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Our Dual Form of Government

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OUR DUAL FORM OF GOVERNMENT

What is the future form of our government in the United States going to be? Will it become one centralized government or will it continue to be a dual form of government?

It now seems generally agreed that the framers of our Constitution established a dual form of government. Of course, at the time, those who held the extreme states' rights position maintained that the Nation was a league of states, while those who held the extreme Federalist position maintained that the states were mere administrative units of the federal government, but the concensus of opinion today undoubtedly is that the Fathers intended to establish a federation of nations.[1] This was one aspect of their scheme of checks and balances. They balanced the nation against the states.

Any doubt which originally existed upon the subject was resolved as a legal proposition by Chief Justice John Marshall in favor of a dual form of government. He made the Union an indestructible Union of indestructible states, a Commonwealth of commonwealths. He took neither the extreme Federalist nor the extreme states' rights position, but the position that our government was a federation of nations—a dual form of government. He established the proposition that the Nation was sovereign within its sphere, and the states were sovereign within their spheres. His two celebrated opinions settling this question were rendered in the cases of *McCullough* v. *Maryland*[2] and *Gibbons* v. *Ogden*.[3] It is true that in these cases he established the supremacy of the United States over the states within the field of its delegated powers and developed the doctrine of the implied powers of the federal government, but he did not destroy the supremacy of the states within their field of reserved powers nor

[1] U. S. Const. Art. 1, sections 8, 10; Tenth Amendment.
[2] 17 U. S. (4 Wheat.) 315, 4 L. Ed. 579 (1819).
[3] 22 U. S. (9 Wheat.) 1, 6 L. Ed. 23 (1824).

our dual form of government. He simply removed all doubt as to whether the Constitution was a constitution or a compact.

Chief Justice Taney did not support the federal government as broadly as John Marshall had. Yet he never departed from Marshall's position that our government was a dual form of government, and he rendered a number of opinions which vindicated the supremacy of the national government within its sphere.[4]

Thus stood the situation up to the time of the Civil War. This entire period up to the Civil War was probably characterized by fear of the federal government. At first, in the time of the making of the original Constitution it was fear of the federal government by the states. Then, in the time of the adoption of the first ten amendments it was fear of the federal government by the people as individuals. Yet, they overcame their fears sufficiently to establish a federation rather than a league, and though, under Marshall, at first the fears of many were accentuated, yet gradally, except in the South so far as concerned the slavery issue, these fears began to subside; and the Civil War actually changed the fears of the people from fear of the federal government to fear of the states.

With the Slavery Amendments and the first judicial interpretations of them, in the *Slaughterhouse Cases*[5] and *Civil Rights Cases*,[6] was ushered in a new epoch in United States constitutional history. Since there were no longer fear and distrust of the federal government, but instead fear and distruct of the states, further limitations were by amendments placed upon the states and the powers of the federal government were increased, and United States citizenship was made independent where before it had been derived from state citizenship. But the sovereignty of the states was not destroyed. Pressure also was brought to bear upon the United States Supreme Court, especially by corporate interests, to make it still further enlarge the sphere of the federal government at the expense of the states by its construction of the due processes clause in the Fourteenth Amend-

[4] *Ex Parte Wells*, 59 U. S. (18 How.) 307, 15 L. Ed. 421, (1855); *Prague* v. *Pennsylvania*, 41 U. S. (16 Pet.) 539, 626, 10 L. Ed. 1060 (1841).

[5] 83 U. S. (16 Wall.) 56, 21 L. Ed. 394 (1872).

[6] 109 U. S. 3, 27 L. Ed. 835, 3 Sup. Ct. Rep. 18 (1883).

ment. But, at first, under the leadership of Justice Miller the court steadfastly resisted this pressure and even intimated that it doubted "very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision." In this period, therefore, our dual form of government still endured. The relative powers of the nation and the states were changed somewhat, but the dual character of our government, as established by the founders and preserved by Marshall, still remained.

At last, however, under the leadership of Justice Field, a reconstituted court yielded to the pressure of business interests and extended the due process clause to the protection, not only of all natural persons[7] and to matters of substantive law[8] as well as legal procedure[8] but also of the property rights of corporations.[9] By taking this action the Supreme Court established the supremacy of the national government over the states in all matters concerning the property rights of corporations, the great owners of property in our land. The use of federal injunctions in labor disputes became a matter of course. Marshall, in the great case of *Cohens* v. *Virginia*[10] had already practically made the state courts inferior courts in the federal system, and had extended the powers of the federal governments in his original package decision,[11] and in his development of the doctrine of the

