

JUDICIAL REVIEW AND POPULAR SOVEREIGNTY

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ASCERTAINMENT OF LAW BY ANALYSIS OF CONDUCT

The law prevailing in a given society or community is scientifically ascertainable by objective scrutiny of conduct therein.¹ It is composed of those rules which are in fact accepted and observed as being obligatory or normative standards of behavior, appropriate for enforcement by public authority.² Two complementary characteristics are essential: the rule must actually be in force in the community, and not a mere ideal or imagined precept; and it must be a rule prescribing what ought to be done, rather than a mere description of what is in fact done.³

Insistence upon the first of these two requirements enables us to lay aside rules which judges and other officials piously profess but would never actually apply. It enables us also to formulate rules which they do in fact apply, consciously or unconsciously, but would never openly acknowledge.⁴ Like all human conduct, that which deals with the official promulgation of law is marked by certain fictions and concealments dictated by propriety or vanity. A lawyer, like a psychiatrist, must be able to penetrate these deceptive appearances and, at least for purposes of his own analysis, state the rules of law in unconventional terms, however shocking or amusing such a version of social phenomena may appear.⁵ Insistence upon what is actually enforced rather than

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1. Dumbauld, *The Place of Philosophy in International Law*, 83 U. OF PA. L. REV. 590, 593 (1935).

2. Concerning the normative character of law, see *id.* at 592; DUMBAULD, INTERIM MEASURES OF PROTECTION IN INTERNATIONAL CONTROVERSIES 8 (1932).

3. As Mr. Justice Holmes said of negligence: "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not." *Texas and Pac. Ry. v. Behymer*, 189 U.S. 468, 470 (1903).

4. See *e.g.*, FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT 1862-1890 66, 231 (1939); KIPLINGER, WASHINGTON IS LIKE THAT 251 (1942); SWISHER, STEPHEN J. FIELD, CRAFTSMAN OF THE LAW 263 (1930); WINKELMAN, JOHN G. JOHNSON 310 (1942). See also *Penna. R.R. v. Sagamore Coal Co.*, 281 Pa. 233, 126 Atl. 386 (1924); *cf.* *Penna. Coal Co. v. Sanderson*, 113 Pa. 126, 6 Atl. 453 (1886).

5. A classical example is ARNOLD, THE FOLKLORE OF CAPITALISM (1937), which many readers thought hilarious but which paralyzed some with rage and horror.

what is judicially proclaimed has been a healthy tendency encouraged in recent years by the so-called "functional" or "realistic" school of jurists.⁶

Yet there has been some danger that in saying that law is what public officials do,⁷ those jurists might overlook the second distinguishing characteristic of law mentioned above, and ignore the normative nature of legal rules. It must thus be emphasized that no mere description of actual conduct is sufficient; one wishing to know the law must inquire what norms or standards for behavior are presupposed by and deducible from the conduct observed.

LAW REGARDING THE FORMATION OF LAW

Some of the rules of law derived from objective analysis of conduct within a given society will be rules relating to the methods by which law is produced in the society. These rules will specify the "sources of law": usually such sources will include, in addition to custom and usage, the acts of certain law-making bodies and the decisions of certain law-applying bodies⁸ (ordinarily called courts).⁹ The relative rank and authority of the several sources of law will also be indicated: thus statutory rules emanating from a legislative assembly may be regarded as superseding inconsistent rules previously created by judicial tribunals; on the other hand, the courts may sometimes have the power to invalidate statutes enacted by the legislative body.

Law regarding the creation of law is commonly called "constitutional" or organic law. It may or may not be contained in rules emanating from the same sources as other legal rules. In England constitutional law is declared by courts and acts of Parliament; in the United States it is found in written documents issuing from special law-making bodies having higher authority than the ordinary legis-

6. Bohlen, *Old Phrases and New Facts*, 83 U. OF PA. L. REV. 305 (1935).

7. LLEWELLYN, *THE BRAMBLE BUSH* 4 (1930). Cf. HOLMES, *COLLECTED LEGAL PAPERS* 173 (1920). Much of what public officials do is mere routine administration or political activity, unrelated to formation of rules of law.

8. John Chipman Gray thought that all law was really generated by the law-applying body. But this assumes that no human communication can be made so clear as not to require interpretation. Corwin, *Judicial Review in Action*, 74 U. OF PA. L. REV. 639, 656, n. 45 (1926).

