AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 11: The Contemporary Era – Judicial Power and Constitutional Authority

Birmingham-Jefferson Civil Center Authority et al. v. City of Birmingham et al., 912 So. 2d 204
(Ala. 2005)

The Birmingham-Jefferson Civil Center Authority is a public corporation authorized by Alabama state constitutional amendment to issue bonds and construct and operate a civic center in Birmingham, the county seat of Jefferson County. The constitutional amendments also authorized the Alabama state legislature to fund the Authority through cigarette, lodging, sales, and other taxes, but specified that any tax levied in the state for the benefit of the Authority must at least apply to Jefferson Country and Birmingham. In 2003, the state legislature passed Act No. 288, which allowed a tax (for the benefit of the Authority) on alcoholic beverages sold in restaurants to go into effect only in Jefferson County, and Act No. 357, which exempted the Authority from having to pay various taxes and allowed it instead to impose an equivalent set of "fees" that it could keep for its own use. The City of Birmingham and Jefferson County sued in state court to have those two acts declared unconstitutional and to direct the Authority to turn over the "fees" it had collected under Act No. 357 to them.

The constitutional challenge to the acts asserted that neither statute had in fact been duly enacted into law in accord with the procedures laid out in the state constitution. Specifically, neither act received a majority of the votes of the quorum of the House of Representatives in violation of the requirement in § 63 of the state constitution that proposed legislation receive the vote of "a majority of each house." The state constitution specifies that a majority of the members of each legislative chamber constitutes a quorum, the minimum number of members necessary to conduct business. With 105 House members, a quorum would be 53 members and a majority of the quorum would be 27 members. Act No. 288 received 21 yea votes, 4 nay votes, with 55 recorded abstentions. Act No. 357 received 18 yea votes, 4 nay votes, and 53 abstentions. With a quorum present on the floor of the House, both bills received a majority of the votes cast, but neither bill received the favorable votes of an actual majority of the quorum. The rules that had been adopted by the House counted only the votes cast, regardless of how many House members were present but not voting.

The trial court accepted this constitutional argument and held that neither bill received the necessary number of votes in the House of Representatives to become a law under the Alabama constitution. After the initial ruling of the trial court, the legislature passed a new bill (Act No. 531) which attempted to validate the two earlier laws at issue in the case. Although Act No. 531 received 39 yea votes, more than minimum majority of the quorum, there were in fact 102 House members present at the time of the voting (though only 8 recorded abstentions and none voted nay). The trial court concluded that the Act No. 531 had likewise failed to receive the constitutionally required majority. The trial court recognized that the House rules pointed to a contrary outcome, but argued that ever since Marbury v. Madison *it was the courts – not the legislature – that must "decide all questions regarding the constitutionality of statutes." The state supreme court accepted the case on appeal and unanimously reversed the trial court. Why does the state supreme court conclude that the quorum question is nonjusticiable? Are courts obliged to offer an independent interpretation of constitutional provisions?*

JUSTICE SEE announced the decision of the Court.

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It is undisputed that for at least 30 years the legislature has interpreted § 63 to mean that when a quorum is present and a bill receives a favorable majority of those votes cast for and against it, then that bill has passed that house of the legislature. Legislators other than those who vote yea or nay are present in the chamber during such votes; some of those affirmatively abstain from voting and some of those take

no action whatever. As a result of this practice, many bills pass with only a handful of affirmative votes, few or no opposing votes, and a large number of members either abstaining or taking no action. This practice was undisputedly employed in the enactment of Act No. 288 and Act No. 357.

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The Constitution of Alabama expressly adopts the doctrine of separation of powers that is only implicit in the Constitution of the United States. *Opinion of the Justices No. 380*, 892 So. 2d 332, 334 n. 1 (Ala. 2004). This Court has said that the Alabama Constitution provides that the "three principal powers of government shall be exercised by separate departments," and it "expressly vests the three great powers of government in three separate branches." *Ex parte Jenkins*, 723 So. 2d 649, 653-54 (Ala. 1998). . . . "'Great care must be exercised by the courts not to usurp the functions of other departments of government. § 43, Constitution 1901. No branch of the government is so responsible for the autonomy of the several governmental units and branches as the judiciary.'" *Piggly Wiggly No. 208, Inc. v. Dutton*, 601 So. 2d 907, 911 (Ala. 1992). Thus, just as this Court will declare legislative usurpation of the judicial power violative of the separation-of-powers provision of our Constitution, see, e.g., *Ex parte Jenkins*, so it must decline to exercise the judicial power when to do so would infringe upon the exercise of the legislative power.

