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Judicial Review in a Legislative State: The South Carolina Experience

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JUDICIAL REVIEW IN A LEGISLATIVE STATE: THE SOUTH CAROLINA EXPERIENCE

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I. INTRODUCTION

The political folk wisdom of South Carolina identifies it as a legislative state, one in which the general assembly's influence permeates every aspect of government. Judicial review, a doctrine by which a court, in the context of a narrowly defined adversary proceeding known as a case or controversy, can declare the actions of the legislative and executive branches to be invalid because they contravene the state or federal constitutions, would seem to be a strange procedure to coexist with a tradition of legislative dominance. Surprisingly, both doctrines have been prominent features of the South Carolina constitutional terrain throughout much of its colonial and state history. What is even more remarkable is that the doctrine of judicial review had its primitive South Carolina beginnings, and had reached a significant degree of development, long before its mature flowering in the federal system in *Marbury v. Madison*.[1] What made possible the initiation and development of this doctrine, which would seem to be almost the antithesis of legislative dominance, on a schedule that was roughly contemporaneous with the growth of legislative power? Under what circumstances is judicial review an effective countervailing force to legislative and executive abuse of power? When is its potency likely to be diluted by political events?

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1. 5 U.S. (1 Cranch) 137 (1803).

Several factors combined to make judicial review a logical, though not inevitable, addition to the persistent strains of South Carolina politics.

First, unlike Great Britain (which had a constitution composed of a mixture of evolving parliamentary and monarchical tradition, common law, and a scattering of basic documents, such as the English Bill of Rights and Magna Charta) the colonial governments, virtually from the start, operated under limitations provided by written documents. These documents were Royal charters, Proprietary or Royal instructions to the Governors, and English laws. As Chief Justice Marshall noted in *Marbury v. Madison*,[2] a frequent, if not inevitable, concomitant of having documents that purport to be superior laws, is the growth of a class of individuals, usually judges, who interpret the superior law and determine whether or not other forms of law are compatible with it. In addition, the colonial legislatures, despite their frequent claims that they were the legitimate inheritors of the powers and traditions of the British Parliament, were clearly subordinate legislative bodies, operating within the ambit permitted by English law. That Royal instructions and English laws were being used by South Carolina courts as early as 1724 as the basis for striking down legislation is evidenced by complaints lodged by the Commons House against the judges with regard to their decision in the case of *Dymes v. Ness*.[3] A committee of Commons asserted that "the whole Government is arraigned [by the judges in *Dymes v. Ness*] for passing Laws as 'tis suggested *contrary to the Kings Instructions & Repugnant to the Laws of England.*"[4]

Second, the core concept of judicial review is that there is a higher law against which the validity of legislation should be

2. *Id.* at 177-78.

3. A. SALLEY, JOURNAL OF THE COMMONS HOUSE OF SOUTH CAROLINA: NOVEMBER 15, 1726-MARCH 11, 1726/7 47 (1946). *See also* McGovney, *The British Origin of Judicial Review of Legislation*, 93 U. PA. L. REV. 1, 48-49 (1944).

4. A. SALLEY, *supra* note 3, at 70 (emphasis added). *See also* McGovney, *supra* note 3, at 10-11. For an example of a South Carolina colonial court striking down a provincial criminal statute because it contravened an act of the British Parliament and was, thus, beyond the scope of power that the King could legitimately delegate to the local legislature, see *Rex. v. Mellichamp*, The S.C. Gazette, May 1-8, 1736, at 1, col. 1 (Charlestowne)(available on microfilm at South Caroliniana Library, Columbia, S.C.). For a useful discussion of the case, see Cook, *Judicial Review and Legislative Power*, in SOUTH CAROLINA LEGAL HISTORY 83, 86-89 (H. Johnson ed. 1980).

measured. This concept was given greater intellectual force because it melded easily with the political philosophies that fueled the colonials' arguments in other disputes in eighteenth century America. Natural law theorists, such as John Locke, developed doctrines holding that governments were formed by social contract between the people and the government to the end that government could protect the people in their lives, liberties, and estates, to which Locke gave the collective term "property." If governments in general, and legislatures in particular, were unfaithful to their task of protecting the property of the people, then they could be resisted.

The ultimate form of resistance was revolution. Thus, the thoughts of natural law philosophers such as Locke were used to justify revolution against King and Parliament because they allegedly had changed the focus of government from protecting the property of the people to self-serving tyranny. The basic concept that the acts of legislators and executives can be measured against a higher natural law, which defines the basic ends of government and renders invalid governmental acts that exceed those limits, can be used to justify two forms of resistance to the extreme and persistent abuse of power: the ultimate form, revolution, and the less disruptive, more stabilizing forms, such as court suits that strike down legislative and executive acts exceeding the power of those officials as circumscribed by the proper ends of government established by natural law and the social contracts.[5]

A third, more textually rooted, supporting beam for judicial review was found in basic English civil liberties documents such as Magna Charta, which were eventually used to protect the rights of the people against encroachments by any branch of the government. This approach provided a precedent for the use of similar provisions in state and federal constitutions, such as the

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5. J. LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT, § 226, at 188 (1690). *See also* McGovney, *supra* note 3, at 6-7 (crediting Locke with establishing a natural law doctrine that could readily be adapted to serve as the basis of judicial review). McGovney asserts that it was Lord Coke who harnessed the somewhat ethereal natural law theories to the mundane task of providing an understandable, workable basis for judging the validity of executive and legislative acts in litigation. *See, e.g.*, Dr. Bonham's Case, 77 Eng. Rep. 646, 652 (K.B. 1610). This case was cited by counsel in an early South Carolina case, Ham v. M'Claws, 1 S.C.L. (1 Bay) 93, 96 (1789), as the basis for arguing that legislation can be voided if it is contrary to common right, reason, and Magna Charta.

Bill of Rights, as the basis for striking down statutes and executive acts that jeopardized the rights of the people.

II. The Colonial Beginnings

Thus, courts in eighteenth century South Carolina had three forms of superior law against which legislative acts could be measured. The first type included Colonial charters, Royal instructions to Crown officials, and English laws. These documents naturally played a less important role in judicial review during the Revolutionary and post-Revolutionary periods than they had earlier. The second form was composed of natural law theories, which asserted that, either by virtue of a social contract between the government and the people or by virtue of an innate pattern in the way the universe and society are organized, there is a higher law by which enactments of government must be evaluated. The third type of superior law consisted of basic documents of English liberty, such as Magna Charta, and their latter day American counterparts in state and federal constitutions.

An analysis of several early South Carolina cases assessing the validity of legislation will demonstrate how these strands were woven together to form the fabric of judicial review. Judicial review has served to retard the expansion of legislative power in two major respects. First, it has limited legislative encroachment on the domain of the other branches of government and acted as a brake on usurpation by those branches of legislative prerogatives. Second, it has shielded the rights of the people from legislative and executive actions that would invade those rights.

In *Dymes v. Ness*[6] we find one of the earliest examples of judicial review not only in South Carolina, but in America at large. As noted above, this 1724 case prompted a reposte from the Commons House that complained about the use of the instructions of the King and English law as the basis for striking down legislation.[7] In that case Royal instructions and English law were used as the bases for an exercise of the first form of

6. A. Salley, *supra* note 3, at 47; *see also* McGovney, *supra* note 3, at 49.

7. *See supra* note 3 and accompanying text; A. Salley, *supra* note 3, at 70; *see also* McGovney, *supra* note 3, at 10-11.

judicial review: curbing legislative power because it allegedly trespassed on the prerogatives of another branch—in that case, the court system itself.

