Marbury v. Madison, Lord Coke And Dr. Bonham: Relics Of The Past, Guidelines For The Present—Judicial Review In Transition?

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The most fundamental question of all, as Thomas Grey rightly stated, is "the legitimacy of judicial review itself," a question that goes beyond the scope of the power to its very existence, however limited. After remarking, "Whether this enormous power can fairly be deduced from the language of the Constitution, and whether the framers of that instrument intended to confer it on the Justices, has been the subject of vast learned controversy . . . unlikely ever to be resolved," Joseph Bishop reassuringly stated, "No matter; the power exists." It is true that the power has long been exercised, but whether it "exists"—has constitutional warrant—is something else again.¹

The decision in Bonham's Case,² a cause celebre of the early seventeenth century, is now over three hundred and sixty nine years old yet is still of pertinent value to the historian, the legal scholar, and even the practicing attorney who are driven in their quest for a thorough grasp and complete understanding of the thrust of history—English and American—upon not only the Corpus Juris as it is known today, but upon the very social framework against which our daily actions are set. This one case, and more particularly certain dicta made in the course of the decision by Lord Coke, has had permanent effect upon the American system of jurisprudence as it evolved from basic theories of fundamental law and judicial review.

It will be the purpose of this article, then, to explore the modern significance of Coke's influence as analyzed and interpreted through the famous Bonham's Case and thereby to provide an insight into the development of our own concepts of judicial review, as borrowed from the English, in its original historical-legal perspective and as seen through the decision in Marbury v.

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¹ The case is more properly referred to as The Case of the College of Physicians and is reported both by Coke in his capacity as Chief Justice of the Court of Common Pleas and by Brownlow, who served as the Court Prothonotary. See 8 Co. 114a, 77 Eng. Rep. 646 (1610) and 2 Brownl. 255, 77 Eng. Rep. 646 (1610).
April 30, 1606, was the eventful date on which Thomas Bonham, Doctor of Philosophy and Physics, graduate of Cambridge University, was cited to appear before the president and censors of the Royal College of Physicians of London to answer to a charge of engaging in the practice of medicine in London without first obtaining, from the Royal College itself, a properly executed certificate to practice. For failing to obtain this certificate, he was fined one hundred shillings and was, further, forbidden—under pain of imprisonment—to practice until he was duly admitted by the College.

Bonham, however, continued to practice and was, consequently, recalled by the College to answer for his actions. He defaulted, and in his absence was fined ten pounds. Within several months, he made still another appearance before the College. On this occasion, he not only refused to pay his fine but to refrain from the further practice of medicine as well. He argued that because he was in fact a Doctor of Medicine of Cambridge University, the Royal College of Physicians of London had no jurisdiction over his actions. As a result of this position, Dr. Bonham was imprisoned.\(^5\)

*Bonham's Case*, as brought before Justice Coke, was a simple action for false imprisonment.\(^6\) For their defense, the defendants pleaded the letters patent of 10 Henry VIII which gave them the powers as a College to impose fines on practitioners in London who had not been duly admitted to the practice of medicine by them. In addition, they claimed the right—granted by the letters—to govern all physicians in London and to impose fines and imprisonment when and if necessary.\(^7\)

Because the letters patent had been confirmed by statute,\(^8\)

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3. 5 U.S. (1 Cranch) 137 (1803).
6. The action was brought specifically against Henry Atkins, George Turner, Thomas Moundford, and John Argent, doctors in physics, and John Taylor and William Bowden, yeomen, as leading members of the Royal College of Physicians.
7. 8 Co. 114a, 77 Eng. Rep. 646 (1610).
8. 14 & 15 Hen. 8, c. 5 (1523); 1 Mary, 2d Sess. c. 9 (1553).
the statute under consideration here was of a negative nature, or one which superseded and defeated the common law. The words of patent were, nonetheless, clear and unambiguous—no one was to be allowed to practice medicine in London without first being certified and admitted by the College. Coke, himself, had always maintained that, "Every statute consisteth of the letter and the Meaning," and accordingly, "every statute ought to be expounded according to the intent of them that made it."10

In support of his holding that the College did not possess the powers to fine and imprison a competent, yet improperly licensed, physician—as opposed to a physician who was engaged in malpractice—Coke made five arguments to sustain his position,11 several of which are tied to early rules of simple statutory construction.