The separation-of-powers provision of the Alabama Constitution limits the jurisdiction of this Court. In *Ex parte James*, the "Equity Funding Case," this Court considered the justiciability of the question of the constitutionality of the State's method of funding the public-school system. After issuing four opinions over the course of nine years, we were finally compelled by the mandate of § 43 to dismiss the Equity Funding Case. We dismissed the Equity Funding Case because the judicial branch of government must "'never exercise the legislative and executive powers, or either of them.'" By finally dismissing the Equity Funding Case as nonjusticiable, we "retreated" from the "province of the legislative branch" and "returned the Equity Funding Case in toto to its proper forum" -- the legislature.

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Because the judicial branch "shall never exercise the legislative and executive powers, or either of them," this Court will not decide "political questions," even if submitted to it. The Supreme Court of the United States has with some frequency addressed whether certain issues are nonjusticiable political questions. We have previously referred to the United States Supreme Court's formulation of what constitutes a nonjusticiable political question, and we look to it again in this case. . . .

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Section 63, Ala. Const. 1901, states that "no bill shall become a law, unless ... a majority of each house be recorded [upon the journals] as voting in its favor." The question presented in the case before us today is whether the rules and procedure by which the Alabama House of Representatives determined that the bills that became Act No. 288 and Act No. 357 each received a majority vote of the House are subject to judicial review. Section 53, Ala. Const. 1901, expressly provides that "each house shall have power to determine the rules of its proceedings." The power of the legislature to determine the rules of its own proceedings is "unlimited except as controlled by other provisions of our Constitution," and "unless controlled by other constitutional provisions the courts cannot look to the wisdom or folly, the advantages or disadvantages of the rules which a legislative body adopts to govern its own proceedings." *Opinion of the Justices No. 185*, 278 Ala. 522, 524-25 (1965).

. . . . [T]here is in the case before us no provision of the Alabama Constitution that defines or limits what is meant by the term "a majority of each house," and there is no other provision of the Constitution that would be defeated by allowing the legislature the final authority over its internal voting rules and procedures. . . . Therefore, whether the legislature conducted its internal voting proceedings in compliance with § 63 is a nonjusticiable issue.

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The Constitution of Alabama, the only source of any limitation on the authority of the legislature, offers no such standard by which the judicial branch of the government can review the legislature's voting rules and procedures with respect to the legislature's determination that "a majority of each house" voted in favor of the bills that became Act No. 288 and Act No. 357. The Constitution does not define the term "majority of each house," and the legislature's power to determine its rules regarding voting procedures is not limited by the text of the Constitution. . . .

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In *Field v. Clark* (1892), The Tariff Act of October 1, 1890, was challenged as not being a law of the United States. The Supreme Court of the United States stated:

> . . . . And when a bill, thus attested, receives his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable. As the President has no authority to approve a bill not passed by Congress, an enrolled act in the custody of the Secretary of State, and having the official attestations of the Speaker of the House of Representatives, of the President of the Senate, and of the President of the United States, carries, on its face, a solemn assurance by the legislative and executive departments of the government, charged, respectively, with the duty of enacting and executing the laws, that it was passed by Congress. The respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated in the manner stated: leaving the courts to determine, when the question properly arises, whether the act, so authenticated, is in conformity with the Constitution."

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. . . . We, like the United States Supreme Court in *Field v. Clark*, are persuaded that uncertainty and instability would result if every person were free to "hunt through the journals of a legislature to determine whether a statute, properly certified by the speaker of the house and the president of the senate, and approved by the governor, is a statute or not," and the internal proceedings of the legislature when passing a bill were to be subject to judicial challenge.

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JUDGE PARKER, concurring.

"It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison* (1803).

In these words, which enshrined the principle of judicial review, Chief Justice John Marshall noted that constitutional interpretation is emphatically the responsibility of the judiciary. He did not say that constitutional interpretation is exclusively the responsibility of the judiciary.

