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The Power of the Courts to Declare Laws Unconstitutional

A Discussion Based Upon Review of Decisions Upon Constitutional Questions Affecting the Workmen's Compensation Act

The peculiarly American legal institution of the power of the courts to declare statutes unconstitutional is one which has met with vigorous opposition ever since its inception over a hundred years ago. Supposedly fortified by time, so that the exercise of the power has become impregnable, the right is nevertheless repeatedly challenged and brought to the forefront in legal discussion at irregular intervals. Like Banquo's ghost, it will not down.

Much of the discussion upon this question is upon insecure grounds. Many of the attacks made upon our courts with reference to the exercise of this power are demagogic and not worthy of serious consideration. Among the laboring people of the United States there is a strongly grounded impression that the power is used unfairly to protect vested interests of capital and to prevent the laboring man from raising his standard of living and from securing those human rights of fair working conditions and economic freedom which every human being ought to enjoy. This is only an impression, however, and is seldom urged seriously by thoughtful persons. On the other hand, much of the literature in support of the exercise of this power is based upon a blind adherence to the past and subservience to the opinions of the financial and industrial interests of the country. It consists in nothing more than reiteration of the principles of government enunciated by the Federalist party one hundred and thirty years ago and vigorously challenged ever since.

Many discussions of the question are in the nature of political argument and usually comprise the conclusions of the speaker without the support of definite data of scientific observation by which their accuracy can be checked. Political questions are usually decided upon matters of impression rather than upon a careful study of the facts and rational deduction of conclusions therefrom. To avoid this tendency and keep this article upon a professional basis, it has occurred to the writer to approach the question from the point of view of the statistician. This method, applied to judicial questions, consists in the study of a series of decided cases involving the
topic under consideration. Such series of cases should be selected at random so that the individual cases cannot be said to have been selected to prove any particular theory. The series should be sufficient in volume to be fairly typical of the field of constitutional law.

To select such a series, one could either take all the constitutional decisions contained in a given series of volumes of reports, as from Volumes 150 to 180 of the California Reports, or one could select all the decisions bearing upon the constitutionality of a particular statute or related series of statutes, if such cases are found in sufficient volume. Under either method there would be presented for study a cross section, as it were, of a typical field of law in which the power of the courts to declare laws unconstitutional has been exercised. If such statistical or scientific method of study is of any value in legal matters, it should give some tangible results when applied to the above question, if the foregoing requisites have been met.

Partly from convenience, as the writer has actively participated for some years in the development of the series of cases selected, and partly because of the advantage of choosing a live topic of social legislation, the writer has selected for study the decisions of the different appellate courts involving the constitutionality of the California Workmen's Compensation Act, its subdivisions and related statutes. There being fifty-five of such cases, it is believed a sufficient volume exists to make the study worth while and to give a fair picture of the practical operation of the judicial power under discussion.

It should be distinctly understood that the writer does not intend to criticize the correctness of any of the decisions listed below. The test of the judicial prerogative under consideration does not depend upon the correctness or incorrectness of decision in particular cases. It will be assumed for the purpose of this article that each case listed was correctly decided, except where the decision has been overruled or reversed by the same or a higher court.

Before listing this series of constitutional decisions it will be well to recapitulate briefly the principal arguments which have been advanced in the past, or which occur to the writer, for or against the exercise of this power by the courts.

Arguments for and Against the Exercise by the Courts of the Power to Declare Laws Unconstitutional

I. Arguments in Favor of the Power.

(1) Historical. That the exercise of the power is necessary to protect fundamental rights of persons and property against hasty
and oppressive action by popular majorities, and to enforce constitutional privileges and immunities conferred in the various bills of rights contained in our constitutions.

This argument has its source principally in two historical considerations: (a) A fear of oppressive and tyrannical governmental action, produced by the injustices of British rule in the American colonies which caused our War of Independence. (b) A revulsion of feeling against democratic government caused by the excesses of the French Revolution. For an excellent discussion see ex-Senator Beveridge's "Life of John Marshall," in which the state of American political feeling during and following the American and French Revolutions is very clearly and picturesquely described. The Federalist party, from force of circumstances, became conservative and fearful of popular government, while the Jeffersonian party became its advocate. Both agreed that possibly tyranny on the part of the government should be checked by the adoption of bills of rights in state and Federal constitutions. The former, under the judicial guidance of John Marshall, urged that these constitutional guarantees be safeguarded by the power of the courts to annul any statute encroaching upon them. The Jeffersonian party urged that the safeguards should be left to the states and to the people, and not to the Federal judiciary.

(2) Historical and Political. That the exercise of the power by the Federal courts is necessary to secure the supremacy of the Federal Government and the preservation of the Union, as well as the harmonious and uniform interpretation of the Federal Constitution and laws.

This position is the keynote of John Marshall's constitutional decisions. It is to this great Federalist that we largely owe the preservation of the Union against the insistence by certain states upon the rights of nullification and of individual state construction of the Federal Constitution and laws.

(3) Political Theory. That the exercise of the power is necessary to make effective a system of government by checks and balances, as contemplated in our constitutions.

Under this theory the judiciary should check the executive and legislative department by declaring void any action by either not consistent with their view of the interpretation of the constitution.

(4) Analytical. That an unconstitutional statute is not law.

1 Beveridge, Life of John Marshall, Vols. 3, 4.
As the judicial function includes the power to determine and apply the law, it necessarily includes the power to determine the legality of purported statutes.

II. Arguments Against the Exercise of the Power by the Courts.

(1) That the power is not now necessary to safeguard fundamental human rights of person and property against oppressive action of irresponsible majorities. The argument here is that the fear of popular caprice of a century ago is no longer justified, in view of the better education, intelligence and experience of the voters today. Also, that the initiative, referendum and recall are now a sufficient protection and substitute for the judicial prerogative under discussion. It is further claimed that the courts of today have in fact become the protectors of property rights as opposed to the rights of humanity, and that the truly human rights and interests are today safer with the legislature, which represents the voters directly, than with the courts, which are not chosen upon a representative basis and do not purport to declare the will for the time being of their constituents.

This controversy is but a survival of the old struggle between the Federalists and the Jeffersonian democrats. This question is political and not legal in nature and will not be discussed further in this article.

(2) That Federal supremacy is not desirable. This contention is the old fight between the supremacy of the Federal Government and the state rights doctrine, which, in its earlier aspect, has been completely decided by the logic of events and by our Civil War. There is, however, a modern aspect to the question, raised by the encroachments of the Federal Government upon state prerogatives within the last ten years, particularly during 1917-18. An illustration of this is the taking over by the Federal Government of the regulation of intrastate railroad rates and the ousting of the state railroad commissions of much of their jurisdiction over such rates. Another phase is the distress arising from increasing complexities in the conflict of state and Federal jurisdiction, such as the difficulty in drawing the line between interstate and intrastate commerce in all its aspects.

This question is again political rather than legal and hence outside the scope of this article.
(3) Historical. *That a government of checks and balances is no longer considered desirable, the modern European type of parliamentary government, with a responsible ministry, being both more democratic and more efficient.*

In this connection it was once suggested by our beloved teacher at the University of California, the late Professor Henry Morse Stephens, that the American government, an earlier form of popular government, has been improved upon by the peoples achieving political liberty at a later date. The parliamentary type of government represents such later development and, it is claimed, is the better practice. In a parliamentary government the courts possess no power to nullify statutes passed by the parliament.

