



# An Overview of Court Review for Constitutionality in the United States

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# An Overview of Court Review for Constitutionality in the United States\*

Ruth Bader Ginsburg\*\*

Before turning to the text of my lecture, I would like to acknowledge why I am here. I have come to this school as Alvin B. Rubin visitor, to remember a judge of extraordinary talent and humanity, a graduate of Louisiana State University Law School, a teacher here from 1946 until 1989. I count it my great good fortune to have known Alvin as judge, colleague, and friend. I appeared before him in 1973, in his days on the District Court, we served together on the ABA Journal Board of Editors, and I sought his counsel in my starting days on the D.C. Circuit.

Judge John Minor Wisdom said of Judge Rubin, altogether accurately in my judgment, that he ranked with Holmes, Brandeis, and Cardozo, Learned Hand and Henry Friendly, as one of the great federal judges of all times.<sup>1</sup> I cannot improve on Judge Wisdom's words, so I will quote them verbatim: "Lucky indeed are all Americans, of all races and creeds, that at a time and place in our history when the United States Constitution was severely challenged, Alvin Rubin was there to meet the challenge with his highly developed sense of injustice."<sup>2</sup>

For this lecture, I have prepared some remarks on the topic: Court Review for Constitutionality—United States style. Tucker Lectures present civilian perspectives, so I will include in these remarks some comparative sideglances.

## I.

I will start by reminding you that, unlike the single national court structure and unitary codes common to most countries, the United States has well over fifty judicial systems, each with its own substantive law to enforce. Puerto Rico, the District of Columbia, and each state has its own two or three tier court system. But there is for the nation one federal court system, with trial courts dispersed throughout the territory of the United States, thirteen courts of appeals in different regions of the country (only two of them—the Federal Circuit and the D.C. Circuit—specialized to any degree), and one Supreme Court. State systems vary in diverse respects—for example, some have elected judges (a

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1. See John Minor Wisdom, *Dedication: Judge Alvin Rubin*, 52 La. L. Rev. 1371, 1371-72 (1992).

2. *Id.* at 1376.

means of selection astonishing to jurists in civil law systems), others have appointed judges. In this talk, I will speak, primarily, of the federal court system.

The first appeal in the United States, in both state and federal systems, is generally a matter of right. The Supreme Court, however, selects the cases it will consider, and the Court is highly selective. The Court receives, nowadays, over 7,000 requests for review in a year (7,487 were on the docket last Term); of those thousands, the Court selects not more than 100 to hear and decide. The great bulk of requests are denied, generally without comment. (On rare occasion, however, a comment is in order. One recent example may have been noticed by some in this audience. In the *Hopwood* case,<sup>3</sup> involving race or national origin as a plus factor in admission to the University of Texas Law School, I thought it appropriate to explain to the public why we did not grant review (a reason in no way detracting from the "great national importance" of the issue presented), and Justice Souter joined me in the view that an explanation was due.)<sup>4</sup> Taking cases from both federal and state courts, the Supreme Court tries to limit its docket to the most important and turbulent federal statutory and constitutional law controversies. And the cases it takes must be ripe, but not moot—they must be fully developed, genuine controversies.

Federal judges in the United States, unlike judges in civil law systems, are not part of a career bureaucracy; they do not train for judicial careers from early days in their working lives, as do judges in France, Germany, Italy, and Spain, for example. They are appointed by the President, subject to confirmation by the Senate, at ages generally closer to fifty than forty. They serve for life or, as Article III of the Constitution says, "during good Behaviour." And the Constitution also provides that their compensation shall not be reduced. Both life tenure and no reduction in pay are prime promoters of the federal judiciary's independence from the executive and legislative branches. As Judge Rubin commented, professional judges abroad, trained from post-graduate days in a judicial career, are high-ranking, respected civil servants, but traditionally, they have not been endowed with the independence or the law-development functions entrusted to life-tenured judges in the United States.<sup>5</sup>

United States Judges are drawn from all fields of legal endeavor—appointees may be practicing lawyers, law teachers, government officials, even members of Congress, and sometimes judges of state courts or lower federal courts. Taking my current colleagues as examples, three of us were once full-time law teachers (Justices Scalia, Breyer, and me), six formerly served on a United States Court of Appeals (Justices Stevens, Scalia, Kennedy, Thomas, Breyer, and me). Justice O'Connor was a state court judge and, before that, Speaker of the Arizona State

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3. *Texas v. Hopwood*, 116 S. Ct. 2581 (1996) (opinion respecting the denial of the petition for a writ of certiorari).

