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JUDICIAL REVIEW IN ACTION

Judicial review is the power of a court to pass upon the validity of the acts of a legislature in relation to a "higher law" which is regarded as binding on both. In this article we are especially concerned with the power of the Supreme Court of the United States to pass upon the validity of acts of Congress and of state legislative acts and state constitutional provisions under the Constitution of the United States. It should be understood, nevertheless, that the courts of every state in the Union exercise a like power over state statutes in relation to the several state constitutions; while the obligation of state judges, under article 6 of the Constitution, to give a preference to "the supreme law of the land" as there defined over all state laws, links up the national and state judiciaries into one system for the maintenance of the supremacy of the Constitution as a rule of judicial decision over all other evidences of law.

But besides these generally recognized branches of judicial review as it is organized in this country, there is one other not so well recognized. I refer to the fact that both national and state courts have at times ventured to review legislative acts in relation to an *unwritten* higher law. In point of fact, the earliest suggestion of judicial review of which the cases afford evidence was made without any reference to a written constitution. This was in Sir Edward Coke's famous dictum in Dr. Bonham's Case,

pronounced in 1612,[1] in which it was asserted that an act of Parliament "contrary to common right and reason" would be "void." Although this doctrine never made much headway in England, and is in this country today regarded as obsolete, yet some of the most important doctrines of American constitutional law are traceable to this source.

Writers on this subject sometimes speak as if judicial review consisted solely in the judicial *disallowance* of statutes as "void" because not squaring with the Court's reading of the Constitution. This notion of judicial review is too narrow for two reasons. In the first place, the Court regards its own previous decisions sustaining acts of the legislature as constituting precedents just as truly as its decisions setting such acts aside. Indeed, the opportunity which the Court has had to furnish well reasoned arguments in behalf of the claims of government —and especially the National Government—has been one of the principal sources of its influence upon our political life, as witness the case of Chief Justice Marshall.

In the second place, disallowance of a statute is not always complete—sometimes it is only partial. That is to say, it sometimes takes the form of a construction of the statute which rids it of its unconstitutional features, but also of much of its effectiveness. Whenever a statute is thus curtailed by construction in consequence of the Court's view of the requirements of the Constitution, we have, obviously, a true case of judicial review —a true case of the simultaneous construction of constitutional provision and of statute with a view to discovering the binding rule of law.[2]

Chiefly because of the fact that the common law comes from them, courts seem rarely to have been under the necessity of pronouncing a rule of the common law unconstitutional. There is no common law in any state in conflict with the constitution thereof; and so far as the nation as a whole is concerned, there is very little common law anyway. Nor do rules of state common

[1] 8 Co. 113b.

[2] See, *e. g.*, U. S. v. E. C. Knight Co., 156 U. S. 1 (1895) and U. S. v. D. & H. Co., 213 U. S. 366 (1909).

law appear to have been set aside under the United States Constitution save in a very few instances.[3]

Nature and Limitations of Judicial Review

There is no such thing as a specifically delegated power of judicial review—judicial review is simply incidental to the power of courts to interpret the law, of which the Constitution is part, in connection with the decision of cases. In the words of a recent opinion: "From the authority to ascertain and determine the law in a given case, there necessarily results in cases of conflict, the duty to declare and enforce the rule of the supreme law and reject that of an inferior act of legislation which, transcending the Constitution, is of no effect, and binding on no one. This is not the exercise of a substantive power to review and nullify acts of Congress, for no such substantive power exists. It is simply a necessary concomitant of the power to hear and dispose of a case or controversy properly before the Court, to the determination of which must be brought the test and measure of the law." [4]

From the very nature of judicial review as an outgrowth of ordinary judicial function arise certain limitations upon its exercise. This, however, is not the only source of the limitations which the Court has come to observe when exercising the most exalted of its powers. Alongside what may be termed *intrinsic limitations* of judicial review, and often modifying them, are others which owe their existence to *cautionary considerations*—to the desire of the Court to avoid occasions of direct conflict with the political branches of the government, and especially with that branch which wields the physical forces of government, the President.

Neither of these factors of judicial review, it should be added, is an altogether constant one. The Court's theory of the nature of judicial power will itself be found to have undergone

[3] Muhlker v. N. Y. & Harlem R. R. Co., 197 U. S. 54 (1904), would seem to be such a case.

[4] Justice Sutherland in Adkins v. The Children's Hospital, 261 U. S. 525 (1923).

development, and to this development judicial review has responded. More changeable has been the other factor, varying in its force with the times and with the personalities of judges —and perhaps also with the personalities of Presidents. Marshall, for example, was a bold and enterprising magistrate, constantly ready to put the pretentions of the Court to the test;[5] while his successor, on the contrary, was—save on one fatal occasion—a notably cautious man. And in recent years, judicial review has undergone great advances.

Among the rules which the Supreme Court has recognized as governing judicial review are the following:[6]

1. A decision disallowing a legislative act, either national or state, must be concurred in by a majority of the entire membership of the Bench. This is a cautionary rule—originally a concession to state pride—for other kinds of decisions are binding when concurred in by a majority of a quorum of the Court.[7]

2. The Court will pronounce on the constitutionality of legislative acts only in connection with "cases."[8] By the Constitution the judicial power of the United States extends to certain cases and controversies; by the principle of the separation of powers it extends only to such. A *case* in this sense, moreover, must be a real case—not a simulated or "moot" case. That is, it must involve a real contest of antagonistic interests, requiring for its solution a judicial pronouncement on opposed views of law. Such is the theory, the obvious advantage of which is its tendency to secure for the Court the benefits of full argument on the issues presented. Actually, the Court seems not to have lived up to its theory always. The celebrated Income Tax Case

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[5] There was one occasion, however, when Marshall lost his nerve. This was when Justice Chase was impeached. He then proposed that Congressional recall of judicial decisions should supersede the power of impeachment! BEVERIDGE, III, pp. 176-178. His conduct on the stand when testifying at Chase's trial was far from admirable. *Ibid.*, pp. 195-196.

[6] On this general subject see COOLEY, CONSTITUTIONAL LIMITATIONS, Ch. 7; WILLOUGHBY, ON THE CONSTITUTION, I, Ch. 2; R. P. REEDER, THE VALIDITY OF RATE REGULATIONS, pp. 369-377.

[7] See C. J. Marshall's announcement in connection with the first argument of Briscoe v. Com. Bank of Ky. and Miln v. N. Y., 8 Pet. 118, 120 (1834).

[8] See Muskrat v. U. S., 219 U. S. 346 (1911), and cases therein cited.

of 1895 [9] was originally a moot case, both the parties to which had substantially the same interest at heart in seeing the act before the Court set aside; and there have been other constitutional cases of the same nature both before and since then.[10]

In contrast to this, the Court at an early date refused to render an advisory opinion on certain legal questions which were laid before it by President Washington; [11] and it has subsequently extended its scruple to the rendition of "declaratory judgments" even in cases involving a real contest of opposed interests, such a judgment being final on the legal issue presented, although not followed by process of execution.[12]

It should be added that the growing practice in recent years of raising the question of the constitutionality of legislative acts by injunction proceedings against their enforcement has come to serve many of the purposes of a Declaratory Judgment Act in this field.[13]

3. Corollary of the rule against moot cases is the rule that nobody may attack the constitutionality of a legislative act in a case before the Court unless his rights are actually affected or clearly menaced by such legislative act; and also the rule, which is the converse of this, that the Court will pass on the constitutional question raised by such an attack only when it is necessary to do so in order to determine the rights of parties to a case before it.[14] The criticism visited upon the Court in connection with the famous Dred Scott decision was based in part on the

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[9] Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429 (1894); 158 U. S. 601 (1894). When the Attorney General, with singular maladroitness, joined in the action, the case ceased to be moot.