9. The term "court" sometimes refers simply to the people surrounding a monarch; such "courtiers" may have the assignment of handing him his shoes or other tasks of the toilette rather than any duties connected with the formulation or application of law. At other times a court may be a legislative assembly (as the "High Court of Parliament," or the "Great and General Court of Massachusetts"). Ordinarily the word indicates a judicial tribunal. The extent to which such tribunals create law also varies. It is greater in jurisdictions governed by the Anglo-American common law than in Civil law countries. It is also greater in a court of last resort such as the United States Supreme Court than in lower courts; and greater there in the case of constitutional law, where action by a legislative assembly is less feasible, than in other fields of law.

latures,¹⁰ and in court decisions commenting upon those written constitutions.

But analysis of the prevailing system of law in any society (even of that relatively undeveloped system of law called international law which governs relations among the society of nation-states) will reveal that it possesses a "constitutional" law, and that each legal rule forming part of the system rests ultimately upon a "fundamental norm" from which all subordinate legislation derives its validity.¹¹

HIERARCHICAL AUTHORITY AND JUDICIAL REVIEW

"It is, emphatically, the province and duty of the judicial department, to say what the law is."¹² Hence it follows that a court making such a determination must heed the hierarchical priority of the various sources of law, and properly evaluate what each contributes.

Thus, just as the court in ascertaining the state of statutory law alone must often reconcile conflicts and resolve questions whether certain provisions have or have not been repealed or modified by the effect of subsequent language, and just as the same task must often be performed in order to clarify the effect of interacting judicial pronouncements, so must the court also in reaching its ultimate conclusion in a case where constitutional provisions are involved determine what the result is of its combined consideration of all relevant sources of law.

For example, a Pennsylvania court in considering a particular question might find a Common Pleas case in point, but then discover that that holding had been reversed by the Supreme Court of the State. The further discovery might then be made that to obviate the ill effects of the Supreme Court's decision an act of assembly had been passed, restoring the rule established by the Common Pleas Court. It might next be ascertained that this legislation had been unsuccessfully challenged in the Supreme Court, upon the ground that the title of the

10. "The constitution of Connecticut is made up of usages," said Paterson, J. in *Calder v. Bull*, 3 Dall. 386, 395 (U.S. 1798). The Virginia Constitution of 1776 was in writing but was enacted by the ordinary legislature. See text at note 23 *infra*. But these instances were unusual in America. Regarding the importance of judge-made "constitutional theory" which goes far beyond the written instruments, see CORWIN, *COURT OVER CONSTITUTION* 94 (1938); JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* xv (1941).

11. Dumbauld, *The Place of Philosophy in International Law*, 83 U. OF PA. L. REV. 590, 593 (1935). Thus a city ordinance has the force of law because a State statute has given it that effect; the acts of the State legislature in turn are law only because the State constitution has vested the legislature with law-making power. Recognition of the fundamental norm (*Grundnorm*) and the hierarchical structure of law (*Stufengang*) are significant contributions of the "Vienna School" of jurisprudence led by Kelsen, Verdross, and Merkl. See KELSEN, *ALLGEMEINE STAATSLERE* 104 (1925); VERDROSS, *DIE VERFASSUNG DER VÖLKERRECHTSGEMEINSCHAFT* 43 (1926). But Oliver Cromwell in 1654 voiced the same notion. DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES* 81 n. 15 (1927).

12. Marshall, C. J., in *Marbury v. Madison*, 1 Cranch 137, 177 (U.S. 1803).

bill did not adequately describe its subject-matter, as required by the State constitution. Then it might be learned that Congress had "occupied the field" by a federal statute regulating the whole subject matter. And finally, it might then be found that the United States Supreme Court had held the act of Congress unconstitutional.

In each step of this process of investigation to ascertain what the law is, it must be emphasized that the court is doing the same thing right along. The nature of its task does not alter when it comes to deal with the question of the unconstitutionality of a statute. In each stage of its inquiry it is simply applying the data derived from relevant sources of law, in accordance with their respective priority of rank and authority, in order to reach its ultimate determination as to the state of the law.