Legislation had been passed setting a rule of court under which those claiming that they lived beyond the jurisdiction of a court which had asserted power over them could raise that issue in a variety of ways, including a formal motion or an informal suggestion made without assistance of counsel. In *Dymes* the general court in Charleston refused to follow the statute and ruled that these issues could be raised only by pleading specially to the jurisdiction, a highly technical procedure that would presumably require the assistance of counsel. The clear implication of the case was that the legislation was unconstitutional as a usurpation of the right of the judiciary to govern the technicalities of its own proceedings. What was implicit in the opinion became explicit following a series of exchanges between the judges and Commons: the Commons House passed a resolution that criticized the decision as violating the statute, and the judges asserted that they had the power to strike down legislation that was contrary to English law or Royal instructions.[8]

Early examples of the second form of judicial review, the protection of civil rights against governmental abuse, were based firmly on appeals to natural law, common reason, traditional law, and Magna Charta as loftier forms of law by which others must be gauged.

Ham v. M'Claws[9] concerned the protection of a civil right that would not be recognized in modern times: a property right in a slave. A family had moved from Honduras to South Carolina and brought slaves with them. The importation of slaves into South Carolina under such circumstances was at that time prohibited by statute, and state revenue officers sought to seize the slaves. The court noted that since the statutory change forbidding the importation was of recent origin and could not have been known by the slave owners, it would be arbitrary and capricious to permit the state to confiscate the slaves. A law permitting such forfeiture of property rights would, thus, be invalid. While asserting the right to strike down such a law, the court

8. McGovney, *supra* note 3, at 10-11; *see also* A. SALLEY, *supra* note 3, at 46-47, 65, 70.

9. 1 S.C.L. (1 Bay) 93 (1789).

chose not to exacerbate the relationship between the judicial and legislative branches and held that the legislature did not intend the statute to operate in such an unjust manner. Thus, while firmly underlining its authority to judicially review the validity of legislative enactments, the court exercised that power in a manner that avoided striking down the law. The fact that the impact of the decision on the legislature was so benign made judicial review easier to accept. A precedent was established, however, for use in future cases in which the result would be less favorable to the legislature.

The court based its judicial review authority firmly on common reason and natural law, concepts that would later be used by South Carolina courts to strike down legislation. The court noted:

> It is clear, that statutes passed against the plain and obvious principles of *common right*, and *common reason*, are absolutely null and void, *as far as they are calculated to operate against those principles.* In the present instance, we have an act before us, which, were the strict letter of it applied to the case of the present claimants, would be *evidently* against *common reason.* But we would not do the legislature who passed this act, so much injustice, as to sit here and say that it was their intention to make a forfeiture of property brought in here as this was. We are, therefore, bound to give such a construction to this enacting clause of the act of 1788, as will be consistent with justice, and the dictates of *natural reason*, though contrary to the strict letter of the law; and this construction is, that the legislature never had it in their contemplation to make a forfeiture of the negroes in question, and subject the parties to so heavy a penalty for bringing slaves into the state, under the circumstances and for the purposes, the claimants have proved.[10]

Not only did *Ham v. M'Claws* affirm the right of courts to appraise the bona fides of a statute according to common or natural reason, synonyms for Lockean natural law, but it also established the principle that the potent weapon of judicial review should not be used indiscriminately or in a way that creates strained relations between branches that must cooperate in order for a tripartite system to work. Thus, when possible, a stat-

10. *Id.* at 98 (some emphasis added).

ute should be so construed as to uphold its validity.

Building on the techniques pioneered in *Ham v. M'Claws*, the court in *Bowman v. Middleton*[11] again acted to protect property rights by invoking the aid of natural law, common reason, and Magna Charta. In *Bowman*, however, the court was unable to interpret the statute under review in a manner that would rehabilitate it and, as a result, struck down a law that divested one group of freeholders of their property and lodged it in others. The members of the court declared that they

> were clearly of the opinion, that the plaintiffs could claim no title under the act in question, as it was against *common right*, as well as against magna charta, to take away the freehold of one man and vest it in another, and that, too, to the prejudice of third persons, without any compensation, or even a trial by the jury of the country, to determine the right in question. That the act was, therefore, *ipso facto*, void.[12]

The emphasis upon natural law and the traditional common-law rights of Englishmen as measuring rods for evaluating the propriety of government acts reached its height in *Zylstra v. Corporation of Charleston.*[13] In this instance the government action declared void was not a state-wide statute, but a judgment of the Court of Wardens of Charleston.

The plaintiff in *Zylstra* brought an action in a higher court to prevent the court of wardens from enforcing a fine it had levied against him. The reviewing court agreed with his contention that the fine was illegal. The court rooted its decision partly on a statutory basis, concluding that the court of wardens had levied a fine in an amount beyond its statutory authority. The major thrust of the decision, however, was that the lower court's actions had contravened a still higher law by levying the fine without a jury trial. The court noted:

> [T]he trial by jury is a common law right; *not the creature of the constitution*, but originating in time immemorial; it is the inheritance of every individual citizen, the title to which commenced long before the political existence of this society; and which has been held and used inviolate by our ancestors, in

11. 1 S.C.L. (1 Bay) 252 (1792).
12. *Id.* at 254 (some emphasis added).
13. 1 S.C.L. (1 Bay) 382 (1794).

> succession, from that period to our own time; having never been departed from, except in the instances before mentioned. This right, then, is as much out of the reach of any law as the property of the citizen; and the legislature has no more authority to take it away, than it has to resume a grant of land which has been held for ages.[14]

This decision planted the seeds for a judicial review power of remarkable fertility. The vision of the *Zylstra* court was that there were rights that antedated the constitution and existed independently of it. These were inherited rights of the English speaking peoples, their origins lost in the primeval mists of England. The opinion implies that there is a law superior to the constitution, which is, in most theories of judicial review, considered to be the supreme law.[15] This is a highly subjective approach to judicial review—one that would permit an activist judge to create rights out of his own version of history and natural law.

Judicial review in South Carolina has not developed such breathtaking scope. *Dymes v. Ness*, however, with its emphasis on written, fundamental documents as a basis for assessing the legitimacy of legislation, and the subsequent decisions in *Ham v. M'Claws*, *Bowman v. Middleton*, and *Zylstra v. Corporation of Charleston*, with their emphasis on natural law, Magna Charta, and the traditional rights of Englishmen, did furnish an adequate foundation for a more measured growth of judicial review.

Judicial review is often perceived as an anomaly within a democracy: an alien elitist practice engrafted on popular government. Why should a small group of specialists, who in the federal government and many states are not directly elected by the people, be able to overturn actions of those who, by virtue of having been elected, can more directly express the will of the people? It may be even more difficult to justify when the state constitution explicitly provides that "[a]ll political power is vested in and derived from the people only . . . ."[16] Should the will of the people be frustrated by a small group manipulating highly technical rules?

To create a climate favorable to the use of judicial review as a balance wheel for government, a theory must be developed

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14. *Id.* at 395 (emphasis added).
15. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).
16. S.C. CONST. art. I, § 1.

that reconciles that practice with democracy and with the tripartite form of government of which the judiciary is only one branch, a branch not intended to dominate the others. In South Carolina jurisprudence, this rapprochement between judicial review and democracy is achieved through a theory that the sovereign will of the people expresses itself in three complementary forms. First, the members of the legislature as individuals represent the will of the people within their particular districts. Second, they represent, collectively, the will of the people on a state-wide basis, but this will is expressed from the unique vantage point of the coming together of legislators who were selected not by a state-wide electorate, but by voters in particular districts. Third, the Governor and other executive officers chosen by a state-wide electorate presumably represent the will of the people in the most comprehensive sense.

These are elementary concepts familiar to nearly everyone who has been exposed to a grade school civics course. What is more surprising, however, is that the courts, although judges are not popularly elected, are also considered to manifest the sovereign will of the people. Thus, when a court strikes down legislation or an executive act as unconstitutional, it does not, in theory, stymie the will of the people, but actually effectuates it. This seeming riddle can be understood only if it is realized that, in a judicial review context, the will of the people is not their immediate will expressed at the most recent election, but rather their long-term will embodied in a document of superior law, the constitution, a document designed to provide stability to government that might otherwise change form, chameleon-like, with every shift in public mood.

