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Judicial Review: Its Influence Abroad

By DONALD P. KOMMERS

ABSTRACT: The doctrine of judicial review, having been nourished in a legal culture and socio-political environment favorable to its growth, is America's most distinctive contribution to constitutional government. Judicial review as historically practiced in the United States was duly recorded abroad, with varying degrees of influence and acceptability. During the nineteenth and early twentieth centuries, the influence of judicial review was most conspicuous in Latin America, where it was adopted as an articulate principle of numerous national constitutions, while most European nations consciously rejected it as incompatible with the prevailing theory of separation of powers. Germany, Austria, and Switzerland, although marginally influenced by the American experience, developed, as did several commonwealth nations, their own variants of judicial review. Since World War II, judicial review has emerged as a governing principle, partly in response to the excesses of prewar popular democracies, in the constitutions of many countries, including those of emergent nations of Asia and Africa. But in nearly all of these new nations, including Latin American nations, judicial review has not developed into an effective instrument of limited government. On the other hand, it has worked well in Japan, West Germany, and Italy, whose postwar constitutions were strongly influenced by the United States. Recent experience shows that judicial review works best in advanced, middle-class societies firmly committed to the idea of limited government.

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ALEXIS de Tocqueville, in *Democracy in America*, observed that there was something very special about the exercise of judicial power in the United States. The special characteristic, still present even as the French observer correctly reported it, is "the right of the judges to found their decisions on the constitution rather than on the laws,"[1] which means that judges are at liberty to refuse to enforce laws held by them to be in violation of the Constitution. This doctrine of judicial review unquestionably is America's most distinctive contribution to modern constitutionalism. Nearly 50 years after the founding fathers assembled in Philadelphia "to form a more perfect union," Tocqueville wrote in his classic treatise that "the representative system of government has been adopted in several states of Europe, but I am not aware that any nation of the globe has hitherto organized a judicial power on the priniciple now adopted by the Americans."[2] In this our Bicentennial year, 150 years after Tocqueville wrote, we might ourselves glance abroad to see what influence, if any, the American doctrine of judicial review has exerted on other peoples.

JUDICIAL REVIEW AND AMERICAN GOVERNMENT

Any assessment of the influence of the American doctrine of judicial review abroad needs to be preceeded by some discussion of the ideas and forces which contributed to the growth and durability of judicial review in the United States and to its significance in the American system of government. It is worth noting at the outset that judicial review was not an explicit invention of the Constitution. Rather, it was formally proclaimed by the Judiciary itself in the person of Chief Justice John Marshall, whose celebrated opinion in *Marbury* v. *Madison* (1803) established judicial review as a mainspring of the American constitutional order. Marshall's opinion, which had ample precedent in the colonial experience, advanced the proposition that the Constitution is the "fundamental and paramount law of the nation," a law of superior obligation binding upon all political officials and all governing institutions and in terms of which all laws and public acts are to be judged. Marshall concluded, with a yawning gap in his logic, that because judges are bound by the Constitution, it is within the particular competence of the Judiciary to declare a law void if in conflict with the Constitution. But whatever the deficiencies of Marshall's logic in justifying the ascription of such power to the Judicial branch, Americans have since almost instinctively identified judicial supremacy in constitutional matters with limited government and the rule of law.

Yet the idea that governments and political rulers must be subject to an order of higher law has ancient roots. The obligation of Athenian judges to apply statutes only as consistent with higher law is probably the oldest historical antecedent of judicial review. Medieval princes and kings were also subject to natural and divine law, and this principle remained prevalent throughout the Middle Ages. For a brief time, judges of the French Parlements during the Ancien Regime also claimed a power to nullify laws and execu-