Thus the power of a court to pass upon the validity of an act of the legislature is simply one aspect of the court's ordinary power and duty to determine what the law is on a given matter after duly applying and evaluating the various relevant elements entering into such a determination. The court is merely respecting the hierarchy of authority¹³ established by the constitutional law of the legal system of the society when it holds that what is lower must yield to what is higher.¹⁴

Such respect for hierarchical authority in dealing with the various layers of the legal structure adequately accounts for the institution of "judicial review," without reference to a written constitution or any doctrine of popular sovereignty. The constitution prevails over the act of the legislature merely because it is *higher than that which is inferior to it*, not because it is "higher law" in the sense of a mystical code embodying natural justice and superior to all precepts based on human will.¹⁵

Thus the doctrine of judicial review at first had no connection with a written fundamental law adopted by the people as the supreme power in the state. Corwin remarks that "*judicial review initially had nothing to do with a written constitution.*"¹⁶

13. That the structure of a legal system is characterized by the existence of various strata or stages of authority is expressed in the terminology of the Vienna School by the term *Stufenbau* ("stage structure"). In English the idea may be more clearly expressed by the words "hierarchy of authority," or equivalent language.

14. Cf. *McCulloch v. Maryland*, 4 Wheat. 316, 426 (U.S. 1819): ". . . where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme."

15. Regarding "higher law" in the latter sense see DICKINSON, *op. cit. supra* note 11, at 96-104; Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 152-53 (1928).

16. Corwin, *The Debt of American Constitutional Law to Natural Law Concepts*, 25 NOTRE DAME LAW. 258, 266 (1950). (Italics in the original.) See also Corwin, *Judicial Review in Action*, 74 U. OF PA. L. REV. 639 (1926). Regarding judicial review generally see CORWIN, *THE DOCTRINE OF JUDICIAL REVIEW* (1914) and HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* (2nd ed. 1932).

If the legal system recognizes principles of "natural law" based upon inherent justice as being a source of law of higher authority than a precept established by the legislature, then of course the latter must yield to the former. James Otis, arguing against the odious writs of assistance in 1761, asserted that under English precedents an act of Parliament contrary to natural justice was void.¹⁷ And at a later date American courts in fact did hold statutes void because of repugnance to natural justice¹⁸ until they found a firmer footing in the written language of the due process clause; by relying upon that the same results might be achieved. Indeed, the United States Supreme Court is today still prolific in rendering "natural law" decisions under the due process clause. To be sure, the discredited dogma of "liberty of contract," developed for the benefit of laissez-faire capitalism out of Justice Field's expansion of the concept of "pursuit of happiness" as a constitutional right, has now been abandoned.¹⁹ But it has been replaced by a "new liberty" which is just as much the product of judicial legislation and just as much the child of natural law doctrines as was the social and economic philosophy which it supplanted. This modern version of liberty is concerned with the privileges of picketers, prisoners, proselyters, publicans (in the Scriptural sense), and pigmented portions of the population.²⁰ Moreover, it would not be far-fetched to regard

17. Paxton's Case, Quincy 51 (Mass. 1761); 2 WORKS OF JOHN ADAMS 522, 525 (1850); DICKINSON, *op. cit. supra* note 11, at 91.

18. Loan Ass'n v. Topeka, 20 Wall. 655, 662 (U.S. 1874); Webster v. Reid, 11 How. 437, 459 (U.S. 1850); Dickinson, *op. cit. supra* note 11, at 101; EVANS, LEADING CASES ON AMERICAN CONSTITUTIONAL LAW 328 (1916); HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS 79, 101, 211 (1930); SWISHER, STEPHEN J. FIELD, CRAFTSMAN OF THE LAW 422-25 (1930); Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247, 252 (1914); Grant, *The Natural Law Background of Due Process*, 31 COL. L. REV. 56, 57 (1931); Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67, 71-81 (1931); Haines, *The Law of Nature in State and Federal Judicial Decisions*, 25 YALE L. J. 617 (1916); Howe, *The Meaning of "Due Process of Law" Prior to the Adoption of the Fourteenth Amendment*, 18 CALIF. L. REV. 583, 592 (1930); Reeder, *Constitutional and Extra-Constitutional Restraints*, 61 U. OF PA. L. REV. 441 (1913).

Cf. *Calder v. Bull*, 3 Dall. 386, 387, 398 (U. S. 1798); *Wynehamer v. New York*, 13 N. Y. 378, 390 (1856); *Sharpless v. Mayor of Philadelphia*, 21 Pa. 147, 161 (1853).

