DIGESTS OF LEADING LAW REVIEW ARTICLES

LIMITING JUDICIAL REVIEW BY ACT OF CONGRESS—Joseph L. Lewinson. 23 *California Law Review* 591 (Sept., 1935).

The numerous pronunciamentos concerning the desirability of a constitutional amendment limiting the power of the Supreme Court make this article timely and thought-provoking.

During the last five months of its recent term the Supreme Court declared unconstitutional four federal statutes and one Joint Resolution of Congress. During the first seventy-five years of our national existence the court declared unconstitutional only two federal statutes.

What can Congress do to limit the power of judicial review? A close inspection of Sections 1 and 2 of Article III of the Constitution shows that the lower federal courts are created by Congress while the appellate jurisdiction of the Supreme Court is held subject to such exceptions and under such regulations as Congress shall make. Congress has no power to limit the original jurisdiction of the Supreme Court.

Federal statutes creating and abolishing inferior federal courts and acts limiting their jurisdiction have been passed so often that such statutes are now rarely questioned. The right to trial in an inferior court can hardly be termed a constitutional right.

In 1796 the Supreme Court said that Congress must provide rules to regulate appellate proceedings before it could exercise appellate jurisdiction. In deciding *The Luckenbach Steamship Co.* v. *U.S.*, 272 U.S. 533 (1926), the court said "appellate review is not essential to the due process of law but is a matter of grace." The *McCardle* case (7 Wall. 506, 19 L.Ed. 264) of 1868 strengthens the belief that Congress can grant or deprive the court of the power of appellate review.

From the very words of the Supreme Court one can argue that Congress may withhold jurisdiction to declare laws unconstitutional without otherwise disturbing the jurisdiction. But can the federal courts function as such without jurisdiction to declare national laws unconstitutional? English courts don't attempt the reviewing power. Judicial review in the United States was little used until 1883 nor is this power expressly provided for in the Constitution. *Marbury* v. *Madison*, 1 Cranch 137, 2 L.Ed. 60, in 1803 gave Chief Justice Marshall an opportunity to declare for judicial review. He failed to distinguish as he could have between state and federal legislation. His doctrine really

implies the supremacy of the federal judiciary instead of an equality with the other branches of the government. Holmes admitted the court could exist and function quite well without the reviewing power.

Congress can act to require the concurrence of more than a bare majority of justices when declaring on the constitutionality of a law. Questions of constitutionality usually arise under the court's appellate jurisdiction. Therefore Congress would be within its right in regulating the appellate power. The members of Congress and the chief executive have also sworn to support the Constitution. If four members of the court also believe the statute is constitutional why should the bare majority be empowered to say that such measure is unconstitutional beyond all reasonable doubt? Such a question seems to be political and therefore subject to action of Congress free from the court's power to review.

The question to be left with every thinking lawyer and layman is this: Do we want to control the free will of the people by judicial authority or are we willing to trust the free will and a free people to work out their own salvation? Statesmen, politicians, publicists will do well to study possibilities of action under Article III, Sections 1 and 2 before such ponderous utterances as "without a constitutional amendment we are back in the horse and buggy days."

THE CHALLENGE OF A NEW FEDERAL PROCEDURE—Charles E. Clarke, 20 *Cornell Law Quarterly* 443 (June, 1935).

In a previous article (44 Yale Law Journal, 307) the author has reviewed the historical background of procedural reform in the federal courts and described the act conferring upon the Supreme Court the power to makes rules in actions at law and to unite federal law and equity procedure.

This article again reviews the historical advancement of procedure. Procedural rules have often been injurious to substantive legal rights. Judicial power to make new rules should correct this failing of the former procedural rules. In the recent past the Supreme Court declared that the difference between law and equity couldn't be ignored. And this declaration in spite of the attempt of the code reformers to combine the systems of law and equity.

After many disappointments the act allowing rule-making by the Supreme Court passed in June, 1934. (28 U.S.C.A., 723 b, 723 c.) Now the Supreme Court can approve some of the many suggestions offered by the bar in the various federal districts. It is to be hoped that the proposed rules will be sympathetic to the real meaning of the

bill. A half-hearted renovation may result in a backward movement, imposing another system over the vestiges of several former systems without obliterating them.

The court may make either a partial or complete reform—promulgate rules for law actions or issue rules uniting the systems of law and equity. If the complete reform is made the other procedural systems will be wiped out and many difficulties now confronting the federal court practitioner will be obviated. The Federal Equity Rules with slight changes can be made applicable to all actions by merely extending their operations. The rule as to joinder of parties is especially satisfactory.

Three new sections are needed: (1) allowing a single civil action and pleading of all matters whether legal or equitable in a single suit, (2) providing for jury trial as of right in cases covered by the constitutional requirement, (3) providing waiver of jury by failure to make affirmative claim therefor within a certain period.

Rule making by courts is an administrative reform sadly needed in the general field of procedure. The courts possess expert skill at making rules far better than an indifferent legislature but they need a strong stimulus to keep the rules abreast of the times. The Chief Justice plans to go ahead with the major reform of combining the systems of law and equity. The results will demonstrate the success or failure of rule making by the courts.

TRANSCENDENTAL NONSENSE AND THE FUNCTIONAL APPROACH —Felix S. Cohen, 35 *Columbia Law Review* 809 (June, 1935).

The author, surveying the field of law, tells us in unmistakable terms just what is wrong with our juristic philosophy. The argument of the medieval classicists as to how many angels could dance on the point of a needle seems to have frequent parallels in the circular reasoning of the bench and bar. Even the liberal Cardozo stays too close to accepted legal logic at times.

