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Courts of the United States Under the Constitution

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COURTS OF THE UNITED STATES UNDER THE CONSTITUTION

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A magazine article on the Federal Courts is not unlike a sonnet on differential calculus—it is scarcely the proper medium to convey the intended lesson.

A proper consideration of the Federal Judiciary involves a philosophical and critical analysis of the Constitution of the United States and all that has been builded thereupon.

If our form of government under the Constitution does not constitute an arch it must surely fall—if it does constitute such an arch, then is the Federal Judiciary the keystone of that arch, bearing the burden of the structure.

No humanly created institution is perfect—no administration by man can ever approximate perfection; something must ever remain for the captious journalist to criticize; something for designing and demagogic politicians to attack.

We here are concerned chiefly with the courts of the United States as an institution, and with the ultimate functioning of that institution through the Supreme Court.

The ordinary citizen of this great country of ours, as he speaks on the street corners, in his clubs, and through his newspapers, knows everything—it is the mission of the learned professions to place a curb upon that All-Wisdom and to point the way as a social duty.

Upon no subject is the ordinary citizen more violent in his infallibility, more ignorant in his permises, or so great a menace to the community, as in matters involving the administration of the law. As political heat and class prejudice increase, as the parts strive to control and direct the whole, so does ignorance increase in the violence of its certainty of belief, and no decision of importance can be rendered without an attendant mass of mouthing partisan friends and foes.

One of the pet prejudices of the ordinary citizen is that the courts of the United States are arbitrary and unjust; that their very jurisdiction is an affront to the liberties of mankind, and that their prerogatives smack more clearly of tyranny than any

other institution of our Government—forsooth, do they not declare Acts of Congress to be unconstitutional and commit men to jail for what they are pleased to term contempt?

Unfortunately, while the safety of our Government and the true liberties of the citizen depend largely upon the wisdom and integrity of these courts and their full exercise of their constitutional jurisdiction, it is upon this very point that the ordinary member of the bar—like his ordinary non-professional brethren—is weakest, both in knowledge and conviction; although a vital branch of his profession, he is too often neither qualified to lead nor to defend. If the law schools of the country will meet that weakness, if they will supply the knowledge and stimulate the conviction, they will have justified their existence and conferred as great a benefit upon their country as upon the profession of the Law.

In 1787, "We, the People of the United States, in order to form a more perfect union, to establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare and secure the blessings of liberty to ourselves and our posterity," performed a great self-creative act—we adopted a constitution which created a nation and prescribed the basic rules for its government.

Prior to 1787, it must be remembered, "We, the People of the United States," had been non-existent. In a certain sense we had been the People of New York, Massachusetts, Pennsylvania and Virginia; in a certain other, and very loose sense, we had been the People of the Confederation, but, whatever the name, "We, the People," had found our condition to be most unsatisfactory—we received neither security at home nor respect abroad. "We, the People," had performed a great political act in securing our independence from Great Britain, but had failed in all of our efforts to secure those things which had been so eloquently heralded a short decade before as belonging to us of natural right.

Now we were about to perform what the world considered to be impossible and which "We, the People," viewed with anxiety as perhaps little more than the expression of a devout hope.

It must not be forgotten that the creative body, the "We, the People," who spoke in convention, was merely a congregation of lawyers, soldiers and politicians, inspired by different and often conflicting hopes, fears and desires—a congregation learned indeed

in the philosophy of the day, but its members were pioneers in that realm of state craft into which they were about to enter.

They knew much of political theory, much of the executive and of the legislative, but they were in a very real sense without guide or precedent in the creation of that third co-ordinate branch of government known as the "Judiciary."

Nevertheless, in the absence of precedent, the political philosophy of these men, even in their disagreement, was sound. They might differ as to the extent that the supreme power, the sovereignty, was to be vested in the new government, but, whether little or much, they knew that the power granted must naturally fall under three great heads, must be distributed among three departments, which must be not only co-ordinate, but, in order to maintain the balance, equal to each other.

From the King and Parliament of Great Britain the colonists had suffered most; with these two departments they were chiefly familiar, and with the limitation of these they were first concerned.

Laboriously then, and with much disagreement, "We, the People," in Article I of the Constitution, developed the legislative branch of the proposed triune sovereign—"We, the People," delegated to it powers and placed a rein upon the exercise of those powers.

With equal labor and equal disagreement, "We, the people," in Article II, developed the executive branch, granting to it powers and limiting its duties.

