The Course of Judicial Review in the State of Ohio. The first constitution of Ohio was framed in 1802, and was not submitted to popular vote for approval. Fashioned by followers of Thomas Jefferson, the new government had as its cardinal principle the doctrine of legislative supremacy. With no power over patronage, and with the veto power denied to him as well, the governor was but a "shadow executive." Since the judges were appointed by the legislature for the limited term of seven years, the judiciary also played a subordinate rôle.

Although the fundamental character of the constitution was conceded, it was a question in the mind of many as to who should determine the nature and scope of that instrument. To ardent Jeffersonians, this matter presented little difficulty; in their judgment, the legislature was fully competent to settle any question that might arise as to the nature of the constitution.

The first legislature under the new constitution met in 1803. Many members of the body had served in the constitutional convention of 1802; in fact, one-third of the members of the convention were elected to the first General Assembly of the state, and the leaders of the convention became leaders in the legislature as well. These men were not greatly impressed with the idea that their work in the convention in one year should control them in the legislature the next year.

The Federalist sympathizers in this first legislature, who were in the minority, had an altogether different idea as to the proper merits of the opposing principles of legislative supremacy and judicial review. Before the year was over, this group was to receive considerable encouragement from the Federalist chief justice of the United States Supreme Court, John Marshall, who, in the case of Marbury v. Madison, asserted the proposition that a constitution is fundamental law, that legislative and executive powers are limited by this fundamental law,

1 Journal of the Senate of the State of Ohio: First Session of the Legislature, held under the Constitution of the State, A.D. 1803, and of the United States the Twenty-seventh (Chillicothe, 1803), I, pp. 1-110.

2 1 Cranch 137 (1803).
and that the courts, as interpreters of the law, must preserve and defend the constitution. This principle had already been adopted in a number of states. Stimulated by Marshall's opinion, it was shortly thereafter accepted in many more. Ohio may be included in this latter group. Her first case of judicial review was in 1806.

In that year, Calvin Pease, sitting as presiding judge of the common pleas court in Belmont and Jefferson counties, was called upon to decide cases arising under a statute passed by the legislature in 1805 relating to justices of the peace. In deciding these cases, Judge Pease held certain sections of the statute to be in conflict with the constitution of the United States and of the state of Ohio, and therefore null and void. The decisions by Judge Pease aroused great opposition. When the legislature convened in 1806, the question of bringing articles of impeachment was strongly considered. After extended deliberation, however, the matter was dropped.

In August, 1807, the same law that had evoked the Pease decision came before the supreme court of Ohio in the case of Rutherford v. McFaddon. In this proceeding, the court for the first time asserted the right of invalidating an act of the legislature on the ground that it was unconstitutional. The judges sitting in this case contended that judicial review was a natural outgrowth of two principles—the separation

The opinion of Marshall did not lay down a doctrine that was new. The principle that an act of legislation contrary to the law under which a legislative body is organized is invalid was familiar in this country long before the Constitution was adopted. Before the Revolution, colonial legislation was frequently subjected to review by the Privy Council, and both before and after the adoption of the federal Constitution, state courts in a number of states had held state statutes in conflict with state constitutions to be invalid. Arthur M. Schlesinger, "Colonial Appeals to the Privy Council," *Political Science Quarterly*, XVIII, 279, 433. Cf. Charles G. Haines, *The American Doctrine of Judicial Supremacy*; Charles Warren, *The Supreme Court in United States History*.

By 1818, the power of the courts to pass upon the constitutionality of legislation was recognized in every state but Rhode Island, and the courts were largely following the lead of Marshall in proclaiming the independence of the judicial department.

The doctrine of judicial review, as stated by Justice Woodbury of New Hampshire in 1818, came to be the rule adopted in every state. See Merrill v. Sherburne, 1 N. H. 204.