One of the earliest South Carolina historians, Dr. Ramsey, summarized this theory in his 1809 description of the role of the courts in South Carolina, when he stated:

> South Carolina in the formation of courts of justice in other particulars, has generally copied after the models of corresponding courts in England; but with this difference, the state considered her courts as the *courts of the people in their sovereign capacity*, enforcing justice between separate units of one common mass of sovereignty.[17]

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17. D. RAMSAY, THE HISTORY OF SOUTH CAROLINA, FROM ITS FIRST SETTLEMENT IN 1670, TO THE YEAR 1808, at 129 (1809)(emphasis added).

The courts have used similar language in defending judicial review as the embodiment, rather than the negation, of the will of the people. One opinion that most trenchantly expressed this point is *Wood v. Wood.*[18] In that case the supreme court struck down one of the so-called "stay laws," which postponed the time at which a creditor could enforce his contractual rights against the debtor in court. These laws were passed to afford debtors relief in the times of general financial distress during and after the Civil War. The court struck down these laws as violative of the constitutional provisions forbidding governmental impairment of contractual obligations.[19] In its opinion, the court outlined the theory that judicial review is not the usurpation by one branch of the authority of another nor a nullification of the will of the people, but an expression of the people's will as embodied in more permanent form in the constitution. The court stated:

> The prohibition of any legislation which "impairs the obligation of contracts" is, therefore, when occurring in the Federal as well as in the State Constitution, one of those *restraints to which the people of the State have voluntarily subjected themselves*, and not one imposed on them by either the legislative or judicial department of their government. Such restraints it is presumed, were assented to in the fundamental law, because they were believed to be, in the general result, most conducive to the true interests of the whole people as a political community; they constitute the only peaceful security of the minority—of the weaker and less self-asserting interests—against the violence of those social convulsions occasionally generated by the action of political or commercial forces, which for a time confound the perceptions of right and wrong, and by the urgency of instant pressure tempt the majority to the adoption of unwise and unjust measures of relief . . . . But whatever may have been the grounds and reasons for their introduction into the Constitution, so long as they continue to be there, *they are expressions of the sovereign will in the most solemn form* such expression puts on, and every one engaged in the administration of the Government is under the highest possible obligation to maintain them.[20]

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18. 48 S.C.L. (14 Rich.) 148 (1867).

19. U.S. CONST. art. I, § 10, cl. 1; S.C. CONST. of 1790 art. IX, § 2. Impairment of contractual obligations is currently prohibited by S.C. CONST. art. I, § 4.

20. 48 S.C.L. (14 Rich.) at 150-51 (emphasis added).

Under such doctrines it was theoretically possible for a strong tradition of judicial review to exist within the milieu of a legislatively dominated government. The legislature's enactments and the court's assessment of the constitutional validity of those laws are merely two different manifestations of the sovereign will of the people. The statutes represent the short-term electorally expressed will, and the constitution, as interpreted by the courts, represents the fundamental, more permanent will. This theory made it possible for judicial review to survive within the context of a democratic, legislatively dominated state. Nonetheless, claims that the constitution is the more basic, long-lasting, and, thus, superior expression of popular sovereignty and that the courts are the chosen interpretors of it have remained controversial throughout South Carolina history.

In addition to the development of theories that facilitated the coexistence of judicial review with a legislative-style democracy by dubbing the court's constitutional decisions as expressions of sovereign will, the survival of judicial review beyond the embryonic stage was greatly aided by the circumstances under which it was born. Judicial review is more palatable if it is introduced in a form that does not threaten the dominant element in the government of the time. Once established, it can later be used against that element.

The earliest traces of judicial review in South Carolina are found during the time when South Carolina was still a proprietary colony. During that time, judicial review apparently was used to bolster the position of the already powerful proprietors against the Commons. Naturally, the proprietors did not complain about this addition to their arsenal of weapons against a rambunctious Commons. Commons complained, but the precedent of judicial review had been planted. While no evidence of the precise contents of the cases involved has survived, the controversy is documented by a set of grievances compiled by the commons house in 1693. The ninth grievance complained:

> That Inferior Courts taking upon themselves to try, adjudge & determine the power of Assemblys, or the validity of acts made by them, or of such matters and things as are acted by, or relating to the House of Commons, all which (we humbly conceived,) is only inquireable into and determinable by the

next Succeeding General Assembly.[21]

South Carolina historian Edward McCrady described the impact of the incident in the following manner:

> So it appears that at this early day the courts of Carolina were assuming to pass upon the constitutionality of laws. They were, it is true, now doing so in the interest of the Proprietors as against that of the people; but whatever its present purpose and inspiration, it was an important step taken, though unconsciously, in the direction of liberty, when courts began to inquire into the authority of the laws themselves. Because, however its immediate purpose was to condemn the assembly . . ., the people at that time failed to recognize the advantage which would accrue to them by such a precedent.[22]

Thus, a number of factors favorable to the establishment and survival of judicial review combined to foster a growing tradition of vigorous court appraisal of the legitimacy of the acts of the other branches. The following factors can be identified: (1) the existence of written documents, such as Royal charters and instructions, British statutes, and Magna Charta, that formed the ingredients of a superior law by which the validity of other laws could be gauged; (2) the popularity of natural law theories that contributed yet another component to the higher law that served as a measuring rod for other laws; (3) the development of a theory that made judicial review compatible with a legislatively dominated democracy by asserting that court constitutional decisions were not antithetical to the sovereign will of the people, but were instead an expression of the long-term wishes and interests of the citizenry; and (4) the introduction of judicial review during the time of the Lords Proprietor under circumstances that made it acceptable to the dominant element of the government.

While these doctrines and events may have made judicial review possible, they did not ensure its tranquil existence. Pow-

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21. W. RIVERS, A SKETCH OF THE HISTORY OF SOUTH CAROLINA TO THE CLOSE OF THE PROPRIETARY GOVERNMENT BY THE REVOLUTION OF 1719, at 434 (1856); E. MCCRADY, THE HISTORY OF SOUTH CAROLINA UNDER THE PROPRIETARY GOVERNMENT 1670-1719, at 242 (1897). *See also* The Constitution of South Carolina, lecture by S. J. Simpson, Esq., to South Carolina College, 96-97 (May 7, 1904)(available at South Caroliniana Library, Columbia, S.C.).

22. E. MCCRADY, *supra* note 21, at 244 (footnote omitted).

erful voices were raised against it. In 1798 Governor Charles Pinckney, in a letter to the president and members of the state senate, criticized judicial review as being "new in its principle" and potentially "destructive in its consequences to the Rights of the Legislature."[23]

III. HISTORICAL CONDITIONS AFFECTING THE SUCCESS OF JUDICIAL REVIEW

At times judicial review has led a shaky and uncertain existence. The successful use of judicial review as an instrument to curb alleged abuses of power by other branches has proven to be most vulnerable to direct attack or manipulation in several situations.

First, court decisions striking down the actions of other branches are most likely to be resisted by those branches, and reprisals against the judiciary taken, if the judgments threaten the economic well-being of large segments of the population or of power interests. Second, court decisions invalidating legislative or executive actions often are difficult to enforce when they deal with visceral moral issues and the branch upon which the court decision weighs most heavily has the will and popular support to resist. Third, legislative or executive recalcitrance to judgments that their actions have been unconstitutional is most likely to be successful when those branches possess control over the wherewithal that the judiciary needs to survive or function efficiently. Fourth, resistance to judicial review is more likely to be successful if the intractable parties can appeal to a powerful outside force—one that is not part of the state government and, thus, not subject to state court judicial review. Finally, when the

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23. Letter from Governor Charles Pinckney to President and Gentlemen of the Senate (Nov. 28, 1798)(available at S.C. Archives, Columbia, S.C., Microfilm Governor's Messages, No. 721, frame 614, Roll No. 5). A view similar to that of Governor Pinckney was urged by Chief Justice Michie in Williams v. Watson, when he stated:

> For if this Court has a Power of Judging wither [sic] the Laws which the General Assembly make are Void, or not, they have a Power Superior to the General Assembly, But this is a power which I conceive this Court has not.
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> Judges in England are the proper Expositors of Acts of Parliament when they are made, But I don't remember that they ever Questioned the power of making Laws.