The abstract approach to legal questions is illustrated in the legal questions: where is a corporation, when is a corporation, how high is "fair" value, when is legal process "due"? The lawyers in answering these questions use other terms such as "property rights," "corporate entity," "title," "contract," "malice,' etc. The revolving wheel of legal definition dare not go beyond the bounds of legal terms else the definitions would have substantial meaning. At present they represent legal nonsense in the highest form with legal concepts, rules of law, and

systems of jurisprudence being the developments of an abstract science of transcendental nonsense.

The traditional method leaves the lawyer in a maze of "mechanical jurisprudence' and legal magic which he can dissolve only by a strong wash of "cynical acid." Eradicate meaningless concepts that have no equivalent in actual experience, forget meaningless questions and redefine our legal concepts in empiric terms. "A thing is what it does" should be a test. Let us redirect our research towards discovering the significance of legal decisions. We must integrate the social sciences with the study of law in order to assist us in appraising in ethical terms the social values at stake in any choice between two precedents.

The functional approach can be used to redefine law in the terms of what courts say and do. Law isn't necessarily what is ethically right but it is what the state can command because it has the power. Likewise the realistic judge in administering the power of the state should frankly assess the human values and appraise the social importance of the precedents. The functional method of legal inquiry must go further than the "hunch" theory of law. What the judge ate for dinner dims in importance when we consider the judge's social heredity and present environment. The old school feels the judge hands down an impartial decision but careful research will show that his background is an important factor in the decision.

To the lawyer interested in more than pure law, legal criticism must have an objective description of the causes and consequences of legal decisions. Then and only then can we correctly appraise law and legal institutions in the light of human values.

ON WHAT IS WRONG WITH SO-CALLED LEGAL EDUCATION—Karl N. Llewellyn, 35 *Columbia Law Review* 651 (May, 1935).

The writer feels that legal education is open to the criticisms which are aimed at other fields of educational activity. Three Eastern law schools, Columbia, Yale and Harvard furnish the basis for his arguments and conclusions. Other law colleges are not worth considering. Legal training lacks variety; its objectives and methods are the products of historical conditioning and chance. The schools so far have failed to prepare for better law. They fail to know what type of lawyers are most in demand. Too much of legal preparation is from the judicial standpoint although relatively few men will become judges. In spite of the excuse of the limited time law schools can do much more than

now. If the law school teacher will trade places with the art school teacher for a day he will discover many things about his ability to capture and maintain interest. The maxim "the law is a jealous mistress" has been carried too far. The artistic and the social fields can be combined with the legal. Training in legislative and administrative fields should be afforded as the political field is one place in which many lawyers engage.

The times with their change of legal decisions press upon the poor law school teacher. The student clamors for a vitalized curriculum. A change is possible—what direction will it take?

Many are the defenses against change but they fall upon critical examination—eliminate wasteful teaching, reorganize courses, use different technique for advanced students. The improvements will give time for the student to integrate the law and other fields. Careful authors can introduce materials into their case books which will lead the students into a study of why is the law. Legal rules can then be sized up in the light of their operation. Legal techniques—use of law library, drafting, counselling, form study, practice court, apprenticeship either interstitial or post-graduate—have a definite place in a law school.

The task of urging the traditional law school forward to cope with the present is a twenty-year task calling for awakened students, a faculty of earnest and critical professors who are willing to put background and teaching skill into their jobs, and a bar willing to teach and apprentice. With the widening of techniques will come a law school worthy of the name.

THE PROBLEM OF THE SOURCES OF POSITIVE LAW—Giorgio Del Vecchio, 47 *Juridical Review* 253 (September, 1935).

The author, a noted Italian jurist and philosopher, outlines the philosophical concepts of law which prevail in Continental Europe. These concepts must be considered by the student of Anglo-Saxon law if he is to analyze and compare the underlying distinctions between legal systems.

Law in its essential elements is human nature; human nature in the mass with the reciprocal connections of obligation and claim is the foundation of law. The absolute ideal of law—justice—can only be approached and positive juridical orders are only imperfectly translated. Such is the case when the jurist makes the law meet the facts in a hard case.

The preponderant social will is determined by the clash and fric-

tion of consciences each interpreting its own ideas of justice. From the coordination of one human subject with another comes a juridical order or a form of human society. The rules of social life can be called the "sources of law."

The modes of manifestation of the preponderant social will are: custom, jurisdiction, and legislation. Custom arises by means of a series of interferences springing from the productivity of single individual consciences. When these customs become too numerous and complex someone classifies and applies the customs thus exercising jurisdiction. The judge or arbiter accelerates the historical growth of law. When custom becomes too complicated for the arbiter the third stage, legislation, develops. The entire social community is represented by a special organ which formulates imperative rules. This is the highest degree of the formation of positive law.

These three sources all spring from the human spirit. Can legislation keep pace with the needs of an ever expanding society? The legislative organ in its highest development only utters or slightly modifies the feeling of the human spirit. A law against the public conscience is effectively abrogated although it may not be formally repealed.

The judge is restrained by the law to certain limits. Within those bounds he has a wide range of judicial discretion so that he can decide in accord with the demands of an expanding social life.

From our own nature we can extract an absolute and universally valid criterion of the just and unjust; from this we can develop an entire system of law. The human spirit in its universal nature will always remain the first source of positive or natural law.