Some Consequences of Judicial Review.

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The experience of the United States with judicial review of the constitutionality of statutes, and with its corollary, judicial interpretation of the constitution, has covered so many years that it is now possible to attempt an estimate of the value of the institution. Although there have been and still are many competent thinkers to whom it has seemed "the last and crowning political growth of our Anglo-Saxon civilization" [1]), a considerable body of unfavorable criticism has also grown up [2]). The many indictments which have been brought against judicial review as it has developed in this country may be summarized under two principal headings, namely:

1. It has led to irregular changes in the constitution by a politically irresponsible agency, the courts themselves.

2. Public policy has been determined in many cases by the courts rather than the legislature.

It has been a principal argument in favor of judicial review, and the interpretation of the constitution by the courts rather than the legislature, that the courts have been able to employ these powers to preserve the integrity of the constitution. A careful examination of the constitutional history of the United States shows that this argument is fallacious. In the first place, constitutional changes have occurred which were beyond the reach of the courts. Among these may be mentioned party control over government, a method of choosing presidential electors which is almost the equivalent of popular election of the President (though not quite so, as the Hayes-Tilden situation and

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[1]) John Woodward, The Courts and the People, Columbia Law Review, Vol. 7, p. 559.

[2]) See T. R. Powell, The Supreme Court and the Constitution, Political Science Quarterly, Vol. 35; Charles Grove Haines, The American Doctrine of Judicial Supremacy; F. J. Goodnow, Social Reform and the Constitution; Boudin, Government by Judiciary, Pol. Sci. Qu., Vol. 26; Lambert, Le Gouvernement des Juges; Pound, Liberty of Contract, Yale Law Journal, Vol. 18; Justice Clark in Congressional Record, July 31, 1911, etc. etc.

various other events have demonstrated), the influence of members of Congress over presidential appointments to various offices, and the President's position as a party leader.

Far more significant and more dangerous than these changes made by usage and custom, however, are the changes which the courts themselves have introduced by way of interpreting the constitution, usually when reviewing the constitutionality of statutes.

The deepest, most far-reaching, and most dangerous change thus introduced is the displacement of the constitution from its ostensible position as the supreme law of the land, and the introduction of various ideas of justice, natural rights, and common law concepts as superior to the written word. In the application of the so-called bill of rights [3]), especially, the courts have been so greatly influenced by extraconstitutional norms as to lead to much vigorous protest, of which the following is a fair example:

"Year by year the effective Constitution is being shaped or reshaped by the Supreme Court..... The practical effect of the first amendment depends a good deal upon the temperament of the men who from time to time compose the Supreme Court..... The Supreme Court seldom finds its judgment greatly restricted by the language of the instrument which is our formal fundamental law [4])."

Not only has the constitution been displaced as fundamental law in favor of whatever the judges themselves believe to be more fundamental principles — thus substituting government by judges for government by law — but many specific changes have been introduced into the constitution. Whereas it attempts to establish a balance among the three branches of government, the courts have destroyed this balance and made themselves superior to both the other branches in many respects. The spectacle of a legislature claiming that it is acting within its constitutional rights in passing a given statute under a specific power bestowed by the constitution, but being overruled by a supreme court, often in a decision made by a bare majority, on the ground that the court has a superior power of interpreting the constitution, is certainly not a picture of balanced powers [5]).

Another striking example of constitutional change through judicial interpretation is found in the case of the application of the thir-

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3) See Pierce v. U. S., 252 U. S. 239, 40 Sup. Ct. 205; Schaefer v. U. S., 251 U. S. 466, 40 Sup. Ct. 259.

4) T. R. Powell, op. cit.

5) Space does not permit us to enter here into the use of the injunction or the general relations between the judicial and the executive branches of government, which would be a most interesting study.

