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Ernest Bruncken

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THE CONSTITUTION, THE COURTS, AND THE COMMON LAW

BY ERNEST BRUNCKEN*

Not so very many years ago, the peculiar power American courts possess of pronouncing a statute void for unconstitutionality was considered, with practical unanimity, one of the chief excellencies of our form of government. Being deemed, alike by lawyer and layman, the necessary consequence of the system of restricted and divided governmental powers, it was held to afford a security against arbitrary government such as no other country could boast. Thirty years ago, Americans would as soon have given up the Constitution itself as this power of the courts.

To-day, things are changed indeed. A large and by no means silent minority, which may possibly become a majority before we suspect it, believes that this power of the judiciary, far from being a "bulwark of our liberty," to use a trite phrase, has become the instrument by which a special class among our people may defend special privileges they enjoy in contravention of the principles and ideals characteristically American since the days of Jefferson and the Declaration of Independence. Lawyers may think such a belief untenable and absurd, but the new doctrine is too persistent and gains adherents too rapidly to warrant contemptuous neglect.

It is proposed in this article to analyze the nature of the power to hold a statute unconstitutional, and to suggest some means that may possibly remove the causes of opposition.

THE NATURE OF THE POWER

In all countries except the United States and a few whose constitutions, like that of the Australian Federation, are closely modeled after our own, the constitutionality of a law is considered to be a political and not a judicial question. Perhaps recollection of the maxim in the Code of Justinian, according to which the maker of a law is its natural interpreter,¹ has something to do

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*Member of the Milwaukee Bar. Contributor of "Making the Accused Testify Against Himself" in 5 Marquette Law Review 82.

¹ "Who would seem to be fitter to solve doubts and make them clear to all men, than he to whom the sole power of making laws has been granted? . . . . The emperor is rightly deemed both maker and interpreter of statutes." Code 1, 14, 12.
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The more obvious and immediate reason, however, is that in all these countries, even though nominally democracies, the effective supreme power resides in the Government. Theoretically, at least, the people, having exercised their function of electing representatives, renounce all right to limit the power of their agents. The representatives, acting in the prescribed forms, have all power the people themselves might exercise. Parliament is omnipotent, not in England alone, but in most other countries. It may change even a written constitution. At most, it has to observe certain modes of procedure differing from those in ordinary legislation. All this really amounts, when compared with the American system, to absolute government exercised by Parliament, just as in the Rome of the Caesars absolute government was administered by the Emperor. Allowing a court to tell such an absolute government that one of its acts is unconstitutional would be equivalent to giving it the judiciary powers of a supergovernment.

The American system is fundamentally different. With us, the people really possess and retain the supreme power, and the various governmental departments have no authority except what the people have granted them. The familiar distinction that state legislatures have all legislative powers except those expressly kept from them, while Congress has only such as are expressly granted to it by the federal constitution, leaves the principle intact. Neither the one nor the other can change the constitution under which it functions.

All this is, of course, a mere restatement of elementary law; but it was necessary to state again, in order to show the contrast with foreign systems in which both logic and custom treat constitutionality as a political question. "Who makes the law shall interpret it." Therefore, where an omnipotent parliament is the law-maker, it is absurd to destroy that omnipotence by giving the court the right to hold its laws void. Conversely, where the legislature is a mere agent, through which the real law-maker, the people, make their will known, the interpretation belongs to the principal. However, to ascertain whether an agent has acted

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2 In some of the new constitutions made since the World War, questions of constitutionality are referred to special judicial tribunals; but there the matter must be brought by a direct and special proceeding. It cannot be made an issue collaterally in an action between private parties and in the ordinary courts. Such a method still leaves the question political rather than juridical; only, the arguments are addressed to a bench of judges instead of legislative or executive officers. A court of this kind is analogous to our administrative boards with quasi-judicial functions.
within the scope of his authority is clearly a judicial function. Consequently, as all judicial power has been delegated by the people to the courts, the interpretation of the constitution, with us, belongs to them.

To most lawyers, accustomed from their youth to the traditional American system, such reasoning must appear obvious, and the opposition to this power of the courts almost perverse; yet it will hardly do to charge so large a group as those who attack this power with being either stupid or acting against their better knowledge. A closer analysis of the judicial function may throw light on this puzzle.