[10] Brushaber v. U. P. R. R., 240 U. S. 1 (1916) was a moot case, at least at its inception. Hylton v. U. S., 3 Dall. 171 (U. S. 1795) was a deliberately planned moot case, in which counsel on both sides were paid by the Government. See WARREN, THE SUPREME COURT IN UNITED STATES HISTORY, I, 146-149. Fletcher v. Peck, 6 Cranch 37 (U. S. 1810), bears all the ear-marks of having been a moot case (WARREN, *op. cit.*, I, 392-399); as also does Buchanan v. Warley, 245 U. S. 60 (1917).

[11] WARREN, *op. cit.* I, 108-111.

[12] Gordon v. U. S., 117 U. S. 697 (1885), was such a case. JJ. Miller and Field dissented from the holding that the Court had no jurisdiction.

[13] See *ex parte* Young, 209 U. S. 123 (1908).

[14] Chicago & G. T. R'y Co. v. Wellman, 143 U. S. 339 (1892); and see generally the references in note 6, *supra*.

supposition that the Court had gone out of its way to discuss Congress's powers in the territories in violation of this rule.[15] Yet the rule would not seem to forbid the Court from resting its determination of the constitutionality of an act on more than a single ground. This at least was not Chief Justice Marshall's understanding of it.[16]

The question arises as to how valuable "rights" have to be in order to invoke a decision of the Court on a constitutional point? In contrast with some of the state courts the Supreme Court seems generally to have discouraged taxpayers' suits, as well as those in which the aggressive party had only the general interest of seeing the Constitution enforced.[17]

4. Another maxim stated with great positiveness by the writers is that no legislative act may be pronounced void by a court on the ground of its being in conflict with natural justice, the social compact, fundamental principles, etc.—in short, on any other than strictly constitutional grounds.[18] This is because the supremacy of the Constitution—its claim to be considered higher law by the courts—is today traced to its quality as an ordinance of the people rather than—as originally—as due in part to its content; to this expression of the will of the sovereign people all other evidences thereof must give way.

This does not signify, however, that judicial review rests on a narrower basis than it once did—it signifies, indeed, the exact contrary. Few American courts ever did invoke extra-constitutional principles as grounds for the disallowance of statutes; but today the utmost latitudinarian view of such principles ever taken by any American court are today available, and freely available, to all courts in the United States in the form of the

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[15] See my DOCTRINE OF JUDICIAL REVIEW, 133-140; also WARREN, *op. cit.* III, 1-41.

[16] *Cf.* his opinions in Brown v. Md., 12 Wheat. 419 (U. S. 1827), and in Cohens v. Va., 6 Wheat 264 (U. S. 1821).

[17] *Cf.*, for instance, Wilson v. Shaw, 204 U. S. 24 (1907), and Frothingham v. Mellon, 262 U. S. 447 (1923).

[18] Note 6, *supra.* The principle originates in Justice Iredell's opinion in Calder v. Bull, 3 Dall. 386 (U. S. 1798), in answer to the contrary doctrine of Justice Chase's opinion in the same case.

modern conceptions of "liberty" and "due process of law." [19] Furthermore, so far as the Supreme Court is concerned, it is by no means strictly accurate to say that even today it will close its ears to arguments based on extra-constitutional principles.[20]

5. Probably no maxim of judicial review is encountered in the decisions more frequently than that which says that a statute may be declared unconstitutional only in "a clear case"; or as it is also phrased, that all legislative acts are "presumed to be constitutional" until shown to be otherwise, and that all "reasonable doubts" concerning their constitutionality will be resolved in their favor.[21] Yet in the face of judicial reiteration and insistence on this point, the maxim in question has been termed "a smoothly transmitted platitude," and treated even with levity by recent writers.[22] What actually is its restrictive force?

To begin with, what is meant by a "clear case" and "reasonable doubt"? In some circumstances the mere fact that clients, advised presumably by competent attorneys, have seen fit to prosecute a constitutional point into the highest Court of the land is sufficient to show some measure of doubt regarding the merits of the question. But the fact more insisted upon by the critics just referred to is the so-called "five to four decision" when it is adverse to an act of Congress or a state act. When four of the nine judges of the Supreme Court, supported it may be by a majority of the judges in the courts from which appeal was taken,

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[19] See the present writer's *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247 (1914); and *Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366 and 460 (1911).

[20] *Cf.* Dorr v. U. S., 195 U. S. 138 (1904) and Gilbert v. Minn., 254 U. S. 325 (1920).

[21] "The declaration [that an act of Congress is void] should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute and this continues until the contrary is shown beyond a rational doubt"; Chief Justice Waite in the Sinking Fund Cases, 99 U. S. 700 (1878). "It is but a decent respect due to the . . . legislative body by which any law is passed, to presume in favor of its validity until the violation of the Constitution is proved beyond all reasonable doubt," Justice Washington in Ogden v. Saunders, 12 Wheat. 213 (U. S. 1827). See also Chief Justice Marshall in Fletcher v. Peck (*supra*, note 10). Compare, however, Justice Chase's statement in Calder v. Bull (*supra*, note 18) that there are certain powers which "it cannot be presumed" the people have entrusted the legislature.

[22] See W. F. Dodd, *Growth of Judicial Power*, 24 POL. SCI. QUAR., 193.

find a statute constitutional, there is, it is urged, at least a "reasonable doubt" of its invalidity; so that, if the maxim under discussion were to be taken seriously, the acts must have been sustained.

An answer sometimes returned to this argument is that it misconceives the nature of the issue between the majority and the minority of the Court; that this is not really whether the act under review is unconstitutional, but whether there is reasonable doubt as to its unconstitutionality; and this question having been decided in the negative, the maxim is satisfied. Unfortunately, a study of dissenting opinions hardly sustains this contention—they usually show the dissenting judges to be quite as positive in their opinion of the constitutionality of the act before the Court as the majority are as to its unconstitutionality.

The real issue seems to be whether a judge should permit his evaluation of a legislative act to be determined by his knowledge of the attitude of his brethren, or whether he should form his opinion substantially independently of such considerations. The maxim evidently assumes that he should do the latter.

A remark of Sir George Jessel concerning an opinion handed down by him as Master of the Rolls in a certain perplexing case is apposite in this connection. Asked if he had no doubts as to the correctness of his decision, Sir George answered: "I may be wrong, but I have no *doubts*." [23] And we should also recall the old saying that "hard cases make bad law." A close decision is apt to indicate a hard case; so that it is not surprising that some bad constitutional law has been made in this way.

The maxim, therefore, that all reasonable doubts must be resolved in favor of the legislative act is to be regarded as addressed primarily to the conscience of the individual judge, just as an analogous maxim of the criminal law is addressed to the conscience of the individual juror. Its operation has consequently taken place for the most part beyond the power of any but divine scrutiny.

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[23] The anecdote is related by Lord Bryce in his ESSAYS IN CONTEMPORARY BIOGRAPHY.