teenth, fourteenth, and fifteenth amendments. Originally intended as a protection for the newly freed negroes from state interference with their freedom, they have become, particulary the fourteenth amendment, the most effective means of control by the courts over state legislation. In the Slaughter House Cases[6]), the court said of the functions of these amendments: "No one can fail to be impressed with the prevailing purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested: we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." Yet within a few years the court had departed from this view, and had applied the fourteenth amendment, with its famous "due process" clause, to such subjects as public utility regulation, labor regulation, workmens' compensation for labor accidents, taxation, health and sanitary regulations, and numerous other subjects of legislation. That the court realized what it was doing is shown by the fact that in the very same case in which it remarked: "The docket of this court is crowded with cases in which we are asked to hold that state courts and state legislatures have deprived their own citizens of life, liberty, and property without due process of law ... In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a state court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded" [7]), it proceeded, by a process of judicial reasoning which can hardly be regarded as justifiable, to extend the conception of due process not only to proper procedure, but also to the very substance of the law itself. After admitting that it was not the function of due process of law, as received from England, to control parliament in the enactment of laws, the court said [8]): "But when, in the year of grace 1866, there is placed in the Constitution of the United States a declaration that 'No state shall deprive any person of life, liberty, or property without due process of law', can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation". Six years later the courts enunciated this doc-

[6]) 16 Wallace 36.

[7]) Davidson v. New Orleans 96 U. S. 97.

[8]) Ibid.

trine more specifically. In the case of Hurtado v. California [9]) the court said:

"In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of the power delegated to their governments, and the provisions of Magna Charta were incorporated into bills of rights. They were limitations upon all the powers of government, legislative as well as executive and judicial.

It necessarily happened, therefore, that as these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but, in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guarantee, not particular forms of procedure, but the very substance of individual rights to life, liberty, and property ... Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude."

By thus declaring that "due process of law" in the fourteenth amendment is applicable as a limitation against states for society in general as well as in respect to the negro, and that it applies to substantive law as well as to procedure, the court had entirely changed the relationship of the state to the nation, for henceforth practically all state legislative action, whether it concerned the form of procedure or the very substance of the law itself, could be reviewed by federal tribunals. This means that the federal courts, rather than the state legislatures, are in final control of state policy. Within the states, the state courts exercise a control over the state legislatures, similar in kind to the control exercised by federal courts, so that it may fairly be said that state policy is under a double judicial control.

One or two other examples of judicial control over social policy may be briefly mentioned. In the Dartmouth College Case [10]), the court, in declaring that a grant made by a state constituted a contract which the state itself could not abrogate in any way by legislative action, instead of a privilege which the state might recall, virtually made it impossible to control in any way grants once made of franchises, and other valuable concessions, granted by the state. In

9) 110 U. S. 516.

10) 4 Wheaton, 518.

the case of Fletcher v. Peck [11]), the Supreme Court went even further and held that although the grant made by the legislature was obtained by fraud and bribery, yet it was still a good and binding contract. [12]).

But not only the social policy of the states has been determined to a very great extent by the courts. By declaring acts of the national legislature contrary to the constitution, the courts have also to a large extent determined national policy. Only a few of the more important cases of such determination can be cited here.

In the famous Dred Scott decision [13]), by holding that the power of Congress over the territories acquired after the adoption of the Constitution was limited by all the provisions in favor of private rights, that the Missouri Compromise was therefore of necessity unconstitutional, and that Congress could not prohibit slavery within the territories, there can be little doubt that the court decided a major question of social policy, without any express constitutional basis for so doing. It is interesting to note that two members of the court, in rendering dissenting opinions, denounced the decision as an attempt to foist the individual political opinions of the members of the Supreme Court upon the country under the guise of constitutional interpretation.

In the case of Pollock v. Farmers' Loan and Trust Company [14]), the federal income tax law of 1894 was declared unconstitutional by a five to four decision. Not only did a great number of people consider that this case was decided on purely political grounds, but the dissenting opinions also intimate as much. Justice White, after saying, "I cannot resist the conviction that the court's opinion and decree in this case virtually annuls its previous decisions in regard to the powers of Congress on the subject of taxation...," added: "If the permanency of its conclusions is to depend upon the personal opinions of those who, from time to time, may make up its membership, it will inevitably become a theatre of political strife, and its action will be without coherence or consistency..." That the decision was contrary to the general policy of the country cannot be disputed, for despite the great difficulties of amending our constitution, it was amended in order to bestow upon Congress in specific language the power to pass an income tax law.

[11]) 6 Cranch 87.

[12]) The language of the court here is interesting. It said: "In this case the legislature may have had ample proof that the original grant was obtained by practices which can never be too much reprobated, and which would have justified its abrogation as far as respected those to whom the crime was imputable. But the grant, when issued, conveyed an estate in fee-simple to the grantee, clothed with all the solemnities which law can bestow."

[13]) Dred Scott v. Sanford, 19 Howard, 393.

[14]) 157 U. S. 429.