19. DUMBAULD, THE DECLARATION OF INDEPENDENCE AND WHAT IT MEANS TODAY 41, 62 (1950). The course of this doctrine may be traced in *Cummings v. Missouri*, 4 Wall. 277, 321 (U.S. 1866); *Slaughter-House Cases*, 16 Wall. 36, 116 (U.S. 1872); *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746, 755, 762 (1884); *Barbier v. Connolly*, 113 U.S. 27, 31 (1885); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 324 (1893); *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897); *Holden v. Hardy*, 169 U.S. 366, 389 (1898); *Lochner v. New York*, 198 U.S. 45 (1905); *Adkins v. Children's Hospital*, 261 U.S. 525, 568 (1923); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

20. Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926); CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 169, 195 (1948). Typical cases are *Cassell v. Texas*, 339 U.S. 282 (1950); *Uveges v. Pennsylvania*, 335 U.S. 437 (1948); *International Harvester v. Dep't of Treasury*, 322 U.S. 340 (1944); *Douglas v. Jeannette*, 319 U.S. 157 (1943); *Thornhill v. Alabama*, 310 U.S. 88 (1940).

the category of natural law decisions as also including the long line of cases imposing restrictions on State power which are supposedly based upon the commerce clause.²¹

JUDICIAL REVIEW AND WRITTEN CONSTITUTIONS

Since written constitutions very obviously are intended to be a source of law of higher authority than the acts of the ordinary legislature, it is natural that judicial review should flourish most vigorously in America where written constitutions became the fashion. In the famous case establishing the power of the United States Supreme Court to set aside unconstitutional acts of Congress, Chief Justice John Marshall dwelt upon the logical necessity of such power under a written constitution imposing limitations upon the power of the ordinary legislature:

The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written . . .

Certainly, all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. This theory is essentially attached to a written constitution, and is, consequently, to be considered, by this court, as one of the fundamental principles of our society. . . .

* * *

Those, then, who controvert the principle, that the constitution is to be considered, in court, as a paramount law, . . . would subvert the very foundation of all written constitutions . . . That it thus reduces to nothing, what we have deemed the greatest improvement on political institutions, a written constitution, would, of itself, be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction.²²

Marshall's political adversary, Thomas Jefferson, was equally positive in demanding that the ordinary legislature be confined within the limitations prescribed by a fundamental law. Perhaps one of the

21. *Hays v. Pac. Mail Steamship Co.*, 17 How. 596 (U.S. 1854) is recognized as a decision based upon general principles of fairness and not on anything in the commerce clause. EVANS, *LEADING CASES ON CONSTITUTIONAL LAW* 328 (1916); Powell, *Due Process Tests of State Taxation, 1922-1925*, 74 U. OF PA. L. REV. 423, 424 (1926). See also, *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767 (1945); *McCarroll v. Dixie Greyhound Lines*, 309 U.S. 176, 183 (1940); Biklé, *Book Review*, 74 U. OF PA. L. REV. 517 (1926).

22. *Marbury v. Madison*, 1 Cranch 137, 176 (U.S. 1803). See also 2 BRYCE, *MODERN DEMOCRACIES* 10, 27 (1921).

reasons why he was annoyed by the opinion in *Marbury v. Madison* was because he suspected a subtle reference to his drafts of a proposed constitution for Virginia when Marshall mentioned "those who have framed written constitutions" as authorities supporting the conclusions reached by the Chief Justice in that decision.

Jefferson contended that the Virginia constitution of 1776, although in writing and called a constitution, was not in truth a fundamental law. That document had been enacted by the ordinary legislature, and hence could be repealed or altered in the same manner by the ordinary legislature. Jefferson believed that a constitution should be adopted by a convention, specially empowered by the people to establish a frame of government inviolable by the ordinary legislature.²³

WRITTEN CONSTITUTIONS AND POPULAR SOVEREIGNTY

These contentions of Jefferson regarding the Virginia Constitution of 1776, and those of Otis regarding writs of assistance in 1761, demonstrate that the significant feature of a constitution in connection with judicial review is not whether it is written or unwritten, but its hierarchical authority as a higher source of law than ordinary legislation. As a modern writer states: "the mere fact that a constitution is written is immaterial apart from the contents of that constitution."²⁴

Jefferson wanted a constitution established by authority of the people, because he believed in government by "the consent of the governed" and hence regarded the people as the supreme authority.