4. *Id.*

5. See Alvin B. Rubin, *Hazards of a Civilian Venturer in a Federal Court: Travel and Travail on the Erie Railroad*, 48 La. L. Rev. 1369, 1371 (1988).

Senate. Justice Souter was his State's Attorney General and later sat on New Hampshire's Supreme Court. The Chief once worked in the Justice Department, as head of the Office of Legal Counsel. The Chief and Justice Stevens, particularly, engaged for several years in the private practice of the law.

We have no tribunal in the United States comparable to the adjudicatory section of the French Conseil d'Etat, no discrete Supreme Administrative Court, only the ordinary courts of the judiciary, courts with authority to adjudicate both private and public law controversies. We also have an all-purpose bar. The barrister/solicitor distinction not yet abandoned in England never took hold in the United States. Nor have we ever had anything akin to the French *avocat*/division of labor. A match for our all-purpose bar, we have an all-purpose judiciary. With some notable exceptions—as I just mentioned, the Federal Circuit and, to a lesser extent, the D.C. Circuit—federal courts are not specialized tribunals; typically, they are generalist courts, and none of their members sit, as continental judges do, in sections divided by subject matter.

## II.

I turn now to the way in which courts in the United States control legislative and executive action for constitutionality. In United States Chief Justice John Marshall's famous 1803 decision, *Marbury v. Madison*,<sup>6</sup> judicial review for constitutionality is justified by the obligation courts have, when deciding particular controversies, to enforce the entirety of the law, including, when there is a conflict, the supreme law of the land, the Constitution of the United States. Just as courts must interpret statutes and prior decisions in order to apply them in particular cases, so the courts inevitably must interpret the Constitution, jurists in the United States continue to maintain; for the meaning of the Constitution's majestically general clauses, when considered in a concrete context, is not always self-evident. The Due Process Clause and Equal Protection Clause are prime examples of the U.S. Constitution's majestic generalities. They instruct, with sweeping simplicity, that government shall not deprive any person of life, liberty, or property without due process of law, nor deny to any person the equal protection of the laws. (Incidentally, the Due Process Clause is contained in the Fifth and Fourteenth amendments. Where does the equal protection principle first show up? What accounts for that?)<sup>7</sup>

One may ask, why shouldn't judges accept, as a "given," the constitutionality of any law passed by Congress. Every member of Congress, after all, takes

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6. 5 U.S. 137 (1803).

7. The equality principle, stated in the Declaration of Independence, received concrete constitutional recognition in the Fourteenth Amendment, which became "law of the land" in 1868. The original Constitution, in contrast, preserved the slave trade until 1808 (U.S. Const. art. I, § 9), and required the return of fugitive slaves (U.S. Const. art. IV, § 2). On the absorption of an equality norm into the Fifth Amendment's Due Process Clause, see *Bolling v. Sharp*, 347 U.S. 497, 74 S. Ct. 693 (1954).

an oath to support and defend the Constitution, and is therefore obliged, in the first instance, to decide whether his or her vote for a measure is compatible with constitutional prescriptions. As Alvin Rubin reminded federal and state officials: "The Federal Constitution is a charter for all officials, federal and state. All those who wield the power of the sovereign must be equally obedient to its commands and faithful in insuring its protections."<sup>8</sup> The additional check of court review may be explained on several grounds.

One most practical ground is the recognition that what may seem constitutional in the abstract may be revealed as unconstitutional when viewed in a specific, contemporary world context—a context that the legislators who passed the law foresaw only dimly, if at all. Social insurance laws providing benefits for widows, not widowers, wives, not husbands may be an example. (One case holding such a law unconstitutionally underinclusive involved a man, Stephen Wiesenfeld,<sup>9</sup> whose working wife, Paula, died in childbirth. The baby, named Jason, was born alive and well. There were no benefits, under the statute, for a father who wanted to care personally for his child; the benefits ran only to a mother. Why, then Justice Rehnquist asked in that case, should the infant Jason lose the chance for the care of the sole surviving parent just because that parent happened to be Stephen, not Paula?<sup>10</sup> The Supreme Court's 1975 judgment in that case effectively converted what was a mother's benefit into a parent's benefit.)