On the other hand, the notion that statutes ought to be presumed to be constitutional does seem to have become embodied in a tangible, even though not always observed, rule of judicial review, to wit, the maxim that of two possible constructions of the statute, one of which renders a statute constitutional and the other unconstitutional, the former is to be preferred as presumably representing the legislature's intention. Overlooked in some instances in which it would have saved a statute from judicial condemnation,[24] this maxim has in other cases been enforced with such severity as to secure practically the full results of outright disallowance of the act before the Court.[25] Lastly, it should be noted that in an endeavor to meet certain devices of the state legislatures for escaping constitutional limitations, the Court has been forced in recent years to recognize a category of state legislative acts which are "*prima facie* void"—for which, in other words, the preliminary presumption of validity is avowedly dismissed.[26]

6. Another limitation on judicial review, which is partially cautionary, partially logical, grows out of the doctrine of "political questions." Originally this doctrine required that when the political departments—the President and Congress, or either—had decided such a question the Court must, in cases coming before it, accept their decision as binding on itself. So if the decision was one of opposed claims resting on opposed views of law, the doctrine clearly interfered with the maxim that the interpretation of the law rests finally with the courts. Originating in the field of international relations,[27] where the law involved was either the law of nations or a treaty, the doctrine was extended in the leading case of *Luther v. Borden*[28] to constitutional law, the Court holding in that case that it could not question a

[24] The Trade-Mark Cases, 100 U. S. 82 (1879); James v. Bowman, 190 U. S. 127 (1903); Howard v. Ill. Central R. Co., 207 U. S. 463 (1908).

[25] See note 2, *supra*.

[26] *Ex parte* Young (*supra*, note 13); also, International Harvester Co. v. Ky., 234 U. S. 199 (1914).

[27] See my PRESIDENT'S CONTROL OF FOREIGN RELATIONS, pp. 10, 100-104, 163-167.

[28] 7 How. 1 (U. S. 1849); off'd in Pac. T. & T. Co. v. Oregon, 223 U. S. 118 (1912).

previous determination by the President and Congress that the then existing government of Rhode Island was "republican in form" within the requirement of article 4, section 4 of the Constitution.

In the strictly accurate sense of the term, then, a *political question* in the field of constitutional law is one growing out of conflicting claims to political authority. Earlier the Court would not decide such an issue even in connection with a case involving private rights—such as *Luther v. Borden* was—if the views of the political branches were ascertainable by it. Today the utmost that can be said is that it will not take jurisdiction of a case for the mere purpose of deciding such a question under the Constitution; and even this statement does not hold as to cases brought by a state in defense of its "quasi-sovereign" rights—whatever these may be.[29] And, of course, the Court has never hesitated in cases involving private rights to pass upon the validity of acts of Congress alleged to invade the sphere of state power and *vice versa.*

But there is also a broader meaning of the term "political questions" which extends it to practically any exercise of governmental discretion. In this sense, whether Congress shall increase the tariff on sugar is a political question; also whether the President shall pardon one who has been convicted of an offense against the United States. Ordinarily, of course, such questions are not for the courts, being mere questions of policy. Yet this is not universally the case. The *purposes* for which certain governmental powers may be validly exercised came to be treated as a judicial question at an early date;[30] while recently the Supreme Court has laid claim to an entirely new range of power of this nature with respect to acts of Congress which appear to invade the historical jurisdiction of the states.[31]

[29] *Cf.* Missouri v. Holland, 252 U. S. 416 (1920) and Massachusetts v. Mellon, 262 U. S. 447 (1923).

[30] The doctrine that the power of eminent domain may be exercised only for a "public purpose," that is, for a purpose deemed by the Court to be *public,* was stated by Kent in 1816, in Gardner v. Newburg, 2 Johns. Ch. 162 (N. Y. 1816).

[31] *Cf.* McCray v. U. S., 195 U. S. 27 (1904); and Bailey v. Drexel Furniture Co., 259 U. S. 20 (1922).

The importance of the doctrine of political questions as a limitation of judicial review seems, in short, to be declining. As a limitation on the Court's pretensions to a supervisory rôle in relation to the President, on the other hand, it apparently retains its original vigor. One obvious reason for this is the cautionary consideration that executive action is not always subject to automatic correction by the simple device of disallowing it. The subject is one which will be dealt with more at length later on.

7. Being an outgrowth of the judicial power to ascertain the existing law, judicial disallowance of a statute does not repeal it, but treats it as void *ab initio* from want of conformance to a "higher law." There is an exception to this, however, in the case of state acts rendered void by the subsequent enactment of a conflicting act of Congress which is otherwise constitutional, or with a treaty made under the authority of the United States. In such a case the state act ceases to have operation only from the going into effect of the act of Congress or of the treaty, and may conceivably be brought into operation again by the repeal or abrogation of the latter.

But an act of Congress or a state act which is found by the Court to be contrary to the Constitution is as if it has never been. In the words of the Court: "An unconstitutional act is not a law. It confers no rights; it imposes no duties . . . It is, in a legal contemplation, as inoperative as though it had never passed." [32] Such is the view that has usually been taken by the Supreme Court, although state courts have sometimes proceeded on a somewhat different principle.[33]

This question arises: Suppose some of the provisions of a statute to be constitutional and others to be unconstitutional—what becomes of the former when the latter fall under judicial condemnation? The answer depends upon that returned by the Court to another question: Would the legislature have enacted the constitutional provisions by themselves, divested of the unconstitutional provisions? If the Court's answer to this question

[32] Norton v. Shelby C'ty, 118 U. S. 425 (1886).

[33] *Cf.* Allison v. Corker, 67 N. J. L. 596, 52 Atl. 362 (1902); also U. S. v. Realty Co., 163 U. S. 427 (1896).

is negative, then the whole statute falls to the ground; if affirmative, then the constitutional provisions still stand.[34]

It has become in recent years a rather common practice for legislatures, in enacting elaborate and complex measures, to declare the separate paragraphs thereof independent, and to direct that the holding of any paragraph or part of the statute invalid shall not affect the question of the validity of the rest. Such declarations are apparently regarded as binding by the Court.[35]

8. A further limitation on the exercise of the power of judicial review arises from the doctrine of precedent; but the real force of this limitation in the case of the Supreme Court of the United States is difficult to estimate. Logically the Court should, no doubt, regard its own past interpretations of the Constitution in the same light as it does its past interpretations of any law whatsoever. But in the first place, unlike the House of Lords, the Supreme Court has never said that it considered itself absolutely bound by its own previous decisions, while, in the second place, its construction of certain acts of Congress—the Sherman Act is an especially glaring example—has been characterized by anything but hide-bound deference to the logic of decided cases.

That, therefore, the Court should claim equal freedom in relation to the Constitution—a law not amendable by ordinary legislative processes—is not strange. It has, to be sure, decided many cases by reference to the authority of past decisions, but this may have been because it still approved of the reasoning upon which these decisions rest. It has frequently shown itself astute to "distinguish" the case before it from analogous cases previously decided—a method of escape from the thraldom of *stare decisis* recognized by the doctrine itself. Lastly, it has on several occasions, with varying degrees of candor, overruled past decisions, and sometimes it has silently suppressed them.[36]

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[34] Cases cited in notes 9 and 24, *supra;* also, Lemke v. Farmers' Grain Co., 258 U. S. 50 (1922).

[35] See, *e. g.,* Keller v. Potomac Electric Co., 261 U. S. 428 (1923).

[36] Compare the following braces of cases: The Genesee Chief, 12 How. 443 (U. S. 1851) with The Thomas Jefferson, 10 Wheat. 428 (U. S. 1825); Leisy v. Hardin, 135 U. S. 100 (1890) with the License Cases, 5 How. 504 (U. S. 1847); Wabash R'y Co. v. Ill., 118 U. S. 557 (1886) with Peik v. Chic. & N.