The first and second clauses of the letters were distinct and parallel. Therefore, Coke reasoned, the definite penalty of the first clause did not attach and imprisonment was not to be imposed on an unlicensed physician. Secondly, it was reasonable to incarcerate the body of a physician who, as a consequence of his malpractice, harmed one of his patients. Yet, when a physician who set about the practice of his profession in a proper manner in London, but without first obtaining a license from the Royal College, and no resulting harm came to his patients, that physician was not to be imprisoned.12

The second clause of the letters patent had no fixed time for enforcement, even though the time interval in the first clause was fixed as a month; so, no charge under it could be maintained until a month had elapsed. Consequently, Coke held the first and second clauses to be distinct.13

In light of the fact that the Royal College was to receive one-half of all the fines it collected, the members of the College could rightly be regarded as not only judges, but also actual parties to any cause of action brought before them. Here, by way of reinforcing dicta, Coke uttered what many authorities believe to be the most controversial statement of his life:14

10. Id. at 330.
11. 8 Co. at 117a, 77 Eng. Rep. at 651.
12. Id. at 117b, 77 Eng. Rep. at 651-52.
13. Id. at 117b-18a, 77 Eng. Rep. at 652.
14. See, e.g., C. Bowen, supra note 5; Thorne, Dr. Bonham's Case, 54 L.Q. Rev. 543 (1938).

For an in-depth consideration of the precedents that Coke drew upon to support this
The censors cannot be judges, ministers, and parties; judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture . . . . [T]he common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void.15

The final argument made by Coke in support of his holding was that no one should be convicted twice for the same offense.16 This, in effect, is the result that would have occurred if the two clauses in the original letters were not held to be distinct; for, an unlicensed physician would not only have been liable to a fine of one hundred shillings, after he had been engaged in practice without a license for a month, but he would also have been subject to a fine and imprisonment. Coke reasoned accordingly that the second clause had to be understood as only applying to improper practice or malpractice, rather than to unlicensed and to improper practice alike.17

At no place in Coke's opinion does the reader find an unequivocal statement that the statute, under which the action was brought, was in fact invalid or void18 or, for that matter, that it was impossible to apply. Instead, it was held to be impertinent—which would seem, by inference, to make a strong point for impossibility of a rather superficial nature.19 Interestingly, the official court reporter merely speaks of an opinion being given by the court. Hence, there is, indeed, considerable reason to question whether a final judgment on the case was actually never rendered.20

A cursory and over-critical reading of Bonham's Case might force the reader to conclude that Coke was not merely making an argument directed against the validity of the letters patent in their statutory form, but for a particular construction that he wished to place upon them.21 Yet, on the other hand, a careful and

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15. 8 Co. at 118a, 77 Eng. Rep. at 652 (1610) (emphasis added).
17. Id.
19. Plucknett, supra note 5.
20. Id. at 39.
21. Boudin, supra note 18, at 244.
thorough consideration of this case allows a ready comprehension of the holding's real significance. When Coke's position as the "prime mover" or dominant spirit for the ultimate fulfillment of the Magna Charta is realized, it is equally clear to see that in his holding here, he was merely continuing his efforts to assist in the enforcement of the rule of higher law—the Magna Charta, the natural law—which was, as such, equally binding on Parliament and the courts.\textsuperscript{22}

"Of the power and jurisdiction of the Parliament for making of laws in proceeding by Bill," said Coke, "it is so transcendant and absolute, as it cannot be confined either for causes or persons within any bounds . . . ."\textsuperscript{23} Coke looked upon Parliament as a court rather than a legislative body. Not once did he recognize the antithesis between adjudication and legislation as some have interpreted him.\textsuperscript{24} The Acts of Parliament were analogous, so he felt, to judgments rendered by a court, and, as such, could always be disregarded if they contravened the fundamental law.\textsuperscript{25}