Records of the Provincial Court of Common Pleas, Journal, 1754-63, at 226, 237 (1759)(available at South Carolina Archives, Columbia, S.C.).

voice of judicial review is splintered and fragmented because of disagreement among courts and judges, it may prove to be ineffective. An examination of historical examples will illustrate the weak fissures in the structure of judicial review.

One of the most notorious examples of legislative revenge against an offending court system that dared to strike down a statute for unconstitutionality occurred in the wake of the famous "Test Oath Case," *State ex rel. M'Cready v. Hunt*.[24] That decision was perceived as posing a threat, albeit a somewhat indirect one, to the economic well-being of the entire state, as well as an affront to the dignity of the legislature.

During the late 1820s and early 1830s, the South, while not economically dead, was certainly among the walking wounded as a result of protective tariffs passed by the national Congress. The economic brunt of these measures fell on the South because it was a largely agricultural region that imported a great variety of manufactured goods from abroad. The tariffs made these imports expensive in order to foster New England manufacturing. The southerners viewed the measures as taking money from their pockets to put it in those of New England mill owners.

To counter these tariffs, as well as other, earlier offenses of the federal government, southern political leaders, such as John C. Calhoun, espoused the "nullification doctrine" or its variant the "interposition doctrine." Under these theories, a state could defend itself and its people against what it regarded as unconstitutional or injurious federal government actions by nullifying them or interposing itself between those acts and its people so that they would be neutralized. As part of their implementation of the nullification doctrine, political leaders in South Carolina, first in a convention resolution and later in a statute, promulgated a "Test Oath" whereby South Carolina Militia officers were to swear primary allegiance to South Carolina rather than to the federal union. One officer refused to take the oath and asked in a court suit that his colonel be directed to deliver his commission anyway because the oath requirement was unconstitutional.

The state court of appeals, in a two-to-one decision, agreed, holding that the Test Oath provisions violated article IV of the

24. 20 S.C.L. (2 Hill) 1 (1834).

state constitution[25] and article VI, clause 3 of the federal constitution.[26] Since the state constitutional provision already stipulated the oath to be taken by state officers, the legislature could not replace it with another. Both the constitutionally prescribed state oath and the federal constitutional provision required state officials to swear to uphold the federal constitution. Thus, higher law in both the state and federal constitutions rendered the Test Oath invalid.

Whether or not a military officer took the prescribed Test Oath did not pose a direct economic threat. The *M'Cready* decision, however, became a symbol around which all the emotions of the tariff controversy gathered. The decision seemed to be the final straw, frustrating the state's defense against what it regarded as economic warfare. The *M'Cready* case, together with other occasions on which the court seemed to vindicate federal over state authority, prompted the legislature to retaliate. The South Carolina Court of Appeals was abolished in 1835 and was not reestablished until 1859. The offending judges were reassigned to other courts of equity and law.[27]

Thus, the combination of a controversial decision, which became a symbol of a severe threat to the South Carolina economy, and the control the legislature had over the very existence of the court of appeals resulted in a repudiation of judicial review. It is difficult to envision such a repudiation occurring today. The supreme court, the modern equivalent of the 1835 court of appeals,

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25. This article provided:

> All Persons who shall be chosen or appointed to any office of profit or trust, before entering on the execution thereof shall take the following oath: "I do swear, or affirm, that I am duly qualified, according to the Constitution of this State, to exercise the office to which I have been appointed, and will to the best of my abilities discharge the duties thereof, and preserve, protect, and defend the Constitution of this State, and of the United States."

S.C. CONST. of 1790 art. IV. A virtually identical oath is currently required of all "Members of the General Assembly, and all officers" by S.C. CONST. art. VI, § 5.

26. This clause provides in part:

> The Senators and Representatives before mentioned and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . .

U.S. CONST. art. VI, cl. 3.

27. *See* Senese, *Building the Pyramid: The Growth and Development of the State Court System in Antebellum South Carolina, 1800-1860*, 24 S.C.L. REV. 357, 366-69 (1972); *see also* D. WALLACE, SOUTH CAROLINA, A SHORT HISTORY 405-07 (1951).

is firmly rooted in the state constitution and not subject to statutory abolition.[28] Furthermore, the constitution grants to the chief justice, as head of the unified judicial system, the power to assign judges to particular courts, thus eliminating the opportunity for legislative control over the assignment process, which could be used to retaliate against judges for unpopular decisions. Of course, the legislature still controls the election and reelection of judges.[29]

Another series of cases demonstrating that judicial review is often the prisoner, rather than the master, of powerful economic convulsions occurred during the immediate post-Civil War period. Because of the massive economic dislocations caused by the war, many otherwise credit-worthy people were unable to pay their debts. To avoid innumerable economic failures, the legislature passed a series of "stay laws" that postponed the enforcement of contract debts, either by delaying the effectuation of court judgments by sheriffs or by staying, until later sessions, the time during which the courts could consider actions *ex contractu*. The judicial review fervor of the courts matched the creativity of the Governor and legislature, point by point. Each succeeding new stay law technique was greeted by a court decision that it violated the constitutional provisions prohibiting government actions that impaired contractual obligations.

Governments have some flexibility in varying the means by which contracts already entered into may be enforced, if such legislation is part of general law and achieves judicial reform. When, however, the laws are intended to and do cripple the basic ability of the creditor to enforce the debt, the statutory provision is constitutionally infirm. A significant delay in enforcement may constitute such an impairment.[30]

The court's impairment of contract decisions must have appeared to the other branches of government and the general population to have an "Alice in Wonderland" quality. The economic world was lying in ruins, but the court insisted on following traditional rules of debtor and creditor rights, whether or not

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28. S.C. CONST. art. V, § 1.

29. S.C. CONST. art. V, §§ 3, 8, 13.

30. *See* Wood v. Wood, 48 S.C.L. (14 Rich.) 148 (1867); State v. Carew, 47 S.C.L. (13 Rich.) 498 (1866)(cases interpreting U.S. CONST. art. 1, § 10, S.C. CONST. of 1790, art. 9, § 2, and S.C. CONST. of 1865, art. 9, § 2).

they conformed to reality. To the court it must have seemed that no economy could survive unless creditors had reasonable expectations of stable laws upon which they could base their decisions to lend money. To win the conflict, the executive and legislative branches appealed to an authority beyond the reach of the judicial review power of the South Carolina court system—General Sickles, the federal military commander for South Carolina. During this time of Presidential Reconstruction, United States Army officers often held the pivotal elements of power.

Sickles issued a military fiat that suspended enforcement of judgments obtained between 1860 and 1865; prohibited imprisonment for debt; stopped procedures for the recovery of money on the basis of contracts for the purchase of slaves; halted foreclosure proceedings for twelve months; and created a homestead exemption for debtors. In a letter to Sickles, Governor Orr wrote: "But for your General Order No. 10, I believe an increase of troops would have been necessary to guard the public records and insure the safety of sheriffs and other officials against popular violence."[31]

Thus, the pressure of economic turmoil resulted in the circumvention of the force of judicial review by appeal to a higher authority, one beyond the reach of South Carolina court edicts. Rather than successfully curbing the unconstitutional excesses of other branches, the courts had merely added their voices to the cacophony of those attempting to deal with the economic problems confronting the state.

Judicial review functions most effectively when the courts, as a branch not possessing its own coterie of soldiers or police to enforce its orders, can rely upon the aid of the other branches to effectuate their decisions. When the assistance of the other segments of the tripartite government is not available, either because of the active resistance of the other branches to constitutional decisions or confusion over who legitimately holds power in those branches, court decisions have a less decisive impact. The potency of judicial review may be further reduced if the judiciary does not present a united front to those whom they seek to guide by their decisions.