What of the Judiciary? The problem related chiefly to power. Relative to forms and methods of procedure, they had no uncertain guide—the distinction between various causes of action and methods of procedure may be recognized by other systems of jurisprudence, but "all cases in law and equity" referred directly and solely to "cases in law and equity" as the same had been developed in England, during the centuries, in the struggle there for civil liberty. This system they knew, it was their birthright as Englishmen—theirs too was the less personal admiralty jurisdiction, as it had grown in all maritime nations from the early courts of the Lord High Admirals. Upon these foundations they might safely build, but, in addition to these, they knew that the governmental, the political, function of the new judiciary was as important as the judicial. This branch must be of equal dignity with the others and, within its limits, supreme. Without

this independent judiciary, there would be no power to determine whether the checks and balances of the Constitution were observed or disregarded—no power to declare whether the states were encroaching upon the new government or whether it was encroaching upon the rights of the states—there would be no power to stand against usurpation or tyranny on the one hand, or disintegration on the other—no power to protect helpless minorities by checking the will of transient majorities and curbing official demagoguery responsive to the clamor of the mob.

The power of this judiciary must be commensurate to the duties imposed; within the limits of the Government of which it was a part, it must be sovereign, in the same sense that, within those limits, the legislative and the executive are sovereign.

The field was well marked by the provisions of the first two articles—"We, the People," were required to bound and describe that field and, almost with the gift of prevision, the grant was made.

Article III of the Constitution and the Articles of Amendments V, VII and XI should be read and understood by every person either pretending to a liberal education or assuming to criticize the courts in the performance of their constitutional duties; commentary upon them, within the limits of this article, would be both useless and inappropriate.

In general terms, the courts of the United States, under the Constitution, are given power to determine all judicial questions, when properly presented, arising out of the contact of our country or our citizens with foreign countries or their citizens; all questions relating to the exercise of the power of the general government upon the several states, or their citizens, or the exercise of power by the states in derogation of the powers of the general government or the rights of citizens under the national Constitution; in determining all questions arising under the laws of the general government, or relating to subject matter within its protection, such as interstate commerce, and in specific cases, affording an impartial tribunal for the determination of controversies between citizens of different states.

The Constitution is the basis law, it is the Supreme law, and nothing, therefore, can be clearer than the positive obligation of the courts of the United States to declare an Act of Congress, or of the State Legislature, void and of no effect if it violates the provisions of that Constitution, in the exercise of the same faculty

by means of which, from time immemorial, the courts have declared void and of no effect municipal ordinances and corporate by-laws—a mere construction of written laws of different potentiality, of which the lesser must give way to the superior.

Nothing can be clearer than the positive duty of the courts of the United States to protect subject matter, constitutionally under national charge and protection, by prohibiting all action by individuals which threaten its security until after a final hearing of conflicting claims, and punishing, as for a contempt, all persons disobeying such order of the court, as the sole means of affording that protection and vindicating those powers which "We, the People," conferred.

Looking at this same ever-important question from another angle, the necessity for this judicial power is equally obvious. It has ever been our proudest boast that we live under a government of laws and not of men. Unless this is to be an empty phrase, we must seek its meaning. To-day it may be difficult to name the most powerful executive head to be found in civilization, yesterday it might have been the Czar of Russia in theory or the Emperor of Germany in fact. Modern man has, however, been diligent in placing the powers of Emperor, King and President in commission.

Without question, the British Parliament is the most powerful legislative body existing to-day. It is subject to no law—it makes the law. It is bound by no limitations—it imposes limitations. No statute enacted by Parliament can be illegal—it may be immoral, it may be vicious, it may result in revolution, but it is the law.

America believes in no such absolutism—with us all powers of government are placed in commission and strictly limited by the Constitution. What Congress may do is so limited, what the Executive may do is likewise limited, and so is the jurisdiction of the national courts.

We are living in a federal, representative democracy. Being federal, there are two kinds of sovereignty involved, the proper adjustment of the relations of which, although fixed by the Constitution, is ever a delicate and essentially a judicial process. Being representative, the people act neither directly, as in the Athenian Agora, nor through an irresponsible oligarchy, but through officials chosen by means of party organizations in the legislative and executive branches, and, to insure independence

and impartiality, indirectly so far as the judiciary is concerned.

The President and the Senate are elected by the people, and through them, as representative agencies, the judges are selected; after which selection they remain, unhampered by the coercion of politicians or the threat of the mob, during good behavior, being at all times, in the event of misbehavior, liable to be impeached by the House of Representatives and summoned before the United States Senate for trial—in this manner answerable to the people they have sworn to protect and to represent.

Our entire system of government is guarded by a series of checks, balances and limitations; there must, however, be finality somewhere; there must be some authority to interpret those limitations and to apply them in particular cases. That power is delegated, by the Constitution itself, to the Supreme Court of the United States.