The reported cases of the supreme court of Ohio do not antedate 1823, the year when the sessions en banc were inaugurated. However, the opinion in the case of Rutherford v. McFaddon was printed in the *Scioto Gazette* and reprinted in the *Liberty Hall* and *Cincinnati Mercury*, Nov. 3 and 10, 1807. See also *House Journal of the Seventh General Assembly*, 123.
tion of powers and the recognition of a written constitution as the supreme law.\textsuperscript{8}

The next legislature met in December, 1807. Headed by Thomas Worthington, an investigating committee reported a resolution "that the judges of this state are not authorized by the constitution to set aside any act of the legislature by declaring the law unconstitutional or null and void."\textsuperscript{9} This resolution was approved by the House, but did not pass the Senate. In 1808, the court question was perhaps the chief issue between Samuel Huntington, the chief justice, and Thomas Worthington, rival candidates for governor. Huntington, with Federalist support, was elected. The anti-court Republicans, however, were in the majority in the General Assembly, and reported articles of impeachment against Judges Tod and Pease.\textsuperscript{10} They, however, failed by one vote to secure the two-thirds necessary for removal.\textsuperscript{11}

The year 1809 brought an attack from another angle. By provision of the constitution of 1802, many appointive offices, including judgeships, were for terms of seven years. The original commissions were issued in the spring of 1803. It was generally understood that a number of vacancies were to be filled by the legislature in 1810. But when the legislature of 1809-10 met, a resolution was passed declaring that the constitution was to be interpreted as vacating all seven-year appointments in 1810, not excepting cases in which the current incumbent had been appointed to fill a vacancy caused by the death or resignation of the original holder.\textsuperscript{12} By use of this provision, the anti-court group, through its majorities in both houses, was able to reconstruct

\textsuperscript{8} Judge Sprigg did not sit in the case, and the opinion was given by Judges Huntington and Tod. The opinion of Chief Justice Huntington sets forth most completely the position of the court, with Judge Tod supporting the position. It is of interest to note that Calvin Pease, George Tod, and Samuel Huntington were all natives of Connecticut. They practiced law in Connecticut for a time and were admitted to the Ohio bar at the same time. Judge Tod had been a student at Judge Reeves' famous law school at Litchfield, Connecticut.

\textsuperscript{9} Liberty Hall, January 11, 1808. House Journal of the Sixth General Assembly, 43.

\textsuperscript{10} House Journal of the Seventh General Assembly.

\textsuperscript{11} In using the impeachment power as a weapon against the judiciary, the Ohio anti-court group followed the tactics of Jeffersonians in the national government. Since most state courts were under legislative control, the impeachment process was not employed. In Pennsylvania, however, the Jeffersonians used it.

\textsuperscript{12} The term of Judge Pease, who was appointed in 1803, would have terminated in 1810 in any event; but Judge Tod had been appointed in 1806. Under the previous interpretation, the latter would have continued in office until 1813. Nevertheless, he was removed.
the judicial personnel of the state. This action was not, however, without serious consequences.

The 'sweeping resolution,' as it was called, caused more excitement in Ohio than any other political event since the Aaron Burr conspiracy. The division of opinion in the Jeffersonian ranks produced by the impeachment of the judges in 1808 was widened further, and many of the moderate Jeffersonians were driven into the ranks of the Federalists. To offset this movement, Tammany societies were organized in Ohio to strengthen the party; and in a short time, the Jeffersonians were divided into definite Tammany and anti-Tammany groups. The matter rested there until these groups were finally reunited, when winning the war of 1812 became the overshadowing problem. With that problem before the country, the struggle over the courts subsided and the doctrine of judicial review gained recognition as a fundamental principle of government.

Although the power of judicial review was quite generally accepted after this period of conflict, it was a long time before it came to be exercised extensively. The supreme court was content to move slowly at first. In pursuing this careful policy, it followed the example of the Supreme Court of the United States and the high courts of other jurisdictions. Cases in which it assumed the power to act usually concerned matters involving the constitutional rights of the court itself. The case of Ester Bingham v. Amos Miller, decided in 1848, is in point.

The question presented here was the legislature's power to grant divorces. By special act, on March 3, 1843, the legislature granted Ralph

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13 As a result of the resolution, the three supreme court judges, three president judges of the common pleas courts, all the associate judges of that court (more than a hundred in number), and all of the justices of the peace, were removed at one fell swoop. Rufus King, Ohio, First Fruit of the Ordinance of 1787 (1888), p. 314.
15 For a complete and interesting account of the struggle in Ohio over judicial review, see William T. Utter, "Judicial Review in Early Ohio," Mississippi Valley Historical Review, Vol. XIV, pp. 3-26.
17 For a list of laws invalidated by the early courts, see Charles G. Haines, The American Doctrine of Judicial Supremacy, p. 288.
Bingham a divorce from his wife Ester.\textsuperscript{19} The defendant denied the legislature's power to grant such a divorce. She was sustained in this contention by the supreme court, which declared that the matter of divorce was by its very nature judicial, and, as such, not within the jurisdiction of the legislature.\textsuperscript{20}