As long as the issue of unconstitutionality is based on questions solvable by the ordinary rules of interpreting written instruments, the juridical character of the problem is so obvious that objection is seldom made. Where a constitution provides that the legislature must not pass a special law granting corporate powers, and the legislature attempts to do so, even the most zealous opponent of judicial power will probably be satisfied to let the court correct the legislative error. In such a case the question is whether a definite formulated rule of the Constitution and a definite, formulated rule contained in an attempted statute are inconsistent. Nobody in this country denies that where two such definite rules conflict, the Constitution must prevail, although the statute is the later enactment.

There is another class of cases, however, where a definite rule laid down in a statute may conflict, not with a similarly definite rule in the Constitution, but with some principle enunciated by that instrument in general terms only, or perhaps held merely to be implied from fundamental notions lying behind the Constitution. Such a notion is, for instance, the universal right to enter into contracts not prohibited by some other principle equally fundamental.  

In such cases, the logical character of the court's work is essentially different from that of the former class. It is no longer the comparison of two definite rules, expressed in authoritative language and to be accomplished by well-established methods drawn from philology and logic. Instead, it is now the court's duty to discover what the principle invoked actually means according to the ideas predominating in the minds of the community. Thereupon, it will declare whether the idea underlying the statute is or

\[^2\text{On the distinction between "principles" and "rules" of law, see: Bruncken, "Interpretation of Written Law," 25 Yale Law Journal, 129.}\]
is not consistent with the beliefs or habits prevailing among the people and but indefinitely expressed in the principles of the Constitution. In other words, the court must apply what has sometimes been called conveniently the sociological method of interpretation.

Now it will be found that the persistent popular dissatisfaction with certain decisions relating to the constitutionality of statutes is almost altogether confined to cases decided according to this sociological method. That is, the courts, or the majority of their judges, differ with their critics regarding the actual state of the public mind. In most cases, these differences occur in cases relating to the police power.

THE COMMON LAW BACKGROUND

This condition can not be properly understood except by a reference to the peculiar nature of the American and English legal system, which distinguishes it sharply from the modern law of the so-called civil law countries, even where there is a superficial resemblance in the actual rules.

Although written law embodied in constitutions and statutes has increased enormously within the last hundred years, it is still true that American law is essentially customary or unwritten law. In daily practice the American lawyer has to deal with statutory questions many times before he has to solve a single question regarding the common law; consequently, it is not surprising that the true nature of our legal institutions is not always present in his consciousness. Yet it is a fact that no statutory or constitutional provision can be treated as an independent statement of the law, to be interpreted merely by its text and the rules of logic. In every case it must be understood with reference to the common law. It is nothing more than an amendment of the latter, whether it makes a mere trifling change or entirely reconstructs a whole province of the legal realm.

This character of American law is curiously illustrated by the

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4 In the modern Continental system (as well as in the Latin-American countries) all law is presumed to be found in the codes and other enactments. If it is claimed that a custom modifies the written provision, such claim must be proven in a manner analogous to the requirements of providing a special custom in England. This is commonly difficult, and often made more so by judicial usage, usus fori, which of course, is itself a kind of customary law, but one known to and applied by the court, proprio motu.

5 See for a larger treatment of this subject: Bruncken, The Common Law and Statutes, 29 Yale Law Journal, 516, and cases there cited.
experience of California with its codes, containing an express provision that "the codes are not amendments of existing law, but an independent statement of the law of the state." What could be more definite than this direction? Moreover, there is another provision, according to which the court may follow the common law of England as subsidiary law where no pertinent provision is found in the codes. Accordingly, the common law has no greater authority in California than the *Siete Partidas* or any other portion of Spanish or Mexican law, which also may be used as subsidiary in proper cases. Such is the theory. In practice, a glance at any published California case shows that the courts of that state argue precisely as do those of common law jurisdictions, with constant reference to precedents based on the common law, which they find in the other states or in England. They cannot do differently as long as they adhere to the rule of *stare decisis*, for that rule means, if it means anything, that no written law is an original statement but an amendment of a pre-existing legal principle declared in some previous decision of a court. Thus the code section cited is nullified by the common consent of a people and a bar to whom common law methods are as natural as eating and drinking. Probably no California lawyer, since Mexican dominion was ended, has ever thought of doubting the doctrine of binding precedent.