What, however, do we mean precisely by the word *decision* in this context? Only the finding by the Court that a certain statute was unconstitutional? Or the reading of the Constitution on which this finding was based? Or the line of reasoning —*ratio decidendi*—by which this reading was justified, involving often a wide range of speculation in the realm of what was described in the previous chapter as constitutional theory? Sometimes, it would seem, we mean one thing and sometimes another. It was Chief Justice Marshall's practice to lay down the most sweeping principles in interpretation of the Constitution; and he not only carried the Court with him ordinarily, but he succeeded in this way in impressing the stamp of his mind upon our constitutional law permanently. On the other hand, the Court which followed him frequently found itself in difficulties when it came to the formulation of an "opinion of the Court," with the result that most of the opinions of this period are hardly more than historical curiosities today.

Practically speaking, that part of an opinion of the Court is *decision* which the Court subsequently treats as such. Nor does this deny the right of a critic to show if he can that any utterance thus invoked by the Court was originally gratuitous, that is, was *obiter dictum.*

At this point we encounter a question which is of much theoretical interest, and which at times has been of considerable practical importance, and may be again. This is the question, to what extent are Congress and the President bound by decisions of the Supreme Court interpretative of the Constitution? [37]

The doctrine of judicial review builds on an act of faith: the notion that the true meaning of the law is a revelation reserved for judges—which means in the constitutional field that

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W. R'y Co., 94 U. S. 164 (1876); Pollock v. Farmers' L. & T. Co., 157 U. S. 429 (1895) with Springer v. U. S., 102 U. S. 586 (1880); Lochner v. N. Y., 198 U. S. 45 (1905) with Bunting v. Ore., 243 U. S. 426 (1917); Terral v. Burke Constr. Co., 257 U. S. 529 (1922) with cases therein cited, the cases cited in note 31, *supra,* with each other. See also C. J. Taft's remarks concerning the Lochner case in his dissenting opinion in Adkins v. Children's Hospital (*supra,* note 4).

[37] See my DOCTRINE OF JUDICIAL REVIEW on this question, at pp. 20-26 and 66-68.

the judicial version of the Constitution *is* the Constitution. And since both Congress and the President are bound by the Constitution, it follows that they are bound by the judicial version of it. Or to put the same theory in different terms—it is assumed that judicial interpretation of the Constitution is of such a nature that it does not alter the Constitution, while that of other organs of government may. Whence it follows that if the Constitution is to be supreme, the judicial version of it must be supreme.

But this theory is confronted by another, which asserts, in effect, that the supposed correctness of judicial interpretations of the law, and so of the Constitution, is only an assumption, which holds, moreover, only within the field of judicial power, namely, that of deciding "cases." In other words, the courts are not vested with any power of law interpretation as such, but only incidentally to the discharge of their primary function of adjudication. Indeed, when the law invoked is the Constitution, the very contrary is the fact. For in relation to the Constitution the three departments are "equal," and so are equally entitled to construe the Constitution within their respective fields.

The advantage of the first and older theory is that it assures us of one final authorized version of the Constitution. Its disadvantage is that which was pointed out by Lincoln, in his first Inaugural, when, with the Dred Scott decision in mind, he said:

> "I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to a very high respect and consideration in all parallel cases by all other departments of the government. . . . At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal." [38]

[38] RICHARDSON, MESSAGES, etc., VI, 9-10.

The second theory, of which Jefferson and Jackson, as well as Lincoln, were at various times exponents, avoids this difficulty, but invites to the opposite one of governmental and administrative anarchy. For if pursued to its logical consequences it would sustain any President in imitating Jackson when he said—or is *said* to have said—"Well, John Marshall has made his decision, now let him enforce it!"—and the decision went unenforced.[39] It would also sustain Congress in using any of its powers—its power, for instance, to enlarge the membership of the Court—in order to overcome an unpopular decision of the Court.

For the working compromise that practice has brought about between these two theories we must turn to the usages of the Constitution—to "constitutional law" in the broader sense. The following are the salient points relevant to this issue: (1) It is the duty of the President as chief executive to enforce the decisions of the Court, even when they are grounded on what he may consider mistaken views of the Constitution and the laws. (What his duty is with respect to an act of Congress which he thinks unconstitutional, in the absence of a decision of the Court to the contrary, is dealt with in another connection.) (2) Congress will not, at least in any but the gravest cases, "swamp" the Court in order to overcome an unwelcome decision. (3) Judges of the United States are not impeachable for holding mistaken views of the Constitution and laws, although it is possible that a pertinacious adherence to "error" might raise a different question. (4) Even in exercising their legislative powers, the President and Congress are prone nowadays to consult the decisions of the Court rather than the Constitution itself; nor does a distinction suggested by Lincoln between a settled course

[39] This remark is credited to Jackson by GREELEY, in his AMERICAN CONFLICT, I, 106, with reference to Worcester v. Ga., 6 Pet. 515 (U. S. 1832); but doubt is cast upon its authenticity by Mr. Warren, *op. cit.*, II, 205-226, *passim*. Taney is authority for the statement that "General Jackson never expressed a doubt as to the duty and the obligation upon him in his executive character to carry into execution any Act of Congress regularly passed, whatever his own opinion might be of the constitutional question." *Ibid.*, p. 224. This is a more dutiful attitude than that which has been displayed by some of Jackson's successors. Mr. Warren contends that no occasion ever arose for the President to bring force to bear in Worcester v. Ga., inasmuch as the Court never issued a mandate in support of its decision.

of decision and a sporadic holding—such as he believed the Dred Scott decision to be—seem to have been much heeded in this connection.[40]

All in all, therefore, the advantage remains decidedly with the early view which claims for the Supreme Court the *exclusive* power of interpreting the Constitution with *finality*. And yet the Court itself has repeatedly discarded outworn precedents. Why, then, should not a Congressman sworn to support the Constitution be free to formulate, and to vote in accordance with, his own independents views thereof when considering the question of the validity of new proposals, particularly if he thinks them to be of serious moment? There could be no great disadvantage, and there might be great advantage, in forcing the Court to reconsider some of the positions it has taken up in the past and to say plainly whether it still adheres to them.

And, of course, whatever weight be assigned the Court's views as controlling the acts of government, it is only the Court's reasoning which can control opinion, and ordinarily the expression of it. While the Constitution, as some one has irreverently remarked, may be for all practical purposes, "the Supreme Court's last guess," it is always open to the critic to point out if he can just why and wherein the Constitution is something else. Thus he may try to show that a particular decision of the Court is not harmonious with the wording of the Constitution as construed according to certain accepted rules, or that it is not harmonious with the ascertainable intentions of the makers of the Constitution, or that it is not harmonious with the logic of past decisions or with the settled conduct of government to date, or again, that it is not harmonious with sound public policy. In short, the critic is free to find the Constitution wherever he wishes to look for it. Whether, however, he has uncovered the truth, in the Pragmatist's sense of that which is destined to win out, or a mare's nest, time alone will determine.

[40] The attitude displayed by the President and Congress in 1909, in connection with the submission of the Sixteenth Amendment, is instructive in this connection.

JUDICIAL FREEDOM IN CONSTITUTIONAL INTERPRETATION

The course of judicial review has also been influenced by the fact that the Constitution is a written instrument and, furthermore, a written instrument of a particular kind—a legal code.[41]

Underlying judicial interpretation of any code is always the idea which is expressed by Cooley for the Constitution in the claim that it is "an instrument complete in itself." [42] That is to say, the Constitution is furnished with an answer, for those who know how to read it, to every question of governmental power or of private rights against government which can possibly be addressed to it. It is a closed system.