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31. F. SIMKINS & R. WOODY, SOUTH CAROLINA DURING RECONSTRUCTION 47 (1932); 3 D. WALLACE, THE HISTORY OF SOUTH CAROLINA 240 (1934).

All of these features served to dilute the force of judicial review in the famous Reconstruction era dual government controversy. In that dispute, the South Carolina courts sought to resolve a set of Byzantine issues revolving around two rival groups claiming to be the legitimate South Carolina House of Representatives and two men staking claims to the Governor's office. The difficulty that normally accompanies attempts by the judiciary to resolve disputes in which the hopes of powerful and ambitious men may be frustrated was compounded by a splintering of views between the state and federal judiciary and by fragmented views within the state judiciary itself. A further complicating factor was the presence of federal troops, which tended to encourage one side of the dispute to refuse to acquiesce to state court decisions. A comprehensive account of these events would be beyond the scope of this article, but a brief description of the key elements of judicial review in the controversy is in order.

South Carolina court attempts to prevent the Republican dominated state Board of Canvassers from exceeding their merely ministerial vote tabulating functions by resolving election disputes in favor of Republicans and against Democrats were frustrated by a contrary federal court decision. The state courts had ordered the Board members imprisoned for contempt when they exceeded limitations those courts had placed on their functions. A federal district judge ordered them released on two grounds. First, he concluded that the proper functions of the Board were not merely ministerial, but also included discretionary duties that were of an executive nature and beyond judicial control. Second, since the federal election for President and Congress was conducted simultaneously with the state vote, the judge concluded that the Board was performing federal as well as state functions and held that the former were not subject to state control. The federal judge ruled, therefore, in a habeas corpus proceeding, that the Board members should be discharged from imprisonment.[32]

The judiciary also failed to present a united position in the

32. *See* Case of Electoral College, 8 F. Cas. 427 (C.C.S.C. 1876)(No. 4336). Quite apart from which court was right in its view of the proper role of the Board, the judiciary presented a confusing babel of voices that led the parties to seek other sources for a solution. *See* F. SIMKINS & R. WOODY, *supra* note 31, at 514-37.

gubernatorial phase of the dispute. Wade Hampton, the Democratic favorite of the southern power structure that hoped for a restoration of its political influence after the Reconstruction years in the wilderness, had eked out a narrow win over the Republican incumbent, D.H. Chamberlain, a Harvard trained lawyer from Massachusetts. Both Chamberlain and Hampton declared themselves winners. This hotly contested dispute was inextricably intertwined with an equally rancorous controversy over who composed the legitimate South Carolina House of Representatives because under the 1868 state constitution, contested elections for governor were to be decided by the general assembly.[33]

A Democratic group that had elected William H. Wallace as speaker claimed to be the duly constituted house. Their assertions were challenged by a Republican dominated group that chose E. W. M. Mackey speaker. The Mackey house announced that Chamberlain was Governor, while the Wallace house predictably chose Hampton. Both these issues—which was the legitimate house of representatives and who was the valid claimant to the governorship—were contested in the courts. In *Wallace v. Hayne and Mackey*,[34] the supreme court concluded that the Wallace group composed the true house of representatives and that the court had authority to order the Republican secretary of state to perform certain ministerial duties connected with the transmission of election returns. The court did not, however, rule on whether or not he was the appropriate object for the order in the confused situation then existing. Eventually, both Hampton and Chamberlain were sworn in by their respective supporters, and both began to discharge the gubernatorial functions.

The ultimate determination of who was the true incumbent of the governorship came in a series of cases probing the legitimacy of pardons issued by Hampton and Chamberlain. The first case, *Ex Parte Norris*,[35] concerned the legality of a Hampton pardon. The second, *Ex Parte Smith*,[36] addressed Chamberlain's authority to grant a pardon.

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33. S.C. CONST. of 1868, art. III, § 4.
34. 8 S.C. 367 (1876).
35. 8 S.C. 408 (1877).
36. 8 S.C. 495 (1877).

The supreme court's decision in *Norris* was characterized by unseemly backing and filling and a confusing proliferation of opinions. Initially, with only two of the three justices sitting because of the illness of the chief justice, the court held that Hampton was the true incumbent and that his pardon was, therefore, effective. Clarity was soon replaced by confusion, when Justice Wright reversed course and held that Chamberlain was the legitimate Governor. The state then had one justice, Willard, for Hampton and one, Wright, for Chamberlain. The magisterial voice of judicial review was replaced by the judicial equivalent of a barnyard brawl. It is no wonder that the decision contributed little to the solution of the controversy.

The *Smith* case, concerning the propriety of a Chamberlain pardon, arose after the resignation of Justice Wright. This time the court, again with only two justices sitting, spoke with greater unity and clarity. Both justices, Willard and McIver, held that Hampton was the Governor and that the Chamberlain pardon, therefore, carried no weight. This opinion added much needed legal respectability to Hampton's hold on the office of Governor.

The *Smith* opinion, however, did not prove decisive in resolving the imbroglio. While confusion engendered by the earlier *Norris* decision still lingered, it was the continued presence of federal troops as a prop to Chamberlain's claims that actually kept the controversy alive. The troop withdrawal was finally brought about through political rather than legal channels. President Hayes conducted interviews with both Hampton and Chamberlain and as a result, although himself a Republican, withdrew the federal troops whose presence had lent an artificial glow of legitimacy to Chamberlain's pretentions to the governorship. Only after this withdrawal did Hampton enjoy undisputed tenure as Governor.

Even though the message voiced by judicial review was sometimes confused and uncertain, the courts did on occasion, especially in *Ex Parte Smith*, inject a note of stability and reason, and the flavor of enduring principles, into a dispute that was otherwise characterized by political and even physical power plays. Judicial review failed to be decisive, even on issues that were largely legal, not only because the judiciary spoke with a fragmented voice, but also because in the dual government dispute, as in the stay law controversy, a powerful force outside the scope of state judicial review—federal troops—discouraged one

side to the dispute from yielding to legal solutions. Since the habit of settling constitutional disputes by force rather than litigation had taken root during the Civil War and Reconstruction eras, it was perhaps too much to expect judicial review to exercise a decisive influence.

The effectiveness of judicial review as a means of policing the constitutional propriety of the acts of the other branches can be seriously diluted when the judiciary is confronted by the combination of the following factors: (1) a case that requires a decision in an area affecting visceral moral issues that deeply divide the community; (2) a decision that must be rendered during a time of major, watershed changes in the political system; (3) strong opposition by elements in the other branches to the course taken by the judiciary; and (4) the availability to those branches of means for manipulating the composition of the judiciary and the timing of the consideration of the case. These circumstances coalesced during the Tillman era in the late nineteenth century when the state was deeply divided over the question of whether and how liquor should be sold within the state.

The so-called "Dispensary controversy" arose out of an attempt to effect a compromise in the rancorous dispute between the temperance proponents, who sought to ban all liquor sales within the state, and the open saloon forces.[37] The compromise pushed by Governor Ben Tillman ultimately spawned new forms of bitterness over the enforcement tactics used to implement the compromise. Tillman favored, and lobbied through the legislature, a law that created a state monopoly over liquor sales, which were all to be made through a state Dispensary. The law neither abolished the sale of liquor, as had been sought by temperance advocates, nor permitted private enterprise saloons to sell liquor freely to all comers. Rather, the statute recognized the reality that liquor would inevitably be bought and consumed, but attempted to regulate that use by controlling who purchased the liquor and how much they obtained.