If then, our law is still what it has always been, customary law overlaid by an immense growth of statutory amendments, it becomes essential for an understanding of judicial methods, to inquire into the manner of declaring the binding custom of the country. If we follow any common law rule or principle backward along the line of leading cases to the decision in which it was first announced, we shall find invariably that the court bases its judgment on some notion of common sense. He assumes, as something beyond dispute, that there is a particular way of acting in the premises which one may expect from any upright and reasonable human being. The question to decide is whether the parties have acted in that way or not. If one of them has failed to do so, judgment goes against him. That way of acting is the custom of the country, the common law, and it is supposed to be known to all persons, including judges and attorneys. In fact, this universal knowledge regarding it is what makes it the law. After the court has once judicially declared it, there is no further

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*C California Civil Code, sec. 4; and analogous sections of the four other codes.*
need of falling back on the universal sentiment of the outside community. The declared opinion of the court, the precedent, now becomes the starting point, and logic the method by which the rule of the first decision, with all its implications and corollaries, is applied to the facts presented by subsequent cases. From time to time, however, the court is struck with the impression that to follow the strictly logical reasoning would work obvious injustice, inconvenience or absurdity; then he breaks away from the logical leading strings and resorts once more to the living fountain of law, the customs of actual life, for a wise judge is aware that logic is the tool, but by no means the motive power, of legal development. When and how this break in the logical chain is to be made must remain a matter of judicial tact; no rule can be stated regarding it.

Now it is simple enough for the judge to know what is the customary way of acting in his community as long as the life of society flows on quietly and steadily without great and sudden changes. To do so, however, becomes one of the most difficult things in the world in periods when the moral attitude, the intellectual habits, and the methods of carrying on business in the community are changing profoundly sometimes within a single decade. Such is the predicament in which we find ourselves today. For a century or more, the evolution of economic and social life has proceeded at such a rapid pace that many a man, not happening to be of rapidly adjustable temperament, has been left hopelessly behind by "progress" of such feverish tempo.

Here is to be found the true reason why so many courts, in deciding cases involving the police power and other matters founded on general principles rather than definitely established rules, are unable to make their opinions conform to what large portions of the people conceive those principles to be. They have no established precedent to guide them and must needs resort to what knowledge they have of the universal custom. But as a matter of fact, there is no custom, no general expectation that a person will act in a given manner; there may even be several customs. One class or group conceives one way of acting in certain circumstances to be the only just, reasonable and expedient one; another group of people may hold diametrically opposed views; but the courts must come to some decision. They cannot suspend their judgment until further knowledge is gained, as would a scientific investigator intending merely to find the truth,
instead of having to put an end to a controversy, as is the business of a court. Of necessity, in such cases, the court's decision will seem to be grossly perverse to one group in the community or to the other.

Such is the fate of our courts at the present time whenever they decide a question relating to the police power of state and federal governments. Being mostly elderly gentlemen, where public opinion is rapidly changing the judges will tend to lean toward the conservative side. When most of the present judges were in the "rising young lawyer" stage, the almost universal custom, in effect the common law of this country, was to leave practically all economic activities to the unrestricted, unencumbered enterprise of individuals. Even so mild and cautious an innovation as the doctrine of the so-called Granger cases, that there may be some kinds of business peculiarly affected with a "public interest" and therefore legitimately liable to governmental regulation, came with quite a severe shock to a majority of lawyers and laymen of those days. When the majority of the United States Supreme Court held that a statute prohibiting bakers from working more than a certain number of hours at night invaded the inalienable right of these workmen to make their own contracts, they merely failed to realize that a far-reaching change in public opinion had taken place within less than the lifetime of the judges themselves. If that decision had been rendered thirty years earlier, it would undoubtedly have been approved by substantially unanimous opinion. In fact, no legislature of 1860 would have passed such a statute.

Is There A Remedy?

The question then arises: Are the decisions often rendered in cases of this kind, blocking as they do lines of progress highly approved by a majority in the community, so obnoxious to the deliberate wishes of the American people as to justify overturning one of our most characteristically American institutions by depriving the courts of the power to decide questions of unconstitutionality?

