29. Judicial Review

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JUDICIAL review is a process whereby a court during a case at law examines an act of some other branch of the government—often a legislature—to determine whether the act conflicts with the supreme law, or constitution, under which that branch of the government functions. Judicial review is an extreme form of the same power that judges exercise every time they hear a case; that is, they interpret and apply the law. If the judges hold that the law does conflict with the constitution, they are saying that the legislature has enacted an unconstitutional, or unenforceable, law. In other words, the court rebukes the legislature. A serious political dispute may thereupon develop. Judicial review may thus be regarded as a *political* action; when exercising the power of judicial review, a judge is functioning as a legislator, in that he invades the area of the framing of government policy. When the court reviews an important rule or other act of an executive agency or officer, it again perforce takes part in the political process of making a policy; it functions in fact, if not in doctrine, as an independent executive.

The concept of supreme law

The foundation of judicial review in the United States is the constitutional proviso that "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." (Art. VI, cl. 2.) Without such an identification of a supreme law judicial review could not exist, for there would be no standard whereby to judge the constitutionality of a law.

The constitutional clause cited above is the authority under which federal courts determine the constitutionality of both State and federal laws. Hence the Judiciary Act of 1789 could empower the Supreme Court to review and reverse all decisions of State courts conflicting with a right guaranteed by the Constitution. Figure 55 shows how many State laws, acts of State administrative agencies, and municipal ordinances have been found unconstitutional by the Supreme Court.

Establishment of judicial review on the federal level

The principle of the judicial review of federal legislation was finally established by the Supreme Court in 1803, in the process of hearing a case at law. This establishment was intimately connected with partisan politics and with the contest among the three branches of the government for supremacy over the whole. In the elections of November, 1800, the hitherto dominant Federalist Party lost both the presidency and Congress. In an effort to retain control over one branch of the government, the Federalists in the "lame-duck" Congress that met in December, 1800, hurriedly created a number of new federal judgeships, and the retiring Federalist President, John Adams, named trustworthy Federalists to these posts. Adams also named his Secretary of State, John Marshall, to be Chief Justice of the United States.

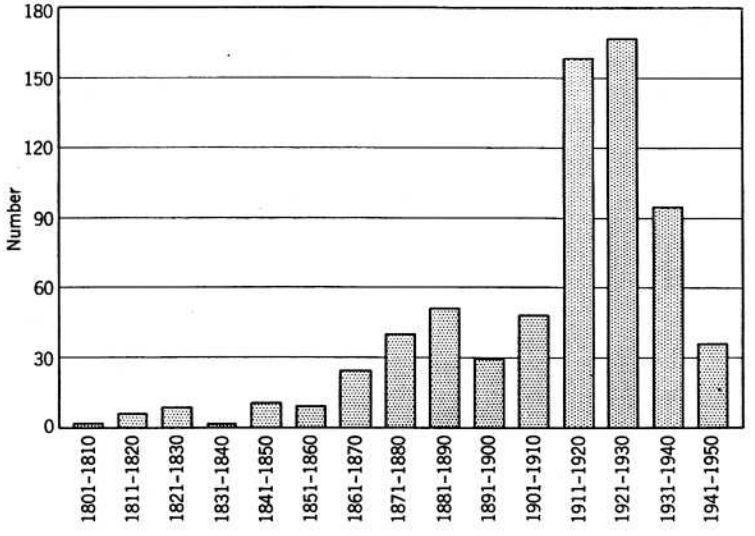
At this time, a federal judge was not formally installed in office until he had been appointed by the President, his appointment had been confirmed by the Senate, and he had been given a commission for the office by the Secretary of State. In the waning days of the Federalist administration, however, the pressure of business was so great that Secretary of State Marshall was unable to issue all the commissions. Hence when the triumphant Republicans entered office in March, 1801, there were still some of the new federal justices who had not been duly commissioned. The new Secretary of State, James Madison, refused to deliver the commissions; and Congress soon abolished the new judicial posts. However, one of the so-called "midnight" judges, William Marbury, who had been appointed a