1. Alexis de Tocqueville, *Democracy in America* (London. Oxford University Press, 1952), p. 79.

2. Ibid., p. 77.

tive decrees that were in violation of the fundamental laws of the realm. In England, Sir Edward Coke's opinions asserted the supremacy of the Common Law and the Magna Charta over parliamentary statutes, and many colonial leaders who were influenced by Coke—especially by his *Institutes*—and opposed to the exercise of the royal prerogative over their affairs formally approved of the doctrine of judicial supremacy. But the principle that judges should be the guardians of the constitution prevailed only in America. In England, Coke's view was totally rejected, and the principle of parliamentry supremacy was fully affirmed in the aftermath of the conflict between king and Parliament. In France, the coming of the French Revolution and the accompanying doctrine of popular sovereignty ended the judicial practice of voiding legislation. Indeed, it was the French doctrine of separation of powers that prevailed in most of Europe.

Although judicial review as known in the United States was rejected in Europe, a firm tradition of constitutional government existed in the positivistic legal cultures of the continental civil law tradition. This tradition, unlike the Anglo-American tradition, regarded the state—whose general will was personified by a national assembly—as the source of all law, even of constitutional law. It also insisted that law be founded on human reason and promulgated for the commonweal. Rationality and generality were thus indispensable properties of a government ruled by law. Generality ensured that citizens would be treated equally under the law, while rationality required that the law itself be reasonable. Under the European variant of separation of powers, all lawmaking authority within the state was vested in the sovereign legislature, while the role of the independent judiciary was to interpret the legislature's will and to administer the law *as written*. For a judge to set aside the law, whatever the reason, was to the European mind, schooled in analytical jurisprudence, the very definition of arbitrary government. Thus, given such a tradition, the liberty and security of the individual in much of Europe was identified with equal administration of justice under law, Europe's principal contribution to the theory of constitutionalism. This notion of constitutional government did not imply democratic political institutions, however. Parliamentary democracy, which also excluded judicial review, was England's contribution to constitutionalism; to this heritage the United States added the concept of judicial review.

LIMITS ON PRIVATE AND GOVERNMENTAL POWER

The American notion of free government provided very suitable soil for the growth of judicial review. The reasons for its success here may possibly help to explain both its acceptance and its rejection in other parts of the world. Moored to the political theories of Locke and Montesquieu, the founders firmly believed in the respective doctrines of natural rights and balanced government. Balanced government to them was synonomous with limited government. To avoid the concentration of political power in any one person or institution, they housed the familiar triad of government powers—executive, legislative, and judicial—in separate structures buttressed by a system of checks and balances. At the same time, they

believed that government existed to protect the natural rights of men and to establish a political order designed to help men pursue their personal happiness. The fulfillment of private ambition and aspiration, endorsed and assisted by a solicitous government, came close to a good American definition of the public interest in the eighteenth and early nineteenth centuries.

Yet the founders regarded all power as potentially corruptible, and they wondered how to limit private as well as governmental power. Madison provided one answer, indicating that private power could be brought under control within a constitutional order which fostered the diversity and multiplication of factions. If enough factions occupied the political space of the new American Republic, he argued, the power of each faction would be checked by the countervailing power of competing factions, allowing not one of them to gain a monopoly of power. At the same time, the power of government generally would be held at bay by the proliferation and cumulative influence of private institutions and groups. Thus, in Madison's thought—which became our conventional wisdom—freedom ultimately was to be based upon the interplay and countervailing thrusts of private and public power.

Judicial review worked supremely well within a legal order characterized by an obsession with individual liberty, an economic order based on private property, and a constitutional order of separated powers. Tocqueville saw this clearly. "Few laws can escape the searching analysis of the judicial power for any length of time," he wrote, "for there are few which are not prejudiced to some private interest or other, and none which may not be brought before a court of justice by the choice of parties, or by the necessity of the case."[3] He also noted that laws which judges refuse to apply, owing to their constitutional invalidity, tend to lose their "moral cogency," which he wisely discerned to be the real significance of judicial review in America.