In this connection it should be pointed out that the power of the courts to declare laws unconstitutional is not fundamental to government, for the reason that most free governments which operate under a responsible ministry, e.g., England and France, do not have it and yet fully protect the liberties and well-being of their nationals. Recent writers have shown, however, that some European and Canadian courts are now making advances in the direction of assuming this power in isolated cases, although they are not as yet definitely claiming it as a matter of right.

The following statement of M. Henry Aubepin in his address to the American Bar Association at its San Francisco convention, last summer, is in point: 2

"I should like, gentlemen, to discuss with you today a subject which in France is occupying our thoughts: It is the relation that exists between the executive, the legislative and the judicial powers. There seems to be developing among us an evolution which has already been completed in your country. It may interest you to learn how this problem presents itself in my country, and I know you will not think me indiscreet if I ask you to let us profit by your experience and permit me to take back to Paris the enlightened opinions which I shall be able to obtain here."

"Under the influence of the ideas of Montesquieu and of his 'Spirit of Laws,' we adopted the dogma of the separation of powers in order to maintain an equilibrium between the three branches, the executive, legislative and judicial, and to make the separation absolute we have enclosed each in its own sphere—almost in what might be called its own compartment. But in human affairs it is rare that separations of this kind are definitive; it is rare that one of the branches does not give off other branches which extend to the neighbor, arresting its development until it is atrophied. But

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2 Reports of American Bar Association, XLVII (1922) 244-5, 249.
it is not always the same branch that prevails or succumbs. A branch will be strong and flourishing in one climate and weak in another. It would seem that in America the judicial has gained the supremacy over the other two branches, while in France it is the legislative that has become supreme. Your courts determine the constitutionality of laws; ours only apply them.

*A whole new school is coming into being which gives the judiciary power over the legislature. In support of their position they refer to you, gentlemen, and to your country.

"Laws have been passed at times which were manifestly contrary to our fundamental law and even to the charter of our country—the Declaration of the Rights of Man and of the Citizen. Many of our jurisconsults would wish to do away with the possibility of such attacks and seek to give the judges the right to judge the law, and quite naturally hope to introduce into our judicial system the right of the courts to pass on the constitutionality of laws.

"Are they wrong, or are they right? You, gentlemen, are in the best position to answer this question."

This question again is political and speculative, and without the scope of this paper.

(4) Historical. The power to declare laws unconstitutional has never been vested by any constitution in the courts in express language. It has always been assumed (usurped?) by the courts, but has never been formally conferred upon them. It first appeared in the Federal Government of the United States a little more than twenty years after the adoption of the Constitution. At the time the Jeffersonian democrats were loud in their denunciation of the courts for misconstruing the intention of the framers of the Constitution.

(5) Analytical. That the courts are not the special guardians of the Constitution. Every officer of state is sworn to obey the Constitution, and each officer is responsible to the people directly and not to the other branches of government. Today the initiative, referendum and recall confer a sufficient control by the people over all their representatives, so that the intervention of the judiciary is no longer necessary to protect the people against wrong or unwise action on the part of their legislators. Under a truly democratic or representative form of government the courts should not possess this power, as it is inconsistent with the vesting of legislative power in the legislative branch of the government, responsible only to the people directly for proper discharge of its representative function.

(6) Practical. The exercise of this power does not work well in practice, for the following principal reasons:

(a) The power has degenerated, particularly where exercised
POWER TO DECLARE LAWS UNCONSTITUTIONAL

under the “due process of law” clause of the Fourteenth Amendment of the Federal Constitution, into a determination by the courts of questions of legislative policy. Such constitutional questions usually turn on the question of “reasonableness,” which is in the last analysis a question of pure legislative policy. It cannot be disputed that courts have on some occasions asserted reactionary views of economic and political philosophy under the doctrine of “reasonableness” to override the will of the people as expressed through their legislatures, whereas the people and legislature were in fact right. It was never intended that our courts should exercise a purely legislative power, as a veto on legislative acts, superior to the legislature itself.

(b) The courts have been at times brought into popular disrepute through the exercise of this power. By occasional erroneous decisions endeavoring to hold back the growth of statute law to obsolete economic and political views, they have come to be regarded, by the laboring classes particularly, as unfriendly to labor and the common people. The result has been to drag the courts into political turmoil, impair their independence, the confidence of the people in them, and the efficiency of their work. If the final judgment of all questions of propriety of suggested social legislation were left to the legislature and the people directly, without interference by the courts, the position of the courts before the people would be improved.

(c) Too many laws good in substance have been declared unconstitutional on purely technical grounds, having no direct relation to public policy and public welfare. The nullification of good legislation on such grounds is undesirable and paralyzing to the efficiency of government.

(d) The exercise of the power results in delay and expense in making good legislation effective. It is coming to pass that no law can be regarded as effective when passed by the legislature, but must be tested in the courts over a period of years to determine its constitutionality before it can be put into efficient operation. Such delay and expense is not consistent with efficiency of government.

(e) Another result is the cluttering up of our Constitution with unnecessary verbiage in the endeavor to safeguard the constitutionality of proposed legislation. If a new statute of any importance is to be passed, it is becoming increasingly customary to first pass a constitutional amendment authorizing it. Even then the law sometimes fails because the constitutional amendment was not drawn with sufficient fullness, or is interpreted by the courts differently from the intention of its framers. Again, it is becoming increasingly customary to place purely legislative matters in the Constitution itself,
to place them beyond the supposed destructive tendency of the courts. The result is that our constitutions, particularly in California, have become entirely too long and complicated. This factor further increases the difficulty of drafting new legislation and the danger of new statutes being declared unconstitutional because of purely mechanical conflicts with the Constitution.

With the foregoing summary of the principal arguments for and against the exercise of the power before us, the writer will now submit for analysis a list of the decisions affecting constitutional features of the Workmen's Compensation Act of California, with a brief statement of the holding in each.

List of all cases involving constitutional questions arising out of the California Workmen’s Compensation Act

1. Great Western Power Co. v. Industrial Accident Commission (1915) 170 Cal. 180, 149 Pac. 35.
   In this case an award of workmen's compensation benefits was made under the Compensation Act of 1911 by the Industrial Accident Commission, created by the Compensation Act of 1913, which succeeded to the functions of the older Industrial Accident Board created by the 1911 act. Petitioner did not attack the validity of the 1911 act, but claimed that the Industrial Accident Commission had no legal existence and could not make a valid award under it, because of the asserted unconstitutionality of the 1913 act. The following grounds were assigned: (1) That a compulsory compensation act transgressed the police power and the "due process of law" and "equal protection of the laws" clauses of the Fourteenth Amendment to the Federal Constitution; (2) That it was class legislation and discriminatory because of the exclusion of farm labor and other excepted employments. The court held the 1913 act valid to an extent necessary to sustain the valid creation of the Industrial Accident Commission and passed the remainder of the constitutional points without decision.

   This case involved an injury to a railroad guard while working on an interstate passenger train within the State of California. The railroad claimed that the State Compensation Act, though in terms covering the case, could not constitutionally apply because of conflict with the Federal Constitution and Federal Employers’ Liability Act. This claim was sustained by the Industrial Accident Commission and by the Appellate Courts.

   Here the Compensation Act was held unconstitutional so far as it applied to a fatal injury sustained by a railroad repair shop employee repairing a switch engine engaged, when in service, in both interstate and intrastate commerce, because of conflict with the Federal Constitution and the Federal Employers’ Liability Act. The United States Supreme Court refused to review the case, but the decision was subsequently reversed by the California Supreme Court in Hines v. Industrial Accident Commission (1920) 184 Cal. 1, 192 Pac. 839, upon the authority of later decisions of the Federal Supreme Court.