A Crowd Lined up in the Supreme Court Building Hoping to Hear Arguments Challenging the Constitutionality of Segregation in Public Schools, Dec. 6, 1953.

justice of the peace for the District of Columbia, turned to the Judiciary Act of 1789, which empowered the Supreme Court to issue a writ of *mandamus* (Latin, "we order"); he asked the Court to issue such a writ to Madison, requiring him to deliver the commission on Marbury's demand. It was this case, *Marbury* versus *Madison*, which came before the Supreme Court in original jurisdiction, that gave Chief Justice Marshall, now arrived on the bench, the opportunity to enunciate and claim the power of judicial review for the federal Supreme Court.

In his opinion in *Marbury* versus *Madison*, Marshall established the basis for all future decisions by the Supreme Court that a federal law is unconstitutional. In this decision, Marshall rapidly concluded that there was no constitutional warrant for the judicial act empowering the Supreme Court to issue a writ of *mandamus*. Said he, whereas the Constitution states that the Supreme Court shall have original jurisdiction over "all cases affecting Ambassadors, other public ministers, and consuls, and those in which a State shall be a party. . . ." (Art. III, sec. 2, cl. 2), the Constitution gives the Court *original* jurisdiction over *no other* type of case.

Marshall then asked "whether an act repugnant to the Constitution can become the law of the land. . . ." He noted that in the Constitution the people had asserted the principles under which they would be governed, and had set limits upon their government. Since the United States has a government of limited powers, and since the Constitution is the supreme law, Marshall went on, Congress may not alter the Constitution by simple legislative act; otherwise Congress would no longer be limited, nor, con-



"The Supreme Court and Unconstitutional Legislation," Studies in History, Economics and Public Law, vol. LIV (1913), no. 133, Columbia University, Faculty of Political Science; "U.S. Supreme Court Cases Declaring State Laws Unconstitutional, 1912–1938," Library of Congress, State Law Index, Special Report no. 2, U.S. Government Printing Office, Washington, 1938; Book of the States and correspondence with the Council of State Governments for the years after 1938

Figure 55. State Laws, Orders of State Administrative Bodies, and Municipal Ordinances Ruled Unconstitutional by the Supreme Court, 1800–1950.

sequently, would the government. Are the courts obliged to enforce a law that is patently repugnant to the Constitution? "It is emphatically the province and duty of the judicial department to say what the law is." Thus, when such a law appears, since the courts must obey the Constitution, they must disregard the law. If the courts do not disregard the law, Marshall declared, they would subvert the very principle of written constitutions. It was therefore the duty of the courts to hold as void any law repugnant to the Constitution.

The fact is that judicial review is an implied power of the Supreme Court. Indeed, there are those who are sufficiently hostile to term it a "usurped" power; they deny that it has any constitutional warrant. Certainly there were strong political motives behind Marshall's opinion in the Marbury case. Marshall's act was but one of the many that have taken place in the unending struggle among the three branches of the government for supremacy. Marshall himself was a vigorous politician. It should be noted that having been Secretary of State, he was himself implicated in the Marbury case; and he might have refused to take part in its adjudication on the ground of possible prejudice. Also it should be noted that he decided against Marbury, a fellow Federalist, sacrificing him for a greater Federalist principle. Marshall had espoused a body of principles, notably the strengthening of the central government and the defense of the propertied interests, that were identified with the Federalist Party. The Federalists now controlled only the judicial branch, but Marshall proposed through that branch to make the Federalist theory of government endure.

Marshall's reasoning in the Marbury case is open to question as to its logic. First it may be observed that the Constitution does not say or imply that the Supreme Court is a better judge of the meaning of the Constitution than is Congress or the President. Also, the clause in question does not say that the *original* jurisdiction of the Supreme Court is absolutely restricted to what is mentioned in the Constitution. In sum, the Marbury case will forever remain debatable. The decision could have been the opposite in law and logic, but the leadership of a powerful man, strategically situated at the proper moment, deflected the course of constitutional history.