And growing out of this idea is the further assumption that every clause of the Constitution is an available basis of private rights. As Marshall urged in Marbury v. Madison, if the Court may read any part of the Constitution—read it, that is, for the purpose of determining rights under it—why may it not read all parts? It results that the very terms in which governmental power is granted become the basis of judicially enforcible immunities against government. Whether this precise outcome of judicial review was always foreseen by its early advocates may be question; [43] but at least it was a development fully accordant with judicial traditions, and the curtailment which it receives from the concept of "political questions" is illogical, rather than otherwise.

It is not my purpose, however, to attempt to set down systematically the rules of documentary and statutory interpretation which the Court has from time to time adapted to interpretation of the Constitution. As we shall have ample reason to conclude, the effort would be largely a wasted one. I purpose

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[41] See further the references given in note 6, *supra*.

[42] CONSTITUTIONAL HISTORY OF THE UNITED STATES AS SEEN IN THE DEVELOPMENT OF CONSTITUTIONAL LAW (N. Y. 1889), pp. 30-31. Vinogradoff, Jellinek, and Ehrlich all comment on this judicial dogma of the logical completeness of the legal system. See the first mentioned writer's HISTORICAL JURISPRUDENCE, Introduction, pp. 26-27.

[43] Compare Hamilton's own attitude in Federalist No. 33 with his argument for judicial review in No. 78.

instead to discuss the question whether such rules have operated in the long run to restrict the freedom of the Court in interpreting the Constitution, or to enlarge it—a question which at once raises the interesting problem of "judicial legislation."

In drawing a hard and fast line between the function of law-making and that of law-interpreting, and assigning the latter function to the judiciary, the American doctrine of separation of powers tacitly assumes that judicial interpretation leaves the law unaltered. This is the view of Montesquieu himself who speaks of the judges as "no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or its rigor." [44]

On the other hand, even as early as the reign of Elizabeth, we find a certain Bishop Hoadley stating a very different view. "Whoever," he wrote, "hath an absolute authority to interpret any written or spoken laws, it is he who is truly the law-giver to all intents and purposes, and not the person who first wrote them." This sentence is regarded by an eminent American writer of recent times as stating the entire truth of the matter.[45] What are the merits of the question so far as relates to the Supreme Court's interpretation of the Constitution?

Let it be said at the outset that, speaking by and large, the version of the Constitution with which the Court has furnished us is a remarkably well-knit and coherent fabric, and one which offers, especially for the period before the Civil War, striking contrast with the wild inconsistencies of interpretation in which sections, parties, and individuals freely indulged themselves in those days. If anything, the Court has been *too* consistent; that

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[44] SPIRIT OF THE LAWS (Pritchard's trans.), I, 170. Marshall uses words of like purport in Osborn v. Bank of the U. S., 9 Wheat. 738 (U. S. 1825).

[45] JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW, (N. Y. 1909), §§ 229, 276, 369. Prof. Gray contended that "all the Law is judge-made law," *ibid.*, p. 119. This position is based apparently on the assumption that it is impossible for a legislature to speak in terms so unmistakable as not to admit of interpretation. But if that is so, then it is impossible for a Court to lay down a decision in unmistakable terms; and so there is no law! Indeed, Prof. Gray seems to have assumed that human communication by language was essentially impossible. As to rules not admitting of interpretation, see some words of Marshall, in Wayman v. Southard, 10 Wheat. 1 (U. S. 1825).

is to say, it has been consistent on too narrow a basis. Far too often has it permitted itself to be governed by a picture of things as of the time when the Constitution was adopted, thus elbowing aside the truer conception of the Constitution as the source of a polity endowed with a life of its own.

Nor has the Court usually made law at the expense of the rules of logic. Champions of the idea that the judges ought to make law seem sometimes to think that Courts are unduly hampered by logic, and that the law would be improved if the judges, taking courage of their convictions, would only thumb their noses at Aristotle.[46] This is sad nonsense. The judicial function is essentially a syllogistic one, and "freedom of judicial decision" is something far more important than freedom to argue badly from accepted premises. It is, in truth, freedom to choose, within limits, the premises themselves; and asserts itself, accordingly, not *after* but *before* the technical grounds of a decision are determined upon. The rules of formal logic are, therefore, its instrument, not its enemy.

That judicial interpretation cannot leave the law unaffected is proved by its very existence. The most ancient maxim of statutory interpretation is that the will of the makers of the statute should govern.[47] Yet were this clear for all situations, as undoubtedly it may be for many, there would be no necessity for interpretation. In theory, the law-maker had a definite intention respecting every case; in fact, he had no intention at all respecting most of the cases that get into court, and that is why they get there. And as regards the Constitution, this consideration has unusual force, first, because its makers deliberately left many questions to the hazards of interpretation; and secondly,

[46] The volume entitled SCIENCE OF LEGAL METHOD in the Modern Legal Philosophy Series (N. Y. 1921) contains many such attacks on judicial adherence to logic, by continental writers. That bad logic has, however, played a part in the development of constitutional law is obvious; but whether it was an indispensable means of arriving at some of the results reached is another question. Perhaps it was sometimes. The opinions in the Pollock Case (*supra*, note 9), the Sugar Trust Case (*supra*, note 2), and the first Child Labor Case, 247 U. S. 251 (1918), taken together, leave few of the rules of formal logic inviolate.

[47] See PLUCKNETT, STATUTES AND THEIR INTERPRETATION IN THE THIRTEENTH CENTURY (Cambridge Univ. Press, 1924).

because of the lapse of time since then—a period abounding in social and industrial developments which could not possibly have been foreseen in 1787. Nor should the testimony of the doctrine of *stare decisis* be altogether overlooked on this point. Why should a Court pay any attention to precedents if it did not regard them as modifying in some measure the statute which they interpret?

We now return to the question suggested above: Has the Court's adaptation of the rules of documentary and statutory interpretation to its task of constitutional interpretation served to cramp its freedom in the latter field? Fortunately, we do not need to consider all these rules; at the outset the most fundamental one will suffice. This is the rule that the words of a statute or instrument should be given their "ordinary meaning." [48] In the case of the Constitution, however, the question at once arises, whether this is the ordinary meaning of 1789 or the present year of grace? The divergence is, naturally, at times a very broad one.

Previously to the Civil War the Court commonly invoked the shades of the men of 1789 as aids in interpretation. Subsequently it has gradually dropped this piety. On one occasion we even find it saying, with reference to the commerce clause, "the reasons which may have caused the framers of the Constitution to repose the power to regulate interstate commerce in Congress do not . . . affect or limit the extent of the power itself." [49] And long before the Civil War the Court, especially under Marshall, had imputed intentions to the framers which in fact removed the business of interpreting the Constitution far from the field of historical research.

In brief, the task of ascertaining the "ordinary meaning" of the words of the Constitution has produced two canons, of constitutional interpretation. One we may term *historical interpretation;* the other *adaptative interpretation.*[50]

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[48] C. J. Marshall, in Gibbons v. Ogden, 9 Wheat. 1 (U. S. 1824).

[49] Addystone Pipe and Steel Co. v. U. S., 175 U. S. 211 (1899).

[50] The terms used by Vinogradoff are "historical" and "widening" interpretation. COMMON SENSE IN LAW, pp. 134, 137.

Of the former no better statement could be asked than the following expression from Chief Justice Taney's opinion in the Dred Scott Case:[51] "As long as it [the Constitution] continues to exist in its present form, it speaks not only the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this Court, and make it the mere reflex of the popular opinion or passion of the day."