Here the constitutional attacks upon the act of 1913 made in Case 1 above were repeated. The California Supreme Court held the act valid under the police power and "due process of law" and "equal protection of the laws" clauses and against the claim of class legislation. Three judges held it wholly valid, three concurred upon limited grounds and one dissented.

5. Western Metal Supply Co. v. Industrial Accident Commission (Mason) (1916) 172 Cal. 407, 156 Pac. 491.

The right of the Industrial Accident Commission to make awards of compensation benefits in death cases was here called in question, upon the ground that the constitutional amendment authorizing workmen's compensation legislation in California did not specifically include death cases or the rights of dependents, but referred only to injuries and injured employees. This was the closest the Commission has ever come to disaster in constitutional attacks. The commission's jurisdiction over fatal injuries was sustained by the court by a four-to-three vote.


It was here held: (1) Testimony taken before a party has been joined as a party defendant cannot be used against him without his consent without violating the "due process" clause of the Fourteenth Amendment. The court did not, however, declare any provision of the statute unconstitutional upon this ground; (2) Sec. 30 of the Compensation Act, imposing a liability upon general contractors and property owners to pay the compensation due an injured employee of a sub-contractor if the immediate employer is uninsured and fails to pay (virtually a mechanic's lien measure) was unconstitutional. This was for the reason that the legislature could not, under the language of the constitutional amendment authorizing workmen's compensation legislation (Sec. 21 of Art. XX) vest in the Industrial Accident Commission jurisdiction to enter awards of compensation benefits against any person other than the immediate employer, as such power was a judicial power and was vested by the Constitution in the Superior Court except insofar as expressly permitted by the Constitution to be placed elsewhere. It was held that Sec. 21 of Art. XX did not include such secondary liability, and the power to enforce it therefore remained in the Superior Courts.


In these two cases Sec. 30 of the 1913 act was held unconstitutional, upon the authority of Case 6, above.


Art XX, Sec. 21. "The legislature may by appropriate legislation create and enforce a liability on the part of all employers to compensate their employees for any injury incurred by the said employees in the course of their employment, irrespective of the fault of either party. The legislature may provide for the settlement of any disputes arising under the legislation contemplated by this section, by arbitration or by an industrial accident board, by the courts, or by either, any or all of these agencies, anything in this constitution to the contrary notwithstanding."
It was here held that the state law cannot constitutionally be applied to an injury sustained by a railroad crossing flagman in the course of his work. One Justice dissented.

Here the constitutionality of a provision of the Compensation Act relating to the admission and use of hearsay testimony in certain cases was challenged as not sustainable under the police power. The point was not decided as the decision turned upon other grounds.

This case holds that the Compensation Act cannot constitutionally be extended to cover an electric lineman injured while keeping in repair trolley wires used in the operation of an electric suburban line of the Southern Pacific Co.

Here held that a crossing watchman employed by a railroad engaged in local and interstate commerce came under Federal jurisdiction, and hence that the State Workmen's Compensation Act could not constitutionally be applied to an injury sustained by him.

13. Western Indemnity Co. v. Industrial Accident Commission (Robson) (1917) 174 Cal. 315, 163 Pac. 60.
The petitioner in this case challenged the constitutionality of a provision of the Compensation Act permitting the introduction in evidence and use as proof of hearsay testimony under certain circumstances. The clause was held constitutional.

This case was the first of a series to come before the Appellate Courts involving a constitutional conflict between the legislative power of the states and the general maritime law as enforced under Federal authority. It was here held that the State Compensation Act could be applied to an injury sustained by a seaman on a California vessel while on the high seas. The decision was subsequently overruled by a five-to-four decision of the United States Supreme Court in Southern Pacific Co. v. Jensen (1917) 244 U. S. 205, 61 L. Ed. 1086.

This is a companion case to the one preceding, involving the application of the Compensation Act to a stevedore injured while loading a vessel at a wharf in California, a maritime occupation. The state law was again held applicable by the State Supreme Court.

This was also a maritime case, involving an injury to a seaman occurring upon a vessel in a California port. The decision of the California Supreme Court holding the state law applicable was reversed by the United States Supreme Court, upon the authority of Southern Pacific Co. v. Jensen, supra.

This was a maritime case, companion to the preceding, which
involved an injury to a stevedore. It also was taken to the United States Supreme Court and there reversed.


Here again the maritime question was presented, the case being one of injury sustained by a seaman upon a vessel. The decision of the United States Supreme Court in the Jensen case became known prior to the making of the decision, and the California Supreme Court accordingly held the State Compensation Act inapplicable because of the bar of the Federal Constitution and general maritime law.


This proceeding involved a question of interstate commerce, the injury being sustained by a railroad call boy while preparing to deliver mail sacks to an interstate train. The state law was held inapplicable.


The constitutional contention made in this case was that the Industrial Accident Commission bad used in its decision certain medical reports without notice to the parties, a deprivation of the right of “due process of law” secured by the Fourteenth Amendment to the Federal Constitution. This position was sustained by the District Court of Appeal. The State Supreme Court reversed the District Court and sustained the commission upon the ground that the medical reports in question were reasonably included within a stipulation of the parties, and did not further consider the constitutional point.


22. Klamath S. S. Co. v. Industrial Accident Commission (Rorvick) (1918) 177 Cal. 767, 177 Pac. 848.

These two cases represent an attack upon the constitutionality of Sec. 75(a) of the 1913 Compensation Act as amended in 1915. This section provided that the act should apply to injuries sustained outside the territorial limits of California in cases where the injured employee was a resident of California at the time of his injury and the contract of hire was made in California. Its validity was challenged by petitioners, employers of labor, upon the ground of alleged discrimination between resident and non-resident employees injured outside the state. It was urged that the conferring of the privileges of the act upon residents to the exclusion of non-residents violated Art. IV, Sec. 2 of the Federal Constitution. [Cf. Western Metal Supply Co. v. Industrial Accident Commission (1916) 172 Cal. 407, 156 Pac. 491.] The Supreme Court passed most of the constitutional questions without decision, upon the ground that the employer, not being a member of the class alleged to be discriminated against, was not privileged to raise the contention.


This case upheld the jurisdiction of the Industrial Accident Commission to make an award against an employer's insurance carrier, as against the claim that Sec. 21 of Art. XX of the Constitution, relating to workmen's compensation, did not authorize such jurisdiction.

24. Southern Pacific Co. v. Industrial Accident Commission (Butler)
This was another interstate commerce case, involving the electrocution of a repairman cleaning an insulator at the employer's powerhouse, such powerhouse being used to generate electricity to operate the employer's electric suburban lines. The commission and the State Supreme Court held the State Compensation Act applicable, but the case was taken to the United States Supreme Court, which reversed the decision below.

25. Thaxter v. Finn (1918) 178 Cal. 270, 173 Pac. 163.

In this case the Supreme Court construed Sec. 21 of Art. XX of the State Constitution to permit the Legislature to exempt decisions of the commission from collateral attack. As a result, parties to proceedings before the commission are limited to one speedy and inexpensive trial, and one expeditious and effective method of correction of errors by the Appellate Courts, without the doubtful additional privilege of collateral attack in other proceedings and courts. The decision was by a close vote, reversing on rehearing an earlier decision to the contrary.


In this case the interstate commerce question was again presented. The employee was a car repairer, engaged in making light repairs to freight cars sidetracked at the Bay Shore yard of the employer for such purpose. He was killed by a train while crossing from one track to another in search of another car to repair, it being unknown whether such car, when found, would be engaged in interstate or intrastate commerce. The commission assumed jurisdiction under the state law, but was reversed by the State Supreme Court.