Because the Constitution of the United States was viewed as an exercise by the people of the right of self-government claimed in and proclaimed by the Declaration of Independence,²⁵ the Constitution became an object of worship in America.²⁶

As an instrument ordained by "the people," its supremacy was derived from the fact that "the highest possible embodiment of human

23. 2 WORKS OF THOMAS JEFFERSON 158-183 (1904) ; 4 *id.* at 22-28, 36, 149, 154 ; 5 *id.* at 14, 30 ; 6 *id.* at 160 ; 12 *id.* at 407 ; Patterson, *Jefferson and Judicial Review*, 30 A.B.A.J. 443 (1944) ; Patterson, *Thomas Jefferson and the Constitution*, 29 MINN. L. REV. 265, 268 (1945).

24. Reeder, *Constitutional and Extra-Constitutional Restraints*, 61 U. OF PA. L. REV. 441, 456 (1913).

25. *Gulf, Colo. and Santa Fe Ry. v. Ellis*, 165 U.S. 150, 159 (1897) ; *McCulloch v. Maryland*, 4 Wheat. 316, 404 (U.S. 1819) ; *Marbury v. Madison*, 1 Cranch 137, 176 (U.S. 1803).

26. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149 (1928). To a lesser degree this was true also of State constitutions, though they often embodied voluminous details having little public interest. At least three States have constitutions which were never approved by popular vote. Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67, 69 (1931).

will, is 'the people.'" 27 Hence "in the American *written Constitution*, higher law at last attained a form which made possible the attribution to it of an entirely new sort of validity, the validity of a *statute emanating from the sovereign people*. Once the binding force of higher law was transferred to this new basis, the notion of the sovereignty of the ordinary legislative organ 28 disappeared automatically since that cannot be a sovereign law-making body which is subordinate to another law-making body." 29

POPULAR SOVEREIGNTY AND NATURAL LAW

That a system of law must rest on a basis of popular sovereignty or consent of the governed in order to be legitimate is a "natural law" assumption on the constitutional plane.³⁰ Positivist jurists would hold that the validity of law is sufficiently demonstrated if it is shown to rest upon the fundamental norm or constitution (*Grundnorm*) of the system. They would not claim for the people, at the constitutional level, a right to participate in the process of making law unless the existence of such a right was disclosed by analysis of the particular constitution under consideration.

The absence of consent by the governed would not deprive of validity a law duly enacted in accordance with the law-making procedure prescribed by the constitution any more than the circumstance that the law might be unjust, unwise, or unreasonable. Indeed, to regard a law as binding only when made by consent of the people is perhaps merely a special case of the proposition that no law contrary to natural justice is binding. Positivism would recognize a people's right to self-government only where it was actually accorded by definite constitutional provisions.

Popular sovereignty, as asserted in the Declaration of Independence, is thus a natural-law concept or principle of political philosophy, just as the similar concept of inherent and unalienable rights proclaimed by that instrument rests upon natural law doctrines.³¹

27. Corwin, *supra* note 26, at 151. That government in the United States rested upon the sovereignty of the people was stressed by James Madison and James Wilson. 9 MADISON, WRITINGS 386, 568, 604 (Gaillard Hunt ed. 1910); 3 WILSON, WORKS 292 (1804); ADAMS, POLITICAL IDEAS OF THE AMERICAN REVOLUTION 142, 170-76 (1922).

28. As recognized in the English doctrine of Parliamentary sovereignty. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 37 *et seq.* (8th ed. 1923).

29. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 365, 409 (1928, 1929). (Italics in the original.)

30. Dumbauld, *The Place of Philosophy in International Law*, 83 U. OF PA. L. REV. 590, 596, 600 (1935). The resemblance between social compact doctrines and the theory that international law must rest on the consent of states has not escaped notice.

31. DUMBAULD, THE DECLARATION OF INDEPENDENCE AND WHAT IT MEANS TODAY 39, 70 (1950). Natural rights philosophies are inevitably subjective and shaped

That popular sovereignty, under Anglo-American constitutional jurisprudence, does not remain a mere speculative principle but is extensively embodied in positive law provisions is a circumstance of congratulation.³²

It cannot be denied, however, that there are areas of American positive law where the principle is not applied. For example, residents of the District of Columbia have no vote. They are not represented in Congress. Their being governed by Congress is therefore plainly a violation of the doctrine of popular sovereignty, of the spirit of the Declaration of Independence, and of the Revolutionary maxim "Taxation without representation is tyranny." Yet I have no doubt that a District of Columbia court would apply an act of Congress as law. This demonstrates that the principle of hierarchy of authority is controlling, rather than the principle of popular sovereignty, in judicial determination of what the law is. Another example is the government of occupied Germany or other conquered countries. The conqueror's edicts, regardless of their acceptability to the population affected, would doubtless be applied by courts as a source of law of superior authority prevailing, in case of conflict, over contrary local enactments.