It was Lord Coke's intention to restore Parliament to the position of judicial prominence it had enjoyed in the fourteenth century. As such, it was to be the highest court in the land and was to stand above the court of equity, at the apex of the common law itself.\textsuperscript{26}

When Coke referred to Parliament as a Supreme Body, however, the word "supreme" had a different meaning than it does today. It never meant "of an unlimited nature." Instead, it simply implied the absence of a superior and certainly did not approach the idea of an unfettered discretion as the concept of legislative supremacy connotes modernly.\textsuperscript{27}

Indeed, the central idea permeating Coke's entire legal philosophy was that the Bench should function independently and apart from the Crown, serving as an arbitrator of problems that arose between the King and the Parliament and to be the sole administrator of the highest law of the realm—the natural, fundamental law.\textsuperscript{28} The court, then, was to employ the natural law


\textsuperscript{23} 4 Coke, supra note 9, at 39 (1644).

\textsuperscript{24} See C. McLwain, The High Court of Parliament and Its Supremacy 378 (1910).

\textsuperscript{25} W. Holdsworth, Sources and Literature of English Law 41 (1925).

\textsuperscript{26} Reif, Notes of the Debates in the House of Lords at xiv (1929); Thorne, Courts of Record and Sir Edward Coke, 2 U. Toronto L.J. 24, 48-49 (1937).

\textsuperscript{27} See C. McLwain, supra note 24, at 175-95.

\textsuperscript{28} J. Tanner, English Constitutional Conflicts of the Seventeenth Century,
as a type of disciplinary gauge to the power struggle being waged between the sovereign and the court itself. 29

Coke’s idea of a law of nature vastly superior to man-made law was not new. It was thought to be both new and indeed, radical, however, for the law courts to be given the power and right to enforce the superiority of the fundamental law. This, then, was Coke’s individual contribution to judicial review of legislation. Although by no means engrafted to the English common law, Lord Coke’s theory of the fundamental law did find warm trade winds and travel the seas to the American Colonies where it grew from a young sapling into a sturdy oak.30

In protesting the English Stamp Act of 1765, the Colonies rallied around James Otis as he shouted, “An Act against natural equity is VOID!”31 When the Massachusetts Assembly declared the Act invalid, it stated that because the Act was against the Magna Charta and the natural rights of Englishmen, it was, according to Lord Coke, null and void.32 The Constitution’s subsequent passage, and more particularly Article III in 1787, ensured Coke’s concept of judicial review a permanent place in the American democracy.33

1603-1689 at 387 (1937); J. TANNER, CONSTITUTIONAL DOCUMENTS OF THE REIGN OF JAMES I, A.D. 1603-1625 at 76 (1930); MacKAY, supra note 22, at 231.


Montague suggests that the central point of contention was whether the strict and decided rules of law were to be the touchstones for the administration of justice or whether justice was to be handled by the courts according to the wishes of the state. In other words, was the law or the will of the King to be supreme in England? See F. MONTAGUE, The History of England, 1603-1660 at 75 (1807).

30. Plucknett, supra note 5, at 61. The English Revolution of 1688 marked the technical abandonment of the dicta in Bonham’s Case in England. Id. at 53. But see Corwin, The Establishment of Judicial Review, 9 Mich. L. Rev. 102, 104 (1910), where it is stated that the dicta was not completely negated until the eighteenth century.


32. McGovney, supra note 29, at 3-37. Indeed, in a 1915 committee report to the New York State Bar Association, it was noted that: “In short, the American Revolution was a lawyers’ revolution to enforce Lord Coke’s theory of the invalidity of Acts of Parliament in derogation of the common rights and of the rights of Englishmen.” NEW YORK STATE BAR ASSOCIATION, YEARBOOK—1915 at 238.

Giddings v. Brown, a 1657 case in the Boston courts, was the very first clear holding made by a court in America which held a particular legislative act, by a town meeting, invalid on the strength of the dicta in the Bonham case. See 2 HUTCHINSON PAPERS 1-15 (Prince Soc. 1865).

33. The Constitution of the United States reads in pertinent part:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . .

In all Cases affecting Ambassadors, other public Ministers and Consuls,
II.