THREE PERIODS OF INFLUENCE

State and federal authority: 1789–1870s

The story of judicial review's influence abroad is partly interwoven with the distinct roles played by the United States Supreme Court in various historical eras. (Like all historical epochs, these eras naturally overlap, but for our purposes a liberal division of Supreme Court history is appropriate.) During each of these eras, judicial review as practiced in America was duly recorded abroad, with varying degrees of influence and acceptability. In the first period, from 1789 to the mid-1870s, the Supreme Court was preoccupied with defining the boundary between state and federal authority and buttressing its own authority as well in the American political order. It was this history that was most familiar to constitution-makers in Latin America and continental Europe when they began to erect representative republics and draft written constitutions in the nineteenth century.

During this period, the American influence was most notable in Latin America. Although rooted in the civil law tradition, various Latin American countries, copying from the colossus of the north, entrusted the power of judicial review to their courts on a broad scale. The Argentine constitution of 1860 and the

3. Ibid., p. 81.

Brazilian constitution of 1891 contained provisions on judicial review consciously copied from the American experience. These constitutions, like the Canadian constitution of 1867 (British North American Act) and the Australian constitution of 1900, established judicial review as a necessary concomitant of federalism. Marshall's opinion in *McCulloch* v. *Maryland* (1819) constituted a significant point of departure for the consideration of federal-state relations by the judiciary in each of these nations. Mexico, which has also had a system of government with strong federal characteristics, has had a more limited variant of judicial review. Nevertheless, Tocqueville himself has been credited with influencing the adoption of judicial review by Mexico's constitution of 1857. As one legal scholar reports, "the immediate source of *amparo* [a proceeding initiated by an individual citizen to challenge an arbitrary governmental act] must be found in the American institution of judicial review transmitted to the Mexicans through Tocqueville's *Democracy in America*."[4] Finally, Costa Rica adopted the American plan of judicial review in 1871.

Shifting briefly to Europe, we find that judicial review was well known to many German legal scholars in the early nineteenth century through the classic work on American constitutionalism by Robert von Mohl.[5] Von Mohl, a member of the Frankfurt Parliament, had a hand in drafting the constitution of 1848, which provided for a high court of constitutional review modeled after the American Supreme Court. "Constitutional review," however, had a different meaning in Europe than did "judicial review" in America. "Constitutional review" was a power exercised by a specialized constitutional court to decide constitutional controversies only between organs and levels of government. But these specialized courts, which also existed under several mid-nineteenth-century German state constitutions, were not attributable to any American influence; rather, they had their institutional antecedent in the fifteenth-century court of the Imperial Chamber, before which warring princes took their disputes. Uniquely European, these institutions nevertheless constituted convenient vehicles for the reception of judicial review more related to the American pattern. Switzerland was the real pioneer of European judicial review. Under the 1848 Swiss bill of rights, a citizen could challenge a cantonal (state) law allegedly in violation of a fundamental right in the federal parliament. Parliament, if it saw fit, might then place the case before the federal court. Still, the legal order predominant in Europe in the 1800s was generally incompatible with judicial review, and even in those countries where traces of American influence were visible, the principles of popular sovereignty and the European variant of separation of powers remained wholly uncompromised by judicial review.

Rights of contract and property: 1870s–1937

In the second period of judicial review, covering the late postbellum period era down to 1937, the Supreme Court used its authority in

4. Richard D. Baker, *Judicial Review in Mexico* (Austin: The University of Texas Press, 1971), p. 33.

5. For a discussion of von Mohl's influence, see Gottfried Dietze, "Robert von Mohl, Germany's de Tocqueville," in Dietze, ed., *Essays on the American Constitution* (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1964), pp. 184–212.

