The Doctrine of Judicial Review and Its Relation to a Declared Purpose or Policy of a Statute

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The most distinctive and significant American contribution to juridical theory is the doctrine of judicial review. Presidents and legislators, from the time of Mr. Jefferson to the present, have criticized it severely. With some justice they have pointed to the fact that in the Constitutional Convention the proposal to grant to the Supreme Court the equivalent of the executive veto power was rejected. Hence, successive critics have raised the cry of judicial usurpation. This criticism, however, ignores three important facts. First, the Constitution itself in declaring that the Constitution, and laws passed in pursuance thereof, should be the supreme law of the land, states: "and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding." Certainly, so far as state action is concerned, this is a clear recognition of the authority vested in the courts to examine the provisions of state constitutions or state statutes in order to determine whether or not they conform to the Federal Constitution. This, of course, is judicial review. Secondly, statutory interpretation is an inherent judicial function. Where there is a document embodying the fundamental law which has been promulgated by the power in which resides the ultimate sovereignty, there is always a potential conflict between such document and statutes enacted in the ordinary process of legislation. The determination of this.

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1 Many of the members of the Convention, however, were of the opinion that the Supreme Court would exercise judicial review regardless of the absence of a specific provision authorizing it. This view that such power would be exercised is strengthened by the provisions of Article III, Section 2, giving the judicial power of the United States jurisdiction over cases arising under the Constitution, laws, and treaties.

2 U. S. Const. Art. VI.
conflict obviously is within this inherent judicial power. Thirdly, and fundamentally, the doctrine of judicial review is the normal result of the existence of a written constitution, the embodiment of the supreme law of the land. This supreme law ipso facto must be superior to ordinary enactments by transient legislatures.

The origin of judicial review in America was not sudden; it was the result of a slow historical development covering more than a hundred years. So far as the colonies were concerned, the basic fundamental law of each colony was its charter. A royal grant, the charter contained the powers, duties, obligations, and privileges conferred on the colony. The enactments of the colonial assemblies were subject to review by the crown and its agencies. With this colonial experience it is not surprising, therefore, to find the principle (that legislation was subject to review) continued after independence. Prior to the promulgation of the Constitution, there had been pronouncements to this effect by courts in Pennsylvania, New Jersey, New York, Rhode Island, North Carolina, and elsewhere. But the most complete formulation of the doctrine of judicial review was enunciated in Virginia in 1782. By the constitution of Virginia a pardon for treason could be granted only by the action of both branches of the Virginia assembly. A person convicted of treason was granted what he alleged to be a pardon, although it had been enacted by one house only. This alleged pardon being pleaded in a judicial proceeding, George Wythe, Chancellor of Virginia, held that no pardon had been granted, since the court was of the opinion that the purported grant of the pardon by a single house was intended by that house to remain inoperative unless concurred in by the other house. But Chancellor Wythe went on to state: "Nay, more, if the whole legislature, an event to be deprecated, should attempt to overleap the bounds prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers at my seat in this tribunal; and, pointing to the Constitution, will say to them, 'here is the limit of your authority; and hither shall you go but not further.'" This was five years before the meeting of the Constitutional Convention in Philadelphia. While there is no evidence that John Marshall, during his very brief study of law under Chancellor Wythe at the College of William and Mary, was consciously

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3George Wythe, signer of the Declaration of Independence and a member of the Constitutional Convention of 1787, was Professor of Law and Police at the College of William and Mary from 1779 to 1790 when he was succeeded by St. George Tucker.

4Commonwealth v. Caton, 4 Call 57 (Va. 1782).
aware of the great Chancellor's attitude toward judicial review, it is none the less interesting to speculate whether or not, perhaps, unconsciously, Marshall absorbed this legal philosophy from his instructor, since it was Marshall who established the doctrine in American Constitutional Law, that the Supreme Court of the United States is supreme, necessarily possessing the power to review legislation.

Under the American theory of government, of course, there are three separate departments. These three departments of government, Legislative, Executive, and Judicial are separate and distinct and are invested with separate grants of power. The character of these grants, in the Federal Constitution is general and undefined, for example, in the several articles it is successively stated: "All legislative powers herein granted shall be vested in a Congress... The executive Power shall be vested in a President... the judicial Power of the United States shall be vested in one supreme Court..." In all these grants the terms were not defined but they were, none the less, well known and well recognized things; so well known and understood as to be unnecessary of further definition. It should not be overlooked that the term judicial power as then used and understood included, of course, the power of interpreting the law.

