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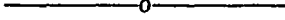
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Boyd: Gentlemen and ladies, we have taken all of the evidence we care to, and while it is a little hasty, perhaps, to give my opinion right now, I think it is just as well to tell you what I think of it. I think this whole thing is a great big joke. I think it is one of the finest jokes I ever saw.

Tigert: Now, I would like to ask, how many in the room thought it was a real bona fide quarrel and trial? (Eleven declared that they thought the trial was real.)

How many caught on to the fact that this was a hoax? (One.)

All the people that testified here, then, thought it was a bona fide disturbance. How many were suspicious while they were testifying? (Four.) One suspected it was an experiment because he had seen the boys in the case conferring with Judge Chalkley all week.



## A CRITICISM OF JUDGE R. M. WANAMAKER'S CRITICISM OF THE SUPREME COURT OF THE UNITED STATES.

By Kemp P. Battle, LL.D.\*

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Hon. R. M. Wanamaker, Judge of the Supreme Court of Ohio, has published a sharp criticism of the Supreme Court of the United States. In my judgment it is full of fallacies.

The Judge lays down five propositions as embodying the contention as to the right of the courts to kill a law regularly enacted by the legislature on the ground that it is not authorized by the Constitution. I discuss these in their order:

1. "At the time of the adoption of our Federal Constitution, no court of any leading civilized nation of the world was then exercising such power."

The answer is plain. In 1787 there was no government like ours. Our Government is a treaty between sovereign nations, then 13, now 48. This treaty is in writing, of course. The functions

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of the executive, legislative and judicial departments differ from those of all other governments. The Parliament of England in 1787 was not a body to be imitated. The woes of Ireland were largely caused by its unwise and selfish legislation. It was this body, corrupted by patronage and money, which, under the urgency of King George, warred against our people and lost the United States to England. As for the France of 1787, two years later its debauched despotism crumbled into the bloody chaos of revolution. As for Germany, its government was so weak and disjointed that it fell for a time under Napoleon's sway. There was no civilized nation whose government was worthy to be copied by the sagacious convention of 1787.

They avoided the evils of other governments. The powers and duties of the new government could not be changed except by the people themselves. Until changed, they must be obeyed, and a tribunal was provided to prevent disobedience.

2. Judge Wanamaker's second proposition is: "Under the common law, as adopted by us from England, Parliament, or the law-making body, was supreme, and for two hundred years no English court or king ever ventured to nullify any act regularly passed by the English law-making body."

The answer is equally plain. The United States never adopted the political law of England. The States adopted only the common law as applicable to disputes between individuals. As Judge Cooley, in his excellent work on the Principles of Constitutional Law, says, "Each of the several States had a common law of its own, derived in the case of most of them from the common law of England, but modified more or less in adoption by circumstances, usage or status. But the United States as such can have no common law. It derives its powers from the grant of the people made by the Constitution, and they are all to be found in the written law, and nowhere else." The common law has no more relation to our Federal Constitution than the Code of Justinian or the Levitical Law.

3. The Judge's third proposition is: "Our Federal Constitution expressly declares that it is a document of delegated powers, and that the powers not delegated are reserved to the people and the States, whether these powers be legislative, executive or judicial."

I assent to this. The Judge concedes that Congress has no powers other than those delegated to it, expressly or impliedly.

4. The fourth proposition is clearly and totally wrong. It is said: "There is no express delegation of such power to courts anywhere in our Federal Constitution, and no one has so contended; even the learned Marshall in his celebrated decision of *Marbury versus Madison*, is significant in the fact that he points out no article, section or provision of the Constitution which delegates any such power to the Supreme Court of the United States."

The Judge also declares that the Constitution does not give the Judiciary "the right to kill a law regularly enacted by the legislature." The expression is ambiguous. If he means by the words "regularly enacted," that Congress had the right to pass it, I will not dispute the assertion. But he evidently means that the Supreme Court cannot kill an alleged law because it is unconstitutional in their opinion. I am sure that this power and duty are so clearly in the Constitution that "he who runs may read." Let us go to the Constitution.

In Art. VI., Paragraph 2, we read: "The Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." That is, if acts of Congress are in pursuance of the Constitution, they are laws. If not in pursuance of the Constitution, they are not laws. They are void and of no effect.

The Constitution enumerates in eighteen paragraphs what power of legislation is conferred on Congress. Acts to carry out these powers are in pursuance of the Constitution. And then are enumerated the classes of laws which they are forbidden to pass, in eight paragraphs. If any of these forbidden laws are passed they are of course not "in pursuance of the Constitution." They are but waste paper. The same law holds as to other powers allowed or prohibited in the Constitution and amendments thereto.