In addition to that practical consideration—one knows it better when one sees it—there is also the important idea (expressed by James Madison in Federalist No. 10) that "[n]o man is allowed to be a judge in his own cause."<sup>11</sup> Congress, one could conclude following that principle, cannot say with finality whether its own acts are constitutional. That function is properly committed to a separate department—a detached, impartial, life-tenured judiciary that is not judging its own cause.

With that brief explanation of the justification for constitutional review by courts, I will attempt to present some salient points about the way the power is exercised in the United States. First, the authority is not lodged in one, special tribunal. We have no Constitutional Court in the United States, no court whose sole business it is to decide constitutional questions. Instead, every court in the United States that exercises general jurisdiction—state courts as well as federal courts—regards and applies the federal Constitution as the supreme law of the land. Because constitutional review, United States-style, is thus dispersed, the system has been called "decentralized," to distinguish it from systems—such as Germany's, Italy's, or Spain's—in which only one court is empowered to review legislation, or executive action, for constitutionality.

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8. *Ruiz v. Estelle*, 679 F.2d 1115, 1163 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042, 103 S. Ct. 1438 (1983).

9. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 95 S. Ct. 1225 (1975).

10. *Id.* at 655, 95 S. Ct. at 1237.

11. *The Federalist* 79 (Clinton Rossiter ed. 1961).

No federal court can *preview* a law before it is promulgated, the way the Constitutional Council (Conseil Constitutionnel) in France does under that nation's 1958 Constitution. (Some state courts in the United States, I should note, the highest state court of Massachusetts, for example, do have a preview function—the state legislature may ask for advice on the consistency of a proposed law with the state constitution, and the highest state court will render the advice. And Louisiana's Supreme Court, in common with several other state high courts, permits federal appellate courts to certify to it "questions or propositions of [state law] which are determinative" of a case "independently of any other questions involved in [the] case," if "there are no controlling precedents in [state high court] decisions.")<sup>12</sup>

A proposal was made at the U.S. Constitutional Convention in 1787 to establish a Council of Revision; judges appointed to the Council would join with executive officers in passing on a law's validity pre-enactment. But the founding fathers rejected the idea of such a mixed tribunal. Federal judges, the United States Constitution has been read to say, may hear only fully ripe, live cases or controversies, and may not give advisory opinions. (The *Hopwood* case<sup>13</sup> is an example. The Court could not decide on the constitutionality of the current University of Texas Law School admissions system, because plaintiffs did not apply for admission and were not turned down under that system. And everyone agreed that the prior system—the one under which plaintiffs had applied and were rejected—was unconstitutional.)

Because judges in federal courts are empowered to adjudicate only full, ripe, actual controversies, they may not respond to questions separated or abstracted from a particular case, any more than they may preview legislation. They cannot, in other words, deal with issues referred to them by other authorities, as do the centralized Constitutional Courts in other nations—Germany, Italy, and Spain, for example. Instead, as I said before, they must deal with whole cases, and cases must travel the full course, from first instance through appellate tribunals, with each court, in its turn, expressing judgment on all issues, nonconstitutional as well as constitutional, that must be decided in order to wrap up the entire case.

Although the system is decentralized and case specific, it is not chaotic—it does not produce Tower of Babel results, thanks to the rule of *stare decisis*, which instructs courts to follow prior decisions, specific decisions, and not just what the French call *jurisprudence constante*, that is, a series of decisions.<sup>14</sup> A decision gains force beyond the particular case and parties through the doctrine of *stare decisis*. Each court generally respects its own prior decisions, intermediate court of appeals decisions bind all lower tribunals in the geographical region, and United States Supreme Court decisions set precedent for all courts, federal and state, in cases arising under the Constitution or laws of the United States.

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12. La. Sup. Ct. R. 12.

13. *Texas v. Hopwood*, 116 S. Ct. 2581 (1996). See *supra* note 3.