With this passage compare a passage from Chief Justice Marshall's opinion in McCulloch v. Maryland:[52] "These words occur in a Constitution which was designed to endure for ages to come and consequently to be adapted to the various crises of human affairs." And again, the words of Chief Justice Waite in Pensacola Telegraph Company v. The Western Union Co.:[53] "The powers thus granted [by the Constitution of Congress] are not confined to the instrumentalities of Congress or the postal system known or in use when the Constitution was adopted, but they keep pace with the progress of the country and adapt themselves to the new developments of time and circumstances."

The moral of all this for judicial freedom of decision is fairly obvious. In all cases in which two opposed canons of constitutional construction, leading to contrary results, compete for the Court's recognition, the Court is furnished from the outset with a double set of answers to choose between. It is true, however, that as between the two canons of construction just dealt with, the historical and the adaptative, its freedom of choice is today somewhat less broad than it once was, past decisions having delimited to some extent the fields within which they are respectively applicable.

Thus it will be generally found that words which refer to governing institutions, like "jury," "legislature," "election" have

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[51] Scott v. Sanford, 19 How. 393 (U. S. 1857).
[52] 4 Wheat. 316 (U. S. 1819).
[53] 96 U. S. 1 (1877).

been given their strictly historical meaning,[54] while words defining the subject-matter of power or of rights like "commerce," "liberty," "property," have been deliberately moulded to the views of contemporary society.[55] Nor is the reason for this difference hard to discover. Not only are words of the former category apt to have the more definite, and so more easily ascertainable, historical denotation, but the Court may very warrantably feel that if the people wish to have their governmental institutions altered, they should go about the business in accordance with the forms laid down by the basic institution. Questions of power or of right, on the other hand, are apt to confront the Court with problems that are importunate for solution.

But this is far from disposing of the question of freedom of decision in relation to constitutional interpretation. For one thing, the Court has achieved some of its most striking results by actually switching from one canon of interpretation to the other.[56] Again, the Court's option between historical and adaptative interpretation is by no means the only option which the maxims of constitutional construction afford it. It has a similar choice between "exclusive" and "inclusive" interpretation;[57] and the contest between "loose" and "strict" construction is, of

[54] See Thompson v. Utah, 170 U. S. 343 (1895); Hawke v. Smith, 253 U. S. 221 (1920); Newberry v. U. S., 256 U. S. 232 (1921). Historical interpretation often consists in assigning terms their common law signification. See U. S. v. Wilson, 7 Pet. 150 (U. S. 1833); also U. S. v. Wong Kim Ark, 169 U. S. 649 (1898), and cases there cited.

[55] See notes 48, 52 and 53, *supra;* also Allgeyer v. La., 165 U. S. 578 (1897); Truax v. Raich, 239 U. S. 33 (1915); Truax v. Corrigan, 257 U. S. 312 (1921).

[56] Thus in early years the Court under Marshall assigned to the term "maritime jurisdiction" its fixed common-law sense. But later this definition was found unsuitable to American conditions, and was abandoned by the Court speaking through Chief Justice Taney. And the construction of "due process of law" has had a similar history, leading to even more remarkable consequences. See the first brace of cases in note 36, *supra;* also Hurtado v. Calif., 110 U. S. 516 (1884).

[57] Exclusive interpretation is grounded on the maxim *unius expressio, exclusio alterius*—the mention of one thing rules out all others of the same kind. Following this maxim in Marbury v. Madison, Marshall held that the enumeration in article 3 of the cases in which the Supreme Court has original jurisdiction must be considered exclusive; otherwise, he asserted, "it would have no force." Yet in McCulloch v. Maryland he repelled the suggestion that because Congress is expressly authorized by the Constitution to enact penal laws in only three instances, it had no "implied" power to enact them for other cases also.

course, historical. Indeed, it is improbable that the Constitution has ever been brought into contact with a single rule of construction to the Court's manipulation of which there have not been exceptions,[58] and it goes without saying that the final judge of whether the rule or the exception shall be followed in any particular case is the Court itself.

Nor should the tendency of precedent to curtail the scope of judicial freedom of decision be too much insisted upon, least of all in the field of constitutional law. If precedent is a hurdle, it is also a screen. Once choice has been made between two lines of decisions, supporting perhaps two alternative rules of construction, the new decision becomes immediately assimilated to the line selected, with the result that every appearance of choice on the part of the Court becomes automatically occulted. Hence no doubt, the fervent denials by judges that courts make law; hence, too, the mask of fatality which has baffled critics of judge-made law from time immemorial.

To sum up: *Interpretation* consists in making clear the application of a rule of law in a situation as to which its application was not clear before. The only escape from the conclusion that this process involves a certain degree of law-making is the untenable notion that the judges enjoy a revelation of the authentic law. In the case of the Constitution of the United States its official interpreters are able to claim an unusual freedom of decision, both because of the generality of the language employed in that instrument, and also because of the variety and

[58] For instance, we are told that the Constitution contains no repetitious language. Calder v. Bull, (*supra*, note 18); Hurtado v. Calif. (*supra*, note 56). But strict adherence to this principle would today invalidate some of the most important branches of constitutional law, that, for example, dealing with railway rate legislation in relation to the Fourteenth Amendment. We learn that exceptions to a power serve to mark its limits. Brown v. Md. (*supra*, note 16). But we also learn that there are exceptions to exceptions. *Cf.* Cohens v. Va., (*supra*, note 16) and Hans v. La., 134 U. S. 1 (1889) in relation to the Eleventh Amendment. Again, we learn that an exception to a power should be narrowly construed. Hylton v. U. S. (*supra*, note 10). Then we find the very exception alluded to broadly construed. The Pollock Case (*supra*, note 9). Yet again, we are told by Chief Justice Marshall that "questions of power do not depend on the degree to which it may be exercised." Brown v. Md. (*supra*, note 16). But the abandonment of this principle in some of the most important provinces of constitutional law has within recent decades affected its fundamental transformation, particularly as it touches state power.

the contrariety in the rules of construction which have grown up about it. And if freedom of decision is sometimes hampered by precedent, it is sometimes assisted thereby, in consequence of the concealment which precedent can lend it.

THE PURPOSE AND METHOD OF CONSTITUTIONAL INTERPRETATION

Three questions remain, all closely related: First, what kind of considerations have governed the Court in its choice of the alternatives open to it in constitutional interpretation? Secondly, by which of the methods best known to formal logic—the "deductive" or the "inductive"—have such considerations usually been imported into constitutional law? Thirdly, what has been the final outcome of the method followed?

Writing with the common law in mind, Justice Holmes has said:

> "The life of the law has not been logic: it has been experience . . . The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."

And again:

> "In substance the growth of the law is legislative. And this in a deeper sense than that what the courts declare to have always been the law is in fact new. It is legislative in its grounds. The very considerations which judges most rarely mention, and always with apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is at fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis." [59]

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[59] THE COMMON LAW, pp. 1, 35-36.

Considerations of public policy also underlie American constitutional law, but whether they are *inarticulate* is another matter. Usually they purport to be highly articulate in such terms as "freedom of contract," "judicial independence," "freedom of commerce," "police power," and the like. Unfortunately, not only are such phrases often vague and jejeune, but the values which they connote are frequently more or less contradictory. So the question arises whether the Court's employment of them may not conceal more than it reveals—whether, in other words, they may not serve, with or without the conscious intention of their users, as instruments for converting the unstated preferences and biases of individual judges into law.