But, each of the three branches of the government were presumably of equal dignity, and the members of the other departments were as much bound to support and defend the Constitution as was the judiciary. It is obvious, therefore, that the powers of the judiciary to declare executive acts beyond the constitutional grant or to declare certain legislative enactments not to be law, because they were not passed in pursuance of the Constitution, were subject to certain restrictive principles. It is a matter of tremendous concern for one co-ordinate department of the government to declare that one of the other departments has acted beyond the constitutional power given it or has erroneously exerted its authority. It is a much graver charge for the court to impugn the good faith of either of the other two departments. It is fundamental, therefore, in determining the constitutionality of a statute that the court proceed with the strongest kind of presumption that the legislation is constitutional, that it will not be overturned without clear evidence of its being beyond the limits granted to the legislature by the Constitution, and that the court wherever possible will so interpret the statute as to bring it within the constitutional limitations.

"U. S. Const. Art. I, II, and III."
There has been a tendency for the states to provide in their constitutions that the title of a statute shall cover its scope and that if matter be included in the statute which is not embraced by the title, such unincluded provisions must fail. For example, the Virginia constitution provides, "no law shall embrace more than one subject which shall be expressed in its title . . . " The Federal Constitution, however, is silent on this point, and this silence, unfortunately, has encouraged the undesirable practice of attaching riders to bills. But in any case when a statute, federal or state, is before a court for interpretation, the purpose of the statute as indicated in its title and the policy of the statute (if the legislature has seen fit to include a declaration of policy) become highly pertinent facts. Care should be taken, however, to distinguish between purpose or policy and the motive which prompted the legislature to enact the statute. In determining the constitutionality of statutes, courts are concerned only with the question of constitutional power and the constitutional exercise of it. In such cases the important questions before the court regarding its constitutionality are, first, did the legislature possess the power to enact the statute, and secondly, was this power exercised constitutionally? In other words, a court in reviewing a tax statute, for example, of necessity, would inquire two things: did the legislature have the power to tax the thing taxed; is the purpose of the particular statute the raising of revenue? If the legislature possessed the power to levy the tax and the statute is for the purpose of raising revenue, the court cannot concern itself with the wisdom, the expediency, or the motive of such statute. But, if the statute obviously is for the purpose of regulation and not for the purpose of raising revenue, it must fail unless the legislature possessed the constitutional power to regulate. This would be true regardless of a legislative declaration of purpose or policy.

In applying the general principles of statutory interpretation, the court is entitled to believe that the legislature does not intend to exceed its powers and that the true purpose of the statute has been stated in the title and the declaration of policy unless the contrary is obvious.

Let us consider some of the leading cases involving the question of the effect of a legislative declaration of purpose or policy on the question of the constitutionality of a statute. In the case of Minnesota v. Barber, decided in 1890, the Supreme Court was confronted with the

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6 Va. Const. § 52.
7 136 U. S. 313, 10 S. Ct. 862, 34 L. ed. 455 (1890).
question of determining the constitutionality of a Minnesota statute which required meat offered for sale for human consumption in Minnesota to be inspected by Minnesota inspectors within twenty-four hours of slaughtering. Its purpose was described thus: "An act for the protection of the public health by providing for inspection, before slaughtering, of cattle, sheep and swine designed for slaughter for human food." In holding the statute to be unconstitutional, as placing an improper burden on interstate commerce, the court stated: "The presumption that this statute was enacted in good faith, for the purpose expressed in the title, namely to protect the health of the people of Minnesota, cannot control the final determination of the question whether it is not repugnant to the Constitution of the United States. There may be no purpose upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under forms of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution. In such cases, the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void."