large measure to protect the rights of contract and property against invasion by both state and federal governments. Mirroring the entreprenurial spirit of a "gilded age," and infused ideologically by social Darwinism and the Gospel of Wealth, the Supreme Court wove a garland of constitutional principles that crowned American capitalism. This history was most familiar to European nations before and after World War I as they sought to anchor representative government in their own newly written constitutions. Austria, Germany, and Czechoslovakia, following the European tradition of constitutional review, established specialized constitutional tribunals independent of the regular judiciary and vested with jurisdiction limited to appeals by national or state governments and, in the case of Czechoslovakia, to the Supreme Court of Justice. Often referred to as "political courts," they were designed largely as forums in which to settle constitutional disputes between levels and units of government. Individual citizens were not permitted to file petitions in these tribunals. Hans Kelsen, the father of the Austrian constitution of 1920, although acknowledging his debt to American constitutional practice in prescribing the constitutional court, was convinced of the superiority of a system which completely separated constitutional from ordinary adjudication.[6] On the other hand, the regular judicial establishments of Denmark, Norway, and Rumania claimed to have the authority to review legislation, mainly to protect property rights, but very few laws actually were struck down. Their legal orders were simply not congenial to the principle of judicial supremacy in constitutional matters. The Polish constitution of 1921 actually banned the courts from reviewing legislation on constitutional grounds.[7]

In continental Europe, the American influence was most perceptible in Germany, where judicial review was debated in the Weimar National Assembly. The "founding fathers" seemed about evenly split on judicial review, for it missed being expressly put into the 1919 constitution by a single committee vote. But the founders did not expressly forbid judicial review either, failing to heed the warning of Hugo Preuss—Germany's leading authority on constitutional law—that the courts would exercise judicial review if the constitution did not expressly forbid it. While some spokesmen argued that judicial review was incompatible with the principle of separation of powers, other more socially conscious delegates were undoubtedly aware of the conservative uses of judicial review in the United States. They may also have been mindful of an 1875 decision by the Hanseatic Court of Appeals which invalidated a local tax law as violative of the right to property under the Bremen constitution. (The first recorded instance of judicial review in Germany, the decision was quickly overruled by the Imperial Court which rejected the authority of judges to review the constitutionality of laws.)[8]

6. See Hans Kelsen, "Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitutions," *Journal of Politics*, vol. 4 (1942), pp. 183–200.

7. A survey of judicial review in all of the countries discussed above may be found in Charles Grove Haines, *The American Doctrine of Judicial Supremacy* (New York: Russell G. Russell, Inc., 1959), pp. 573–662.

8. See Donald P. Kommers, *Judicial Politics in West Germany. A Study of the Federal Constitutional Court* (Beverly Hills, Cal.. Sage Publications, Inc., 1976), p. 36

Preuss's prediction came true as several German high courts claimed the power of judicial review even over national laws. Indeed, the High Court of Justice voided two national laws in the 1920s, one on the ground that the constitutional right to property had been violated, which generated another full-dress debate on judicial review by German legal scholars. Still, Walter C. Simon, president of the High Court during this time (1922–29), was disappointed in his effort *firmly* to establish judicial review. Clearly influenced by the American experience, he noted: "During the seven years of my office, I have tried to heighten the position of the *Reichsgericht* unceasingly but unsuccessfully. I wanted it to be like the Supreme Court of the United States, a high organ of the Commonwealth equal in rank to the Cabinet, having immediate intercourse with the President of the Republic . . . . Until now, the *Reichsgericht* has not found a Chief Justice Marshall." But Simon betrayed a revealing distrust of the political process when he remarked further:

> . . . in my opinion a republican commonwealth will never find a check on the overbearing power of parliamentarianism and the secret influence of ministerial bureaucracy if the Supreme Court is not perfectly independent and on the same footing with both the other powers of the state.[9]

In the late nineteenth and early twentieth centuries, judicial review continued its growth, at least in terms of its acceptability as a principle. At least 10 additional Latin American nations (Bolivia, 1880; Brazil, 1891; Colombia, 1886; Honduras, 1894; Cuba, 1901; Nicaragua, 1911; Haiti, 1918; Uruguay, 1919; Chile, 1925; and Venezuela, 1928) adopted various aspects of American judicial review. Most constitutional provisions favoring judicial review were adopted in unthinking imitation of the American model, for judicial review simply was not suited to regimes marked by political instability and constitutional discontinuities. Only in the then relatively durable constitutional orders of Chile, Brazil, and Colombia did judicial review become an operative principle.