The possibility must be admitted, and it is fairly plain that it has been occasionally realized. Yet, on the whole, the average Supreme Court Justice seems to have taken his constitutional theory pretty seriously. Nor is it necessarily an argument to the contrary that in the more or less inchoate mass of ideas covered by this term are many which, when pressed to logical extremes, collide with one another. The most ordinary function of a high court is to mark off the fields of jurisdiction of conflicting principles of law. In the field of constitutional law the Court has evidently felt that one of its highest duties was so to adjust the claims of the conflicting principles which are thought to find embodiment in the Constitution as to prevent any of them from being crowded to the wall.

Instructive in this connection is a glance at the history of our constitutional law. It will be seen at once to fall into successive periods demarked from each other by the coming to ascendency on the Bench of certain large generalized ideas of policy, which then continue to sway the Bench often for years. Thence, indeed, far more than from the doctrine of *stare decisis,* arises that substantial coherency which was noted earlier as characterizing the Court's version of the Constitution. Marshall deemed himself the apostle-elect of the nationalistic and individualistic creed of the framers of the Constitution. The Court under Taney represented the frontier reaction of the period of Jackson toward localism and notions of popular sovereignty,

which also chanced to fall in well with the property interests of the slave-owning South. Then came a Court which felt the urge to repair the damage which had been wrought by the Civil War to the Federal Equilibrium; and after that a Bench which thought all wisdom to be summed up in the teachings of the *laissez faire* political economists, the contemporary creed of the universities and of budding big business. In the past at least, before judicial ideas of public policy have been able to obtain solid foothold in American constitutional law, they have generally had to be accredited by some kind of political or social philosophy linking them with traditional American ideals of social order.

Nor is the attitude of the present Court essentially different from that of its predecessors. As heir of the past the Court is comfortably free to dispense with creative effort of the most striking sort. It is also, perhaps, a less "naif" Bench than some that have gone before it; that is to say, is better aware of and more ready to confess both the opportunities and the responsibilities that fall to it in the way of law-making. Still this is all a matter of method rather than of fundamental purpose. The values safeguarded by the Court remain singularly the same they have always been; only their inter-relations have changed, the patterns which they make in the law having become, necessarily, more and more complex with the growing complexity of the social order itself.

2. And this brings us to the further question of the nature of the logical method pursued in judicial legislation. On this point some recently expressed views of Dean Pound are directly relevant.[60]

"Law begins," Dean Pound writes, "with definite detailed *rules* whereby a definite detailed consequence is attached to a definite detailed state of facts." Later with the increasing complexity of social organization, "other types of legal *precept* are required." Thus "the legal *principle*" makes its appearance, through a comparison of legal rules and the discovery of the

[60] THE SUPREME COURT AND THE MINIMUM WAGE, Introduction, pp. xvi-xx (N. Y. 1925). The italics are supplied by the present writer.

distinctions between them. "For example, it is a rule that 'no state shall make anything but gold or silver coin a legal tender in the payment of debts.' It is a principle that whenever a power is given by a constitution, the grant carries with it by implication whatever is necessary to make the power effective." Nor is this the end of development. Presently legal *conceptions* appear, that is, "a generalized type of situation of fact is defined and established as a legal *institution* . . . In constitutional law we have an example of a legal conception in the so-called police power. The Constitution says nothing of such a power. It is a conception worked out by the courts."

Then, "in the maturity of the law still another type of legal precept grows up, namely, one establishing a *standard* to be applied to conduct." Thus "in the everyday law of private relations" we have the "standard of due care which the common law imposes upon anyone who enters upon any course of action," while "in constitutional law we have such a standard"—applicable to legislative and executive action—"in 'due process of law.'"

Nor, Dean Pound continues, may we stop at this point. For in addition to legal precepts, there is also "the traditional technique" of the courts in "developing and applying" these, whereby they "are eked out, extended, restricted, and adapted to the exigencies of the administration of justice." Furthermore, into every system of law enters "a body of traditional or received ideals as to the nature of politically organized society and the purpose of the legal ordering of human relations, and hence as to what legal precepts should obtain . . . and how they should be applied." This element of our constitutional law has already been referred to under the designation of constitutional theory; and Dean Pound adds that it is an element which changes but slowly, though "it does change with social, economic, and political development." [61]

[61] Worth quoting, too, is Dean Pound's application of these views to the question of judicial criticism. "Critics of constitutional decisions," he asserts, "seeing that something gets into those decisions continually which they cannot find in the texts, take the perfectly legitimate and, indeed, necessary resort of the judiciary to this element of the law for 'usurpation.' On the other hand

A passing word of comment is due Dean Pound's terminology. It is not to be supposed that he would insist upon its complete precision, or at any rate, its indispensability. Thus a "principle," as he uses the term, would seem, in final analysis, to be only a more generalized "rule," and a "standard" a more flexible one; and the line to be drawn between the content of any two of these terms must be often a very uncertain one. Nor is a legal "conception," as he defines it, a thing apart; the very example he gives, the police power, can be phrased as the legal rule or principle that the state has power to promote the general welfare.

Of greater importance is the question raised as to the manner in which constitutional law has developed. While recognizing the controlling and durable influence of constitutional theory on the content of constitutional law, Dean Pound nevertheless strongly implies that the method of "growth" of the latter, like that usually attributed to the common law,[62] has been what the

those who defend the whole course of decision of the courts on the constitutionality of social legislation, and every item of it, ignore this element and assume that in all such decisions the courts have been applying rules of law analogous to the rule that Congress shall not pass an act of attainder or that a state shall not emit bills of credit. They assume that all such decisions have flowed inevitably, by a logical process, from the absolutely given content of constitutional texts. The one view is no more mistaken than the other. It is no criticism of the courts to point out that they constantly resort to the third or ideal element of law, whether consciously or not. They must do so. Where they are sometimes open to criticism is that they give little or no consideration to this important and often controlling element in what they do, and hence speak dogmatically about matters very much open to dispute without adequate canvassing of the materials of their opinion." *Ibid.*, xx.

[62] The contrast which Ehrlich points out in his JURISTISCHE LOGIK between the development of the common law and law on the Continent, on the basis of the codified Roman law, is essentially that between the inductive and deductive method. The following statement from DICEY, INTRODUCTION TO THE LAW OF THE CONSTITUTION illustrates the same contrast: "If it be allowable to apply the formulas of logic to questions of law, the difference . . . between the Constitution of Belgium and the English Constitution may be described by the statement that in Belgium individual rights are deductions drawn from the principles of the Constitution, whilst in England the so-called principles of the Constitution are inductions or generalizations based upon particular decisions pronounced by the Courts as to the rights of given individuals." *Op. cit.* (7th edition), p. 193. Tennyson's phrase about English liberty "broadening from precedent to precedent" expresses the same theory so far as the English Constitution, is concerned. The accuracy of the theory is, nevertheless, open to grave doubt. It is to be suspected that it has owed much of its vogue to the Darwinian theory of the Evolution of Species by minute accretions and rests on just about as secure a foundation. Large speculative ideas have played a greater rôle in the development of British liberties than is generally admitted.

logicians call "inductive," that is to say, has been from the particular to the general, and has taken place in consequence of a comparison and summation of numerous particulars. Thus it seems a fair inference from his remarks that not only are the "rules" of constitutional law to be taken as corresponding to an older type of legal precept than its "principles," but also that the latter have frequently arisen from judicial manipulation of the former, if in fact they could have arisen in any other way.