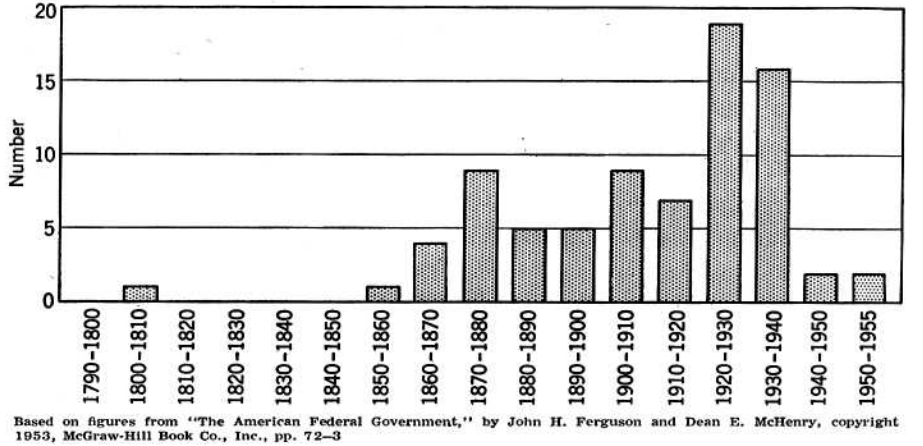
Once this vast power of the judicial veto had been established, the Supreme Court was never to surrender it. One could not say that the Court has abused this power, for, as Figure 56 shows, since 1803 it has found only some eighty federal laws unconstitutional. Yet there was at least one occasion when the Court behaved almost as though it feared reconstruction by Congress and the President after having overthrown an unusually large number of laws. This behavior occurred in 1937, following a period of only four years in which the Court had voided eleven statutes, all of which were comprised in the New Deal program of Franklin D. Roosevelt.

After his tremendous victory in the 1936 elections, which he interpreted in part as a public mandate for his projects and a rebuke to the Court that had opposed them, Roosevelt began openly to ascribe the actions of the Court to the age of its members, which in 1937 averaged seventy-two years.

He urged that Congress empower him to appoint a new justice for each member over seventy years of age, an authorization that would have enabled him to name six new justices. (Incidentally, lest this plan be considered a diabolical invention of Roosevelt, it should be noted that its originator was James C. McReynolds, who proposed it in 1913 when he was Attorney General; the *same* Justice McReynolds was now a bitterly anti-New Deal member of the Supreme Court, threatened by the two-edged sword he had once forged and forgotten.) Since at this time there were three justices who usually upheld New Deal legislation, the appointment of six new members would have given the President a working margin of nine to six. However, this plan excited such opposition from some sectors of Congress and of the public that Roosevelt was unable to secure this authority. On the other hand, the Supreme Court beginning in 1937 suddenly curtailed the use of its judicial veto, as though fearful of being penalized by Congress or the administration. In fact, from 1937 until 1956 the Court declared only two minor laws unconstitutional, neither of them related to the fundamental policy of either of the branches of the government. Thus President Roosevelt lost his battle but won his war; the Supreme Court reacted as if it had accepted a new climate of opinion that fostered the New Deal. Today the Supreme Court is more restrained in holding acts of Congress unconstitutional.