In this case the United States District Court granted an injunction to restrain enforcement of an award of the commission in a maritime case. This award had become final prior to the decision of the United States Supreme Court in Southern Pacific Co. v. Jensen, supra, which ousted the state compensation acts from application to such situation because of conflict with the Federal Constitution and the Federal maritime jurisdiction. The injunction proceeding was later dismissed upon the ground that the jurisdictional amount was lacking, and upon appeal to the United States Supreme Court this decision was affirmed in Western Fuel Co. v. Garcia (1921) 257 U. S. 233, 66 L. Ed. 97, 42 Sup. Ct. Rep. 89.


Again an interstate commerce case, in which the state law was held applicable to a flagman on a local work train upon the ground that the train following was an interstate train.


It was here determined that the Industrial Accident Commission had no jurisdiction in equity beyond the immediate scope of the Workmen's Compensation Act. The suit was in the Superior Court in equity for an injunction to restrain enforcement of an award of the commission upon the ground that it had been obtained by fraud of the claimant and in violation of a contract, the plaintiff before the Superior Court not having been a party to the compensation proceeding before the commission.
30. Perry v. Industrial Accident Commission (Kendall).

   In these proceedings Sec. 25 of the 1917 Compensation Act, a re-enactment of Sec. 30 of the 1913 act held unconstitutional in Cases 6, 7 and 8 above, was held unconstitutional upon the same grounds as before. The section had been re-enacted under the belief that newer amendments to the State Constitution, Sec. 17 1/4 of Art. XX adopted in 1915 and Sec. 21 of Art. XX adopted in 1918, would validate it.

   In this proceeding a portion of Sec. 8b of the 1917 Compensation Act, further defining the relationship of employer and employee, and its antithesis of independent contractor, was held unconstitutional. The ground of the decision was that as the term "employee" had been inserted in the constitutional amendment of 1911 authorizing compensation legislation, the Legislature could not thereafter define or re-define the term, as such action would tend to alter the constitutional grant of jurisdiction.

   Here the constitutionality of Sec. 25 of the 1917 Compensation Act, previously held invalid in Cases 30 and 31 above, was re-argued in the hope that the court might, upon re-examination, alter its position. The Court, however, reaffirmed its previous holding.

   This was a damage suit brought against the employer in the Superior Court, the plaintiff endeavoring to avoid the Workmen's Compensation Act upon the ground of its unconstitutionality. The grounds assigned were that it deprived claimants of trial by jury and divested the Superior Courts of their constitutional jurisdiction. The act was held constitutional.

35. Sudden & Christensen v. Industrial Accident Commission (Soarey) (1920) 182 Cal. 437, 188 Pac. 803.
   This proceeding involved the constitutionality of an act of Congress approved October 6, 1917, restoring the protection of state workmen's compensation acts to maritime workers, which had been taken away a few months before by the five-to-four decision of the United States Supreme Court in Southern Pacific Co. v. Jensen et al., supra, Case 14, supra. The injury on which the proceeding was based was sustained by a stevedore while unloading a vessel afloat upon navigable waters. The Court held the act of Congress unconstitutional, and therefore that the State Compensation Act could not constitutionally apply to this injury, because of conflict with the Federal maritime jurisdiction.

   A claim was made in this case by a widow for a death benefit for the death of her husband, an emergency hospital steward, from influenza, contracted by him in the line of duty. The question of whether influenza was a compensable injury should have raised only a question of ordinary compensation law, but astute counsel further raised the constitutional point that Sec. 21 of Art. XX of the State Constitution, authorizing workmen's compensation, did not go so far as to authorize recovery for influenza contracted in line of duty. The Court held the Compensation Act to include such disease under such circumstances, and that the act was constitutional as so interpreted.
37. **Engels Copper Mining Co. v. Industrial Accident Commission (Rebstock)** (1920) 183 Cal. 714, 192 Pac. 845.
   This was a companion case to No. 36, involving the same determination.

38. **Hines, Director Gen. of Railroads v. Industrial Accident Commission** (Brizzolara) (1920) 184 Cal. 1, 192 Pac. 859; (1920) 254 U. S. 655.
   This was another interstate commerce case, involving an injury sustained by a railroad roundhouse worker while repairing a switch engine used in both interstate and intrastate commerce, but taken out of service at the time. The State Supreme Court held the Compensation Act applicable, overruling its previous decision in the Ruth case, No. 3 in this list. A petition for certiorari was denied by the United States Supreme Court.

   The attack was here renewed upon the constitutionality of the provision of the Compensation Act relating to extra-territorial application (Sec. 75a, Act of 1913, re-enacted without change as Sec. 58 of the present, 1917, act. See footnote 4). The same grounds were assigned as in Cases 21 and 22 above. In its first decision in this case the California Supreme Court held the employer was privileged to raise the question of discrimination between resident and non-resident employees, reversing its holding in Cases 21 and 22, and then went on to hold the section in violation of Art. IV, Sec. 2 and the "equal protection of the laws" clause of the Fourteenth Amendment of the Federal Constitution because of such discrimination. On rehearing these positions were reaffirmed, but the constitutionality of the section was upheld upon the further ground that the effect of the Federal Constitution read into the section was to strike down the limitation only and not the entire section. It therefore conferred *ex proprio vigore* upon non-resident employees the privileges given by the section to resident employees. The case was taken to the United States Supreme Court but dismissed for want of a substantial Federal question, the final decision of the State Supreme Court having eliminated the alleged deprivation of a Federal right.

   In this case the constitutionality of Sec. 6b of the 1917 Compensation Act, increasing compensation benefits fifty per cent where serious and wilful misconduct on the part of the employer existed, was attacked. The grounds were (1) That the provision was not authorized by Sec. 21 of Art. XX of the Constitution; (2) That it deprived the party of a jury trial. The Supreme Court upheld the provision.

   This was a damage suit in the Superior Court, in which the same contentions were made as in the previous case. The District Court of Appeal upheld the validity of the statutory provision.

   An interstate commerce case, in which a railroad shop repairman was injured while repairing a freight engine withdrawn from service at the time. The District Court of Appeal held the state law inapplicable because the engine was permanently devoted to
interstate commerce, it having been taken from an interstate run for the repairs and being under assignment to the same run upon their completion. The State Supreme Court denied a petition for hearing before it by a four-to-three vote. The case was taken to the United States Supreme Court, which reversed the courts below and held the case not one of interstate commerce, because the engine was not in service in interstate transportation at the time of the injury.


In this case the Supreme Court held unconstitutional Sec. 57b of the 1917 Compensation Act, which authorized the commission to try and determine controversies arising out of compensation insurance policies in which a working employer or member of an employing partnership insured himself along with his men for benefits under the Compensation Act, if injured in the course of the business. The ground of the decision was that such jurisdiction was not conferred by Sec. 21 of Art. XX, and therefore infringed upon the constitutional jurisdiction of the Superior Courts.


These were companion cases involving the maritime jurisdictional question. In each case an employee of a ship construction company was injured upon a vessel afloat upon navigable waters while working in completing the vessel after its launching and before it was turned over to its owners. The District Court of Appeal held the State Compensation Act applicable, upon the ground that the circumstances of the employments were not such as to cause material conflict with the law maritime.


In this case the Industrial Rehabilitation Act, a supplement to the Workmen's Compensation Act authorizing vocational re-education and rehabilitation benefits to employees disabled in industry, was held unconstitutional upon the ground that it was not within the sanction of Sec. 21 of Art. XX of the constitution, and hence transgressed upon the constitutional jurisdiction of the Superior Court.