Only one other great field where the federal courts have seriously interfered with public policy may be mentioned here. Congress has twice enacted statutes on the subject of child labor, first under its commerce power [15]), and second, under its power of taxation [16]). In both instances these acts have been declared unconstitutional by a mere majority decision.

Part II.

Our rapid and cursory survey of a few of the most important cases has served to show in a very general way the fact that the courts themselves, instead of protecting the constitution, have introduced important constitutional changes and have served to control public policy, both negatively, by preventing legislative action along certain lines, and positively, by laying down criteria of due process and other criteria which they read into the positive law.

This development is objectionable not only because the courts, ever looking to the past for guidance, are nearly always more conservative than is the controlling public opinion of any given period, but because the courts are by their very nature the wrong agency for determining either fundamental constitutional policy or ordinary legislative policy. Policy should be determined by agents responsible to the people, if representative government is to exist. In no case should those who shape policy be beyond the reach of the people. It is not enough that in a large way the courts may follow, although at a distance, the prevalent public policy. If the courts do this, they themselves become a political instead of a purely judicial institution. If the courts pass upon great questions of public policy, it is almost inevitable that their members be selected for their particular beliefs in respect to large social or economic questions rather than their judicial ability. This has actually happened in the past in the United States; and that it is likely to happen at any time, is shown by the fact that during the present presidential campaign one of the issues is the kind of judges whom the respective candidates would appoint to the vacancies in the Supreme Court which will probably occur during the next four years.

A particular objection to the control of public policy by the courts lies in the fact that this control may be so subtle that it is not immediately realized. Slowly and quietly, through a gradual process, the great lines of social policy are built up without any opportunity for the people to see a clear cut issue or make a stand against policies that are contrary to their wishes. It is hardly conceivable that if the question

[15]) U. S. Statutes at Large, Vol. 39, 675. See also Hammer v. Dagenhart, 247 U. S. 251.

[16]) U. S. Statutes at Large, Vol. 42, 306.

of the application of the Fourteenth Amendment had been placed before the people, they would have permitted the interpretation given it by the courts. At the very time when the people were striving through their leglislative bodies to control public utilities, for example, the courts were using the "due process" clause of the Fourteenth Amendment to bring this control into their own hands, rather than leaving it in the hands of legislative or executive authorities. When the legislatures were attempting to regulate a growingly complex society through various kinds of social legislation, the courts were slowly building up a system of limitations upon them, through narrowing concepts of the police power, public purpose, public utility, and so on.

One of the most disastrous effects of judicial control is the fact that it has made for a weakening of the legislative bodies, national, state and local. By being placed under the tutelage of the courts they have ceased to be the real representatives of the people. Well knowing the decisions of the courts on important subjects, they try to keep within the limits set by the courts, instead of independently passing upon public questions. The chief debates in our legislative bodies are often not on questions of expediency but on questions of constitutionality, and this not with reference to the language of the constitution, but to the attitude of the courts. Often important provisions are eliminated from bills, or changed to their detriment, in order to fall within the limits set by previous court decisions. Again, the legislatures become irresponsible. In many cases the legislature may pass a bad law knowing that it is bad, in order to placate certain interests or win temporary popularity or political support, in the assurance that the courts will declare the law unconstitutional.

In general, it has been the experience of the United States that when the people through their representatives are unable to carry out their will, several bad results almost inevitably follow:

1. The people lose interest in government and governmental policy. What is the use in debating public policy that cannot be put into effect? They lose heart in working for legislation which is almost certain to be declared null and void by the courts.

2. In case they regard the policy declared null and void by the courts, as fundamentally important, they may take measures, sometimes ill-advised, to do away with the court decision. The two most common methods are, to enlarge the scope of the power of the legislature by express grants, which affect only a special situation, and to insert what amounts to statutory law into the constitution itself. The reason why so many state constitutions are filled with what in reality are only statutory measures is the fact that the people have either wished to do away with some limitation placed upon legislative

action by the courts, or to make sure that in the future the courts would not declare certain acts as unconstitutional. But the situation is thus made worse rather than better, since the more numerous the constitutional provisions of statutory nature, the greater becomes the actual control of the courts, for all future legislative acts must be in harmony with these provisions as the courts interpret them.

3. By filling constitutions with positive law, not only is the control of the legislature weakened, but the law cannot be easily changed to meet changing needs.

