DEPARTMENT OF LAW

UNIVERSITY OF PENNSYLVANIA
LAW REVIEW
AND AMERICAN LAW REGISTER
FOUNDED 1852

VOL. { 56 O. S. / 47 N. S. } JUNE, 1908 NUMBER 6

THE INTENTION AND WISDOM OF THE DIVISION OF LEGISLATIVE POWER BETWEEN CONGRESS AND THE STATES.

If there is one principle that our forefathers, founding the Constitution, had more at heart than any other, it is personal liberty,—personal liberty as guaranteed by the universal right to equal law, the laws made by their own home representative bodies, administrated in their own home courts, and based on the common law of England; and the common law of England has ever been jealous of all but common law tribunals, wholly rejects any administrative law peculiar to the government as is known in continental countries, and abhors any tribunal, board, or commission, drawing its authority from the Executive, and which, while not a proper court of justice, undertakes to settle judicial questions.

To secure all this, the great principle of the separation

NOTE.—This article formed the subject of an address delivered by Mr. Frederic J. Stimson before the Society of the Alumni of the Law Department of the University of Pennsylvania at their annual meeting on Friday, April 10th, 1908, and is published through his courtesy and kind permission.

of the powers of government was adopted and carried to its full extent. In the splendid words of the Massachusetts Bill of Rights:

"In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws and not of men."

The cardinal liberties secured by the Bill of Rights are put forever under the aegis of State legislatures and local common law courts and their independence from the Executive duly secured. And furthermore, we have the State autonomy forever secured by the independent, indestructible State, as well as by the separation of the three powers in both State and nation. And of these cardinal rights, no man may be deprived but by twelve men of his equals in his own country, nor, in criminal causes, be deprived for one day of his personal liberty, but by a finding of twenty-three of his neighbors that there is probable cause for holding him guilty of crime. The totality of all these principles we will sum up in the convenient phrase "local self-government",—but remembering that this phrase means much more than administrative government alone.

To show how strong was this feeling, we will read from a few of the earliest State constitutions adopted both before and after the Federal Constitution of 1789; first that of Pennsylvania, September 28, 1776; then in the same year, that of Maryland, November 11, 1776, and North Carolina, November 18, 1776, and of Vermont, 1777.

"That the people of this State ought to have the sole and exclusive right of regulating the internal government and police thereof."

In the same year is that of Connecticut:

"This Constitution adopted by the people of this State, shall be and remain the Civil Constitution of this State, under the sole authority of the people thereof, independent of any King or Prince whatever. And that this Republic is, and shall forever be and remain, a free, sovereign and independent State, by the name of the State of Connecticut."

In 1780, we have the constitution of Massachusetts and in 1784 that of New Hampshire.

"The people of this commonwealth have the sole and exclusive right of governing themselves as a free, sovereign and independent State and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction, and right which is not, or may not hereafter be, by them expressly delegated to the United States of America in Congress assembled."

And for an example of a later constitution, we have that of West Virginia, in 1872.

"The government of the United States is a government of enumerated powers, and all powers not delegated to it nor inhibited to the States are reserved to the States or to the people thereof. Among the powers so reserved by the States is the exclusive regulation of their own internal government and police, and it is the high and solemn duty of the several departments of government created by this constitution to guard and protect the people of this State from all encroachments upon the rights so reserved."

Solicitude for local courts apart from the centralized courts even of our own government reaches right back to Magna Charta.

(Chapter 17) "Common pleas shall not follow the King's Court, but be held in some certain place."
(Chapter 20). "Fines to be assessed by honest men of the neighborhood."
"The writ called Praecipe shall not in future be issued, so as to cause a freeman to lose his court."

So in the Virginia Bill of Rights, he must be tried by a "jury of his vicinage," and the Maryland Constitution of 1776 says:

"That the trial of facts where they arise is one of the greatest securities of the lives, liberties and estates of the people."

And this is repeated in the Massachusetts Declaration of Rights and expressly recognized in the Federal constitution, Article 3, Section 2, providing that all trials shall be held in the State where the crime is committed and shall be by a jury; and in the Sixth Amendment the venue is further limited to the district where the crime is committed; and

by the Seventh Amendment the right of trial by jury is preserved also in civil cases and the Federal power is forbidden to retry any cause other than according to the rules of the common law.