One might simply counsel the critics of the courts to have

1 Munn v. Illinois, 94 U. S. 113; Chicago, Burlington & Quincy Railway v. Iowa, 94 U. S. 115.
patience. The elderly judges, still imbued with notions cast aside by the new generation, are not immortal. As they retire and younger men fill their places, the new opinions will have their chance and the obnoxious precedents be overruled, or whittled away into innocuous desuetude by the familiar process of distinguishing. This advice might appeal to the thorough-paced legal mind. It would seem, however, as if the dissatisfaction had become too widely spread and had assumed too distinctively a political character to allow of a method so typically lawyer-like.

The process of changing the law by changes on the bench might be accelerated somewhat, if the Ohio constitutional provision were universally adopted, according to which a statute cannot be held unconstitutional as long as two of the judges uphold it. That would do away with the irritating five-to-four decisions of the United States Supreme Court. It is really nothing more than the express enactment of a principle steadily upheld by the courts in theory, sometimes in the same opinion in which it is violated in practice, for it is elementary that every presumption is in favor of the constitutionality of the act of a co-ordinate branch of the government, and only the most convincing reasons will justify the court in holding a statute void as unconstitutional. One should think that the reasons against validity can hardly be very clear and indubitable, where four learned justices out of nine do not see their cogency.

It is not probable, however, that the existing agitation against continuing to let the courts exercise this power will be quieted by such mild devices; much more radical measures have already been proposed, although hardly elaborated with sufficient definiteness. Theodore Roosevelt's dramatic pronouncement for a "recall of decisions" need not be taken too seriously. It was probably more the impulsive outburst of an orator enamored of epigram than the deliberate counsel of a statesman. Recently, however, a leader hardly less distinguished than the late president, and at the same time himself a lawyer, has suggested that an opinion of the United States Supreme Court should have, in such cases, a merely suspensive effect. If at its next session the Congress re-enacts the law, it must be given effect by the court. If Congress fails to do so, the opinion of the court stands as law.

This proposal of Senator LaFollette was made in the course of a political speech and he has not, to the writer's knowledge,

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9 See address of Former Justice Clark, Proceed. Amer. Bar. Assoc., 1923.
10 Speech to the American Federation of Labor at Cincinnati, June, 1922.
formulated the idea as a definite legislative measure. Since then, and no doubt encouraged by the distinguished senator's authority, a number of political conventions of varying degrees of progressivism or radicalism have declared for this measure as a remedy for what some of them have been pleased to call the usurpation of power by the courts.

An obvious feature of this proposition is that it breaks with the American distinction between the Constitution and ordinary legislation, as functions of different nature, entrusted the one to a body with delegated and restricted powers, the other exercised by the people themselves in their sovereign capacity, acting through the several states. It may be doubtful whether the adoption of such a measure would not, in effect, change the entire character of our government, whether it would not substitute for the limited government as we have known it in the United States, the English and Continental system of an omnipotent parliament, for evidently Congress might enact any law whatever, and by the simple device of re-enacting it after the Supreme Court had pronounced it void, change the Constitution to any extent they saw fit.

Where the United States Supreme Court has pronounced against the constitutionality of a state statute, it is not clear whether the state legislature is to have the analogous right of validating it by re-enactment. If so, additional complications may arise. It may be that the invalidity was based on conflict with an act of Congress. If the legislature can validate its statute, can it not thereby repeal an act of Congress? Or even of the federal constitution? That comes very close to the ancient doctrine of nullification.

The proposal, in its present shape, can hardly be expected to gain the approval of the American people until they are ready to abolish much of what is most characteristic in our institutions. It seems to the writer, however, as if the underlying idea of a decision merely suspensive at first could be utilized without subjecting the Constitution to any appreciable strain, by the following device: Let the judgment, in those cases involving unconstitutionality for inconsistency with general principles rather than formulated rules, be suspended until after the next session of Congress. Then let Congress, if it chooses, adopt a resolution upholding the validity of the act, perhaps giving the reasons for its opinion. Such a resolution ought to be most excellent
evidence for the court in its task of discovering what the belief and custom of the community, its *mores,* really is in the premises. It is safe to say that in most cases the court would accept such evidence as conclusive. In this way the danger of establishing precedents based on erroneous conceptions of settled public desire would be avoided, and on the other hand the basic principles of the American form of government would remain intact.