This case presents the type of problem which prompted the court to exercise judicial review. The power of the courts is involved. The supreme court will assert its power to assist the cause of the judiciary. In this particular case, it would seem that it is bent not only on protecting the existing powers of the judiciary, but on actually adding to them.\textsuperscript{21}

Up to this time, however, critics of the judicial power had small ground for complaint. As a matter of fact, during the first half-century of statehood, there were only seven officially reported cases in which the Ohio supreme court declared acts of the state legislature invalid, in whole or in part, on constitutional grounds. Such restraint could not last forever.

In 1851, a new constitution was adopted which provided, among other things, for popular election of judges and stricter constitutional limitations. Encouraged to use their power more freely, the courts pro-

\textsuperscript{19} 41 Ohio Laws. Nineteen divorces were granted at this session by the General Assembly.

\textsuperscript{20} In arriving at this decision, Judge Reed did more than question the legislature's power to grant divorces. He boldly maintained not only that the legislature had assumed power not delegated to it, but that it had usurped powers expressly conferred by the constitution upon the courts. This view becomes one of more interest when compared with the statement made twenty years earlier by Judge Hitchcock in the case of Heirs of Ludlow v. Johnson, 3 Ohio 563 (1828). In that case, Judge Hitchcock held that the constitution actually conferred no specific jurisdiction upon the courts, but merely made them capable of receiving such jurisdiction at the hands of the legislature. This is an altogether different view from the one held by Judge Reed. A close examination of the books reveals that changes in the practices of the court between 1828 and 1848 agree quite closely with the change in the tone of the above assertions. This trend in Ohio is in keeping with a general movement taking place in our state governments during that period, in which a gradual readjustment between the legislative and judicial branches was being effected. See Arthur N. Holcombe, \textit{State Government} (1926), pp. 109-143.\textsuperscript{19}

\textsuperscript{21} The constitution of 1802 made no mention of where the power to grant divorces rested, and in practice the legislature had granted divorces from the beginning.
ceeded to do so.\textsuperscript{22} Since 1851, it is safe to say, the supreme court has declared acts of the legislature invalid in no less than 200 cases.\textsuperscript{23}

A number of factors have contributed to this change of attitude. In the first place, there was an increase in the volume of state legislation. Then, too, a more favorable attitude toward the courts had developed. The legislature was blamed for several sad experiences encountered during the thirties and forties, when the state was going through a period of inflation. Losing confidence in the legislature, the people looked hopefully toward the judiciary. This attitude was not peculiar to Ohio.\textsuperscript{24} It was apparent in all of the states. As a matter of fact, the Civil War period may be said to introduce a new era in many respects in American judicial history. From that time on, judicial power expanded rapidly the country over.\textsuperscript{25} In Ohio, this activity increased rather than diminished with the passage of years.\textsuperscript{26}

During the latter part of the nineteenth century, the agricultural economy of early Ohio gave way to a new urban, industrial order. A great mass of legislation was passed to meet the changing needs of the state. It was a trying time for the courts. Old landmarks lost their significance. Much of this new legislation demanded by an industrial society collided with the traditional constitutional and legal principles developed in an agricultural society. When, because of modern condi-

\textsuperscript{22} See Joseph H. Hixson, \textit{The Judicial Veto in Ohio} (master's thesis, Ohio State University, 1922), p. 23.

\textsuperscript{23} Mr. Jackson H. Ralston, who has compiled a list of state laws held unconstitutional by state courts from 1858 to 1916, lists Ohio as having 132 laws declared unconstitutional up to 1916. Mr. Ralston makes no pretense to absolute accuracy. See \textit{Study and Report for the American Federation of Labor upon Judicial Control over Legislatures as to Constitutional Questions} (1923), p. 91.

\textsuperscript{24} Between 1790 and 1850, the United States Supreme Court held 32 measures unconstitutional; between 1850 and 1911, some 247.

\textsuperscript{25} Whereas laws had formerly been invalidated by the courts to protect their own constitutional rights, they were now invalidated because of defective legislative procedure, or because of conflict with the "due process of law" clause of the federal constitution, or its equivalent in the state constitution. The growing complexity of state constitutions and the increasing number of limitations also encouraged judicial supervision over statutory enactments. Moreover, there arose a tendency in many quarters to construe constitutional limitations as limiting the legislative powers very strictly. See \textit{Ohio Constitution}, Sec. I, Art. 20.