4. Finally, where acts are declared unconstitutional by the courts, there results a disrespect for law. No one knows whether a law is really a law until it has been passed upon by the courts,. For several years after the passage of almost any important act, there exists not only great uncertainty among the people, but also among the executive officers of the government. Enforcement is likely to be lax. Business arrangements and contracts may be held up for years until leading cases are finally decided upon. The government may proceed to enforce the law, only to find out that all its acts in so doing have been illegal. Very often, it is impossible for the government to take any action pending the outcome of a long drawn out suit.

Since the courts will give no interlocutory or advisory judgments (except in a very few states), but will pass merely on cases, it often happens that a law is deliberately broken in order that a case may be brought before the courts. In every way, therefore, the system of judicial review in the United States leads to a weakening of the power of the legislature and hence of its quality, and to a general apathy in regard to government, and disrespect for law.

Already several attemps have been made to limit the power of the courts to questions of process, leaving the legislature rather than the courts to determine questions of the compatibility of the substance of the law with the provisions of the constitution. Though these have not been successful except in minor ways, there is unquestionably a growing tendency to seek to restrict the scope of judicial review in the United States.

Part III.

The question of judicial review has given rise to much discussion in Germany, and able and distinguished men have ranged themselves on both sides of the controversy. Anschütz remarks that there is no question as to the right of the judge to inquire: (1) whether a law which he is called upon to apply has been promulgated in due form; (2) whether a state law is in conflict with a national law; (3) whether an ordinance

is in conflict with the legal provisions governing it [17]). To this list might be added a fourth subject of judicial review which few would be inclined to question (although some might wish the decisions to be made exclusively by the Staatsgerichtshof), namely: whether a given national statute or decree which was in force before the adoption of the Weimar Constitution is still valid, under Article 178, paragraph 2, sentence 1, which provides, »Die übrigen Gesetze und Verordnungen des Reichs bleiben in Kraft, soweit ihnen diese Verfassung nicht entgegensteht«.

The controversial point is therefore narrowed to the question of judicial examination into the compatibility of national statutes with the Constitution of the Reich. That the courts have already assumed the right to such examination, there can be no doubt, in view of the decision of the Reichsgericht of 4 November 1925 [18]), which contains the following passage:

"The latter provision (Article 102) does not prevent the judge from denying the validity of a national law or the individual provisions of such a law, in so far as they contradict other superior provisions which the judge must observe.... The provisions of the national Constitution can only be invalidated through a constitutional amendment passed in the regular form. They remain binding upon the judge, therefore, despite conflicting provisions of a later national law which has been passed without observation of the requirements of Article 76; and they make it necessary for him to set aside as invalid the conflicting provisions of the later law.... Since the national Constitution itself contains no provision removing from the courts and bestowing upon some other specified authority the right of deciding upon the constitutionality of national laws, the right and the duty of the judge to examine into the constitutionality of national laws must be recognized."

To what confusion the unrestricted practice of judicial review by all courts might lead, in view of the fact that there are in the Reich numerous courts of last instance, including not only the Reichsgericht, but the Reichswirtschaftsgericht, the Reichspatentamt, the Reichsfinanzhof, and the Staatsgerichtshof, one of which may declare a given law unconstitutional while another holds it valid, German jurists are well aware. The discussions of the öffentlich-rechtliche Abteilung of the Deutscher Juristentag in Köln, in September 1926 [19]), and

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[17]) Anschütz, 3—4 ed., p. 217. On pages 215 and 216 he lists the following persons as in favor of judicial review: Triepel, Stier-Somlo, Bühler, Fleischmann, Hubrich, Nawiasky, Preuß, Düringer; and the following as opposed to it: Hatschek, Schack, Wittmayer, Anschütz, Thoma, Giese, Jellinek, Ablaß, Kahl, Sinzheimer. See also his discussion of Article 102.

[18]) Ent. RGZ, 111, p. 320.

[19]) See report of Dr. Wieruszowski in Deutsche Juristen-Zeitung, 1926, p. 1445.

the bill which embodies the results of this discussion, point the way to a method of avoiding such confusion, by vesting in the Staatsgerichtshof alone the right to declare a Reichsgesetz unconstitutional. Dr. Poetzsch has pertinently said: »In diesen Bestimmungen scheint mir ein durchaus zweckmäßiger Ausgleich zwischen dem Wunsche, das allgemeine Prüfungsrecht nicht völlig aufzuheben und der Notwendigkeit, Reichseinheit und Rechtssicherheit zu erhalten, angebahnt zu sein [20].«

It is not the purpose of the present study to contribute to the general discussion of the advantages and disadvantages, methods and restrictions, of judicial review in Germany, since it would be an intrusion for non-Germans to dogmatise upon a subject as to which the ablest home talent is so greatly divided. The question to which this paper will confine itself is: Are the evils which have developed in connection with judicial review in the United States likely to develop if any form of judicial review is established in Germany?