The dicta Lord Coke proclaimed in Bonham's Case seems to have fashioned the American concept of judicial review, and this was never more clearly enunciated than in Marbury v. Madison. In holding that the Judiciary Act of 1789 was void, because it purported to grant to the Supreme Court the power to hear cases beyond the Court's jurisdiction as delimited in Article III, section two of the Constitution, Chief Justice Marshall used reasoning almost identical to Lord Coke's:

[I]n declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution have that rank.

... [T]he particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that the courts as well as other departments, are bound by that instrument.

Justice Marshall believed the Court's duty was to declare the law and to decide which laws were to govern when laws conflicted. In cases involving a law of the United States, the Court had a duty to decide, before applying the law, whether it was in conflict with the Constitution. When such conflict existed, the Court was sworn to uphold and enforce the Constitution as superior to any such law. In this sense, the role of judicial review as Marshall saw it was very like that Coke attributed to the Bench in England, as the administrator of the highest law of the realm, with the power and right to enforce the fundamental law's superiority.

The power of judicial review has been exercised differently in the many years since the Court decided Marbury v. Madison. Through all the doctrinal shifts that have occurred throughout

and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all other Cases . . . the supreme Court shall have appellate Jurisdiction . . . with such Exceptions, and under such Regulations as the Congress shall make.

U.S. Const. art. III, § 2.

34. 5 U.S. (1 Cranch) 137 (1803).

35. Mr. Justice Marshall stated that for the Court to be enabled under the Constitution to issue writs of mandamus, the power conferred by the Judiciary Act, such power would have to be an exercise of appellate jurisdiction. But an action brought asking the Court to issue a mandamus was essentially to sustain an original action and the issuing of that writ would therefore be an exercise of original jurisdiction. Consequently, the Court acting under the Constitution, could not issue such writs. Id. at 175-76 (1803).

36. Id. at 180 (emphasis in original).
the Court’s history, however, there has remained constant the principle that the Court will decide only an actual case or controversy and will not render an advisory opinion or a judgment in a nonadversary proceeding. In fulfilling its function of deciding such justiciable controversies, the Court has been reluctant to anticipate a question of constitutional law in advance of the necessity of deciding it and has preferred to rest its decisions on any available alternative grounds.\(^{37}\) When the necessity arises, however, the Court will decide a constitutional question in order to provide a remedy against a protected right’s infringement. As Justice Marshall stated, the Court has the right and duty to examine the Constitution’s provisions insofar as it is necessary for the instant case’s proper determination. It is only when the questions presented are “political” in nature, involving issues that are constitutionally committed for autonomous determination to some other government agency, that the Court can properly refrain from decision.\(^{38}\) Even this judgment is an exercise of review to be accomplished by adherence to standards that govern the interpretive process generally.

The Court’s special role in resolving questions of great moment, transcending the interests of the litigants, is inherently paradoxical. The Court will perform its duty only when necessary to adjudicate a conventional legal dispute between the parties. Thus, it is not difficult to understand how the Court has on occasion had difficulty in restraining from a decision in a case that perhaps did not meet the qualifications for a “case or controversy” for the Court to decide. At times, the grave nature of the issues presented and the pressures for a just settlement have moved the Court to pass upon constitutional questions in cases where alternative grounds were available on which to rest its decision, or in cases that may have been something less than justiciable controversies.\(^{39}\)


\(^{38}\) Justice Marshall recognized this in Marbury when a preliminary question to be decided was whether the issue at hand was political in nature. If so, then the province of the Court did not extend to the decision of such an issue, 5 U.S. (1 Cranch) at 164-66. See also Luther v. Borden, 48 U.S. (7 How.) 1 (1849); A. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1962).