Liquor consumption issues inevitably engender highly charged emotional disputes in Bible Belt states. The explosiveness of the controversy was enhanced by rumors that heavy

37. For a description of the Dispensary dispute, see F. SIMKINS, THE TILLMAN MOVEMENT IN SOUTH CAROLINA 185-202 (1926), D. WALLACE, *supra* note 27, at 624-29 (1951).

handed enforcement techniques would be used. Rumors quickly spread that household searches would be conducted to root out illicit purchases of liquor not sold through the Dispensary. These stories of privacy invading tactics touched off a storm of protest, including rioting. The disorder was compounded when the urban dominated militia balked at enforcing the act and Tillman recruited his own ad hoc rural militia. "Wets" were set against "drys," town against city, pro-Dispensary forces against anti-Dispensary forces. Into this maelstrom entered the court system.

A circuit judge prohibited the Darlington County Board from operating a Dispensary. A newly seated Tillmanite member of the supreme court stayed the circuit court order. This decision was superseded when the supreme court, by a vote of two anti-Tillman judges to one Tillmanite judge, declared the Dispensary law unconstitutional because it created a state-run monopoly.[38]

According to the pristine theory of judicial review, the other branches, even though they might disagree with and even resent a court decision, should at least acquiesce in it. The Tillman era, however, was an unusual time.[39]

Tillman had been swept into office on a wave of popular fervor that, in its uglier manifestations, sought the elimination of black political influence.[40] Even during the Dispensary controversy, the galvanic force of his movement was hard to stop. After effectively marshalling his popular and legislative support and obtaining passage of a new Dispensary law, Tillman set out to manipulate the judicial review process to his own advantage.

Justice McGowan, an anti-Tillman judge who had voted to declare the Dispensary unconstitutional, came up for reelection. Tillman managed to engineer his defeat and his replacement by E.B. Gary, who was more sympathetic to Tillman's policies. To complete the coup, Tillman managed to postpone consideration of the new Dispensary Act's constitutionality until after Mc-

38. *See* McCullough v. Brown, 41 S.C. 220, 19 S.E. 458 (1894).

39. *See* F. SIMKINS, PITCHFORD BEN TILLMAN, SOUTH CAROLINIAN (1944); F. SIMKINS, *supra* note 37.

40. *See* F. SIMKINS, *supra* note 37, at 203-28 (discussing how this was carried out by adoption of a new constitution with highly restrictive franchise provisions).

Gowan's term had expired and he had been replaced by Gary.[41]

Tillman struck at the Achilles heel of judicial review in South Carolina: the reelection process. Before the adoption of the 1868 Constitution,[42] judges enjoyed the security of tenure during good behavior. Since then, however, both supreme court justices and circuit judges have been required to submit themselves periodically to the legislature for reelection. Although opponents may be nominated freely at these elections,[43] the potency of judicial review as a brake upon unconstitutional executive and legislative acts has been maintained; judges who have served competently have been reelected, even though they may have authored controversial opinions.[44]

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41. *See* F. SIMKINS, *supra* note 37, at 196-97; F. SIMKINS, PITCHFORK BEN TILLMAN, SOUTH CAROLINIAN 257-59 (1944); D. WALLACE, *supra* note 27, at 626.

42. *Compare* S.C. CONST. of 1868, art. IV, §§ 1, 2, 13 *with* S.C. CONST. of 1865, art. III, § 1.

43. Currently, under the terms of S.C. CONST. art. V, §§ 3, 9, 13, supreme court justices and circuit judges serve for ten- and six-year terms, respectively.

44. Traditionally, reelection of judges by the house and senate have been short and unopposed affairs. *See* 1984 S.C. SEN. J. 1717; 1982 S.C. SEN. J. 1514; 1980 S.C. SEN. J. 282-83; 1978 S.C. SEN. J. 263-64; 1976 S.C. SEN. J. 671-72; 1974 S.C. SEN. J. 81; 1972 S.C. SEN. J. 46-47; 1970 S.C. SEN. J. 84; 1968 S.C. SEN. J. 31-32; 1966 S.C. SEN. J. 71-76; 1964 S.C. SEN. J. 73-74. A brief dispute over the reelection of an associate justice did occur during a time of dissension between the court and legislature over a decision invalidating the election of sitting legislators to court of appeals judgeships. *See* State *ex rel.* Riley v. Martin, 274 S.C. 106, 117, 262 S.E.2d 404, 409 (1980). In McLeod v. Yonce, 274 S.C. 81, 261 S.E.2d 303 (1979), a statute directing the chief justice to appoint circuit court judges to preside over utility rate cases was held unconstitutional. *See* The State, Jan. 1, 1980, at C1, col. 1. That controversy soon abated, however, and the judge was unanimously reelected. *See* 1980 S.C. SENATE J. 282-83.

With the exception of times of political upheaval such as the Tillman era, judges at both the supreme court and circuit court levels usually have been routinely reelected. A survey of the tenure of supreme court and circuit court judges over a 20 year period, from 1964 to 1984, examined the records in the South Carolina Legislative Manual and produced a number of instructive findings.

First, circuit court judges serve an average of 10 to 15 years on the bench, with 20 years not being uncommon. In fact, within that 20 year period only 3 circuit court judges left the bench under an apparent political cloud. *See* The State, May 10, 1973, at A1, col. 1; The State, Jan. 4, 1980, at C1, col. 2; The State, April 16, 1982, at A16, col. 1.

Second, supreme court justices demonstrate a remarkable continuity in office that transcends periods of extreme strife between the high court and the legislature. The consistent reelection of justices continued even during the 1980s, when a vigorous dispute between the legislative and judicial branches was taking place concerning the power to make rules of court. *See* 1982 S.C. SEN. J. 1914; 1980 S.C. SEN. J. 282-83.

Finally, the survey indicated that when both supreme court and circuit court judges do in fact retire from the bench, the primary reasons are advancing age and failing health rather than a "Tillmanesque" manipulation of the reelection process to satisfy

IV. JUDICIAL REVIEW OF THE EXECUTIVE BRANCH

Because of the strong tradition of legislative dominance that long has been the most salient characteristic of South Carolina government, many of the major tests of the efficacy of judicial review have involved court attempts to curb legislation that breached constitutional limitations. Yet some of the most difficult challenges confronted by South Carolina courts in exercising their judicial review functions have arisen when they were asked to delineate the proper boundaries of executive power. In this area the South Carolina courts have followed a familiar, if difficult to apply, path blazed many years ago by the United States Supreme Court in *Marbury v. Madison*.[45]

In *Marbury* the Supreme Court reasoned that federal courts could issue orders to members of the executive branch, even at the highest levels, under the following guidelines. First, when the official's duties are merely ministerial responsibilities, which he has no choice under law but to carry out, a court order directing him to perform those duties is more appropriate than if he is granted broad discretion under the law to determine whether it is wise to perform the act.

Second, when the official's responsibilities are rooted in statutory law, rather than constitutional provisions, and those statutes concretely specify his duty, an order is more likely to be appropriate than if his power is of constitutional origin and is expressed in terms subject to a variety of interpretations. If the question is a "political" one, expressly committed by the Constitution to an elected official, and depends for its proper execution upon insight into the popular will, it is inappropriate for the courts to interfere except when necessary to protect vital rights.[46]

Third, when the primary impact of executive action is to injure personal civil liberties, such as rights of free expression, property, or due process, the courts have greater incentive to in-

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dominant political forces. Judges are most vulnerable during times of major shifts of political power from one ruling class to another, such as the 1876 return of the native white population to office. Democratic party ascension to power resulted in the ouster, on an election procedure technicality, of most judges elected by Republicans. *See* 3 D. WALLACE, *supra* note 31, at 326 (1934).

45. 5 U.S. (1 Cranch) 137 (1803).

46. *See* Baker v. Carr, 369 U.S. 186 (1962).

terfere with executive functions by the issuance of an order. In mixed circumstances, when a case concerns the exercise of a constitutionally granted executive function over which an official enjoys wide discretion and the exercise of that function injures vital personal liberties, the court must apply a balancing test: The harm to the vigor and efficiency of the executive function that would accompany issuance of the order must be weighed against the degree of harm to civil liberties that would occur without the order.