47. Madera Sugar Pine Co. v. Industrial Accident Commission (Mankin) (1922) 64 Cal. Dec. 136, 208 Pac. 278.

In this case petitioners attacked the constitutionality, under the "due process of law" clause of the Fourteenth Amendment to the Federal Constitution, of Sec. 14a of the 1917 Compensation Act, which conferred conclusive presumptions of total dependency in favor of minor children of deceased employees in certain cases. The question was passed by the Supreme Court, the decision turning upon other grounds.


49. Madera Sugar Pine Co. v. Industrial Accident Commission (Venegas) (United States Supreme Court).

In these cases the employer attacked the constitutionality under the police power of provisions of the Compensation Act allowing a death benefit to non-resident alien dependents of workmen killed in industrial operations in California. The State Supreme
Court denied petitions for writs of review to review awards of the Industrial Accident Commission allowing death benefits to the dependents, and the cases were then taken to the United States Supreme Court by writ of error. Oral argument was heard by the Court in March, 1923.

50. People v. Yosemite Lumber Co. (Moore) (State Supreme Court). This case is a sequel to Case No. 47 above. Following the decision of the court in that case divesting the Industrial Accident Commission of jurisdiction to collect the contribution due from employers under the provisions of the Industrial Rehabilitation Act, suit was brought by the commission in the Superior Court to collect the sum due in the instant case from the employer. The employer has attacked the constitutionality of the act upon the ground of alleged conflicts with a number of provisions of the state constitution and with the Fourteenth Amendment to the Federal Constitution.

51. Lee v. Superior Court. (State Supreme Court). This matter involves the constitutionality of provisions of the Compensation Act authorizing the Industrial Accident Commission to fix attorney fees in cases before it, to allow liens upon compensation benefits therefor, and appointing trustees for minors and incompetents to disburse compensation payments for their benefit.

52. Coos Bay Lumber Co. v. Industrial Accident Commission (Josephsen) (State Supreme Court). Involves a new phase of the maritime jurisdictional question.

53. Los Angeles Shipbuilding and Drydock Co. v. Industrial Accident Commission (Fontain) (U. S. District Court). A sequel to Case No. 45, raising the same questions by suit in equity in the U. S. District Court to enjoin enforcement of the award pronounced valid in that case by the State Appellate Courts.

54. Alaska Packers' Association v. Industrial Accident Commission (Hansen) (State Supreme Court). Another phase of the maritime question, dealing with a rigger overhauling the employer's vessels while laid up for the winter.

55. Zurich General Accident Ins. Co. v. Industrial Accident Commission (Denny) (State Supreme Court). Involves the maritime question.

Analyzing the above list, it appears that constitutional questions affecting the validity, or constitutionality of application of the Compensation Act have been raised in fifty-five cases. Sixty-one separate constitutional attacks have been made, as more than one ground of attack sometimes appears in a single case. This is for the period of seven years, from 1915 to 1923. Fifteen separate statutory provisions have been attacked, of which six have been declared unconstitutional and nine have been upheld.

Studying the list further, it will be found that the sixty-one constitutional attacks can be divided into four classes, as follows:

CLASS A. Conflicts between the State and Federal jurisdictions. This question was raised in twenty-four cases, of which thirteen involved conflicts with the maritime law and eleven involved injuries
POWER TO DECLARE LAWS UNCONSTITUTIONAL

329

to railroad employees in interstate commerce. In the maritime cases the question presented was whether the State Compensation Act, sufficiently broad upon its face for the purpose, could constitutionally apply to various injuries sustained by California workmen in maritime employments. The application of the law was held barred by conflict with the Federal Constitution and the law maritime in six cases and upheld in two. Four cases were undecided at the time this article is written, and in one other the constitutional question was raised but passed without decision.

In the interstate commerce cases the question involved was whether the application of the State Compensation Act to various injuries sustained by employees of railroads engaged in interstate and intrastate commerce would bring it into conflict with the Federal Employers Liability Act, a statute passed by Congress in 1908 for the protection of railroad employees under the authority of the "interstate commerce" clause of the Federal Constitution. The application of the State Compensation Act was held in violation of the Federal Constitution and Federal statute in nine cases, and upheld in two.

CLASS B. Cases involving private constitutional rights. The principal argument in favor of the power of the courts to declare laws unconstitutional is that such power is necessary to protect the liberties of the people, and their constitutional rights as secured by the Bill of Rights, against encroachments by legislative bodies which are supposed to be spurred on by the whims and passions of the populace. Statutory provisions were attacked in this class of cases ten times and their validity was upheld in eight, with two cases pending at the time this article is written. In six the "due process of law" clause of the Fourteenth Amendment to the Federal Constitution was invoked, and in two the claim of a right to a jury trial. In the six "due process" cases the validity of the provision was upheld in three, and the question was passed as not necessary for decision of the case in three. In no case has the law or any section thereof been held unconstitutional upon this ground.

CLASS C. Cases of mechanical obstruction or interference in the machinery of the State Government. In this group of twenty cases the constitutionality of various provisions of the statute under consideration was attacked upon grounds having no relation to fundamental public policy, but involving only the technical machinery of government, such as encroachment of one officer or body upon the constitutional functions of another, or the attempt to confer a power not expressly authorized by the constitution. In other words, the constitution has created a system or machinery of government
intended to clearly define the functions of each department and officer, so that there will be no conflict or interference between them. But due to the imperfections of the instrument, or the failure of the legislature to correctly anticipate the construction of the constitution or statutes later given by the courts, the legislature has provided machinery equally good, but at variance with that specified in the constitution. Considerations of fundamental public policy are not involved, for in every case included in this class the legislature could reasonably have passed the statutory provision under attack if there were no constitutional provision upon the subject. No higher consideration was involved than that of ordinary legislative policy.

For instance, most of the cases in this class are those in which the jurisdiction of the Industrial Accident Commission to make a certain award was challenged upon the ground that Section 21 of Article XX of the State Constitution, authorizing workmen's compensation, did not include the power to make the particular award in question, and that therefore such power could be exercised only by the Superior Courts, created and given the judicial power of the state by Article VI of the Constitution. Of such nature are Cases 5, 6, 7, 8, 23, 29, 30, 31, 32, 33, 40, 43, 46, 50 and 51 of the foregoing list. As the Industrial Accident Commission has been judicially pronounced to be a court and exercises judicial functions, and as the powers involved in said cases relate more or less closely to workmen's compensation, no reason of substantial public policy exists why the legislature should not have freedom to determine whether such powers should be exercised by one judicial body or another, Superior Court or commission. The question is of no higher dignity in substance than one of legislative policy.

Similarly, in Case 32, it was held that as the term "employee" had been inserted in the constitution in 1911, the legislature could not thereafter give a statutory definition of the term at variance with what the courts considered it to have borne in 1911 as a common law expression. In other words, that the legislature could not by subsequent statutory definition expand the constitutional grant of power conferred in 1911. As a matter of public policy, no reason existed why the legislature should not change the definition of the term "employee" so as to include or exclude certain classes of cases from the Compensation Act, as the legislature usually may alter, amend or repeal the substantive law of the state at will. The bar

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5 Supra, n. 3.
imposed upon its powers by this decision is therefore a formal bar, growing out of the rigidity of a written constitution, not a bar founded upon fundamental public policy.

In this class we find nine cases declaring legislation unconstitutional (six separate statutory provisions being annulled), unsuccessful attacks on nine other provisions, and two cases pending.