And the separation of the powers is shown expressly in ten out of the thirteen of the first constitutions of the original States and is to-day recognized in every single one of the States of the Union with the solitary exception of the State of New York.

But the English principle of local liberty, local parliaments and county courts, and the control by the people at home of their own affairs, became to the thirteen colonies far more important; for instead of a small homogeneous country like England, they had, even in 1776, a country reaching from the sub-Arctic to the torrid zone, from ocean to prairie, with different climates and different institutions, made up of five different races, even if we count Scotch and English and Irish as one, and with at least four mutually hostile religious faiths; with a social system in the South as different from that in the North as black from white; and all the colonies agreeing only on this one thing, to preserve the cardinal liberties of the Bill of Rights. How reconcile these local liberties, this government by the people of their own affairs, with that strong yet far off central government they were about to create in order to regulate their foreign relations and the affairs that they deemed of national concern? Yet the experience of the Revolution showed that such a government was necessary.

It is a familiar truth that this reconcilement of national power with local liberty was their great invention; a strong central government for political, national affairs, working directly on the people, not, as in all previous confederations, on the component States; conjoined with absolute autonomy as to the making and the judging of laws, and the administration of their own affairs at home; also the control by the people of each State of the great money power, of the raising and expending of practically all the taxes, leaving the national government to support itself by indirect taxation only and

the taxes to be imposed upon foreign commerce. I have not time to dwell on this point, which is familiar to all of us; I hasten to consider the actual division made by the founders of the American Republic of all sovereign power between the States and the central government. This is the special subject, I ask you to reconsider to-day; in a day when all things, even constitutional principles a thousand years old, must justify themselves to us anew.

Now if you will draw a sphere to represent the total domain of sovereign power under a constitutional republic, you have at once suggested our first distinction. For our governments, both State and national, must always remain republican and constitutional. They are not meant, as now seems to be thought, only to enforce the will of the majority, but in certain things to protect the minority, as well, and to guarantee forever free government and private rights. There is a vast domain of unlimited, sovereign, autocratic, imperial power, outside of this sphere, that may stand for those powers of conquest and oppression which are outside a[illegible] and may be wielded by an oriental despot or a European [illegible]peror; but these powers remain outside our constitution. Our forefathers intentionally and forever excluded them, withheld them from any and all governments they were about to create, Federal, State, or both together. Undoubtedly the people can set aside this constitution, and establish, if they like, an empire or an oligarchy; but until they do so, it is treason in any one to attempt it and a breach of the oath of every Federal officeholder, judical or executive.

As the king himself exists but by the law, so the Federal government is the creature of the Constitution. And this after all is really our greatest contribution to the history of humanity; the American people, forming a great nation, a sovereign people, forever denying to themselves and their own government imperial power, limiting it to be republican in form, their own legislatures to a written constitution, and both forever by the rights of each free man.

Now between the central government and the State, how did they in fact divide the constitutional powers of government; these that are represented within this sphere that I have drawn? Let us first draw a zone A to represent the powers they granted to the nation and the Federal governments. Let us now draw a zone B to represent the powers given or reserved to the States. Where they cross, the segment AB will exactly represent the powers shared by both—where State and Federal jurisdiction coincide.

But this is a government not only of delegated but of limited powers. Large prohibitions were imposed upon the Federal government. Let us represent these by the zone X, and draw that farthest away from the zone A where we have put the powers allowed. And many such prohibitions were imposed, even in the Federal Constitution, on State governments or legislatures also; let us represent these by zone Z, farthest from zone B, the zone of the States' Rights. And in like manner, where those zones of prohibition cross, we shall have the double prohibition on both State and nation represented by the segment XZ, those great rights which the people chose to protect from either government.