Finally, an order directed at an executive official may be legitimate if it is necessary to produce information or other vital materials necessary for the judicial or legislative branches to function. Separation of powers does not mean that each branch operates in a watertight compartment. The recalcitrance of one branch cannot be permitted to impede the functions of another. If compliance with an order by an executive official would help another branch discharge a pivotal function, but would also result in damage to the executive agency's performance of its own responsibilities, then a weighing process must again be undertaken.[47]

South Carolina courts have developed a similar formulation. In *State ex rel. Wallace v. Hayne and Mackey*,[48] in the midst of the dual government controversy, the court addressed the question of whether the secretary of state should be subject to an order that directed him to deliver election results to one of the two rival groups claiming to be the true house of representatives so that that body could discharge its constitutional function of determining who was the legitimate winner in the gubernatorial election. The court concluded that it had the authority to issue the order because the duty to deliver the returns to the proper house of representatives was a ministerial one, imposed by laws granting the secretary of state no discretionary decisionmaking power. Thus, the order would not violate the separation of powers doctrine. The exact language of the court is worth quoting at length because it enunciated principles frequently followed by

47. *See* United States v. Nixon, 418 U.S. 683 (1974), Black v. Sheraton Corp. of Am., 237 Fed. R. Serv. 2d (Callaghan) 1490 (D.C. Cir. 1970). *See also* R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 228 (1974); J. UNDERWOOD, A GUIDE TO FEDERAL DISCOVERY RULES 70-83 (2d ed. 1985).

48. 8 S.C. 367 (1876).

South Carolina courts in later years. The court declared:

> Then it is alleged that this Court has not jurisdiction over H. E. Hayne, one of the executive officers of the state, because, according to the limitations of the Constitution, the powers of the government are vested in three distinct bodies, neither one of which can exercise any control over another. That may be conceded to the fullest extent, and yet what would become of the rights of the citizen, vested in him not only by the common law but by the statutes, if there was no control over the executive department of the government? The Treasurer is a part of the executive department, and yet more than one case may be found where this Court has interposed to compel him to perform duties specially required of him by law. And so of the other officers. It is not an encroachment upon the duties of their particular departments. This Court does not undertake to say to them that "we are to perform the duties assigned by law to you." It does no more than say you must perform the specific duties assigned to you by law where you have not the privilege of exercising discretion, that is all. The *mandamus* could not compel the Governor to issue a pardon to a man; that would be an encroachment on his prerogative. But to say that the judicial department of the government, where a citizen avers that his right has been infringed upon by an executive officer, could not interfere, as, for example, when the Legislature had appropriated a certain sum of money to be paid to him, and the Treasurer refuses, is startling. Where would the judiciary be? Where would the other departments be? The judiciary would sink into mere insignificance. The other departments might increase in bulk and wield their powers to such an extent that the whole liberties of the people might be entirely destroyed.[49]

The head of a branch of government can remain separate and independent only so long as he can exercise managerial control over the lower officials and employees who must carry out his policies. Thus, one of the most persistent problems in walking the tightrope of judicial review of executive actions is maintaining the proper balance between meddlesome interference with another branch's personnel affairs and abdication of a responsibility to see that constitutional limitations on executive

49. *Id.* at 375-76. *See also* Foster v. Taylor, 210 S.C. 324, 42 S.E.2d 531 (1947)(use of mandamus to compel county to pay judge's salary).

power over personnel matters are not breached.

Achieving this is an especially difficult task in South Carolina, a state that anomolously grants "supreme executive authority" to the governor,[50] but simultaneously permits the existence of a variety of executive agencies, many of which are independent or quasi-independent of the governor's discretion. Application of the *Marbury-Wallace* standards to gubernatorial personnel actions, especially the removal of officials, requires careful scrutiny of the facts of each case to determine the degree of discretionary control that statutory or constitutional law grants the Governor over the official in question.

The basic guidelines for conducting a judicial examination of gubernatorial removal of key personnel were set in *State ex rel. Rawlinson v. Ansel.*[51] In that case the court had under consideration the Governor's removal of members of the Dispensary Board. The ousted officials claimed that they had been removed by the Governor in violation of their due process rights because they had received only a summary hearing at which evidence had been illegally admitted. They further alleged that they had been given insufficient opportunity to confront witnesses against them. The deposed officials sought a writ of certiorari for review of their firing.

The court used the occasion to discuss the use of a variety of writs, especially mandamus, against the executive department in personnel matters. The court concluded that no writ could issue against the Governor in the instant case because he had acted well within the scope of his statutory and constitutional authority.

Writs of mandamus may be issued only when the official is under a statutory or constitutional duty that he has no choice but to perform and the nature, scope, and steps of that duty are clearly delineated. Because the constitution and augmenting statutory laws give the Governor great responsibility, if not always power to match it, and his duties touch so many interacting facets of governmental activities, it is especially difficult to determine which of his duties are ministerial and which are discretionary. Duty is mixed with duty in a fashion difficult to separate. Thus, the issuance of writs of mandamus directed at the

50. S.C. CONST. art. IV, § 1.
51. 76 S.C. 395, 57 S.E. 185 (1907).

Governor is seldom appropriate.

No writ of any variety could be appropriately issued in the *Ansel* case because statutes had given the Governor sweeping removal power over members of the Dispensary Board in an effort to clean up the corruption prone agency. Under the statutory authority granted him, he was not required to conduct any hearing at all, much less one of a plenary, trial nature. The Board members were political appointees, who assumed their positions with the knowledge that they were subject to the Governor's summary dismissal rights. Thus, they could not reasonably have expected to obtain property rights in their positions. All of these factors, together with the inherent need of the Governor, as chief law enforcement officer, for power to discipline state officials who were not acting in accordance with the law, made an order interfering with his prerogatives highly inappropriate.

When the Governor is not acting under a constitutional grant of independent power, but rather under statutory power that he is directed to share with the legislature, and he attempts to appropriate the entire power to himself, the courts may issue the appropriate orders to restrain this abuse of power. The authority of the courts to issue such directives to the executive is especially clear when gubernatorial action injures personal liberties of the ousted officials or the prerogatives of other branches.

One of the most dramatic examples of the effective use of judicial review power under such circumstances occurred in a series of cases arising out of a long, bitter struggle between Governor Olin Johnston and the South Carolina Highway Commission in the mid-1930s.[52] Chief Highway Commissioner Ben Sawyer and his colleagues wished to pursue a vigorous policy of paved highway construction to replace the narrow, rutted roads with modern transportation facilities. Johnston, an ardent populist, considered this too rich a diet to be pursued by a poor state in the midst of the depression. He especially opposed an expensive set of bonds that the Commission wanted issued to pay for the construction. He also wanted to make motoring less an elitist privilege and more a pastime available to all. After promising

52. *See* Dacus v. Johnston, 180 S.C. 329, 185 S.E. 491 (1936); Hearon v. Calus, 178 S.C. 381, 183 S.E. 13 (1935), Heyward v. Long, 178 S.C. 351, 183 S.E. 145 (1935). *See generally* J. HUSS, SENATOR FOR THE SOUTH, A BIOGRAPHY OF OLIN D. JOHNSTON 64-72 (1961).

the electorate that they would soon be able to get automobile license tags for only three dollars, he became frustrated when the Commission did not share his enthusiasm for this project. He then attempted, unsuccessfully, to have the recalcitrant Commissioners removed and replaced by his own nominees.

The senate, which had advice and consent authority over his appointees, was uncooperative. Unwilling to endure the elaborate for-cause hearing procedure that was a prerequisite for removal, Johnston decided to take more direct action. Under his direction, armed elements of the National Guard seized Highway Commission offices and erected machine guns and guard posts in the hallways. He then ejected the incumbent Commissioners and installed his own men. His agents took possession of the Highway Commission bank accounts and blocked the attempts by the sitting Commissioners to perform their duties. He justified these actions by complaining that corruption was rife throughout the department and that funds were being used for unauthorized purposes. When the Commissioners resisted his attempts to correct these problems, he declared them to be in insurrection against the lawfully constituted government. They had, he claimed, formed a rump faction government of their own.