There are, fortunately, many reasons for believing that this question can be answered in the negative.

Perhaps the most important difference between the situation in the United States and the situation in Germany is the fact that in the latter country the Reichstag can amend the Constitution by a two-thirds vote [21]; whereas in the United States, no change can be brought about except through a difficult process which usually consists in a two-thirds vote of both the Senate and the House of Representatives, followed by ratification by the legislatures of three-fourths of the forty-eight states. In Germany, therefore, the courts can never stand greatly in the way of social progress or interfere materially with social policy, and even shape social policy; since any objections that they may make to a bill on the ground of constitutionality can easily be overcome if the bill has enough friends in the Reichstag to command the two-thirds vote necessary for amending the Constitution.

Another factor of almost equal significance is the very broad legislative power of the Reich. The Constitution attributes to the Reich

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[20]) Deutsche Juristen-Zeitung, 1926, p. 1265 (1270). See Friedrich, Dr. Carl J., The Issue of Judicial Review in Germany, Political Science Quarterly, June, 1928, for the view that, "where nothing further is provided than one special court charged with the duty of advising the legislature regarding the constitutionality of laws and endowed with the power of deciding upon request by a lower court whether a law is constitutional or not, it cannot be said that judicial review is established."

[21]) It is of course understood that a similar vote of the Reichsrat is required by Article 76, but the same Article, read with Articles 74 and 75, makes it clear that the Reichstag can overcome the objection of the Reichsrat by a two-thirds vote. Only the people can then annul the amendment, and they can do so only if a majority of qualified voters participate in an election on the matter.

such comprehensive rights of legislation as to leave little opportunity for the restraining hand of the courts to make itself felt. The right bestowed by Article 9, for example, to legislate in respect to public welfare (an expression so general as to cover a multitude of possibilities) in so far as a need exists for the issuance of uniform regulations, the long list of legislative powers contained in Article 7, and the other powers granted by various constitutional Articles, together invest the Reich with a competence so broad and so imposing as to enable the Reichstag, always within the limits of the Constitution, to legislate upon almost any subject of social-political importance. The Reichstag, rather than the courts, will thus remain in actual control over social policy.

The obverse of the same fact is the absence of numerous limitations, and above all of general limitations, upon the Reichstag. Such limitations as are found in the Constitution are as a rule either in the nature of general directions or guiding principles, as in Articles 8 and 16; or in the nature of guarantees of specific rights, as the right of association guaranteed by Article 124, or the right of religious liberty guaranteed by Article 135. The vague general limitations of "equal protection of the laws", and "due process of law", which have given to the courts in the United States such large opportunities for controlling national legislation under the fifth amendment and state legislation under the fourteenth amendment, and even for building up a system of positive law under the guise of jurisprudence, are missing from the Constitution of the Reich — although it would be dangerous to prophesy that some of the general phrases of the latter may not be expanded in unforeseen ways.

Despite recent developments, the whole trend of German jurisprudence is less favorable to the assumption of political control by the courts, than is the jurisprudence of the United States. The doctrine of *stare decisis* is less binding, the powers of the legislature are more broadly construed, and the whole attitude of the courts is one of recognizing the legislature as the most important agency of government.

It should be realized, also, that the social conditions in Germany to-day are so very different from those in the United States when the courts began to extend their powers over legislative acts, as to make control of the same sort quite impossible. The constitutions of the Reich and the states, and a vast body of legislation, have already established the broad, liberal, and progressive social policies in Germany, which the courts have so hindered in the United States.

Finally, the institution of judicial review in Germany will be a conscious matter, openly discussed and carefully controlled by legislation, rather than a subtle assumption of power.

For all these reasons, it is possible to hope and to expect for the Reich, that even though judicial review of legislative acts is already accepted, and will probably be formally established when the national administrative court is organized, it will operate under such different conditions, and will be so carefully safeguarded, that the evil results which have followed it in the United States can be avoided in Germany.