In 1928 the principle enunciated in Minnesota v. Barber was applied in the Louisiana Shrimp Case. The act under consideration declared that all shrimp and parts thereof in Louisiana waters were property of the state. It was made unlawful to ship any shrimp from Louisiana without removing the heads and hulls, while it also was made unlawful to export any raw shells, heads, and hulls since they were "required to be manufactured into fertilizer or to be used as an element in chicken-feed." The facts showed that 95% of the Louisiana shrimp was intended for out of state consumption; that some shrimp bran was made in Louisiana from heads and hulls, all of which was shipped out of the state for use in making fertilizer; that no more than 50% of the hulls and heads removed in Louisiana was used for any purpose; and that the heads and hulls had no market value and frequently became a nuisance. The court held the statute to be unconstitutional as amounting to a burdensome regulation of interstate commerce, stating: "The facts alleged in the complaint, the details set forth on the plain-

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8 136 U. S. 313, 319, 10 S. Ct. 862, 863, 34 L. ed. 455 (1890).
9 The court cited a long line of cases in support of this doctrine, quoting from Henderson v. Mayor of the city of New York, 92 U. S. 259, 268, 23 L. ed. 543 (1875), as follows: "in whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect."
10 Foster-Fountain Packing Co. et al. v. Haydel, 278 U. S. 1, 49 S. Ct. 1, 73 L. ed. 147 (1928).
tiffs' affidavits and the provisions of the Act to be restrained show that the conservation of hulls and heads is a feigned and not a real purpose. They support the plaintiffs' contention that the purpose of the enactment is to prevent the interstate movement of raw shrimp from the Louisiana Marshes to the plants of Biloxi [Mississippi] in order through commercial necessity to bring about the removal of the packing and canning industries from Mississippi to Louisiana. The conditions imposed by the Act upon the interstate movement of the meat and other products of shrimp are not intended, and do not operate, to conserve them for the use of the people of the State.10 The court said further: “One challenging the validity of a state enactment on the ground that it is repugnant to the commerce clause is not necessarily bound by the legislative declaration of purpose. It is open to him to show that in their practical operation its provisions directly burden or destroy interstate commerce... In determining what is interstate commerce, courts look to practical considerations and the established course of business...”11

In 1904 in McCray v. United States12 with three justices dissenting, the Supreme Court held constitutional a federal statute levying a tax on colored oleomargarine at much greater rate than was levied on uncolored oleomargarine. The statute declared as its purpose the raising of revenue although neither the court nor the general public was so naive as to believe that the declaration of purpose disclosed the real legislative intent. But, the court, recognizing the deference due to an enactment by a coordinate branch of the government, chose to treat it as a valid exercise of the taxing power on the ground that the statute on its face was intended to raise revenue rather than to regulate. Since a statute which on its face is intended to produce revenue is none the less a taxing statute even though little or no revenue is produced and even though regulation results, the court refused to look behind the purpose as manifested by the legislative declaration and by the statute as a whole. This probably was correct since the judicial power can not extend to a consideration of the soundness of constitutional theory, the wisdom of political action, or an undisclosed motive.

Fifteen years later the Supreme Court decided another important case quite analogous to the McCray case. In United States v. Dore-

10278 U. S. 1, 10, 49 S. Ct. 1, 3, 73 L. ed. 147 (1928).
11278 U. S. 1, 10, 49 S. Ct. 1, 3, 73 L. ed. 147 (1928), citing cases, among them Minnesota v. Barber, 196 U. S. 515, 10 S. Ct. 862, 34 L. ed. 455 (1890); Brimmer v. Reeman, 198 U. S. 78, 11 S. Ct. 213, 34 L. ed. 862 (1891).
the court held valid a federal statute placing a tax on the sale of narcotics and establishing considerable control over such sales. Although the statute in its terms declared that it was a revenue measure, its constitutionality was questioned on the ground that it was not an exercise of the taxing power but was an attempt to regulate a matter beyond federal control. By a five to four decision the court viewed the statute as a valid exercise of the taxing power since on its face it was a revenue producing measure which was not refuted by the statute as a whole, and beyond this point the court had no authority to inquire. Ironically, the future justified the position of the majority of the court in that the narcotic law has become a source of considerable revenue.