Now, lastly, we have a central area left unnamed. What may be the meaning of this? The answer is obvious. This is the most important of all; for it is that vast realm of sovereign power reserved to themselves by the people, virgin yet, delegated by them neither to the State nor to the nation, kept in their own hands until such time as, by amendment to the Constitution, and by amendment only, they, the people, might choose to give them up. The things belonging to this area resemble those in the area XZ, the powers forbidden to the nation and the States, for powers forbidden are necessarily reserved; but in Y we will class those powers which, such as we find in the Ninth and Tenth Amendments, are by express words reserved to the people or to the States; the great principles of the Bill of Rights, the right to law and to equal law, the right to property, the right to vote their own taxes, those taxes to be for the benefit of all

and to be expended by the people who pay them, the right to a republican form of government, in both State and nation, to be administered by the people themselves, or by officers who are their trustees and servants and are elected by popular suffrage; by an Executive who is not to be left in power one year without a meeting of the legislative branch; by an army that may not be maintained two years without a new vote of Congress; by judges, who, that they may not be dependent on the Executive, are appointed for life, and paid a salary that may not be reduced by Congress. These are a few of the principles that remain in the great central area Y, of which the States and people may never be deprived.

Now observe—this area we call Y, the central realm of the people's rights, alone is unlimited and indefinite; for it represents all the sovereign power in the world, *that remains*, —all that remains of all possible power of free government when you have granted away the eight definite subtractions of these other zones. Take eight from infinity and infinity remains. All other powers are definite, limited, defined; the people's powers alone are not.

But coming lastly to our special theme, there are two segments that I have not mentioned, AZ and BX. AZ where the zone of what is forbidden to the States cuts the zone of what is permitted to the nation; the area of absolute Federal power given to the nation, and at the same time denied to the States,—here, under the Constitution, is the realm of centralization, of imperialism. For what is in the rest of our zone A expresses powers which are merely *permitted* to the nation, not necessarily denied to the States; and this little difference between A and AZ is therefore to be one great problem of American Constitutional law. So, in like manner, in B simple, we shall find what the States may do and the nation also; while that part of B which is crossed by X represents all that is *withheld* from the Federal Government. Here therefore is the scope and realm, the home-ground, of what we call States' Rights. Let us not be prejudiced against

them because the term is identified in our memories with the heresy of secession; purged of that fault, we may live to see that the cry, "States' right," embodies our truest liberties.

Now on these two qualifications hang all the law of our Constitution. If you can say what is to be AZ, and what is A; for instance, whether all corporations or industries are to be solely under Federal control or also under the power of the States—if you can tell what is to be BX and not B simply; for instance, whether the rights of property, trade, taxation are to be solely under the State or to be controlled by the nation—you shall tell me the future of our republic.

The Federal powers are political; that is the great criterion The State powers, on the other hand, are domestic, social. They relate to the relation between a man and his fellow men, to his control over his own property, and to the trial of his disputes with his neighbors, of his controversies with all except the Federal Government and of all his crimes or offences except only those which, like treason, relate directly to his duty to the Federal Government, or are committed in the places subject to its exclusive jurisdiction, such as forts, military reservations, national territory not incorporated into a State, and the high seas. The Federal Government is a political sovereign; but has almost none of the attributes of sovereignty for any other purpose. This broad fact is revealed to us with startling clearness when we note that it has generally neither the power of capital punishment nor, in effect, of direct taxation. It would be hard to find two more necessary attributes of sovereignty as commonly understood in the science of government, than the power over life and the power over property. Moreover, except for special purposes of national defense, etc., it cannot hold any land. Even its political power is far less than is commonly enjoyed by sovereign nations; it cannot, for instance, cede territory from any State. Moreover, our national sovereign is controlled by the most fundamental of all limitations. It may not, under the Constitution, that is to say, without going back to the people, which it rec-

ognizes as the only source of power—change its form from a republican form of government not even to a pure democracy. It is even possible, under the Fifth and Fourteenth Amendments, that it may not adopt a system of socialism or communism, or permit a State so to do.