The origin of judicial review in Canada, Australia, Ireland, and other countries with present or past links to the British Commonwealth is not so clearly the product of American influence. Their high courts are the lineal successors of the old Privy Council. As McWhinney remarks, "In its historical origins, judicial review of the Constitution in the Commonwealth Countries was simply part of the apparatus of Empire—a projection of Imperial power in legal institutional form."[10] Here also judicial review developed on a far more restricted scale than in the United States. McWhinney's summary indicates the multiple influences that account for judicial review in these countries:

> Judicial review of the constitution in the Commonwealth Countries today is an organic growth stemming in part from the accidents of past imperial associations; in part from conscious reception, in more recent times, of American legal ideas; and in part from the pragmatic, trial and error, case-by-case, experiential development inherent in the Common Law and Common Law-derived legal systems.[11]

9. Walter C. Simon, "Relation of the German Judiciary to the Executive and Legislative Branches," *American Bar Association Journal*, vol. 15 (1929), p. 762.

10. Herman Mosler, ed., *Constitutional Review in the World Today* (Berlin: Carl Heymanns Verlag KG, 1962), p. 77.

11. Ibid., p. 87.

Civil rights: 1937–present

In the third period of judicial review, from 1937 down to the present time, the Supreme Court has been heavily concerned with protecting the rights of defendants and those rights of conscience specified in the First Amendment and incorporated into the Fourteenth Amendment's concept of "liberty." The right to property has still been clearly within the ambience of the Supreme Court's protective powers, although the Court has applied harsher standards of review toward legislation impinging upon First Amendment freedoms than toward legislation affecting property rights. This history, along with the total experience of judicial review in the American system of government, has been most influential in the establishment of judicial review in many countries of the world in the post-World War II era.

Judicial review spread quickly around the world in the first two decades following the war. But the American influence was most manifest in the immediate postwar years when India and the defeated nations of the Second World War adopted judicial review as a key feature of their constitutional orders. India, having just gained her independence, established a Supreme Court with powers even greater than that of the U.S. Supreme Court. A reading of the debates of the Constituent Assembly, which drafted the constitution of 1950, leaves no doubt of India's debt to constitutional practice in the United States, just as American constitutional jurisprudence is heavily reflected in the subsequent growth of Indian constitutional law. In Japan, the American influence was absolutely decisive. One authority on the Japanese legal order writes:

> The [Supreme] Court exists in its present form mainly because of the American victory in World War II and subsequent allied Occupation of Japan. On the surface, the legal reforms of the Occupation were monumental—especially the establishment of a democratic constitution and the creation of an independent Supreme Court to interpret the constitution and protect human rights through the exercise of judicial review.[12]

American influence was less direct in Austria, Germany, and Italy, but still the exercise of judicial review was cited and debated in their respective constitutional conventions. The Europeans, of course, were themselves determined to engineer new regimes of liberty and to mend the cracks in their post-1918 constitutions which had permitted popular majorities to get out of hand and through which dictators had thrust their ugly heads. Judicial review was available as a means for limiting popular government and for protecting basic rights; but Austria and Italy, in establishing a judicial review mechanism, followed the civil law pattern of creating a special constitutional tribunal outside of the regular judicial establishment. Austria reestablished its prewar Constitutional Court and Italy created a new Constitutional Court imitative of the Austrian model.