In the case of *Hill v. Wallace*, decided in 1922, the Supreme Court held invalid a federal statute which was declared to be “An Act taxing contracts for the sale of grain for future delivery, and options for such contracts, and providing for the regulation of boards of trade, and for other purposes.” Mr. Chief Justice Taft, speaking for the court stated: “It is impossible to escape the conviction from a full reading of this law, that it was enacted for the purpose of regulating the conduct of boards of trade through the supervision of the Secretary of Agriculture and the use of an administrative tribunal consisting of that Secretary, the Secretary of Commerce, and the Attorney General. Indeed, the title of the act recites that one of its provisions is the regulation of the boards of trade.” Since the act sought to regulate a matter not shown to be subject to federal regulation, namely, intrastate commerce, the court held the statute beyond the federal authority. The court held that the *Child Labor Tax* case completely covered the case.
in hand and quoted from the former as follows: "Out of a proper respect for the acts of a coordinate branch of the Government, the court has gone far to sustain taxing acts as such, even though there has been ground for suspecting from the weight of the tax it was intended to destroy its subject. But in the act before us, the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions. Grant the validity of this law and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitations to the powers of Congress and completely wipe out the sovereignty of the States."19

A study of these cases suggests the quandary in which the courts are placed: either they must accept the declared purpose and policy of the legislature as controlling, even though the whole statute indicates something entirely different, or else they must declare that the legislature has committed an error or has been guilty of bad faith. There seems to be but one course for the courts to follow and that is for them, as they have done in the past, to view the statute as a whole and determine whether or not by any possibility it can be interpreted in accordance with the declared legislative purpose or policy. If this can be done, of course, in light of general principles of statutory construction, the statute will be held to be constitutional, but if the declared purpose and policy are at complete variance with the actual character of the statute and its operation, the court would be derelict if it relied solely on such declaration of purpose and policy. In fact such a view would be stultifying. To impugn the motives and good faith of a coordinate branch of the government, surely is a very serious matter, but to permit unconstitutional legislation to hide behind the cloak of a title or a declaration of policy is reprehensible.

The problem is aggravated when in addition to a declaration of purpose or policy the legislature includes a finding of fact. For example, after the Futures Trading Act was declared unconstitutional,20 Congress enacted another statute, the Grain Futures Act in which were recited congressional findings of fact that: transactions known as "fu-

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tures" were affected with the public interest; they were susceptible to speculation, manipulation, and control; sudden and unreasonable fluctuations in price frequently resulted; such fluctuations in price were an obstruction to and a burden on interstate commerce; and that regulation was imperative to protect such commerce and the national public interest therein. The statute came before the court in the case of Board of Trade of the City of Chicago, et al. v. Olsen, et al., 21 decided in 1923. Mr. Chief Justice Taft again speaking for the court compared the instant case with Hill v. Wallace and quoting from the latter said: "It follows that sales for future delivery on the Board of Trade are not in and of themselves interstate commerce. They cannot come within the regulatory power of Congress as such, unless they are regarded by Congress, from the evidence before it, as directly interfering with interstate commerce so as to be an obstruction or burden thereon."22 The court held that the Grain Futures Act differed from the Futures Trading Act "in having the very features the absence of which" prevented the court from sustaining the earlier legislation.

Continuing its opinion, the court quoted from Stafford v. Wallace23 as follows: "Whatever amounts to more or less constant practice, and threatens to obstruct or unduly burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. This court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent." Then said the court, "in the act we are considering, Congress has expressly declared that transactions and prices of grain in dealing in futures are susceptible to speculations, manipulations and control which are detrimental to the producer and consumer and persons handling grain in interstate commerce and render regulation imperative for the production of such commerce and the national public interest therein." "It is clear" continued the court, "from the citations in the statement of the case, of evidence before committees of investigation as to manipulations of the futures market and their effect, that we would be unwarranted in rejecting the finding of Congress as unreasonable, and that in our inquiry as to the validity of this legislation we must accept the view that such manipulation does

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21 262 U. S. 1, 43 S. Ct. 470, 67 L. ed. 839 (1923).
23 258 U. S. 495, 42 S. Ct. 397, 66 L. ed. 735 (1922).
work to the detriment of producers, consumers, shippers, and legitimate dealers in interstate commerce in grain and that it is a real abuse.\textsuperscript{24} Two justices dissented from this opinion. The conclusion seems inescapable that a legislative finding of fact declared in a statute unless obviously false may result in the statute's being held constitutional when without such declaration the statute might be held void.