THE PROCEDURE OF JUDICIAL REVIEW

The procedure of judicial review today illustrates the self-restraints that the Supreme Court has imposed upon itself. Among the various restraints, which were enumerated by Associate Justice Louis Brandeis in 1936, perhaps the most important is that the Court will make no ruling apart from an actual case at law. The supreme courts of some States render *advisory decisions* respecting the constitutionality of State legislation, but the Su-



Based on figures from "The American Federal Government," by John H. Ferguson and Dean E. McHenry, copyright 1953, McGraw-Hill Book Co., Inc., pp. 72–3

Figure 56. Federal Laws Declared Unconstitutional by the Supreme Court, 1790–1950.

preme Court will not thus counsel Congress or the President. The Department of Justice is expected to render this service to the President. Should the Court do so, it is believed, the Court would become thoroughly involved in the policies of the executive and legislative branches; it might suffer a decline of its independence, and furthermore be plagued by numerous inquiries about imaginary issues. Also the case must involve a legal, not a political, question. It is difficult to fix an arbitrary line dividing the two categories; however, as an example, the Court has refused to state whether or not the Constitution has been properly amended, ruling that this is a matter for the political branches (Congress and the President).

Moreover, the question of constitutionality is not raised unless it is absolutely essential. If the Court may settle a case without raising the question, it does. Too, the Court always presumes the constitutionality of a law, as it does the innocence of a defendant. Also, the Court does not peer into the motives that prompted the legislature to enact the law. Finally, the Court declares unconstitutional only the part or parts of the law that is or are repugnant to the Constitution. The rest of the law remains effective, provided that it can be separated from the part that has been overthrown. Most laws today are drafted with a clause arranging for such a separation.

The net effect of a ruling of unconstitutionality is that the Court refuses to enforce or apply the law. The Court does not repeal a law; a law declared unconstitutional may stay forever on the statute books. What the Court does is simply to state that no person may be held guilty of violating this law, or that no person may be held liable in a civil suit under the terms of the law. Essentially, then, the Court has said that there is no law. Presumably, if a person were brought before a lower court after a ruling of unconstitutionality, the Supreme Court would bring the case within its own jurisdiction by a writ of *certiorari*, then repeat its original ruling. Actually, the Court numerous times has reversed past findings of unconstitutionality. Yet at least for some time after the original decision all courts will assume the law to be of no force. However, only in theory can it be said that the Court has acted as if the law had never been passed. For example, taxes collected under the Agricultural Adjustment Act of 1933, which was found unconstitutional, were not returned to the persons who had paid them; the very complexity of such a task made it not feasible. Perhaps the most important consequence of judicial review in this regard is that all courts may be skeptical of new legislation until the Supreme Court has ruled on its constitutionality.

POLICY-MAKING THROUGH JUDICIAL REVIEW

From 1789 until the present, whereas Congress was designed to be the policy-making organ of the national government, the Supreme Court through its power of judicial review has made great contributions to policy. Some of these policies have later been rejected; others remain to this day, although they too might be overthrown by adverse decisions. The following dis-

cussion is in no way exhaustive of the policy contributions of the Supreme Court; it is intended only to be illustrative.

Supremacy of the national government

The supremacy of the national government over the States was asserted by John Marshall in his opinion in the case of *McCulloch* versus *Maryland* (1819). This case revolved about the power of the State of Maryland to tax the Bank of the United States, a financial institution that had received its charter of incorporation from Congress. The litigation arose when the Bank refused to pay the tax. Marshall ruled first that the establishment of the bank was constitutional, his logic providing the classic statement of the theory of implied powers. He went on to assert that the government of the United States is a government of all the people and was created, not by the States, but by the people. This government, he argued, is supreme in its own sphere. However, "the power to tax involves the power to destroy." Maryland, or another State, could wipe out federal agencies and property by taxation. Since the constitution and laws of a State are controlled by those of the federal government, no State can have such power to destroy an agency of the federal government. Hence, Marshall declared, the Maryland tax is unconstitutional. This decision founded a principle that reigns today; practically all federal property is exempt from State taxation.