To see how completely this division between what is political and what is social, domestic, or relating to private right is carried out in the Federal Constitution, it will repay us to run over its provisions in some detail. The Preamble relates both to social and political objects, such as the common defense, but lays down at the beginning the great principle that it is the people and not the States who made the nation and the constitution. The first two sections of Article I relating to Congress are political. Section 3 forbids all direct taxes; that is, all taxes directly imposed upon property or individuals, except they be apportioned to the States according to their population and not according to their wealth. This not only is, but was intended to be, in effect a prohibition to the Federal Government of the power of direct taxation. All the rest of the first seven sections are also political; relating generally to the organization, election and liberties of the Congress, and the method of legislation. Section 8 of Article I contains almost the only powers given to the Federal Government which may, under our division, be called social; and while no one would desire to change the Constitution in this particular, it is highly significant that this exception has given rise to most of the litigation, most of the discussion, and to the leading division between the two great political parties today. That is to say, while the object of the Federal Government is to protect the nation from attack and manage its foreign affairs and impose taxes therefor "for the common defense and general welfare of the United States", the lesson of the existence of the thirteen States under the Confederation showed that they could not be trusted with the regulation of commerce passing from or to other States crossing their borders. This, therefore, was denied to the States, and necessarily left to the Federal power; doubtless, however, rather with the intention

of preventing the States from interfering with such commerce than allowing the Federal Government to do so. Then, Congress is authorized to make a uniform bankruptcy law throughout the United States; the only matter in which the necessary advisability of uniform laws was recognized in the Constitution and expressly given to the Federal Government; and the power to establish post offices and post roads and issue national patents and copyrights, being a usual national power, is hardly an exception to our rule. Yet these matters, until we come to the Fourteenth Amendment, are the only subjects in which the Constitution clothes the Federal Government with any power relating to the citizen's individual affairs and his private business.

But even the political powers are not broadly given. The eight clauses of Section 9 in the first article consist entirely of negations; and there are many others. On the other hand, the entire sovereignty of the State over individual relations, social and domestic affairs, and property rights is shown by the very few restrictions and exceptions we can find in the Federal Constitution. And these exceptions are purely political.

National political powers, as well as powers of taxation, or relating to interstate or foreign trade, are, of course, forbidden to the States. Article II relates entirely to the Federal executive power and is entirely political; Article III to the Federal judicial power; and here the only time when the national courts may be invoked other than to interpret and define the Federal Constitution and laws is to guarantee a fair trial in an impartial tribunal between citizens of different States. Article IV, Section 2, does indeed, provide that a citizen of one State shall have all the social and contractual rights that are given in any other State to the citizens thereof; but this can hardly be said to give the Federal Government any power over social matters; rather it merely guarantees the right to law in each State to all citizens of other States, much as the Fourteenth Amendment later does to all citizens of the United States, and even as Henry II guaranteed it to all free men of England. Over the territories in-

deed, Congress is expressly given full power, social and domestic as well as political; but it is only of late years that it has generally exercised it in any other way than to erect territorial legislatures; and in the older territories, at least, there is no meddling with individual rights.

The first eleven amendments are *all* restrictions; that is to say, they are at great pains expressly to withhold all social and domestic affairs, or cardinal liberty rights, from the Federal Government, and even some that are political; the first ten, therefore, showing a strong reaction in favor of the rights of the States and the liberties of the people, in 1791, while the eleventh Amendment was a still more decisive step in that direction, withholding all Federal judicial power where a State was directly concerned; much as James I endeavored, through vainly, to get Chief Justice Coke to rule that he would not consider a case where the interests of the King were involved. The Thirteenth Amendment is striking in that it is the only instance where the Constitution is expressly extended to any place subject to the jurisdiction of the United States, and where, as it has recently been put, "The Constitution follows the flag". Slavery, therefore, can exist nowhere, not even in the Sulu Islands; although even the other cardinal requirement, a republican form of government, may constitutionally be withheld from them as from the other territories.

The modern reaction in favor of the Federal power is shown first in the Fourteenth Amendment proclaimed July 28th, 1868, though the interpretation which might have revolutionized the whole State and Federal system has substantially been denied by the Supreme Court. The Amendment does, however, and for the first time, interfere between the State and the individual, if not between the individual and his neighbors. The State is forbidden to deprive any person of life, liberty or property without due process of law, or to deny any person within its jurisdiction the equal protection of the laws, and this directly by the Federal Government. The radical upholders of centralization, in reconstruction times, undoubtedly believed that this brought the

hand of the Federal Government between a man and his neighbors and indeed all his private affairs; otherwise it would be surprising that it took nearly twenty years of great decisions by the Supreme Court to read the amendment in strict accordance with its simple words—that it applied only to a State and to due process of law of a State; that it did not, as had been done in early times after the Conquest, give the Norman Court, the centralized government, jurisdiction of all matters and causes on the mere plea of Englishry, or that a Norman was concerned. As it has therefore worked out, it is merely a new national guarantee, like that securing a republican form of government, of the cardinal liberty and property rights against law-making by the States; and it does not, under the plea that a person is being unfairly treated by a neighbor or an official, drag all matters of ordinary trade and private right into the Federal courts.