CLASS D. Miscellaneous cases. This group is without significance, except for statistical completeness. In this class we find three cases in which an unsuccessful assault was made upon a provision of the Compensation Act giving extra-territorial force to the law, upon the ground that it violated Article IV, Section 2 of the Federal Constitution (privileges and immunities of citizens of the several states) and the "equal protection of the laws" clause of the Fourteenth Amendment to the Federal Constitution. Also three cases in which portions of the statute were unsuccessfully attacked as "class legislation." One case is now pending involving the claim of class legislation (Case No. 50).

Summarizing, 24 cases, or 39.3 per cent, are in Class A (conflicts with Federal jurisdiction), out of which 15, or 24.5 per cent, involved successful constitutional attacks; 10 cases, or 16.3 per cent, are in Class B (substantive private constitutional rights), of which none were successful in annulling the statutory provision; 20 cases, or 32.7 per cent, are in Class C, mechanical interference in the machinery of the state government. Classes A and C combined, representing conflicts of governmental machinery as a whole under state and Federal constitutions, include 44 cases, or 72 per cent of the total number of decisions upon constitutional questions. This is an alarming confession of governmental inefficiency and weakness. Ideally our government should be so organized that all its powers could be exercised in carrying out its functions, with no friction or interference between departments. Every case in which governmental force is used up in clashes between departments or in jurisdictional conflicts, and in which the time of the judicial department and attorneys is taken up in litigating and settling such conflicts, and in which the executive officer or board marks time and refrains from vigorously performing its duties until the constitutional attack is decided, is a case of functional maladjustment or of governmental pathology, approaching at times malignancy or paralysis. Whether there be a remedy, however, is a more difficult question. To state the evil does not immediately prove the remedy, contrary to the views of some of our leading politicians.

Returning to the arguments for and against the exercise by the
courts of the power to declare laws unconstitutional, viewed in the light of the foregoing tabulations and analysis:

(1) As to the argument that the exercise of the power is necessary to preserve the liberties of the people, experience under the Workmen's Compensation Act, at least, shows that while this ground may be the one most relied upon in theory, it is the one for which the power is least used in practice. Out of sixty-one attacks upon the Compensation Act but eight were upon this ground, and all were unsuccessful. The power is being invoked almost wholly for other purposes, and the number of cases in which it is invoked to secure fundamental rights of individuals is negligible.

(2) As to the argument that the exercise of this power is necessary to secure Federal supremacy and uniform interpretation by the Federal judiciary of the Federal Constitution and statutes, it appears that this ground was invoked in more cases than any other, 39.3 per cent of the whole number, and that supremacy of Federal jurisdiction over state laws was decreed in 15 out of these 24 cases, or 24.5 per cent of the whole. If the extent to which the power has been invoked with reference to this ground is a test of the necessity for its exercise, the contention has been proved.

Practical considerations tend to weaken this conclusion. The power has been invoked by railroads in these cases, not altruistically to secure Federal supremacy, but selfishly to evade liability by jockeying between the conflicting jurisdictions of Federal and state governments. If the particular case is one in which there is a danger of a large recovery under the Federal Liability Act, the railroad will usually cheerfully settle for a less amount under the State Compensation Act, or claim that the case comes under the state law. But if there is no danger of recovery against it under the Federal Act, as where the employee cannot prove negligence on the part of his employer, the endeavor of the railroad company is to exclude the state law by claiming the applicability of the Federal Act. Wherever a reasonable doubt exists as to which law can be applied, the tendency with some roads is to force a settlement of the claim for less than either law would give, using the fear of delay and expense of litigation to determine which law applies as a weapon. Again, where the case might come under either law, the provision of the Compensation Act giving to the Industrial Accident Commission power to approve settlement agreements and thereby protect parties against improvident settlements becomes of no value, as settlements can be made under the Federal law without such approval.

The same is true to a less extent of the conflict between the State
Compensation Act and the Federal maritime law. The existence of the jurisdictional conflict can be used to shut out the injured employee from pressing his claim because of the fear of prolonged litigation on constitutional grounds, and to induce unconscionable settlements through fear of such litigation.

Notwithstanding these practical evils, it is clearly necessary that the Federal courts possess the power to review state legislation alleged to encroach upon the Federal jurisdiction, both to maintain Federal supremacy and to secure, as far as can be done, uniformity of interpretation of Federal statutes among the several states.

(3) With respect to the argument against the exercise of the power, that such power is no longer necessary to safeguard fundamental human liberties, the small percentage of cases involving this constitutional question arising out of the Workmen's Compensation Act would seem to prove the contention. The field studied is, however, too narrow to draw a final conclusion upon this point. There have been cases in the past and will be cases in the future in which fundamental constitutional rights may be impaired by improper legislation, and it is not safe to say that the necessity for the check of the court has wholly disappeared.

(4) The practical objection urged against the exercise of this power by the courts, that it does not work well in practice, would appear from the foregoing list of decisions to be well taken.

THE NUMBER OF CONSTITUTIONAL ATTACKS IN PROPORTION TO THE LEGISLATION INVOLVED IS TOO LARGE

The existence of sixty-one grounds of constitutional attack in the higher courts in seven years upon the Workmen's Compensation Act, a mild and inoffensive statute, and the declaring of six separate provisions involved in it unconstitutional, indicate that too much time has been devoted to the constitutional phases of the act. Were our governmental system reasonably perfect, there would be perhaps one test case to determine constitutional questions, and after that all energy of the respective governmental departments could be put into the efficient enforcement of the statute rather than in repeated harassment of its operation by constitutional attacks recurring constantly.

PARALYZING TENDENCY OF TOO PROFUSE CONSTITUTIONAL ATTACKS

The existence of the possibility of so many constitutional attacks tends to have a paralyzing effect upon the execution of the laws. There are at the present time still more constitutional questions to be tested arising under the Workmen's Compensation Act. The
Industrial Accident Commission is necessarily enforcing certain provisions of the law cautiously, paying more attention to the aspect of possible test cases to test constitutional questions involved, than to the full enforcement of the provisions. It has been found by past experience that if a test case goes up on an unfavorable state of facts, or involving too many issues at once, or involving aspects prejudicing the main question, it is apt to have an unfavorable effect upon the decision upon the main constitutional question involved.

Moreover, whenever a particular provision is under attack upon constitutional grounds, enforcement of this provision must, as a matter of practice, be suspended for one or more years, and until final determination of the test case can be had. This is paralysis of governmental function.

Again, the delay in making legislation effective is noticeable. It has come to be a by-word that a statute does not become a law when passed by the legislature, but only after it has received its approval from the appellate courts in test cases involving the constitutionality. Such test proceedings involve delay of nearly a year usually in the state courts; and two years more if taken to the United States Supreme Court.

ABSENCE OF PUBLIC POLICY IN MANY CASES

Again, provisions of the Compensation Act or allied statutes which are in themselves useful legislation have been declared unconstitutional upon grounds having no direct relation to public policy or wisdom of the legislative policy involved. Again let it be said, that the writer is not criticizing the correctness of these decisions. They are assumed to be correct as a matter of constitutional law. The grounds of the decisions are, however, matters arising out of mere details of organization of the state government and are formal rather than substantial.