\textsuperscript{26} It was the same elsewhere. In the brief span between 1903 and 1908, 400 state laws were held invalid by the courts, state and federal. Charles G. Haines, \textit{The American Doctrine of Judicial Supremacy}, p. 307. All but 28 of these vetoes were by state courts.
tions, a new policy such as a compulsory compensation law was adopted, there was a fair possibility that it would be held invalid by the courts as in violation of the state constitution. An amendment to the constitution was the only method of relief in such cases. When Ohio amended its constitution in 1912, it included a provision authorizing legislation with regard to mechanics' liens; a provision authorizing legislation fixing and providing for the comfort, health, safety, and general welfare of employees; a provision authorizing workmen's compensation; and a provision prescribing an eight-hour day on public work.27

The members of the constitutional convention of 1912 were not content to protect these newer types of legislation by constitutional safeguards. They were determined to limit the powers of the court to interfere with such legislation. This sentiment was encouraged by Theodore Roosevelt, who made a speech before the convention in which he advocated a system of control through the recall of judicial decisions.28 Although generally sympathetic with the Roosevelt point of view, the convention was not prepared to accept his plan.29 As a matter of fact, it had great difficulty in reaching an agreement on any of the plans proposed. One member suggested an amendment providing that the supreme court should have no right whatever to pass upon the constitutionality of legislative acts. Each department should be held responsible for its own acts, and should be prohibited from overlapping

`Unfavorable judicial decisions were responsible for the amendments dealing with mechanics' liens and hours of labor on public work. Laws concerning these matters had been annulled as contravening the broad guarantees of the Ohio constitution which compare to the "due process" clause in other constitutions. The other two amendments were added to prevent possible judicial annulment in the future. Two of the amendments expressly provided that no other provision of the constitution should restrain or limit the powers so granted. See Palmer v. Tingle, 55 Ohio St. 423 (1896); Cleveland v. Clement Bros. Cons. Co., 67 Ohio St. 197 (1902); Steele, Hopkins, and Meredith v. Miller, 92 Ohio St. 115 (1915) [bulk sales law], cited in Walter F. Dodd, State Government, pp. 125.


`In Colorado, Roosevelt's proposal was adopted during the same year in the form of a constitutional amendment authorizing the people, by the same procedure as that provided for the direct initiative, to order the enforcement of a statute which had been duly enacted by the legislature and approved by the governor, but held invalid by the Supreme Court. The provision was held unconstitutional by the state supreme court. People v. Western Union Telegraph Co., 70 Colo. 90 (1921); People v. Max, 70 Colo. 100 (1921).
or overriding the work of another department. The initiative and referendum provided for in the constitution should be used to pass upon the constitutionality of legislative acts. This member was vigorously opposed to any scheme whereby unconstitutionality should be determined by any other power than the people. This plan was rejected, however, as were several others.

After much deliberation, a proposal was adopted by the convention which provided that "no law should be held unconstitutional without the concurrence of all but one of the judges, except in the affirmance of the judgment of the court of appeals declaring a law unconstitutional." The supreme court was further limited by making the court of appeals very largely a court of final appeals. However, in cases of public or general interest, the supreme court might, within such limitation of time as might be prescribed by law, direct any court of appeals to certify its record to the supreme court, and might renew and affirm, modify or reverse, the judgment of the court of appeals. This plan was accepted by the people of Ohio, and is in effect today.

Unfortunately, the plan of permitting a minority of the court to control has not proved altogether satisfactory. The supreme court has expressed its impatience with this limitation on several occasions, and with very good reasons. Due to the strictness of the requirement, the majority of the court is forced to permit decisions to be handed down which are contrary to its convictions; or members of the minority are

In 1914, a similar plan was submitted to the people of Minnesota. It was approved by a majority of those voting on it, but failed of adoption because of the failure of a majority of all those attending the polls to vote for it, as required by the state constitution. In 1918, a constitutional amendment was adopted in North Dakota providing that "in no case shall any legislative enactment or law of the state of North Dakota be declared unconstitutional unless at least four of the judges shall so decide." Since North Dakota has only five judges, this is much the same as the Ohio provision. In 1920, Nebraska adopted a constitutional amendment requiring the concurrence of five of its seven judges. See R. E. Cushman, "Constitutional Decisions by a Bare Majority of the Court," *Michigan Law Review*, XIX, 771-803 (1921).