Whether the extreme interpretation of the interstate commerce clause now proposed will carry us to this length it is too early now to say; nor, indeed, is this a controversial essay. That there has been for some years a decided trend in that direction, one must admit. The history of the interpretation by the courts and by Congress of the words "regulate commerce among the several States" has been to extend the meaning of commerce from the things transported, the physical instrumentalities of interstate commerce, the necessary documents concerning it, to the corporations and persons conducting it, the conditions of their labor and the rates they may charge—this by the year 1908—and of the words "among the several States" from the natural physical transportation across State lines to a combination or contract made in one or more States intended to act in others or in effect carried out in others.

It is perhaps obvious that we intend to withhold the right of conducting interstate commerce from any *corporation* not conforming to a Federal standard. Whether we shall go further and deny it to individuals; whether, indeed, Congress has the constitutional right to deny it to indi-

viduals; and whether, on the other branch of the definition, we shall extend it from commerce, in the sense of interstate traffic, to manufacturing, mining, or producing goods intended to be sold outside of the State where they are manufactured, mined or produced; and to the returns, or the profits, or the fortunes, or the disposition of the fortunes, derived therefrom; and still more, to the contractual relations, the conditions of labor, etc., of the persons so engaged,—are all matters for the future to settle.

The power of suspending laws or their application, or agreeing not to prosecute in certain cases or to pardon certain offenders, is a dangerous one in the hands of the Executive. Moreover, there is an increasing tendency today in Congress to grant legislative power to the Executive or to boards or commissions of his appointment. Notably has this been done in recent years in the case of making treaties, fixing customs duties, the rates of railways, and in the control of corporations,—all properly legislative matters. The excuse made is that Congress declares the general principle and the act of the President, for instance, in finding a state of affairs to exist upon which he may ratify a treaty or proclaim a commercial arrangement, is merely ministerial. An example of the length to which this theory may be carried is found in the recent railway regulation act or Hepburn Bill, where Congress merely proclaims that the rates shall be reasonable and without discrimination,—both mere expressions of the common law,—and leaves the determination of what is reasonable between the Interstate Commerce Commission and the Supreme Court, neither of them legislative bodies. The common law may, indeed, be decided by a judicial body; but it is difficult to see why the alteration of the common law is not legislation. When, therefore, the commission fix a "just and reasonable" rate,[1] if they are applying the common law, their act is judicial; if they are fixing other standards, it is legislative. Federal judges have

[1] U. S. Act of February 4, 1887, as amended June 29, 1906, Section 15.

consistently, from the beginning, refused to exercise other than judicial functions.

The leading modern English historian ends a long account of the attempted centralization of English administration under the Norman kings with the boast that from that time on until now there is no body of ten thousand English speaking men in the world, which is not governed by the laws that they make themselves.

I believe that the constitutional decisions of the next ten years will prove the most important in the history of our own republic. It is peculiarly the duty of those of our profession to point out the dangers that beset the path upon which the people may wish to go. Legislation is now pending in Congress which seems to me to be more radical, more un-English than anything that has been enacted in an English speaking legislature for many centuries. It has been the proud boast of the great statesmen and lawyers of England that we have no administrative law, no law peculiar to the government or administered by government officials, but that every officer, civil or military, must answer for his acts in the common law courts, and that every individual or association of individuals has the right to have their legality tried there, and tried there alone. To submit the judgment of the great right of freedom of contract and association to the judgment of an administrative official would be well on the road to the introduction of the whole European system of administrative law and government by bureaucracy. When a man is responsible for his acts or contracts not to legislatures or courts and juries, but to executive officers, you cease to be American and become European, if not Oriental, and when you give up your care for local self-government and your home courts and juries, you are not far from the state of the kingdom of Italy or the Empire of Russia, where a mighty central government stretches its paralyzing hand between the laborer and his daily bread, the merchant and his trade, the citizen and his vote.

F. J. Stimson.