you. Meantime I may step out of this door and 150 burly fellows may take mine. Your purse is gone, and mine is gone. Does the fact that my pocketbook was taken by 150 men make my loss less severe than yours? We have both been robbed; you by an individual and I by a multitude. The important thing is that you have rights as against that thief, and I have rights as against the mob. The fundamental principle of our system enables you and me to assert that right against both, and the Constitution of the United States was written for no other purpose except to protect individuals and minorities in such situations. And remember again, that minorities have no such protection anywhere else in the world.

It is useless to repeat and revere the Declaration of Independence, on the 4th of July, unless you assert and maintain a practical remedy in the hands of each person for the protection of those natural rights that the Declaration speaks about. Occasionally, not nearly often enough, in my opinion, courts of the States and Nation have spoken of the Declaration of Independence as being the spirit of that of which the Constitution of the United States is merely the letter. What causes dissatisfaction on the part of the multitude of our population are opinions of the Supreme Court which exalt the letter of State and Federal Constitutions and obscure the spirit of both. Such decisions always stimulate a great clamor for taking from the Supreme Court its right to do such a reviewing job and therein lies the real and destructive danger.

I believe that there is room in our Government under the Constitution for the establishment of full, complete and absolute protection for all our individuals in modern society. Years ago one method of protection may have been sufficient, and adequate. Now we need many more. A few years ago the Chief Justice of our Supreme Court, Justice Hughes, wrote into his decision of the Minnesota Mortgage Case, so-called, this statement, in substance:

"The complexity of our modern society has made it necessary for us to make an increased use of government in order to protect the very basis of individual opportunity."

This is a concise statement of the answer of our American system to the challenge of modern society.

Government is augmented and functions enlarged not to destroy liberty but in order to give more adequate protection to it. The more frequently we indulge the misleading assertion that liberty is an out worn anachronism that is constantly retreating before the advance of the common good, the sooner will our population begin to hold our priceless ideals of liberty and freedom in complete contempt.

Ours is an individualistic state. Our government was launched not on the theory that the majority of men, nor the mere general run of men have rights, but that each man and each woman has unalienable rights which government is bound

to respect, rights which government is hired to protect. That is still our American theory. If we do not believe that, our Fourth of July celebration becomes a hypocritical sham. Ask yourself this afternoon whether you could conscientiously sign the Declaration of Independence. Ask yourself whether you believe in natural rights, and what the Declaration says about them. What ever we do, let us do it unhypocritically and directly. If we do not believe in the reason for judicial review, then let us cease a reasonless attempt to preserve it.

By defending judicial review, I am not defending the result of all the judicial reviews. I defend merely the principle which is tantamount to saying that government can go only so far, and that wherever it goes it must go in the name of its protective purpose. That principle ought to be the very first syllable of any study of our American Constitutional Law.

In conclusion, therefore, let me reassert that in America we have natural rights; that the job of the American Government is to protect them in each individual person; that the only method for their adequate protection is resort to the courts, the place where each individual goes when his rights have been violated by anybody; that if you deprive the court of its right to entertain suits involving the inherent validity of governmental actions, you automatically destroy the one method for protecting the natural right, and you, therefore, and consequently, destroy the natural right itself. If it is your purpose to deny natural rights, then, by all means, eliminate the procedure of judicial review. But if you can and do subscribe to the Declaration of Independence with its reference to God and the rights which He put into each human soul, then by all means let us preserve the only practical method by which those rights can be protected, and further than that, let us not be mistaken about the form of government as distinguished from the substance of it. We have all too often mistaken principle for method, and vice versa. We have frequently confused our destination with our various methods of getting there. Whether something is "intra" rather than "inter state" commerce or constitutes a delegation of legislative powers may be of great interest but it is not a matter of

fundamental American principle. We can hardly ask even an ardent patriot to lay down his life for either proposition. Much of our defensive Constitutional research has been mere shadow-boxing. We have engaged in spirited defenses of what were often mere mirages of principle, and we have fastened upon the public consciousness the impression that Constitutional Law is a matter of juggled phrases and a complexity of punctuation marks.

Let us give the fellow in the street a proper conception of what American principle is, and not ask him to defend an outlying barbed wire entanglement, while the citadel of rights is left vulnerable, unprotected, unstudied and even unknown. Let us not lose the substance while we fight for a shadow.

We may preserve the form, we may exalt the letter, but if we lose the spirit, we are back on the dead drab level of the rest of the political world. America is the only place where the right of the individual was ever made the basic conception of government, and against that conception the force of parallel and precedent have constantly pressed ever since 1776. Our resistance is beginning to flatten out. Soon what is left of our resistance may give way. State absolutism will then be enthroned here as it is elsewhere in the world. When that day comes the question of blood purges, mercy deaths, property confiscation, Aryan supremacy and other lively topics will immediately assume more than a mere academic interest for us.

The way for the courts, for lawyers, for legislatures, for the rank and file to look at our American system is to sense its spirit, and subordinate its letter. A reversal of this procedure will destroy us. I have it on the authority of St. Paul, I believe, that the letter killeth, but the spirit giveth life.