The German Federal Constitutional Court deserves more detailed comment if only because of the major role it has played in the political system of the Federal Republic. Created by the Bonn Basic Law of 1949, it owes its existence only indirectly to the Occupation Powers. True, when the military governors commissioned the Germans to draft

12. Glendon Schubert and David J. Danelski, eds., *Comparative Judicial Behavior* (New York: Oxford University Press, 1969), p. 122.

a new constitution, they made clear that the constitution "should provide for an independent judiciary to review federal legislation, to review the exercise of federal executive power, and . . . to protect the civil rights and freedoms of the individual."[13] But there is no evidence to suggest that judicial review was forced upon the Germans. Following their own tradition of constitutional review, they created the Federal Constitutional Court—paralleled by a constitutional court in each of the German states—to hear constitutional controversies only, mainly between branches and levels of government. In this respect, the Constitutional Court was to serve as the successor to the Weimar Republic's High State Court (*Staatsgerichtshof*), not to be confused with the Supreme Court (*Reichsgericht*), which stood at the apex of the regular judicial system. While the judges of all the regular German courts were barred from declaring laws void on constitutional grounds, they were authorized by the Basic Law to certify constitutional questions arising in the normal course of litigation to the Federal Constitutional Court for decision. Conferring upon the individual citizen the right to file a constitutional complaint before the court was unprecedented in Germany, and indeed was only statutorily based until 1971, when the citizen's right to complain directly to the Constitutional Court was rooted in the Basic Law itself. Eventually , the court came to play a role far more significant in the protection of individual rights than as an arbiter of federal-state relations, a phenomenon that has also occurred in the United States.[14]

The German court's authority actually exceeded that of the United States Supreme Court, for the Constitutional Court was authorized to rule, within the framework of what is called an abstract judicial review, on the validity of federal and state laws merely upon the request of the federal or a state government or upon the petition of 100 members of the lower house of the federal Parliament. The court was also empowered to determine, at the request of the federal government, the constitutionality of political parties. (So far, the court has declared two parties unconstitutional, namely a neo-Nazi party in 1952 and the Communist party in 1957. Both were found to be undemocratic in structure and antagonistic to the principles of democracy.)

The adoption of judicial review in Europe was not regarded with universal favor, however. Some observers, fearing judicial intrusion into politics, had trouble reconciling judicial review with parliamentary democracy. Others argued that judicial review simply would not work in Europe's legal environment, a reservation that seemingly would apply to Japan with even greater force. Was it really possible for constitution-makers other than those with sugar plums dancing in their heads to believe that judicial review could be made to work automatically by constitutional fiat? Would judicial review survive in a political culture where the judiciary historically has been subordinated to legislative and executive authority? Karl Loewenstein, writing in 1951, frankly doubted that judicial

13. *Germany 1947–1949: The Story in Documents* (U.S. Department of State Publication 3556, 1950), p. 278.

14. See Kommers, *Judicial Politics*, pp. 215–32.

review would "integrate itself into [European] political life as the unique regulatory force it is in the United States."[15]

The Europeans themselves, and particularly the Germans, were well aware of the abuses of judicial power that could occur in a constitutional order based on judicial review. That was one reason for the concentration of constitutional litigation in separate courts. They were particularly fearful of the American system of judicial selection, and consciously refused to bestow life-time tenure on the justices. Thus, their justices are nominated and chosen for single non-renewable terms of 12 years by the two houses of parliament, not by the executive. This system of recruitment, along with compulsory retirement at the age of 68, constitutes a strong check on the court and assures that its political complexion will not differ substantially from that of parliament or the nation. In Italy and Austria, parliament also shares, along with the executive and the regular judiciary, in the recruitment of constitutional court judges.

It is of some interest to note, finally, that France had remained steadfast in its opposition to judicial review until quite recently. In a substantial departure from the French tradition of parliamentary supremacy, the 1958 constitution provided for a constitutional council for the purpose of reviewing the constitutionality of laws by parliament. But the council was deliberately designed as "a watchdog on behalf of executive supremacy."[16] Only the president of the republic, the prime minister, or the president of either house of parliament may ask the council to review a statute, before its promulgation, on the ground of constitutionality.