There is no difficulty, either, in conceiving of a legal system where the supreme lawgiver recognized in the hierarchical structure would not be the people at all, but an Emperor, Pope, King, Dictator, or Parliament deriving no authority whatever from the consent of the governed (except in the sense that they acquiesce in such rule and do not revolt against it). Thus even if the English Parliament should enact that the members of Parliament were to be appointed by the Lord Chancellor and hold office for life, acts of Parliament would still be law in English courts.

POPULAR SOVEREIGNTY AND JUDICIAL REVIEW

Nevertheless it is clear that the doctrine of popular sovereignty made the acceptance of judicial review in America seem desirable as well as natural and inevitable. This occurred because judicial review came to be viewed as an effective weapon in the defense of popular sovereignty when the will of the people received specific expression in constitutional documents having higher authority than the enactments emanating from other sources of law.

by individual idiosyncracies. *Id.* at 38. Thus a Kentucky court has held that "the right to use liquor for one's own comfort, . . . is one of the citizen's natural and inalienable rights, guaranteed to him by the Constitution." *C'wealth v. Campbell*, 133 Ky. 50, 63 (1909). But this has not received assent *semper et ubique et ab omnibus*.

32. Dumbauld, book review of VOSSLER, *DIE AMERIKANISCHE REVOLUTIONSIDEALE IN IHREM VERHÄLTNIS ZU DEN EUROPÄISCHEN*, in 24 AM. POL. SCI. REV. 773-75 (1930).

That the power to give effect to the popular will as so enunciated was entrusted to a professional class jealous of its independence and prerogatives accentuated the vigor with which judicial review was exercised.³³ Both because of this *esprit de corps* in the legal profession, and because the function of judicial review was regarded as a form of homage to popular sovereignty, the prestige of the judiciary increased.

Not only were judges esteemed as guardians of the people's will, but they retained their ancient glory as spokesmen of a "higher law" embodying ethical justice and not resting on human volition. A vestige of this historical tradition survives among lawyers in the respect accorded to courts and the distrust felt toward administrative bodies, even when both are equally agencies established by the same public authority and manned by personnel of identical training and ability.³⁴

The authority of courts was enhanced by a wide-spread belief that judges did not make law but merely declared it, that they exercised no volitional legislative function, but merely announced, as an investigator in the natural sciences might do, the findings obtained as the culminating results of a rational process of inquiry. Since by reason of their professional training knowledge of all law was their peculiar province, courts were regarded as especially qualified to expound constitutional law with authority. When they spoke as interpreters of the supreme law they were thought to be merely enforcing the will of the people who had ordained and established it. Moreover, from the standpoint of practical politics, courts were thought to be more trustworthy, as well as less corrupt and partisan, than other agencies of government. Thus it was with a considerable degree of popular acquiescence that the judiciary claimed and exercised the power to review, for the purpose of determining their constitutionality, the acts of other organs of government, including the ordinary elected legislatures of the land.

Logically there was nothing wrong with this system. It was natural that the professional function of determining what the law is should include the incidental and subsidiary task of giving effect to the supremacy of the supreme source of law. Practically, however, the courts though professing to speak in the name and by authority of the

33. Corwin, *supra* note 29, at 182-83, 409.

34. See note 15 *supra*. This involved, in so far as juristic positivism was accepted, an illicit transfer, to rules based merely upon public authority, of the reverence habitually accorded to rules based upon justice. Corwin, *supra* note 29, at 409. As to the distinction between judicial and administrative agencies, see ARNOLD, *THE SYMBOLS OF GOVERNMENT* 201-206 (1935); DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES* 76-77, 82-84, 93-95 (1927); Jackson, *An Organized American Bar*, 18 A.B.A.J. 383 (1932).

people introduced their own individual economic and political idiosyncracies into their interpretation of vague and broad constitutional language. Assuming "the powers of a super-legislature,"³⁵ they struck down statutes which were more consonant with the actual will of the people than were the court decisions holding them unconstitutional.

Thus the United States Supreme Court held for nearly a quarter of a century that Congress could not take action against child labor by excluding from interstate commerce "the product of ruined lives."³⁶ Such decisions preventing governmental action to remedy acknowledged evils, though they may be regarded in certain professional circles as the essence of constitutional law,³⁷ are eloquent contradiction of the proposition that judicial review is merely an agency for enforcing the people's will.