14. See Rubin, *supra* note 5, at 1370-78.

## III.

In discussions of the relations between nation and states in the United States, commentators often feature Supreme Court interpretations of the clause of the Constitution authorizing Congress to regulate commerce, Article I, Section 8. Through construction of that clause, the Supreme Court has not reduced the states to positions of insignificance, as the Court's 1995 decision in *United States v. Lopez*<sup>15</sup> underscores. (*Lopez* held that Congress had exceeded its commerce power when it defined as a federal offense possession of a firearm within 1,000 feet of a school.) But, the Court has surely contributed to the building of one nation by checking state attempts to favor themselves or their merchants to the detriment of enterprises from other states. Judicial decisions in this line have secured an open, national market within the United States. The countries and the Court of Justice of the European Communities may have found some of that history and case law instructive.

Constitutional review by courts in the human rights sphere is perhaps the most lively issue as we move toward a new century.<sup>16</sup> In the human rights domain, I would like to highlight some significant differences in premises and approaches in the United States and in other nations. Review for constitutionality in the human rights area became prominent after World War II. That is certainly true in the United States, but it is also true elsewhere. World War II cast grave doubt on the conviction that popularly elected legislatures can be relied upon to protect human rights through law, for much that was evil in that era had the stamp of approval by legislators. Post-World War II constitutions in Germany and Italy, most conspicuously, provide for constitutional review (although in special courts set apart from the regular civil court hierarchy) as one protection against return to autocratic government, and as a safeguard of individual rights.

Many jurists in the United States regard constitutional review by courts in the human rights sphere as our nation's hallmark and pride. I agree, although with considerable humility.

I recognize not only that judges are fallible and can make dreadful mistakes. In the "dreadful mistake" category, many commentators mention the infamous 1857 *Dred Scott* decision,<sup>17</sup> in which the United States Supreme Court used the majestic Due Process Clause to justify one individual's right to hold another in bondage. I appreciate too that in its declaration of human rights, the United States Constitution has not been regarded as the model document for a modern state.

Recall that, although the United States is not old among the world's nations, its Constitution is the oldest written Constitution still in use. It was drafted in

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15. 115 S. Ct. 1624 (1995).

16. See generally Louis Henkin, *The Age of Rights* (1990). This text draws particularly from *Rights: American and Human*, in *id.* at 143 and *Rights: Here and There*, in *id.* at 157.

17. *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

1787, a terse Bill of Rights was added to it four years later, and thereafter it has been amended on only seventeen occasions. (More than half the world's nations have constitutions written since 1970.)

The United States Constitution, as composed in 1787, is dominantly concerned with the structure of the national government and the powers of its three branches (legislative, executive, and judicial). The Constitution's text details few individual rights. The Bill of Rights, added in 1791, is short and has distinct gaps. For example, it contains, as we just noted, no express equal protection of the laws guarantee applicable to federal legislation. (Incidentally, how did it come about that an equal protection principle was applied against the federal government?)<sup>18</sup> Moreover, the Bill of Rights does not even *declare* our most basic rights. Instead, it assumes they exist and simply tells the state to keep its hands off.

Our principal rights-declaring document, indeed, is not the 1787 Constitution or the 1791 Bill of Rights; it is the 1776 Declaration of Independence, a document not directly enforceable in court. The Declaration, in ringing tones, declares: "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 . . ." Our founding fathers thought in the natural rights vein. Human rights pre-dated the state. They were not the state's to confer. Rather, the state was to be kept from trampling on them.

So our First Amendment does not say, even as the celebrated 1789 French Declaration of the Rights of Man does: "[E]very citizen may speak, write, and publish freely . . ." Rather, it assumes that right for all humans (not only citizens) and simply says: "Congress shall make no law . . . abridging the freedom of speech or of the press."

Modern human rights declarations in national and international documents do not follow the United States Bill of Rights' spare, government-hands-off style. Not only do contemporary declarations contain affirmative statements of civil and political rights; they also contain economic and social guarantees, for example, the right to obtain employment, to receive health care and free public education, even—more grandly—the state's assurance of the conditions necessary to the development of the individual and the family. Any current effort at constitutional amendment to include such guarantees in the United States, I am confident, would encounter defeat far more stunning than the 1980s defeat of the proposed Equal Rights Amendment, which would have confirmed the equal stature of men and women before the law.