Somewhat similar to the two cases of \textit{Hill v. Wallace} and \textit{Board of Trade of the City of Chicago v. Olsen} are the cases dealing with the Agricultural Adjustment Act and the Agricultural Marketing Agreement Act. The former was considered in 1935 in the case of \textit{United States v. Butler}.\textsuperscript{25} The Agricultural Adjustment Act declared that an economic emergency existed "due to the disparity of farm prices and those of other commodities, reducing farmers' purchasing power thus affecting transactions in farm commodities, burdening and obstructing interstate commerce." The act further declared that it was the policy of Congress to establish and maintain such balance between the production and consumption of agricultural commodities and such marketing conditions therefor as well as reestablish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy equivalent to the purchasing power of agricultural commodities in the past period. The technique employed was the levying of an alleged processing tax. Interestingly enough the government did not seek to have this statute upheld on the ground of regulating interstate commerce (despite the mention of it in the act) but sought to have it upheld as a valid tax. The court, with three justices dissenting, held that as a matter of fact the statute sought to regulate agricultural production and that the alleged tax was a mere incident, a means to that end. Since the majority of the court was of the opinion that regulation of agricultural production was beyond the power of the Federal Government to regulate, the statute was held unconstitutional.\textsuperscript{26}

Undaunted, Congress in 1937 enacted the Agricultural Marketing Agreement Act and declared that "the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing

\textsuperscript{24}262 U. S. 1, 97, 43 S. Ct. 470, 477, 67 L. ed. 839 (1923).
\textsuperscript{25}297 U. S. 1, 56 S. Ct. 312, 80 L. ed. 477 (1936).
\textsuperscript{26}Mr. Justice Stone in his dissent which was joined in by Mr. Justice Brandeis and Mr. Justice Cardozo, stated: "While unconstitutional exercise of power by the executive and legislative branches of the Government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint." 297 U. S. 1, 78, 56 S. Ct. 312, 325, 80 L. ed. 477 (1936).
power of the farmers." Such interference was declared in the statute to "burden and obstruct the normal channels of interstate commerce." And it was stated that it was the congressional policy, by the use of power delegated to the Secretary of Agriculture "to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period . . ." The Supreme Court, by a five to four decision, upheld the constitutionality of the Agricultural Marketing Agreement Act in the case of United States v. Rock Royal Co-op., Inc., et al., which concerned marketing agreements affecting the production and distribution of milk.

The constitutionality of the Agricultural Marketing Agreements Act was again upheld in the case of H. P. Hood and Sons v. United States, decided at the same time. Mr. Justice Roberts dissented on the ground that there had been an unconstitutional delegation of legislative power to the Secretary of Agriculture. He maintained that there was no standard by which such administrative action was confined or executed, and that the only guide in respect to the choice of method which the Secretary of Agriculture might select for raising the price of milk was the declaration of policy embodied in the statute. Here

27 With certain exceptions, as in the Agricultural Adjustment Act, the base period was fixed at August, 1909, to July, 1914, or if it was impossible to determine such period then the period 1919 to 1929.

28 Mr. Justice McReynolds and Mr. Justice Butler dissented, stating: "First, Congress possesses the powers delegated by the Constitution—no others. The opinion of this court in A. L. A. Schechter Poultry Corp. v. United States (1935), 295 U. S. 495, 79 L. ed. 1507, 55 S. Ct. 837, 97 A. L. R. 947, noteworthy because of modernity and reaffirmation of ancient doctrine—sufficiently demonstrates the absence of congressional authority to manage private business affairs under the transparent guise of regulating interstate commerce. True, production and distribution of milk are most important enterprises, not easy of wise execution; but so is breeding the cows, authors of the commodity, also sowing and reaping the fodder which inspires them." 307 U. S. 533, 582, 59 S. Ct. 993, 1017, 83 L. ed. 1446 (1939).

The dissenting justices stated further that even if this power were possessed by Congress it could not be delegated to another. Such delegation of power to the Secretary of Agriculture allowing him to "prescribe according to his own errant will and then to execute" was "not government by law but by caprice." Mr. Justice Roberts, dissenting, maintained that the act was so administered, contrary to the terms of the statute, that all producers did not receive uniform prices for milk, thus the small handlers, placed at the mercy of the large ones, were destroyed and denied due process of law.

29 Mr. Justice McReynolds and Mr. Justice Butler joined in this dissent. 307 U. S. 588, 603, 59 S. Ct. 1019, 1027, 83 L. ed. 1478 (1939).
there is injected a new suggestion as to the effect of a legislative declaration of policy on the question of administrative action. It seems highly doubtful that this case was intended as authority for any such principle that a declaration of policy might replace a standard for administrative action.