The incumbent Commissioners responded with a series of court actions that sought to prevent the Governor and his agents from interfering with the exercise of their offices and from exercising any control over Commission funds.[53] The court concluded that the Governor's power to declare an insurrection was a broad constitutionally rooted power requiring expertise different from that of a court. Thus, the Governor's edict that a state of insurrection existed could not be questioned in court. The techniques used to enforce that declaration, however, could be subject to judicial orders curbing gubernatorial abuses of power that encroached upon the authority of other branches and upon civil liberties. Since the Governor was required by statute to conduct hearings prior to removing Commissioners and had not done so, he had interfered with the Commissioner's reasonable expectations that they would be able to continue in their positions and perform their jobs.[54]

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53. *See* cases cited *supra* note 53.

54. Hearon v. Calus, 178 S.C. 381, 397-415, 183 S.E. 13, 19-27 (1935).

In terms of modern day due process rights, Governor Johnston had interfered with their property rights in their jobs. Unlike the members of the Dispensary Board in *Ansel*, who had accepted their jobs with knowledge of the Governor's right to summarily oust them, these officials could reasonably have expected to continue as Commissioners unless the appropriate charges were brought and hearings conducted. The court's explanation was not quite so elaborate, or cast in such contemporary terminology, but that, in essence, was its holding with regard to gubernatorial interference with personal rights.

The governor had also trespassed on the domain of the legislative branch by appropriating to himself appointive power that ought to have been shared with the senate in its advice and consent capacity. The court concluded that unless it could control such power usurpations by the Governor, the doctrines of separation of powers and personal civil liberties would fall prey to the caprice and whim of the Governor.[55]

These were not cases in which court authority to conduct judicial review was based on the need to direct an executive to perform clearly and narrowly defined ministerial duties that he was obligated to carry out. Nor were these cases in which the executive had discharged such duties, but had deviated from the specified manner in which they were to be performed. These were cases in which the Governor, although acting in areas in which he enjoyed some discretion, had leaped far beyond the outer boundaries of his authority and transgressed the personal rights of the Commissioners and the prerogatives of another branch.

The broad legislative backing found for the Governor's action in *Ansel* was absent. Unlike the stay law and dual government controversies, judicial review was effective during the Highway Commission disputes not only because the Governor had clearly overstepped the bounds of his authority when he used military might in a situation where there had been no outbreak of violence, but also because the judiciary presented a relatively united front, while the political branches were fragmented. Many legislators opposed Johnston's actions, and he

55. Dacus v. Johnston, 180 S.C. 329, 338, 185 S.E. 491, 495 (1936); Hearon v. Calus, 178 S.C. 381, 399-400, 183 S.E. 13, 20-21 (1935); Heyward v. Long 178 S.C. 351, 376-79, 183 S.E. 145, 156-57 (1935).

had few allies. He did attempt to appeal to a higher authority, beyond the scope of judicial review: he went to the people in the next election and demanded a pro-Johnston, anti-Commission legislature. Although he met with some initial success in the elections for the house of representatives, his plans for marshalling popular and legislative support behind his position went awry when an opponent, Sol Blatt, was elected speaker of the house.[56]

V. Security of Position and Salary: A Predicate for Effective Judicial Review

In order for judicial review to succeed in curbing abuses of power committed by branches of the government with more coercive resources and, often, a wider public following, the courts must operate from a position of security. Disastrous consequences to the stature of judicial review may quickly follow decisions invalidating legislative and executive action if those branches can respond with effective retaliatory measures, such as the abolition of the offending court that occurred in *State ex. rel. M'Cready v. Hunt*,[57] the "Test Oath Case."

Article V, section 16 of the state constitution is a key provision designed to insure the independence of the judiciary. This section prohibits the salaries of judges from being diminished during the terms for which they were elected. In the absence of such a measure, a tacit threat of financial revenge, which could be made real, might hover over the judiciary whenever it evaluated the constitutionality of acts of other branches involved in the budget process. Fertile occasions for such threats might occur during times of economic difficulty. When states become economically strapped and want to retrench all around, cases may arise asking the judiciary to rule on economic emergency measures, which often go to the outer limits of constitutional power. It is the possibility of the use of financial weapons to encroach upon judicial independence that makes the decision of *Grimball v. Beattie*[58] so important in securing the integrity of judicial review.

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56. *See* J. Huss, *supra* note 53, at 64-72.
57. 20 S.C.L. (2 Hill) 1 (1834); *see supra* notes 24-29 and accompanying text.
58. 174 S.C. 422, 177 S.E. 668 (1934).

In the midst of the depression of the 1930s, South Carolina was attempting to follow Spartan fiscal policies to avoid overcommitment in a time of scarce money. As part of these retrenchment measures, the legislature declined to appropriate money for the full salaries of the judiciary. Although there is no evidence in the opinion that the salary reduction was any form of retaliation for unpopular decisions, it was a clear violation of the constitutional guarantee that there be no reduction of judges' salaries during the term for which they were elected. Judges instituted suit against the state treasurer and comptroller and sought an order directing those officials to pay full salaries to the judges. All of the supreme court justices disqualified themselves as interested parties, and a special court of distinguished lawyers was appointed by the Governor to hear the case.[59]

The special court concluded that the salary reduction violated not only the explicit provisions of article V, section 9 (now article V, section 16), but also the more general separation of powers doctrine because it threatened the independence of the judiciary. The court noted that the state judges must not only resolve conflicts between private individuals, but also between the various branches of government regarding their proper spheres of power and between government agencies and individuals concerning alleged encroachments upon civil rights. If the judges could be manipulated by any party to such disputes, the entire system would crumble. An independent judiciary was the balance wheel of society.

An order to the state treasurer and comptroller to grant the judges their full salaries was issued. The court regarded this as merely a directive to perform ministerial duties that did not trespass in any manner on the discretionary functions of those officers. The appropriations acts in force at the time the sitting judges took office, together with the constitutional measures outlawing judicial salary reductions effective during judges' term of office, combined to create a self-executing spending statute. The special judges were not creating a new fiscal policy; they were merely ordering compliance with one already in place. This

59. S.C. CONST. of 1895, art. V, § 6. Disqualification of justices and appointment of special judges is currently authorized by S.C. CONST. art. V, § 19 and S.C. CODE ANN. §§ 14-1-130, 14-3-130 (1976).

posed no real difficulty for the executive officers since, despite the economic hard times, a surplus existed in the treasury. Perhaps the *Grimball* opinion gave the judiciary a strong enough sense of security to enable it to issue controversial constitutional rulings in the tumultuous atmosphere of the Highway Commission dispute.

VI. CONCLUSION

In the final analysis, no structure of rules can insure the success of judicial review as a restraint on unconstitutional abuse of government power unless that instrument is used cautiously and with restraint. The political world would not long tolerate a small, nonpopularly elected group of specialists who promiscuously interfered with the functions of other branches and arrogated to themselves broad policy making power. Thus, as the supreme court noted in *Crow v. McAlpine*,[60]

> This Court has repeatedly held that all reasonable doubt must be resolved in favor of the constitutionality of the act. If a constitutional construction of a statute is possible, that construction should be followed in lieu of an unconstitutional construction.[61]

If the court must use restraint in deciding whether or not to strike down statutes, the end product of the legislative process, it must be especially cautious in interfering with the inner working of the legislative and executive branches before their deliberative processes are complete and some injurious action has resulted. Each branch must be given leeway to correct its own mistakes before judicial interference occurs.[62]

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60. 277 S.C. 240, 285 S.E.2d 355 (1981).

61. *Id.* at 242, 285 S.E.2d at 356 (quoting Casey v. South Carolina State Hous. Auth., 264 S.C. 303, 312-13, 215 S.E.2d 184, 187 (1975)).

62. Chester County Hosp. and Nursing Center v. Martin, 281 S.C. 25, 314 S.E.2d 308 (1984).