In later cases, Marshall dealt with particular governing spheres where the national authority is supreme. In *Cohens* versus *Virginia* (1821), Marshall formulated a powerful expression of national supremacy:

> That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial relations, we are one and the same people. In many other respects, the American people are one; and the government which is alone capable of controlling and managing their interests, in all these respects, is the government of the Union. It is their government, and in that character they have no other. America has chosen to be, and to many purposes, a nation; and for all these purposes her government is complete; to all these objects, it is competent. The people have declared, that in the exercise of all powers given for these objects, it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory.

In *Gibbons* versus *Ogden* (1824), one of the most important of these cases, the Court ruled that a law of New York State giving one steamship company a monopoly of the traffic upon the Hudson River was unconstitutional, since it interfered with the power of Congress to regulate interstate commerce.

Defense of property rights

Almost from the very beginning, the Supreme Court functioned as a defender of property, a role that the Federalists had hoped it would adopt. One foundation for this role was the constitutional clause prohibiting a State from passing any "law impairing the obligation of contracts" (Art.

I, sec. 10, cl. 1). States were not, then, to enact legislation breaking a contract in any manner; the Court construed this ban so as to work in behalf of property owners. For example, in 1795 the State of Georgia for speculative purposes created a Yazoo Land Company to which the State sold lands that were disputed among Georgia, the United States, and Great Britain. It quickly transpired that the sale was fraudulent, since many of the stockholders in the company were members of the State legislature. The next legislature voided the contracts, but not before many private citizens had also invested in the stock. Later Georgia yielded these disputed lands to the United States. Meanwhile some of the private citizens who had purchased stock in the now defunct land company demanded reimbursement, on the ground that the State of Georgia had acted improperly in breaking the contract. Finally, in the case of *Fletcher* versus *Peck* (1810), the Supreme Court ruled that the Georgia legislature had acted in an unconstitutional manner in breaking the contract; and Congress appropriated eight million dollars to pay the claimants.

About a decade later, the Court reached a highly important decision involving breach of contract, in which it defined a corporation charter as a contract, with all its privileges. The State of New Hampshire sought, through legislative action, to transform Dartmouth College into a State institution. The College had received a charter as a private corporation from the New Hampshire colonial government; the State now proposed to alter the terms of the grant. In the case of *Dartmouth College* versus *Woodward* (1819), the Supreme Court held that a charter is a contract. Thanks to this broad interpretation of the term "contract," industrial and financial corporations (which, like Dartmouth College, receive their charters from the States) were able to obtain exceptional immunities for themselves which, because of the "full faith and credit" clause in the Constitution, they could enjoy in every State. States eventually found a sure means for protecting themselves by including in every charter a clause authorizing them to change the charter, or by fixing a constitutional limit on the duration of every corporate charter.

Limitations on social legislation

The Supreme Court during the years from the Civil War until about 1937 was a frequent barrier to the enactment and enforcement of social legislation by both the State and the national governments. This position, of course, in part complemented the role the Court had previously adopted as the defender of property interests. It must not be thought, however, that the Court invariably overthrew State and federal labor laws. For instance, in 1898 it upheld a Utah statute limiting the hours of work in mines. Then, in 1908, it favored an Oregon statute limiting the hours of work for women. Also, the Court accepted the constitutionality of federal laws regulating railroad workers, for these workers incontestably were engaged in interstate commerce and were thus within the province of congressional action. However, so long as the Court was capable of finding that manufacturing was only "incidental" to interstate commerce, it could overthrow any fed-

eral law regulating the conditions of labor in factories. In recent years the Court has enlarged greatly its definition of the scope of interstate commerce, thus allowing important new federal and State social legislation.

The defense of political rights

In late years, also, the Supreme Court has become a prime defender of political rights, not only against State legislatures but also against popular sentiment. It was once believed that the clauses of the Fourteenth Amendment forbidding any State to "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . ." would serve to block State limitations on political rights. However, shortly after this Amendment was adopted, the Court ruled, in effect, that there are very few political rights that are attached to United States, or federal, citizenship; it said that most political rights are elements of State citizenship, and that it would not overrule State laws respecting the privileges and immunities of State citizenship. Only in recent times has the Court agreed to extend any of the first eight Amendments to the protection of individuals against *State* action. In the past two decades the Court has ruled against numerous State laws on the ground that they are repugnant to one or another of these Amendments.