. . . . Because officers of each branch of the government must swear to support the Constitution, it is reasonable to conclude that officers of each branch have a duty of constitutional interpretation.

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Just before *Marbury v. Madison* was decided, Congressman Joseph Nicholson, a former judge, warned what might happen if a right of judicial review of constitutional questions was permitted to become a doctrine of judicial supremacy:

> "By what authority are the judges to be raised above the law and above the constitution? Where is the charter which places the sovereignty of this country in their hands? Give them the powers and the independence now contended for, and they will require nothing more; for your government becomes a despotism, and they become your rulers. They are to decide upon the lives, the liberties, and the property of your citizens; they have an absolute veto upon your laws by declaring them null and void at pleasure; they are to introduce at will the laws of a foreign country, differing essentially with us upon the great principles of government; and after being clothed with this arbitrary power, they are beyond the controul of the nation, as they are not to be affected by any laws which the people by their representatives can pass. If all this be true; if this doctrine be established in the extent which is now contended for, the constitution is not worth the time we are now spending upon it. It is, as it has been called by its enemies, mere

> parchment. For these judges, thus rendered omnipotent, may overleap the constitution and trample on your laws; they may laugh the legislature to scorn and set the nation at defiance." [1]
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Applied to the legislative branch, this principle directs legislators to keep their oaths of office by exercising their authority and responsibility to consider the constitutionality of every bill that comes before them. If a legislator believes a bill to be unconstitutional, he has the right to propose a corrective amendment. If that fails, he has the right and duty to vote against such a bill. Likewise, a chief executive seeking to enforce a statute may be convinced that it is unconstitutional if construed a certain way. If so, according to the separation of powers and in keeping with his oath of office, the executive must exercise the authority and responsibility he possesses to construe the statute in such a way that it would be constitutional, where possible, and to enforce it accordingly.

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The instant case addresses precisely this type of legislative interpretation. Section 63 of the Alabama Constitution of 1901 provides that "no bill shall become a law" unless "a majority of each house be recorded thereon as voting in its favor. . . ." This provision could be interpreted at least three ways:

> 1. An absolute majority of each house -- that is, 53 members of the 105-member House of Representatives and 18 members of the 35-member Senate -- must vote in favor of a bill for the bill to pass;
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> 2. Assuming a quorum of 53 House members and 18 Senate members are present when a vote is taken, a majority of those 53 House members (at least 27) and a majority of those 18 Senators (10) must vote in favor of the bill; or,
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> 3. Assuming a quorum of each house is present, a majority of those present and voting in each house must vote in favor of the bill (e.g., if 53 House members are present, and 10 vote "yes" and five vote "no" and the remaining 38 do not vote, the bill passes the House; similarly, if 18 Senators are present, of which 5 vote "yes" and 3 vote "no" and the remaining 10 do not vote, the bill passes the Senate).

As Justice See demonstrates in his opinion, the Alabama Legislature has consistently followed the third interpretation for at least three decades. I believe the Legislature is within its authority to interpret §

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[1] Judge Nicholson's 200-year-old warning could hardly be more timely than it is today. Despite everything in the text of the Constitution, its history, and the expressed intent of the Framers being completely contrary to the notion of judicial supremacy, the United States Supreme Court has presumptuously arrogated such a position for itself simply by declaring it so.

In *Cooper v. Aaron* (1958), the United States Supreme Court stated: "[*Marbury v. Madison*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system." Tellingly, this proclamation of judicial supremacy was made without citation to the Constitution or any other authority.

The result of this unconstitutional doctrine of judicial supremacy has been an increasing shift of the balance of powers from the elected executive and legislative branches of the federal government to the unelected judiciary, thereby emboldening federal courts to rule upon constitutional questions based upon foreign law or perceived changes in public opinion instead of the Constitution and its history.

In so doing, courts have taken one part of Chief Justice Marshall's opinion in *Marbury v. Madison* but ignored another: "It is apparent, that the framers of the constitution contemplated that instrument, as a rule for the government of courts . . . And that courts, as well as other departments, are bound by that instrument."

The turning away from our national compact by federal courts now threatens our country with a constitutional crisis.

63 in this way, and I therefore conclude that this Court should defer to that interpretation. By so deferring, we show proper respect to a coordinate branch of government.