Any decision the Court makes in the exercise of its review power, requiring an examination of the Constitution's provisions, demands that the Court follow the language of that document.40 When those words are not clear, however, what criteria should the Court use in making its choice? History and precedent also play a role in the decision-making process, in clarifying the Constitution's language, and in setting a standard for the Court's reasoning.41 But where all these together do not provide the answer for a particular problem facing the Court, it must rely on its own analysis of the problem and must ground its choice between the competing values on thoroughly reasoned and neutral principles. No legislature or executive is obligated by the nature of its function to support its choices by the same type of reasoned explanation that is inherent in judicial action. Indeed, this is the Court's special duty when exercising the power of judicial review. It is obligated to act, not as a mere power organ, but in an entirely reasoned and principled manner. Inherent in the Court's duty to apply the law is the duty to apply it with the same sense of generality and neutrality existing in the law itself. It has been suggested that this result will be obtained only if the Court supports its decisions with reasons that in their neutrality and generality transcend the immediate case and form a base for future action.42 When no sufficient reasons of this kind can be assigned for overturning the value choices of the legislature or the executive, those choices must survive. It is only in exercising this type of self-restraint in judicial review that the Court's decisions will be more than the mere result of arbitrary choice and will remain influential in constitutional development.

At first, the power of judicial review was expected to be exercised only in those instances when other agencies were venturing beyond their authority, and even this minimal exercise of review was expected to be in the nature of intervention by negation. In the past decade, however, the Court has been put to a different kind of task: being called upon to act in a positive manner in effecting great reforms in areas where political and legislative

40. See, e.g., United States v. Sprague, 282 U.S. 716, 731 (1931). In Sprague, the Court reiterated its duty: "Where the intention is clear there is no room for construction and no excuse for interpolation or addition." The language of the Constitution, where clear, must be given its plain and evident meaning. Ogden v. Saunders, 25 U.S. (12 Wheat.) 212, 302 (1827).

41. See, e.g., Reid v. Covert, 354 U.S. 1, 50 (1957) (on rehearing) (Frankfurter, J., concurring).

processes have failed. In the School Segregation cases, the Court unanimously exercised a judgment from which it could not escape, announcing a principle that was inevitable, and granted relief that in the exercise of conventional judicial powers could not be denied. These decisions precipitated rather than supplant legislative action, as the Court extended its ruling to include other public facilities such as public parks and other recreational facilities, public transportation, and public beaches.

The cycle of decisions in these civil rights cases, led by the School Segregation cases, played a crucial role in leading legislatures toward meeting the challenge and the burden of the race problem as a constitutional obligation. Another aspect of constitutional development that began with these cases is the Court’s ever-continuing attempts to restate the present influences of sociology, psychology, social welfare, and even religion, making them applicable and pertinent within the widening concepts of law and order as they evolve from our own primary concept of justice.

III.

The test of judicial strength that was initiated by the decision in Baker v. Carr started from a more fragmented base than that on which rested the decisions in the School Segregation cases. Decided by a divided court, the Baker case was founded on debatable principles, resulting in an abrupt reversal of the Court’s previous policy related to “political” issues. The complaint in Baker alleged that the inequality in voting districts resulting from the Tennessee Legislature’s failure to obey the commands of the state’s constitution resulted in a denial to the plaintiff voters of rights guaranteed by the fourteenth amendment of the Constitution of the United States. The claim that plaintiffs asserted was not unlike those that had been asserted,

46. 369 U.S. 186 (1962).
although unsuccessfully, in a series of prior cases. The district court dismissed the Baker case, holding that the court lacked jurisdiction over the subject matter and that the complaint failed to state a claim upon which relief could be granted. In so holding, the court noted that the Supreme Court had decreed the federal courts’ nonintervention in reapportionment matters “whether from lack of jurisdiction or from the inappropriateness of the subject matter for judicial consideration.” Also, the court recognized that this position should be maintained because of the difficulty in finding an appropriate judicial remedy.

Because the cause of action arose under the Constitution and did not involve a frivolous or insubstantial federal question, the Supreme Court held that dismissal of the case on the ground of “lack of jurisdiction over the subject matter” was error. The Supreme Court also rejected the second ground for dismissal, that the cause failed to state a claim upon which relief could be granted. The Court held that the mere fact that the suit sought protection of a political right did not render it a nonjusticiable political question. Relying on the appellants’ claim that they were denied equal protection under the fourteenth amendment, the Court concluded that the case was within the courts’ judicial competence. If such discrimination could be sufficiently shown, the right to relief under the equal protection clause would not be diminished by the fact that the discrimination related to political rights. The question of the appellants’ standing to challenge the constitutionality of the apportionment statute was likewise re-