For instance, the holding of the court in Carstens v. Industrial Accident Commission, Case No. 6 above, was that Section 21 of Article XX of the state constitution did not include authority for creating a system of liens upon property benefited by a workman's labor to secure payment to him of workmen's compensation benefits from the immediate employer, usually a sub-contractor. That, therefore, jurisdiction to determine such matters placed by Article VI in the Superior Court was not validly transferred to the Industrial Accident Commission by the Workmen's Compensation Act. As a matter of public policy it makes no great difference whether such judicial power be vested in the Superior Court or in the Industrial
Accident Commission. The Industrial Accident Commission has been held by our Supreme Court to be a court, and to exercise true judicial functions. It is a constitutional court. The question of whether such power should be placed in one court or another court where the subject matter relates to workmen's compensation is of no greater gravity, in substance, than one of legislative discretion and expediency. Any decision holding void an action of the legislature which apportions such jurisdiction is therefore based upon formal and technical grounds and not upon grounds of public policy.

Similarly, in Employers' Liability Assurance Corporation v. Industrial Accident Commission, Case No. 43 above, the question was whether the Industrial Accident Commission could be vested with jurisdiction to determine controversies arising out of workmen's compensation insurance policies which included employers with their workmen within the protection of the policy. Such section was held unconstitutional upon the same ground as that stated in the preceding case, although as a matter of public policy the legislature could easily give jurisdiction over such cases to the Commission or to the Superior Court in its discretion, the issues in such cases depending wholly upon the construction and application of the Workmen's Compensation Act.

Similarly, in Flickenger v. Industrial Accident Commission, Case No. 32 above, it was held that the legislature could not amend the definition of the term "employee" as used in the Compensation Act, so as to give greater scope to the act. This was because the term had been used in Section 21 of Article XX of the constitution, as adopted in 1911. The legislature was therefore limited to the common law meaning of the term in 1911, as determined by the judicial construction given it in 1917, the date of the decision. Ordinarily the expansion or contraction of the substantive law of the state, including the differentiation of employees and independent contractors, is wholly within the jurisdiction of the legislature, and both the common law and the codes can be altered by it from time to time in its discretion. The decision was therefore upon formal grounds, not based upon public policy.

Lest it be thought the Compensation Act presents too narrow a field for considering this question, the writer has glanced over the last few volumes of the California Reports and noted the following cases which are open to the same objection:

In re Lockett (1919) 179 Cal. 581, 178 Pac. 134. In this case

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6 Supra, n. 4.
7 Cal. Const., Art. XX, Sec. 21.
the court held unconstitutional Sec. 288a of the Penal Code which denounced as criminal offenses the acts of fellatio and cunnilingus, upon the ground that the statute was not in the English language. Conceding the point to be well taken, the writer believes every Superior Judge and schoolboy in the state knew definitely the meaning of these terms by the time the statute took effect, so that the constitutional defect was one of form and not one of substance.

In Mordecai v. Board of Supervisors (1920) 183 Cal. 434, 192 Pac. 40, the Irrigation District Act of 1919 was held unconstitutional for want of uniform operation. The unconstitutional classification involved in this case was one having no direct relation to public policy and involved purely the mechanics of government.

In McMillan Company v. E. P. Clarke (1920) 184 Cal. 491, 194 Pac. 1030, 17 A. L. R. 288, the constitutionality of the free high school text book act was unsuccessfully assailed upon a considerable number of alleged conflicts with different provisions of the state constitution, most of which involved no constitutional questions of public policy.

And in Vol. 187 of the California Reports, four cases will be found, on pages 181, 287, 343 and 533, respectively, in which statutes were held unconstitutional relating to county government, municipal corporations, jurisdiction of the courts, and conflict of jurisdiction between the courts and the State Water Commission. In all of these cases the defect was one of the mechanics of local governmental organization involving no questions of fundamental public policy.

These cases are typical of a large proportion of the total number of constitutional questions raised in the courts, in which the controversy is over the mere machinery of government. Of such are cases involving the powers, functions, organization and validity of acts of municipalities, counties, irrigation, reclamation and school districts and other governmental agencies. No private rights or constitutional liberties are involved, and the cases turn wholly on the question of whether the legislature has followed exactly the constitutional scheme for local government. If it has not, the local organization must be re-created, or discharge its particular function over again in a different way, with a considerable loss of time, money and efficiency in the meantime. In the absence of such constitutional restrictions one way would usually be as good as another, or at least the legislature could choose among several possible ways of organizing or regulating inferior governmental bodies without any greater risk of harm to the state than now exists in the exercise of any of its present functions.

It will be argued that when the people have chosen to incorporate in their constitutions, for their own protection, a specific scheme for local government, no legislature should have the power to disregard the constitutional restraints placed upon it and deliberately substitute a different plan. As an abstract proposition or matter of political theory, this statement is unimpeachable. There are, nevertheless, certain answers to be made:
(1) The proposition does not fit the facts. Seldom, if ever, does a legislature intentionally violate the mandates of the constitution which create it. The cases which come before the courts are not those of wilful defiance of the constitution, but of disagreements, usually reasonable, as to its interpretation in minor respects. Frequently the members of the appellate courts are not unanimous in their decision construing it, indicating that reasonable persons can disagree as to the proper construction. And, as pointed out, usually in this class of cases a construction contrary to that adopted would do no real harm to the state or its citizens, as is illustrated by the fact that frequently a constitutional amendment is proposed and adopted at the next opportunity to validate the legislation previously held void. The statute is then re-enacted and goes successfully into operation to the general satisfaction of the community.

It is therefore not a question of restraining the legislature from intentionally defying the constitution, but rather one of whether, in this class of cases, the advantage of checking a legislative interpretation by a later judicial one in order to secure theoretical perfection of constitutional observance, is worth the confusion in the administrative branches of government resulting from its exercise. After all, government, particularly local government, is more a practical than a theoretical matter, and perfection of interpretation is not as important as good government.

(2) Conceding that the constitution should be obeyed, does it necessarily follow, as a practical matter, that the courts should be vested with the final power to vindicate it, in this class of cases? We already have the checks upon the legislature of frequent elections, the bicameral system, the veto power of the governor, and the referendum and recall. The legislators and the governor are each sworn to support and uphold the constitution. Representative government must, if it is to survive, produce men of sufficient integrity and capability to discharge the duties of these offices. Why provide further checks, except where fundamental private rights are at stake?

Of course, the original error was in making the mere machinery of subordinate governmental agencies constitutional, instead of leaving their organization and powers to the legislature and providing a short constitution with only a fundamental framework of the major offices, as is done in the Federal Constitution. There are but few limitations on the power of Congress to create and specify the jurisdiction of both all executive offices below the President and of all courts below the Supreme Court. But we are not likely to reach this stage in state constitution-making for some time, as the tendency
still is to put everything in the constitution, partly because of fear of the legislature and partly because of fear of the courts. Palliative measures such as those discussed below are therefore more likely to receive consideration.

**REMEDIES**

(1) Class A cases, representing conflicts between state and Federal jurisdictions, obviously disclose an evil. There is too much litigation over jurisdictional questions, needlessly taking up the time of the courts and attorneys and causing needless expense to litigants. The question of which forum a party is entitled to in a particular case cannot easily and clearly be determined in advance, the law is uncertain, and there is a danger of twilight zone between state and Federal authority in which neither will be able for a time to function efficiently. The situation is very like that existing in English and American courts before the amalgamation of legal and equitable proceedings.