In the last two decades, judicial review has spread to other parts of the world. A 1970 study revealed that the national constitutions of nearly 60 nations provided for some measure of judicial review. Most of these constitutions were authored by the emergent nations of Asia, Africa, and some additional Latin American countries.[17] Their judicial review structures were based on either American or European practice, or variations between the two. Nations in which Anglo-American influences were strong—for example, Burma, Pakistan, South Korea, Nigeria, Tanzania, Uganda, and the Philippines—tended to confer broad powers of judicial review on their highest appellate courts of civil and criminal jurisdiction. Countries under continental European influences—for example, Algeria, Central African Republic, the Congo, and Madagascar—tended to establish specialized constitutional courts of limited review. In other countries—for example, Dahomey, Mali, Rwanda, Senegal, and Upper Volta—the highest appellate courts were authorized to hand down only advisory opinions on constitutional questions.

15. Karl Loewenstein, "The Value of Constitutions in Our Revolutionary Age," in *Constitutions and Constitutional Trends Since World War II*, ed. Arnold J. Zurcher (New York: New York University Press, 1951), p. 217.

16. Jack Hayward, *The One and Indivisible French Republic* (New York: W. W. Norton & Company, Inc., 1973), p. 122.

17. Donald P. Kommers, *Cross-National Comparisons of Constitutional Courts: Toward a Theory of Judicial Review*, prepared for delivery at the Annual Meeting of The American Political Science Association, Los Angeles, Cal., 8–12 September 1970.

JUDICIAL REVIEW ABROAD: PRINCIPLE AND PRACTICE

What larger meaning can be drawn from this brief survey of judicial review around the globe? Initially, it needs to be remarked that the spread of judicial review as a formal constitutional device says nothing about its operation or effectiveness. Indeed, the judicial review powers of many of the countries listed above have never been invoked. This is true of most African nations, nearly all of whose constitutions were written in the 1960s and many of whose regimes have since collapsed or are under the control of a single party or governed by a military junta. In Latin America, too, judicial review as an operative principle of constitutional government—for example, in Chile, Argentina, and Brazil—has been washed away by the rising tide of military dictatorships.

Ordinarily, we have tended to associate judicial review with Anglo-American influences and, as this essay has shown, these have been substantial in the development of judicial review in many parts of the world, even in regimes where the legal order and political tradition were at variance with the Anglo-American experience. Contrary to the early expectations of Loewenstein and other skeptics, judicial review has worked, and rather effectively, in the "alien environments" of Japan, Italy, Austria, and West Germany. The acceptance of the principle of judicial review in so many other nations may possibly have more to do with the idea of a written constitution, as McIlwain suggested, than with any particular genius or influence of American constitutionalism.[18]

18. Charles McIlwain, *Constitutionalism and the Changing World* (New York: The Macmillian Company, 1939), p. 248.

Anglo-Americans often tend to associate judicial review with constitutional governments characterized by federalism, separation of powers, a bill of rights, and an independent judiciary. The constitutions of the world do reveal the presence of judicial review as a constitutional principle in the large majority of the world's 17 federal systems of government. Yet it would be stretching matters to say that judicial review is a functional condition of federalism, for judicial review is found in numerous non-federal systems. By the same token, at least at the level of constitutional principle, judicial review seems not to be associated with any given pattern of executive-legislative relations, although it is usually found in regimes where the judiciary is wholly independent of the executive and legislative branches.