In fact government regulation is often the only means the people have of making their will effective against the machinations of powerful private interests.³⁸ To hold such regulation unconstitutional is in truth a denial rather than a vindication of popular sovereignty.

As Abraham Lincoln said in his First Inaugural: "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."³⁹

35. Brandeis, J. dissenting in *Burns Baking Co. v. Bryan*, 264 U.S. 504, 534 (1924).

36. Justice Holmes, dissenting in *Hammer v. Dagenhart*, 247 U.S. 251, 280 (1918). This holding was not overruled until *United States v. Darby*, 312 U.S. 100, 115-17 (1941).

37. "To the professional mind the 'Constitution' that is worth talking about comprises judicial decisions purporting to interpret the constitutional document, but more especially *those decisions in which some national or state law has been declared unconstitutional*. Nor is this strange, for usually the best fees are to be had from those who have an interest in resisting the extension of governmental authority; nor do the decisions in which challenged legislation is sustained offer by any means the same degree of promise of future litigation—and hence of fees—that the other sort do." CORWIN, *THE TWILIGHT OF THE SUPREME COURT* xxiii (1934). (Italics in the original.) Judge Clark likewise comments on "the well-nigh complete obsession of the American Bar Association with fears of governmental activity." Clark, Book Review, 54 *YALE L.J.* 172, 174 (1944).

38. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* xxiii (1941): "Our struggle has been to restore effective government—the only means through which the will and opinion of the people can have any expression."

39. Quoted in CORWIN, *COURT OVER CONSTITUTION* 73 (1938). Justice Robert H. Jackson recognizes the existence of a basic inconsistency between popular government and judicial supremacy. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* vii (1941). The same problem troubled Jefferson: "A judiciary independent of a king or executive alone, is a good thing; but independence of the will of the nation itself is a solecism, at least in a representative government." 12 JEFFERSON, *WORKS* 178 (1904).

What caused public concern over the operation of judicial review was the fact that court decisions directly contrary to the desires of the people were rendered in doubtful and controversial matters of burning political interest. And most of these decisions which antagonized popular sentiment were later recognized by history as having been wrong.⁴⁰ It was not the existence of judicial review, but the manner in which it was exercised, that created controversy.

For no one can deny that by its intrinsic nature constitutional law cannot be rigid, but calls for flexibility and a wide range of judicial discretion in the application of more or less elastic standards. Characteristic of it is the amorphousness which annoyed John Chipman Gray, that unrivaled master of the iron-clad rules of real property law, and caused him to characterize constitutional law as being "not law at all but politics." The court enjoys "a freedom virtually legislative," enabling it "to achieve almost any result in the field of constitutional interpretation which it considers desirable, and that without flagrant departure from judicial good form." In the famous language of John Marshall: "we must never forget that it is a *constitution* that we are expounding . . . intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs."⁴¹

The task of upholding the supremacy of a source of law whose authority is controlling but whose commands are couched in vague and substantially meaningless terms necessarily compels a court to indulge in a certain amount of judicial legislation. This is legitimate and unavoidable; it is a consequence of the necessity for deriving specific decisions from indefinite generalities, for extracting concrete meaning from something which contains none. It is what courts constantly do, because cases must be decided, whether there is any genuine governing authority applicable or not. *Ex post facto* interpretation of a constitutional provision as to which the framers expressed no actual intent is just the same process as discovering the supposed intent of a statute or contract with respect to matters not dealt with therein. But the fact that an agency of government is vested with a large measure of "discretion," even in matters of political importance, does not justify a continued course of decisions exercising that discretionary power in a manner contrary to public sentiment.

Popular dissatisfaction with judicial review in practice, when it ceased to be a genuine expression of popular sovereignty in any but the

40. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* x (1941).

41. *McCulloch v. Maryland*, 4 Wheat. 315, 407, 415 (U.S. 1819); CORWIN, *THE TWILIGHT OF THE SUPREME COURT* 117, 181 (1934); Frankfurter, *The Constitutional Opinions of Justice Holmes*, 29 HARV. L. REV. 683 (1916).

most artificial sense, has produced many proposals designed to diminish the uncontrolled political influence of the judiciary. In the case of the Supreme Court of the United States, such proposals began with Jefferson and culminated in Franklin D. Roosevelt's "court-packing" plan.