Despite the obvious concern of the Supreme Court in recent years with personal civil and political liberties, many observers have felt that the Court is still too timid. In an article in *The Nation*, October 9, 1954, entitled "The Supreme Court and Our Civil Liberties," Professor Herman Pritchett wrote that the Supreme Court was no longer defending vigorously the rights of individuals and that it yielded too readily to Congress and the executive branch. He presented interesting data on fifty-one divided decisions of the Supreme Court between 1946 and 1953 involving government action against aliens (twenty-three cases) and general issues of civil

TABLE 16. SUPPORT OF PERSONS AGAINST GOVERNMENT BY SUPREME COURT JUSTICES[1]

(percentage of cases in which individuals were upheld)

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	Alien Cases	Civil Liberties Cases	Combined
Supreme Court (as a whole)	39%	21%	30%
Murphy (1947–1949)	100	100	100
Rutledge (1947–1949)	100	100	100
Black	100	96	98
Douglas	63	100	84
Frankfurter	82	44	61
Jackson	50	22	35
Burton	35	14	24
Vinson	30	11	20
Minton (1949–1953)	19	15	17
Reed	9	18	14
Clark (1949–1953)	14	10	12

[1] From Pritchett, Herman, "The Supreme Court and Our Civil Liberties," *The Nation*, October 9, 1954, p. 303.

liberties (twenty-eight cases). Table 16 gives the percentage of decisions in which each justice, as well as the Court as a whole, supported the individual's case against the government's.

The table shows that Murphy, Rutledge, and Black consistently leaned over backward to protect civil rights and liberties whereas, at the opposite extreme, Burton, Vinson, Minton, Reed, and Clark supported Congress and the Justice Department's view of individual liberties. It is well to note here, too, the strong evidence that the "law" can be read very differently by equally learned judges; the wide spread between the two groups of justices cannot be explained away as a coincidence.

CONSEQUENCES OF JUDICIAL REVIEW

It is impossible to make unequivocal, yet accurate, assertions regarding the consequences of judicial review, since almost everything that has happened in American history has been the product of more than one factor. However, it is possible to speculate about certain traits or tendencies that might have had a different emphasis, had judicial review never existed. For example, States might have shown a greater willingness to experiment in social legislation, and through this experimentation would have been less similar to one another in their governmental structures; the Supreme Court has overthrown a considerable number of early laws of this nature. The national government, too, would probably have a greater body of social legislation, and would be carrying out some services independently that it now administers cooperatively with the States through grants-in-aid. Indeed, without judicial review the federal government might own a great deal of industry that is "affected with a public interest," such as railroads. In the national government, Congress might have been emboldened to make the executive branch considerably stronger than it is now but for court restraints upon delegating legislative power to the President. Too, members of the legal profession might not have earned their current prestige and predominance in American politics. These differences, and many others, can be in part attributed both to actual decisions of unconstitutionality and the wish to avoid such decisions. The *potentiality* of judicial review has perhaps been as effective as the *actuality* of judicial review.

CRITICISMS OF JUDICIAL REVIEW

Judicial review has been the target of many criticisms from both inside and outside the government. Some persons have adopted a position already cited, that judicial reivew is a usurped power. Others maintain that it hampers legislators, and that it restrains their initiative. It is true that much of the time in the dispute over the propriety of judicial review, those who favor constant change in governmental machinery and functioning have supported legislatures against the Court; and those who have resisted change, or at least rapid change, have looked to the Court as an effective rein upon rash legislative action. (It is important to remember,

in this connection, that much of the agitation depends upon whose ox is being gored. When a labor union is hurt by a court decision, it is likely to feel that judicial review is a usurped power; it is inclined to take the opposite view, however, when the Court knocks down a law restricting labor union membership.)