One of the delegates made an examination of cases in the Ohio State Reports from 63 Ohio State to 84 Ohio State, with the purpose of finding the number of cases where individual interest came in conflict with a corporation interest, and where the individual received a favorable decision in the circuit court, only to have this decision reversed in favor of the corporation in the supreme court. He found thirty-three such cases. *Proceedings and Debates, Ohio Constitutional Convention, 1912*, Vol. II, pp. 1092-1101.
forced to concur with the majority to make the real opinion of the court effective. Since the adoption of the constitutional provision, there have been nine clear cases of minority control of the decision of the court. Other cases might be mentioned, but without complete assurance. Cases of minority control seem to be on the increase. A survey of the supreme court reports shows one such case in 1918, one each in 1923 and 1925, four in 1927, and two in 1929.

In four cases of minority control, the action of the court was determined by three judges; while in five cases, two members of the court controlled its action. In the course of a recent decision of this sort, the court said: "While members of the court deplore such a constitutional provision, one which permits judicial control over grave constitutional questions by a minority vote, the fault lies, not in the court, but in the constitutional provision which produces such a result."

In 1930, a case came before the United States Supreme Court testing the validity of this provision. It was attacked as violating those sections of the federal constitution which provide for due process of law and equal protection of the law. It was also argued that the provision denied the state of Ohio a republican form of government as guaranteed by the federal constitution. The Supreme Court swept

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This discussion is based on a study made by Mr. W. Rolland Maddox, of the University of Michigan. See W. Rolland Maddox, "Minority Control of Court Decisions in Ohio," in this Review, Vol. XXIV, pp. 638-648 (Aug., 1930)

Barker et al. County Commissioners v. City of Akron, 98 Ohio St. 446, and 121 N.E. 46 (April 2, 1918); DeWitt v. State ex rel Crabbe, Attorney General, 108 Ohio St. 513, and 141 N.E. L51 (Nov. 13, 1923); City of East Cleveland v. Board of Education, 112 Ohio St. 607, and 148 N.E. 350 (May 26, 1925); Fullwood v. City of Canton, 116 Ohio St. 732, and 158 N.E. 171 (March 29, 1927); Myers v. Copelan, Chief of Police et al., 117 Ohio St. 622, and 160 N.E. 855 (Oct. 26, 1927); State ex rel. Jones v. Zangerle, Auditor, 117 Ohio St. 507, and 159 N.E. 564 (Dec. 21, 1927); State ex rel. Williams v. Industrial Commission of Ohio, 116 Ohio St. 45, and 158 N.E. 101 (March 8, 1927); State ex rel. Bryant v. Akron Metropolitan Park District for Summit County et al. 166 N.E. 407 (Mar. 27, 1929); Shook et al. v. Mahoning Valley Sanitary District et al., 166 N.E. 415 (March 27, 1929).


Bryant v. Akron Metropolitan Park District, 281 U.S. 74.
aside all of these contentions. It held that the right of appeal to a higher tribunal is not required by due process of law, and that the state was therefore free to impose any restriction upon appeals to the state supreme court which accorded with its view of public policy.

The claim that the provision denied equal protection of the law was based on the fact that a state statute might be held valid in a case arising in one county of the state and invalid in another, depending upon whether the decision of the supreme court happened to affirm or reverse the decision of the court of appeals. Chief Justice Hughes pointed out, however, that there is no requirement of the federal constitution that a state shall adopt a unifying method of appeals which will insure to all litigants within the state the same decisions on particular questions that may arise. The Court ruled out the argument based on the supposed destruction of the guarantee of a republican form of government, on the ground that it was a political question.

From all appearances, this provision of the Ohio constitution will remain in effect for some time to come. Although hampered by the restrictions of 1912, the power of the supreme court in relation to the other branches of the government remains essentially unimpaired. Although the balance of control within the court may have shifted, and some curious results are undoubtedly produced, the power of judicial review in Ohio retains practically the same form and strength that it possessed during the days of its growth. At least, the coordinate position of the judiciary among the several branches of the state government remains unchallenged.

F. R. Aumann.

Ohio State University.