It is not that the United States, today, is in fact less of a welfare state than other nations that proclaim in a constitution state-assured rights to life's basic needs. Indeed, more than half a century ago, President Franklin Delano Roosevelt stated,

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18. See *Bolling v. Sharp*, 347 U.S. 497, 74 S. Ct. 693 (1954).



in his January 11, 1944 State of the Union Message,<sup>19</sup> that the nation had come to accept "a second Bill of Rights" as "self-evident." "Necessitous men are not freemen," Roosevelt said. While a world war was still raging, the President listed goals for a lasting peace, his aspirations for all people, "regardless of station, race, or creed": the right to a good education, to earn a living, to secure decent housing, adequate medical care, protection from the economic fears of old age, sickness, accident, unemployment. We cannot be content, FDR told the nation, "if some fraction of our people—whether it be one-third or one-fifth or one-tenth—is ill-fed, ill-clothed, ill-housed, and insecure."

Yet FDR, and all who shared his hopes for the future, understood that, in the United States, we properly rely on legislation, not the Constitution, to declare and implement safety-net protections. Implementation of such protections is also accomplished by statute elsewhere. So the absence of constitutional status for economic and social safeguards in the United States lacks telling practical significance.

Were we to place economic and social security guarantees explicitly in the Constitution, our style of constitutional review by courts would require adjustment. Our courts, through judicial review, are accustomed to telling government what it may not do; they are not, by tradition or staffing, well-equipped to map out elaborate programs detailing what government must do. (Of course, decisions that say, "the State shall not," may indicate, in a general way, what the State shall or must do. In a very recent case, for example, the Supreme Court said the State of Virginia could not maintain a military college (Virginia Military Institute) for men only.<sup>20</sup> That meant, if the State continued to maintain the college as a public institution, the school would be obliged to admit qualified women.)

Foreign observers of judicial activity in the United States might raise a question at this point. Is it not true that courts in the United States of America more than occasionally map out precisely what the Executive must do? What of the class actions that have been used as vehicles to obtain institutional reform—court decrees regulating school systems, conditions in prisons or mental hospitals, or the boundaries of electoral districts? Litigation of this kind was in large measure needed, and was accordingly invented, to end racial segregation in the United States. It is business the courts do not like, and will undertake, when pressed by litigants, only in the last resort, when the political branches—the legislature and the executive—have failed to carry out their constitutional responsibilities, despite notice, and ample opportunity to address the problem.

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One last observation and then I will leave off. Judges in the United States prize, above all, their independence from the political branches. I mentioned

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19. H.R. Doc. No. 377, 78th Cong., 2d Sess. (1944), *reprinted in* 90 Cong. Rec. 55, 57 (1944).

20. *United States v. Virginia*, 116 S. Ct. 2264 (1996).

earlier that the founding fathers sought to secure that independence by providing for tenure during good behavior and irreducible salaries. Judicial independence is vital, our Chief Justice has explained, because the good judge must strive constantly to do what is legally right even when the result is not the one Congress, the President, or the "home crowd" wants.<sup>21</sup> The day we stop striving to do that is the day we should resign from office.

I can think of no more appropriate end to these remarks, or beginning to our conversation, than to quote what Chief Justice Rehnquist said on the topic of judicial independence in a recent address at American University:

The framers of the United States Constitution came up with two quite original ideas—the first[,] . . . a chief executive who [is] not responsible to the legislature as Chief Executives are under the parliamentary system. The second[,] . . . the idea of an independent judiciary with the authority to declare laws passed by Congress unconstitutional. The first idea—a President not responsible to Congress—has not been widely copied by other nations . . . . But the second idea—that of an independent judiciary with the authority to finally interpret a written constitution—has caught on [abroad], particularly since the end of the Second World War. It is one of the crown jewels of our system of government today.

Change is the law of life, and the judiciary will have to change to meet the challenges which will face it in the future. But the independence of the . . . judiciary is essential to its proper functioning and must be retained.

To that, I am confident the Honorable Alvin B. Rubin would join me in saying "Amen."

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21. See William H. Rehnquist, *Dedicatory Address: Act Well Your Part: Therein All Honor Lies*, 7 *Pepperdine L. Rev.* 227, 229-30 (1980).