In the field of public utilities we also are confronted with the effect of a legislative finding of fact on the constitutionality of legislative enactments. It is a truism that a business which is not by nature and character a public utility cannot be converted into one by legislative fiat. There have been instances in which legislatures have declared certain businesses to be public utilities which, by the nature and character of their holding out, were not, as a matter of fact, public utilities. Despite such legislative pronouncements, the courts have declared such statutes unconstitutional. But when a business once not considered one affected with a public interest becomes generally so considered, it would seem that a legislative finding of fact to that effect becomes of tremendous significance in a question of the constitutionality of the statute. Perhaps one should mention in passing a comparison of a legislative conclusion of law, for example, that a particular business is a public utility, with a legislative finding of fact which will support such conclusion of law.

The courts seem to have been impartial in holding unconstitutional legislation which, as a matter of fact, denies the declared constitutional purpose and policy since both federal and state statutes of this type have been declared invalid. There seems not to have been any greater tendency to declare state legislation unconstitutional because of an attempt by state legislatures to enact unconstitutional legislation behind the cloak of a declared purpose or policy than there has been in federal legislation, although probably there may have been in the mind of the court a belief that congressional legislation, since enacted by a coordinate branch of the government, is entitled to greater deference and consideration where declarations of purpose or policy and findings of fact have been included in such legislation. The Supreme Court seems to have been reasonably consistent, for in all the cases it has not been the declaration of purpose or policy alone that has been the determining factor, but such declaration coupled with the nature, character, operation and effect of the entire statute. In those cases dealing with the declaration of the finding of fact by Congress, such declaration seems to have been given greater weight in that the court has been unwilling to presume to doubt the correctness of this finding of fact.
unless there is no evidence to support it. It seems as if the court has applied here, the principle which is applied to administrative findings of fact, that such finding of fact will be accepted by the court unless from the evidence before it, such administrative body could not have arrived at the decision which it reached.

Let us consider by way of summary three types of statutes, one without a declaration of policy, another with such declaration, and still another with a legislative finding of fact added. In all three, of course, the presumption is in favor of their constitutionality, but in the second case a declared policy may result in a statute's being held constitutional when without it the opposite conclusion might be reached, since such declaration clarifies the legislative intent. And in the third case the likelihood of the statute's being held valid is enhanced, since the legislative finding of fact (unless arbitrary and without evidence) showing that the matter falls within the legislative power, supports the legislature's assumption of authority over it.

The position, therefore, of the court seems generally sound. It is inconceivable that a statute which actually, by nature and by operation, was intended to do one thing and attempts to do that thing should be held constitutional, if as a matter of fact it is unconstitutional, merely because the legislature has declared substantially that black is white. It is something like "a rose by any other name." Perhaps this attempt by a legislature to do something it feels would not receive sanction when reviewed by the courts, by including a declaration of purpose or policy quite different, would not exist were it not for judicial review. It is, perhaps, not too unreasonable to assume that did the responsibility for the constitutionality of legislation not rest ultimately on the courts the legislators might assume greater responsibility, to the end that legislation of doubtful constitutionality be not enacted. Unfortunately, even in the recent past, there have been instances where the executive and legislative branches both have presumed to secure enactment of legislation, regardless of any doubts of constitutionality, no matter how reasonable such doubts may have been. Such an attempt scarcely is calculated to impress the citizen with either the legal wisdom or good faith of such reckless proponents of doubtful legislation.

It is certainly true that a great deal of legislation inconsistent with the Constitution would have been allowed to stand had the courts been willing to accept as conclusive the legislative declarations of purpose and policy. If the Constitution is the supreme law of the land, as by its own terms it is declared to be, and if statutes enacted by transient
legislatures must conform to the fundamental law in order to be valid, and if the interpretation of such fundamental law and the statutes purportedly passed in pursuance thereof is a function of the judiciary, the courts must continue to hold unconstitutional legislative enactments which transcend the Constitution, even to the extent of looking behind the declaration of legislative purpose or policy when such declarations and the statutes themselves are irreconcilable. This they must do even though in the doing they question legislative good faith.