47. See, e.g., Colegrove v. Barrett, 330 U.S. 804 (1947) (dismissed as not presenting a substantial federal question, after arguments similar to those subsequently asserted in Baker); Colegrove v. Green, 328 U.S. 549 (1946) (suit to invalidate an Illinois statute prescribing congressional districts dismissed for “want of equity”). See also Kidd v. McCannless, 352 U.S. 920 (1957); Cox v. Peters, 342 U.S. 936 (1952); Tedesco v. Board of Supervisors, 339 U.S. 940 (1950); South v. Peters, 339 U.S. 276 (1950); MacDougall v. Green, 335 U.S. 281 (1948). In all of these cases, the Court refused to hear the challenges to the various apportionment methods and dismissed the state cases on grounds of lack of a substantial federal question, or affirmed the dismissal of such cases by the federal courts.

49. Id. at 826.
50. Id. at 827.
52. The Court distinguished prior cases involving legislative apportionment on the grounds that they asserted nonjusticiable political claims under the Constitution’s guaranty clause. The question had never been decided whether such a claim could be successfully brought under the equal protection clause, assuming that the claim was not so enmeshed with those nonjusticiable political question elements as to actually present a political issue itself. Id. at 208-18.
53. Id.
solved in their favor. These voters, said the Court, asserted "a plain, direct, and adequate interest in maintaining the effectiveness of their votes"\textsuperscript{54} and were, therefore, entitled to a hearing and the court's decision on their claims.

The lower courts could have viewed the \textit{Baker} decision as simply an invitation to fully consider the reapportionment problem, without being a decision "on the merits," or still less a command to proceed with reapportionment. This was not, however, the manner in which the Court's decision was read. Within a short time after the decision was handed down, the lower courts' action in implementing what was interpreted as the Supreme Court's "mandate" was swifter and more far-reaching than any action that had been taken in implementing the School Segregation cases. The Court's entrance into the field of reapportionment amounted to a judicial reformation of the political structure, both on the national and state levels, based on the necessity of protecting the effectiveness of the franchise under the fourteenth amendment.\textsuperscript{55} Through its decision the Court has been drawn into an area where standards are difficult to formulate and where even its power to formulate those standards is questionable.

IV.

Perhaps the greatest contrast between the modern Court and its predecessors is in its attitude toward social and economic measures the states enacted, as opposed to state action dealing with civil liberties and procedural due process of law. In the field of civil liberties—free speech and assembly and free exercise of religion—and in cases dealing with procedural due process—especially those involving the criminally accused—the Court has been very active in reviewing state determinations. The Court's decisions in these areas show a marked tendency to relate unconstitutionality to defects in procedure that the legislature can remedy.\textsuperscript{56} The impetus the Court provided has been constructive in conforming state criminal procedures and has effected changes in police officers' conduct and in the course of trials. The Court's insistence on procedural correctness when federal and state agencies exercise legal authority against an individual has

\textsuperscript{54} Id. at 208.


\textsuperscript{56} For a thorough discussion of the Court's recent emphasis on individual rights, see B. Schwartz, \textit{Rights of the Person} (1968) (2 vols.). \textit{See generally} Black, \textit{The Supreme Court and Democracy}, 50 Yale Rev. 188 (1961).
left to those agencies the responsibility of curing the defects by more careful procedures or by strict adherence to the established procedures.

In *Marbury*, Justice Marshall declared it the right and duty of the Court to review questions of law involving judicially enforceable duties. Although the legislature may not add to this constitutionally granted power of judicial review, neither may it withdraw from judicial consideration any case involving constitutional questions affecting the rights of one of the parties. This, in essence, is Justice Marshall’s concept of the power of judicial review, as derived from Lord Coke and *Bonham’s Case* that has prevailed through the course of our constitutional history: that is, where there is no other adequate remedy for a wrong suffered by an individual as a consequence of governmental action, judicial review of the action must be available to the individual. This is the Court’s inherited duty and though the methods of performing that duty may have undergone somewhat of a transition, the spirit of Justice Marshall remains.