Such an account of the matter would, nevertheless, be quite erroneous, as regards most of the great leading principles, conceptions, and standards of our constitutional law. Instead of being due to the process of comparison and induction pictured by Dean Pound, they seem in almost every instance to be traceable to some general phrase or statement in the Constitution itself, approached from a selected rule of construction, or to represent a direct transplantation from constitutional theory. They are, therefore, the outcome of *deduction,* in the sense of the spontaneous recognition by the Court of the presence in the situation before it of some antecedent principle or doctrine; or indeed, of *creation,* in a sense elsewhere suggested by Dean Pound himself, in the assertion that "except as an act of omnipotence creation does not mean the making of something out of nothing," but the reshaping of existing materials to new uses. [63]

Such certainly is the case with the Court's conception of "commerce," of "liberty," of "police power," of "necessary and proper," of "obligation of contract," of "due process of law." The issuance of every one of these as a citable legal principle can be assigned with fair accuracy to a specific judicial utterance in which it sprang from the forehead of the Court full grown.[64] Nor have subsequent decisions generally enlarged the scope of these original conceptions; although they have some-

[63] INTERPRETATIONS OF LEGAL HISTORY (N. Y. 1923), p. 127.

[64] For "commerce," see Gibbons v. Ogden (*supra,* note 48); for "liberty" Allgeyer v. La. (*supra,* note 55); for "police power," Charles River Bridge Co. v. Warren Bridge Co., 11 Pet. 420 (U. S. 1837); for "necessary and proper," McCulloch v. Md. (*supra,* note 52); for "obligation of contract," Fletcher v. Peck (*supra,* note 10); for "due process of law," Hurtado v. Calif. (*supra,* note 56).

times pared them down, in accordance with what Dean Pound has termed "judicial technique."

And it is much the same even with what may be termed the intermediate precepts of constitutional law, those which have resulted from the Court's endeavors to adjust the broader conceptions and principles just mentioned to one another. That the Court has frequently derived needed principles of demarkation and differentiation from a consultation of precedents admits of no doubt. Still, it is true, that to a remarkable extent these have been drawn from the Court's own invention or from its borrowings from other branches of the law. That is to say, the subordinate principles of constitutional law are also, in no small measure, the product of adaptative creation, and of deduction in the sense just given. They spring from the convergence upon particular situations of already established conceptions, doctrines, principles; and denote, consequently, a logical progression from the more to the less general, not *vice versa.*[65]

But has not the Court itself sometimes said that it works by the "process of inclusion and exclusion" and by "pricking out lines" with successive decisions as the cases arise? It has; yet actually the fruitfulness of the method thus hinted in stateable principles of law—in the broader data of legal prophecy—is most especially open to doubt in the very field of constitutional decision with reference to which such assertions have been most frequent.

It was in 1877 that the Court, declining an invitation to be more explicit, said it would have to determine the meaning of the due process of law clause of the Fourteenth Amendment by "the judicial process of inclusion and exclusion." [66] Since then not far from a thousand cases have come before the Court in-

[65] I am thinking particularly of the Court's application of the commerce clause as a restriction on state power. The "original package" doctrine is an instance of judicial inventiveness. The "unit" rule of taxation was transplanted from the law of taxation. The rule against taxation of gross receipts of concerns engaged in interstate commerce is a deduction through two stages from the general principle that a state cannot regulate interstate commerce. As an instance of "induction" may be mentioned the principle that transportation, or the immediate prospect of it, is a necessary ingredient of "commerce."

[66] Justice Miller, in Davidson v. N. O., 96 U. S. 97 (1877).

volving the same clause. This of itself is eloquent of the persistent hazards attending prediction as to its meaning; and in fact the tests with which it confronts important categories of state legislation are probably less susceptible of practical statement today than ever before.

In this connection passing notice should be paid the *legal maxim*—the axiomatic statement of supposed elementary principles of justice. Some of these have played a considerable rôle in the development of our constitutional law. An illustration is the saying that "the legislature may not take the property of A and give it to B without A's consent"; another, the doctrine that no law should be given a retrospective interpretation at the expense of vested rights.[67] These and certain derivatives—for instance, the doctrine that taxation must be for a "public purpose"—were, before the Fourteenth Amendment was adopted, constitutional waifs, which since then have been gathered by the Court under the hospitable roof of the due process clause.[68] Yet even when axioms of this character tend to standardize the application of the clause, it is obvious that their recognition by the Court cannot be said to represent a triumph for judicial "inclusion and exclusion", but is only a fresh instance of transplantation and adaptative creation.

The fact is that the phrase "judicial process of inclusion and exclusion" is of far greater significance for the confession than for the promise which it imports. This is that the Court is really acting without there being any stateable rule of law at hand. And this, no doubt, is what Dean Pound has in mind in characterizing due process of law as a "standard." But even a *standard* implies stateable tests. Whether the modern doctrine of due process of law as "reasonable law" confronts the state legislature with stateable tests is altogether doubtful. Mr. Justice Brandeis has said recently that the Court's present application of it makes of the Court a "super-legislature" [69]—a species of third house

[67] See, *e. g.*, Justice Chase's opinion in Calder v. Bull (*supra*, note 18).

[68] Compare Loan Assoc. v. Topeka, 20 Wall. 655 (U. S. 1875) with Fallbrook Irrigation Co. v. Bradley, 164 U. S. 112 (1896).

[69] Burns Baking Co. v. Bryan, 264 U. S. 504 (1924). *Cf.* Weaver v. Palmer Bros. Co., decided March 8th, last.

of every state legislature in the Union. Yet, it is, curiously, almost exactly the formula for judicial review which Coke suggested in 1612, before written constitutions had been thought of!

3. The final outcome of the Court's law-making in the constitutional field has been, therefore, to supersede, to a degree, the relatively predictable control of constitutional law with a discretionary superintendence of the Court—which answers our third question. Constitutional limitations in an important field of the law have been put in solution; but judicial review has, in consequence, been transferred to a broader basis than ever. By the same token, and in the same measure, the Court has resigned its *constituent* rôle for that of *legislation*—and this in face of the doctrine of the separation of powers on which judicial review rests! Nor can it be doubted that this result owes much to the Court's *a priori* and deductive method. In the presence of the complexities of modern industrial society, judicial review was forced to adopt *one* premise which would afford an eligible recourse when others proved too rigid. Confronted with the alternative of expanding or perishing, it chose the former.

To sum up: Judicial review arose out of the American doctrine of the separation of powers; and this doctrine still dictates the occasions of its exercise, to wit, in connection with the decision of cases. Yet too much might easily be made of this fact, for the extended use of the injunction renders this limitation upon the availability of judicial review of much less moment than it once was. As to the implication of the doctrine of the separation of powers that interpretation of the law, and so of the Constitution, does not change it—that was never anything more than a pious fiction; while today, in consequence of the supersession of predictable rules in important fields of constitutional law by the vague standard which is connoted by the term "due process of law," judicial review has come to vest the Court with an almost undefined power of inhibitory guidance of state legislative policy. In brief, the entire history of judicial review is that of the progressive relaxation of the restraints which are implied in its doctrinal foundation.

On the other hand, the deference which constitutional usage

today renders the doctrine of judicial review is, perhaps, more exacting than ever before, claiming as it does for the Court's reading of the Constitution finality not only as to *cases* but also as to *questions*. And this fact offers pre-eminent proof of the political conservatism of the American people; for the values which are safeguarded by judicial review remain essentially the same they have always been. It is from this cause that the general coherency of our constitutional law for the most part proceeds. The Court has seen the Constitution steadily and it has seen it whole. Indeed, the really important criticism to be made of the Court is that it has centered its attention too exclusively upon the document and the rights thought to be embodied therein, and has given but casual and incidental heed to the nature of the legal order thus implied and its relevancy to the times.[70]

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[70] See POUND, SPIRIT OF THE COMMON LAW, pp. 203-204.