Much can be done to reduce this evil by appropriate Federal legislation. For instance, in the field of maritime law, a Federal statute has been passed, effective June 10, 1922, restoring the protection of State Workmen's Compensation Acts to all maritime workers except masters and members of crews of vessels. As to the latter, a uniform Federal Workmen's Compensation Act is now pending before Congress. The constitutionality of the first-named measure is now under attack and the statute has just been declared unconstitutional by the Supreme Court of Washington. In the course of another year the matter will be decided by the United States Supreme Court, which declared a similar law unconstitutional some years ago by a five-to-four vote. If these two measures become or stay constitutional much of the present conflict will disappear, as far as State Workmen's Compensation Acts are concerned. A uniform Federal Workmen's Compensation Act for all maritime workers, while not as advantageous in practice, would also largely solve the jurisdictional question.

Again, with respect to interstate commerce cases, all injuries sustained by employees of interstate railroads were originally under the protection of state laws solely. The conflict was caused by the passage of the Federal Employers' Liability Act by Congress in 1908. A bill is now pending before Congress to repeal this measure, and

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restore to the states jurisdiction over all injuries sustained by railroad employees. If this measure should be adopted, the conflict of jurisdiction in interstate commerce cases between State Workmen’s Compensation Acts and the Federal jurisdiction would cease.

Such measures, while clearing up present grounds of conflict, do not bear upon the power of the courts to declare laws unconstitutional. It is the opinion of the writer that it would not be wise to curtail the powers of the courts directly in this class of cases. It is necessary for the welfare of the country that the Federal courts retain the power to declare void any state law transgressing upon Federal jurisdiction, in the interest of Federal supremacy and uniformity of construction of Federal legislation and jurisdiction. And if the Federal courts possess it, the state courts, in which such questions will usually be raised in the first instance, might as well retain power to determine the Federal questions raised before them, subject to review by the Federal Supreme Court.

(2) In the Class B cases, it has heretofore been pointed out that the actual exercise of the power with reference to the claim of private substantive rights guaranteed by the constitution is of comparatively small extent. Even outside of the Compensation Act such questions do not occur to as large an extent as classes of cases represented by groups A, C and D in the present article. It is occasionally argued that it is in this class of cases that the power of the courts to declare laws unconstitutional is most frequently abused by reactionary decisions of illiberal judges. For instance, the decisions which have brought the greatest censure upon the courts have been those sustaining theoretical constitutional rights of no practical value to the holders in labor disputes, as the right of freedom of contract. It is but cold comfort to a workman to be told that the courts are upholding his alleged freedom of contract, when the court declares unconstitutional a statute designed to protect him against being forced by economic pressure to forego relief for injury, the right to labor in a sanitary place of employment, or to relinquish the struggle to maintain an adequate standard of living for himself and his family. The opportunity to labor under healthful surroundings for a living wage, and free from oppression and abuse imposed by mercenary employers, is of more importance to such workman than a “freedom of contract” which permits him, under irresistible economic coercion, to contract to forego such rights.

Further discussion here on this point is fruitless, as the question presented is political and social rather than legal. In the opinion of the writer, it is not yet time to urge the abolition of the power of the
courts to declare laws unconstitutional in this class of cases. If constitutional guarantees of private rights of security of persons and property and of rights contained in the "Bill of Rights" are to be safeguarded, the power must be left to the courts to do so, even though the power is in some cases but seldom exercised and may be at times abused.

(3) Class C cases—Administrative Conflicts. In this class of cases a real evil exists, as pointed out above. Since no substantial private rights of person and property are involved, the ill effects of the exercise of the power in practice should be sufficient to justify depriving the courts of their power to declare laws unconstitutional in this class of cases. No real harm will come from the possibility of occasional technical violations of the constitution, as there are sufficient means of holding the legislature in check without continuing this power in the courts. The issue is not between constitutional and unconstitutional government, but between governmental efficiency on the one hand and a loss of efficiency on the other through hewing too closely to an arbitrary line of demarcation of subordinate governmental powers and functions.

A similar situation is presented by the circumstances which caused Section 4½ of Article VI of the California Constitution to be adopted. In that situation, appellate courts of the state had been granting new trials wherever error was shown in the record of the trial court, as a matter of right. While some errors had been disregarded as being non-reversible, the situation was still so bad as to constitute a public scandal. The courts were therefore given authority by Section 4½ of Article VI, adopted in 1914, to refuse to reverse for error, however patent, unless such error would amount to a real miscarriage of justice. Similar action should, I think, be taken with respect to Class C cases in this article. Unless the ground of invalidity of a statute would seriously interfere with the constitutional right of private persons, or cause otherwise a miscarriage of justice, the law should be allowed to stand as the legislature passed it, even though in the opinion of the courts the legislature has misconstrued its constitutional authority. Private litigants should not be allowed to defeat justice, or to refuse to conform to wise legislation, by setting one function of government against another and escaping in the resulting turmoil.

(4) This recommendation calls to mind another evil, not strictly within the scope of this paper. That is the vesting in the inferior courts of the power to declare laws unconstitutional. At the present time the question of the constitutionality of a statute is first presented
to a Justice of the Peace or a Superior Judge and then through the successive Courts of Appeal to the court of final determination. It is not worth the time of the parties or the courts to brief a constitutional question to a Justice of the Peace or a Superior Judge, when all the parties know that the question will ultimately be decided by the Supreme Court of the state or of the United States.

The absurdity of the present arrangement was amply illustrated following the passage of the Eighteenth Amendment to the Federal Constitution and the enactment of the Volstead Act, by the multiplicity of decisions from United States District Courts construing the constitutional amendment and determining the constitutionality of the Volstead Act. Conflicts of opinions between the different District Courts resulted in many absurdities, and would have created serious havoc, except for the fact that lawyers paid no attention to them. All were waiting for the decision of the United States Supreme Court. It would have been better had the constitutional questions been certified directly to the United States Supreme Court the first time they were properly raised below, without the delay of first briefing them to individual United States District Judges in different parts of the country. It is therefore the suggestion of the writer that questions involving the constitutionality of statutes be brought in one way or another, such as by certificate, request for instructions, or similar procedure, direct to the State Supreme Court when the question first reaches a stage in the lower courts where decision on the point becomes necessary. In that case speedy determination by the one court qualified to give a final answer to the question can be had.

The writer would therefore suggest a constitutional amendment substantially to the following effect, designed to meet the evils pointed out above:

"No court of this state, except the Supreme Court, shall declare any statute to be unconstitutional or void; and the Supreme Court shall not declare any statute of this state to be in conflict with this constitution, or the Constitution, laws or treaties of the United States, except at the instance of a suitor claiming in a proper proceeding a substantial right, privilege or immunity secured to him by this constitution, or by the Constitution, laws or treaties of the United States, other than a right to use or enjoy a particular agency of government; or where a denial of a constitutional right, privilege or immunity would amount to a substantial miscarriage of justice. The legislature shall, by appropriate legislation, provide for the submission to the Supreme Court of constitutional questions arising in the courts of this state as decision thereon may become necessary or advisable."
Such provision would not be destructive of the liberties of the people or the welfare of the country. The State Supreme Court would still be at liberty to enforce the "Bill of Rights" of the state constitution and the Fourteenth Amendment to the Federal Constitution, containing the "due process" and "equal protection" provisions. This would give protection to litigants wherever protection were really necessary. Also, no provision of the state constitution could divest the United States Courts of their jurisdiction in diversity of citizenship or Federal question cases to declaring state laws unconstitutional. The interests of the people would therefore be fully protected.

The further questions of whether the power of the courts to declare laws unconstitutional under the "freedom of contract" or "due process of law" clauses of the Federal Constitution should be abridged, in view of certain abuses which have occurred in the past with respect to its exercise, or whether the law should require a unanimous court, or a court nearly unanimous, before it could declare laws unconstitutional are worthy of further consideration.

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