However, in any event it would not be correct to assert that the Court has always opposed change. For instance, Chief Justice John Marshall, in his insistence upon national supremacy, was a political radical in his own era. Associate Justice Oliver Wendell Holmes once made the following comment respecting judicial review: "I do not think the United States would come to an end if we [the Supreme Court] lost our power to declare an act of Congress void. I do think the Union would be imperilled if we could not make that declaration as to the laws of the several States." What Holmes meant was that on the federal level the Court in theory was no more than the equal of Congress or of the President, in interpreting the Constitution and that, if the Court lost its power of judicial review, the chief effect would be the substitution of one set of opinions regarding the meaning of the Constitution for another. On the other hand, he felt that the Supreme Court required the power of voiding State laws, lest the States encroach upon and restrict both the federal government and each other.

Opponents of judicial review have suggested various means for curtailing its use, or for enabling Congress to override a judicial veto. One common proposal has been to demand an extraordinary majority of the Court, such as six-to-three or even seven-to-two, for a declaration of unconstitutionality. Others have recommended that Congress be empowered to repass a law declared unconstitutional, perhaps by the same two-thirds majority necessary to override a presidential veto. Of course, Congress and the State legislatures together may collaborate against a judicial veto by amending the Constitution. This procedure has been followed twice: (1) the Fourteenth Amendment, with its definition of United States citizenship, reversed the Court's declaration that Dred Scott, as a Negro, could never be a citizen; and (2) the Sixteenth Amendment, authorizing Congress to levy an income tax without concerning itself about apportioning the tax according to population, reversed the earlier Court decision defining the income tax as a direct tax that must be apportioned among the States according to their population.

After the dramatic and important Supreme Court decision in 1954 that held racial segregation in public schools to be unconstitutional, the governments of some southern States held that they could overthrow this decision by a means known either as "nullification" or as "interposition." Nullification and interposition amount to approximately the same thing, although nullification is harsher. Each constitutes a protest against some action by the federal government which State leaders feel is an improper interference with State affairs; nullification is associated with the actions of the southern States just before the outbreak of the Civil War. As an example of nullification, the legislature of Alabama in 1955 declared that

the Court decision outlawing segregation was "null, void, and of no effect." An instance of interposition came about through a resolution in Congress sponsored by seven Senators from the South; the resolution asserted that the Court had exceeded its authority in this decision and asked Congress to declare that the southern States are fulfilling their constitutional obligations so long as they maintain separate but equal schools. Inasmuch as the federal court system and machinery of law enforcement operate independently of State governments, these declarations had no formal effect upon the ruling of the Supreme Court. Actually, the Court itself has, under political pressure or because of changed personnel or philosophies, shown considerable flexibility through the years in rejecting or readjusting its own previous rulings. In any event, it appears that judicial review will remain a power of the Court so long as a great many politically influential Americans support it.

QUESTIONS AND PROBLEMS

1. Define judicial review. How does it contrast with other parts of the work of a court?
2. Compare the use and results of federal judicial review of State laws and of congressional enactments.
3. Supposing that you were the attorney for Marbury and knew that Chief Justice Marshall was considering the question of judicial review, how would you have argued against the principle of judicial review?
4. The periods when the greatest number of federal laws were declared unconstitutional coincided with periods when economic change and economic distress were most prominent. Offer some explanations for the existence of this relationship.
5. State briefly the principle of law involved in these cases: *McCulloch* versus *Maryland; Gibbons* versus *Ogden; Fletcher* versus *Peck.*
6. What do the data from Table 16 have to contribute to the theory that the Supreme Court is a political as well as a judicial body?
7. Write a 400-word report on the activities of the Supreme Court over the past two years, using as source material the *Encyclopedia Britannica Yearbook* or a comparable work.