It is that delegation which preserves for us a government of laws and not of men. Untouched by the pride and the ambition of the executive, aloof from the passion and intrigue of the legislature, the Supreme Court, either under its original or appellate jurisdiction, determines the extent and the meaning of the limitations imposed upon the powers of all of the branches of the Government, including the judicial, as questions are presented to it, from time to time, involving those limitations, and its decisions are the law of the land.

These decisions may cause a revolution in government, but they are the law until a successful revolution, expressive of the sovereignty of the people, either peaceably, by constitutional amendment, or forcibly, by arms, has changed that law at the source.

From the time that John Marshall, fearless evangel of the Constitution, became Chief Justice, the Supreme Court in particular has been the target of wanton attack. Often have the judges been criticized and abused without opportunity to reply, but the court has breasted every storm; it has welded our country into its present form; it has defended it against every usurpation of authority; it has ever recognized the monuments of our representative democracy; it has preserved the state, until to-day, after an existence of more than a century and a third, it stands untarnished still, as the defender of our liberties, without a single decision not vindicated by time, and without the name of a single unrighteous judge found upon its roster.

A federal, representative democracy, of limited and delegated powers, created by and existing under a written constitution, subject to amendment by methods insuring as nearly as may be the sober judgment of the people as a whole, and providing for an independent judiciary of original, supervisory and appellate jurisdiction, by which, in the final analysis, all rights arising under the constitution are protected, and the validity of all laws determined.

It is this triune sovereignty, created by the constitution, based upon and supported by the will of the people, to which we, as Americans, owe allegiance.

Not to the executive alone, not to the legislative alone, not to the judicial alone, but to the three in combination as representative of the ultimate sovereignty of the people. No person may, in good faith, take an oath to support the Constitution of the United States with a mental reservation, as to some one of the component parts of the Government, he may not say to himself that he will not serve in the army, under the executive, if called to defend his country; nor that he will not pay taxes, levied to support his country by the legislature; nor that he will refuse to obey orders entered by the courts to protect constitutional rights. "We, the People" have a full right to demand complete allegiance to the power which we have created, whether the obligation be assumed by an alien upon naturalization or by a Senator or President of the United States.

Conditions change with times, and in order to preserve the spirit of our free institutions, the power to amend the constitution by peaceful means is essential, and that power is freely granted by the constitution itself, but, whether considered as a right or a privilege, it must be honestly exercised with full understanding of the purpose sought—it must be an intelligent expression of that which "We, the People" have determined for the sovereign good.

That is the theory of our national Government. The system may be wrong; if so, it should be changed, but it has been vindicated by the history of our country and its greatness, from the fringe of settlers scattered along the Atlantic seaboard to the most powerful nation of modern times, blessed with the greatest liberties of any nation known to history.

Our system is wrong if personal rights, local prosperity and national greatness can be best conserved by restricting the jurisdiction of the courts, and thereby permitting the will of transient

majorities to have full sway after the manner of democracies of antiquity. Such a change, however, involves a complete revolution in our scheme of government and must be recognized as such, but, if "We, the People," so decree, in the manner provided by the constitution, the experiment must be tried.

At the present time an amendment is pending in Congress, obviously introducted to pamper a vocal and organized minority, for the alleged purpose of limiting the power of the national courts, the revolutionary extent of which is, however, admirably concealed. If adopted, this amendment would throw down the principal bars which protect minorities and, by destroying the checks and balances of our system, result in a government of men and not of laws.

In form the amendment confers upon Congress the power to override any decision of the Supreme Court declaring a statute to be null and void for constitutional reasons by repassing the obnoxious law by a two-thirds majority.

This amendment is not frankly drawn and it is difficult to believe that it is sincerely presented—if it was intended for the serious consideration of the whole people, rather than the selfish and passionate consideration of a part of them, it would by its terms amend Article V of the Constitution, which prescribes the method for its amendment, for, by its adoption, that Article would necessarily be construed to read, "This Constitution may, at any time, be amended by a majority vote of any two Congresses, provided that the action of the second Congress be by a two-thirds majority."

Under that amendment, if any Congress should in its wisdom provide for an hereditary executive, or should repeal Article III of the Constitution creating the national courts, or should abolish private property and create a socialistic state, and such legislation should be declared void by the Supreme Court, the desired revolution might constitutionally be accomplished by repassing the law by a two-thirds majority.

Our system may be wrong, but it cannot be believed that it requires such a radical remedy, so opposed to all the theories upon which our country has flourished and the liberties of our citizens been preserved.

Let all law students and all lawyers learn to understand the bases of our national strength, let them know to appreciate the powers and duties of the national courts under the constitution,

with which understanding and appreciation let them prepare to enter the arena in the impending combat with ignorance, passion and demagoguery in defense of a free judiciary in a free state, performing the duties imposed upon it by the fathers—one of the components of that triune sovereignty which, as lawyers, they have sworn to defend.