Now let us see if there is provision in the Constitution for preventing acts passed not in pursuance thereof, from going into effect. According to the new doctrine a majority of Congress, the President concurring, or two-thirds without the President, has for two

years despotic powers. In other words, that the sages of 1787 copied after their corrupt enemy the Parliament of England, and provided no means of checking unlawful legislation. See what this leads to. Congress can pass acts to arrest without warrant in times of peace, pass bills of attainder and *ex post facto* laws, levy taxes not allowed by the Constitution, levy export duties, give favored harbors exclusive privileges, draw money from the treasury without accounting for it, grant titles of nobility, line their purses and the purses of their co-robbers with foreign money, and this unlawful legislation must be binding, at least until the next Congress. It is a fearful doctrine. Such an autocratic Congress could control elections in their own interests. They could force the re-election of themselves and their partisans, and the two years' tyranny might last indefinitely, or, which is more likely, provoke a frightful civil war. Let us not sneer at these possibilities as fanciful. We should not forget the history of the Parliaments of Charles I. and of Cromwell, and the turbulent legislatures of the French Revolution.

Is it possible that the extremely able men of 1787 could not foresee the dangers of creating a legislature with powers unchecked for two years? It is incredible that they should frame a government of successive biennial despotisms; that, for example, North Carolina or Virginia should concede to the delegates of Massachusetts or New York, combining with delegates from other States, biennial unrestrained control over their rights of persons and property.

They did not adopt a government, a Constitution, so devoid of political wisdom. They provided for a Supreme Court, composed of judges selected by the people's President, and approved by the people's Senators, eminent for wisdom, from all the States, to hold office during good behavior and secure as to their livelihood. They entrusted to this great tribunal the power and duty of guarding their Constitution from the ill-advised attacks or mistakes of Presidents, Governors, National and State judges and legislatures. It is asserted that "no article, section or provision of the Constitution delegates any such power to the Supreme Court of the United States." I deny this. The creation of the court carries the power. What is a court? Judge Cooley well describes it: "The business

of the courts is to apply the law of the land in such controversies as may be brought before them, to decide the true meaning of the law, and whether it was rightfully enacted." What is the "law of the land," which is placed under the guardianship of the court? 1st, above all, the Constitution. 2nd, laws in pursuance of the Constitution. 3rd, treaties under the authority of the United States. The people have declared what is the supreme law. They establish a supreme court to apply this law in controversies brought before it. How is it possible to apply the law without interpreting it, and declaring its meaning? Suppose Congress passes an act authorizing an officer to seize the land of A without compensation, and the officer seizes and sells to B. A brings suit against B, who relies on the act of Congress. A replies that the act was not in pursuance of the Constitution, and therefore is not law. How can the court evade deciding in his favor? Shall it cravenly say, B has A's land, but we dare not say so, lest we offend the august Congress? Shall the court say, "It is true that our duty is to protect A, but he must wait until after the next election and possibly another Congress will do him justice?"

This brings us to Judge Wanamaker's fifthly:

5. "The question of a supervisory board or council of revision to pass on the constitutionality of acts of our National Congress was four times before the Constitutional Convention of 1787. Said council was to be composed of the President and a number of Judges of the Supreme Court. Each time the suggestion was made to create such a supervisory body the same was overwhelmingly voted down."

Of course, the proposition was voted down. The convention preferred to entrust the power to the Supreme Court.

The case of *Marbury vs. Madison* decided that Marbury was entitled to his commission. It was this that chiefly offended Jefferson and Madison. They and their followers contended that the decision was not only wrong, but unnecessary, because the court further decided that Congress had no power under the Constitution to give the right to a mandamus in the Court of the District of Columbia. Marbury was non-suited. Dana in his work on the Constitution says that "this second decision has met with universal

acquiescence." Our judges generally, National and State, and our able statesmen for over a hundred years, and the erudite commentators, Kent, Story, Duer, Tocqueville, Dana, Cooley, Wharton, our trusted historians, eminent lawyers, all thoughtful men, have concurred in the doctrine that Congress is not supreme and the court must not sustain its acts when unlawful.

And the people have endorsed the decision. Whenever a decision of the court was against the popular will, it has been changed by constitutional amendment.