A close look at the nations in which judicial review has developed into a vital regulatory device—for example, Japan, Australia, West Germany, Ireland, Canada, Italy, India (until very recently), and several Latin American countries—suggests that certain political conditions and legal values are as important as constitutional structure in sustaining a regime of judicial review. The effective exercise of judicial review in these countries seems to be associated, with few exceptions, with the following legal and political conditions: a political order marked by a durable constitutional tradition; a pluralistic society with autonomous groups free to oppose the government; a high degree of individual liberty; an advanced economy, usually based on private enterprise; significant independence of executive, legislative, and judicial authority; a political culture characterized by moderation and a stable competitive party system; and a legal cul-

ture that places a high value on the judicial role as an instrument of constitutional change. These are generally the characteristics of middle-class societies whose governments are circumscribed by substantial controls. The judicial system in such societies, suggests M. J. C. Vile, "is the expression of the determination to insure that certain values are given priority at the expense of expediency or speed in the performance of certain types of governmental tasks."[19] The most important of these values are the high priority placed on individual liberty, on the one hand, and political compromise between contending interests, on the other—the kind of social context that Madison associated with the notion of limited government. These liberal democratic values, so highly regarded in Japan and in advanced Western societies, are largely rejected in the Third World where national unity and the coordination rather than the separation of powers is vigorously stressed. Regarded as a bourgeois luxury, judicial review is likely to be increasingly rejected by these societies in principle as well as in practice. Judicial review also lacks support in advanced societies under Communist domination. Socialist constitutions, like that of the German Democratic Republic, which recognize no meaningful distinction between social and individual interests and whose purpose it is to install a political economy under the tutelage of the working class, cannot very well tolerate a separation of powers of the traditional Western variety.

India constitutes a classic study of a struggling democratic society which has sought to reconcile basic freedoms and their judicial protection with the need for social policies and programs sired by the legislature. In fact, the Indian Supreme Court was a causal factor in the recent crisis of democracy in that country. A major constitutional debate raged in Indian legal circles over the question of Parliament's power to amend the fundamental rights, particularly the right to property. In 1969, in a landmark case, the Supreme Court invalidated by a narrow six to five margin an act of Parliament nationalizing fourteen major banks.[20] The furor in Parliament generated by the decision prompted the Court actually to reverse itself in the 1973 Fundamental Rights case.[21] There, the Court emphasized the priority of "social justice," in terms of which, the justices noted, all "fundamental rights" must be interpreted. One justice even proceeded to undermine the doctrine of judicial supremacy: "A modern democratic constitution is, to my mind, an expression of the sovereign will of the people, . . . a legal sovereignty, which was previously vested in the British Parliament."[22] But the constitution was also broadly interpreted to sustain the right of Parliament to amend the fundamental rights. The same justice wrote:

> In the background of the Indian Constitution, the fundamental rights were intended to make all citizens and persons appreciate that the paramount law of the land has swept away privilege and has laid down that there is to be perfect equality between one section of the community and another in the matter of all those rights that are essential for the material and moral perfection of man.[23]

19. M. J. C. Vile, *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1967), p. 339.

20. *Salak Nath* v. *State of Punjab*, 2 S. C. R. 762 (1967).

21. *Kesavanda* v. *State of Kerala*, 60 All Indian Reporter 1461 (1973).

22. Ibid., p. 1969.

23. Ibid., pp. 1971–72.

Nevertheless, the Supreme Court remained a potential break on governmental action in future cases. Thus, when Prime Minister Indira Gandhi (through the president) declared emergency rule in India in June of 1975, the full scope of judicial review was among the first privileges of the constitution to be sacrificed for the sake of "national unity," along with the basic freedoms of speech, press, and political association.

CONCLUSION

This essay has sought to trace the influence of American judicial review abroad. Men and nations alike have marveled at the American experiment in democracy, even as Tocqueville did, and judicial review has been an important aspect of that experiment. On the whole, and particularly in this century, it has served the cause of liberty in the United States. And those nations which have adopted judicial review have also, for the most part, placed their basic constitutional rights under the protection of the judiciary. But, of course, the liberties of a people clearly do not depend upon judicial review any more than democracy does, for judicial review itself is an extremely fragile institution. It has proved workable and durable only in stable constitutional democracies which, like the United States, have been willing to tolerate diversity and a pluralism of interests while yet seeking equal justice under law.