Jefferson urged in 1821 that the tenure of office of members of the court be limited to a short term, such as six years.⁴² In 1823 a proposal was made in Congress that decisions holding statutes unconstitutional should require a certain number of votes more than a bare majority of the court.⁴³ This scheme was revived a century later by Senator Borah.⁴⁴ A proposal by Senator La Follette would have permitted a statute held unconstitutional to stand if re-enacted by Congress.⁴⁵ The La Follette and Borah schemes were offered again in 1937 by Senators Wheeler and O'Mahoney.⁴⁶ Roosevelt's plan, disclosed in his message of February 5, 1937, was to authorize appointment of an additional Justice for each one over retirement age who did not retire.⁴⁷

The various measures proposed to curb the court's power were usually defective or undesirable in some respects, and they were never adopted. Thus La Follette's plan is rather bizarre in that it is difficult to see why an unconstitutional law should become constitutional if it is passed twice. Similarly, Borah's scheme of requiring a vote of seven out of nine members of the court to declare legislation unconstitutional is illogical and contrary to the custom of majority rule which prevails in the determination of all other legal questions by courts. Decisions as to constitutionality, under our system, are simply one phase of the exercise of the normal judicial function of ascertaining what the law is, after giving due consideration to all sources of law in accordance with their hierarchical authority.⁴⁸ No judge should subordinate his own opinion to that of others in constitutional questions any more than

42. 2 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 116 (1922).

43. *Id.* at 123-24.

44. WARREN, *CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT* 179 *et seq.* (1925).

45. *Id.* at 138.

46. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 352-53 (1941).

47. 81 CONG. REC. 877-881; H.R. REP. NO. 4417, 75th Cong., 1st Sess. (1937); Fite and Rubinstein, *Curbing the Supreme Court—State Experiences and Federal Proposals*, 35 MICH. L. REV. 762 (1937). This scheme had been proposed in 1869 by Congressman John A. Bingham of Ohio, one of the framers of the Fourteenth Amendment. FAIRMAN, *MR. JUSTICE MILLER AND THE SUPREME COURT 1862-1890* 393-96 (1939).

48. See text at notes 13 and 14 *supra*. Courts possess no substantive power of vetoing legislation, such as had been proposed in the Constitutional Convention of 1787. *Adkins v. Children's Hospital*, 261 U.S. 525, 544 (1923); *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923); CORWIN, *COURT OVER CONSTITUTION* 26-29 (1938); FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, 21, 104, 131, 138-40 (1911).

in any other questions coming before the court for determination.⁴⁹ Likewise, Roosevelt's plan to replace over-age judges who did not resign might have made the personnel of the court too numerous and unwieldy. It would have permitted as many as fifteen members.⁵⁰

But although none of the court reform proposals were adopted, they were beneficial to the public, nonetheless, in making courts aware of the necessity for self-imposed limitations upon the political activity of the judiciary. They achieved their purpose in causing the courts to correct their own errors,⁵¹ to apply the standard of reasonableness to judicial action as well as to that of other governmental agencies, and to go "back to the Constitution" for principles of constitutional law instead of continuing to sponsor unacceptable judge-made theories as an official gloss upon or substitute for the written document. In so doing judicial review regained its legitimate function as a weapon for the defense of popular sovereignty.

49. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 401 (1937); WARREN, CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT 204-6 (1925); Corwin, *Judicial Review in Action*, 74 U. OF PA. L. REV. 639, 646 (1926).

50. Dumbauld, *A National Court of Appeals*, 29 GEO. L.J. 461, 465-66 (1941).

51. Subsequent history has justified Corwin's confidence in corrective action by the court itself as the most appropriate technique for bringing constitutional law into accord with the principles of popular sovereignty and democratic government. CORWIN, *THE TWILIGHT OF THE SUPREME COURT* 117, 181 (1934); CORWIN, *THE COMMERCE POWER VERSUS STATES RIGHTS* 265 (1936); CORWIN, *COURT OVER CONSTITUTION* 68, 126-27 (1938); JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* vii (1941); 3 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 470 (1922). The need for judicial self-restraint was well stated by Mr. Justice Stone in *United States v. Butler*, 297 U.S. 1, 78-79 (1936): "while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint."

An illustration of unconstitutional judicial action is found in *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938). FREUND, *ON UNDERSTANDING THE SUPREME COURT* 73 (1949).