But no cavalier has had the temerity to advocate an amendment like the following: "Article VI, paragraph 2, shall be amended by adding after the words 'law of the land,' the following, 'but acts of Congress not in pursuance of the Constitution shall be binding on the courts until modified or repealed by Congress.'"

It seems strange that a critic of the courts should hold up "five hundred slaughtered statutes," as a reproach to the court. The censure should rather be on the carelessness of the legislatures. The courts should be praised not blamed for their vigilance and firmness.

The Judge contends that in the 14th amendment, the words, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of the law, nor deny to any person within its jurisdiction the equal protection of the laws," do not protect corporations. The infringement of the rights of all persons, whites, blacks, yellows, copper-colored, is forbidden by this amendment to the States, as they were already forbidden to the United States. But the Judge contends that corporations are not included in the words "persons." "The paramount purpose of the amendment, unmistakably and without the shadow of a doubt, demonstrates that in using the word 'person,' the framer and adopters intended to mean a human being and nothing else." Certainly the word "persons," does not mean monkeys, nor horses, nor asses, but men, women and children. But a corporation is but the human beings who compose it. The law allows those human beings to do business under one name with other privileges, but the owners, partners, or stock-

holders, as we call them, are the corporation, and equally protected by the amendment.

Another thing, the enemies of corporations ignore the fact that many of the persons who do business under a corporate name, are as much entitled to our sympathy, as the laborers, for whom so much pity is exhibited. Some have scanty means, perhaps their share in the corporation is all they have. The 14th amendment protects them from robbery by excessive taxation or otherwise, as well as the owners of land and other property.

Judge Wanamaker contends that the 14th amendment was chiefly designed to protect negroes. Taking this erroneous, limited view, suppose a hundred negroes engage in partnership and find it convenient to use one name and become incorporated. Do they lose their benefits of the amendment? They are negroes still. They will not be allowed to be plundered by State legislation.

It is unfortunate that people have been wrongly taught that corporations are not the human beings that own them, that they are not men and women, but monsters to be dreaded. The grand inventions and machinery of modern civilization could not have been created without them. If they break the law, let us punish them, the punishment falling on the human beings who own them, or their agents. If they are law-abiding, treat them fairly as other persons, white or colored.

For the refusal of the Supreme Court to carry into effect acts of Congress not in pursuance of the Constitution, this eminent tribunal is accused of having usurped despotic powers. The charge is not only unfounded, but impossible. If the people desire it, constitutional changes can be, as they have been, adopted. Congress has much control over court procedure. The consideration of a case (McArdle's) was once averted by repealing the right of appeal. President Grant and Congress co-operating reversed the decision in the Greenback case. President Jackson declined to release by force Worcester from a Georgia prison, as the removal of the Cherokees west of the Mississippi settled the controversy. Chief Justice Taney failed to deliver Merrimon from Fort McHenry even before martial law was proclaimed. The court was of the opinion that the Constitution as originally worded did not authorize



the passage of a certain act taxing incomes. The people by amendment speedily gave Congress the desired power. By the 11th amendment a State cannot be sued by a citizen, although the text of the Constitution seemed to allow it. After the seats of the present justices are vacated, Congress can fix salaries so small that able lawyers will not accept the seats on the bench. The evil of a weak and unlearned judiciary cannot be conceived. Jefferson had a strong dislike of all Federalists, especially of Chief Justice Marshall; yet, although his party was dominant in the Union, he made no move to procure an amendment to give Congress supreme biennial power, by forbidding the court to question its unlawful acts. The truth is that the court is more likely to lose its relative weight as designed by the framers of the Constitution, than ambitiously to reach out to grasp ungranted power.

There appears to be a concerted effort to make the court odious, by describing it as a tyrant aiming to deprive people of their liberties. Why accuse the judges of being the agents of a terrific unseen monster called "interests"? Some of these detractors doubtless are working for the election of judges by the people, a fantastic idea considering the wide extent of the United States, and the impossibility of the people of one State knowing the qualifications of lawyers in distant regions. Others would require a unanimous vote of the judges, thus placing the decision in the power of a crank, or of one bribed by an interested party. If a majority of judges chosen from the ablest and best lawyers of the land, with the eyes of the Nation upon them, agree that a proposed law is not authorized by the Constitution, out of respect for that most sacred instrument, let us acquiesce in their verdict. The presumption is that they are right. If occasionally their judgments, for the good of the Nation, ought to be reversed, let it be done in an orderly way. Let us not endeavor to drag down the Supreme Court from the lofty position it holds in the estimation of thoughtful political students throughout the civilized world.