[7] *Hurtado* v. *California*, 110 U. S. 516, 28 L. Ed. 232, 4 Supp. Ct. Rep. 117 (1883); *Chicago, Etc., Ry. Co.* v. *Minnesota*, 134 U. S. 418, 33 L. Ed. 976, 10 Sup. Ct. Rep. 1062 (1889); *Reagan* v. *Farmers L. and T. Co.*, 154 U. S. 352, 38 L. Ed. 1040, 14 Sup. Ct. Rep. 1047 (1892); *Allgeyer* v. *Louisana*, 165 U. S. 578, 41 L. Ed. 832, 17 Sup. Ct. Rep. 427 (1896); *Lochner* v. *New York*, 198 U. S. 45, 49 L. Ed. 937, 25 Sup. Ct. Rep. 539 (1904); *Traux* v. *Corrigan*, 257 U. S. 312, 66 L. Ed. 234, 42 Sup. Ct. Rep. 124 (1921); *United Mine Workers* v. *Coronado Coal Co.*, 251 U. S. 344, 66 L. Ed. 975, 42 Sup. Ct. Rep. 57 (1921); *Wolff Packing Co.* v. *Court, Etc., of Kansas*, 262 U. S. 522, 67 L. Ed. 1003, 45 Sup. Ct. Rep. 630 (1922); *Adkins* v. *Childrens' Hospital*, 261 U. S. 525, 67 L. Ed. 785, 43 Sup. Ct. Rep. 394 (1922); *Meyer* v. *Nebraska*, 262 U. S. 390, 67 L. Ed. 1042, 43 Sup. Ct. Rep. 625 (1922).

[8] *Murray* v. *Hoboken L. and I. Co.*, 59 U. S. (18 How.) 272, 15 L. Ed. 372 (1855); *Davidson* v. *New Orleans*, 96 U. S. 97, 24 L. Ed. 616 (1877); *Lawton* v. *Steele*, 152 U. S. 133, 38 L. Ed. 385, 14 Sup. Ct. Rep. 399 (1892).

[9] *Minneapolis Ry. Co.* v. *Beckwith*, 129 U. S. 126, 32 L. Ed. 585, 9 Sup. Ct. Rep. 207 (1888); *Scott* v. *McNeal*, 154 U. S. 34, 38 L. Ed. 896, 14 Sup. Ct. Rep. 1108 (1892).

[10] 18 U. S. (6 Wheat.) 264, 5 L. Ed. 257 (1821).

[11] *Brown* v. *Maryland*, 25 U. S. (12 Wheat.) 492, 6 L. Ed. 670 (1827).

implied powers of the gederal government.[12] The Supreme Court, in this period of Justice Field, also made the powers of the federal government under the interstate commerce clause encroach upon those of the states until it is a question whether or not the states have any jurisdiction over intrastate commerce in a number of important lines of business;[13] and held that the federal government has greater power against the states in both taxation[14] and eminent domain[15] than the states have in either taxation[16] or eminent domain[17] against the federal government; and stretched the scope of the postal powers,[18] the treaty powers[19] and the war powers[20] of the federal government until it raises the suspicion that any act of the federal government might be constitutional under them. As a result the dual character of our form of government underwent a profound change. The dual form of government was not entirely destroyed, but states' rights were radically affected and the states were in the process of being reduced to the statuts of administrative units of the federal government.

The process begun with Justice Field and his associates was continued in the last period in our constitutional history, the period of the recent amendments, with this difference that, while the new growth in the Constitution accomplished by the Supreme Court was by unauthorized judicial interpretation and amendment, the new growth brought to pass by amendments

[12] *McCullough* v. *Maryland, supra,* n. 2; *Gibbons* v. *Ogden, supra,* n. 3.

[13] *Commission* v. *Railroad,* 257 U. S. 563, 66 L. Ed. 371, 42 Sup. Ct. Rep. 232 (1921); *Shreveport Case,* 234 U. S. 342, 58 L. Ed. 1341, 34 Sup. Ct. Rep. 830 (1913); *Minnesota Rate Case,* 230 U. S. 352, 57 L. Ed. 1511, 33 Sup. Ct. Rep. 721 (1912).

[14] *Veazie Bank* v. *Fenno,* 8 Wall. 533, 19 L. Ed. 482 (1869); *South Carolina* v. *United States,* 199 U. S. 437, 50 L. Ed. 461, 26 Sup. Ct. Rep. 110 (1905).

[15] *St. Louis* v. *W. U. Tel. Co.,* 148 U. S. 92, 37 L. Ed. 148, 13 Sup. Ct. Rep. 485 (1893); *United States* v. *Gettysburg Electric Ry.,* 160 U. S. 668, 40 L. Ed. 576, 16 Sup. Ct. Rep. 427 (1895).

[16] *North Dakota* v. *Hanson,* 215 U. S. 515, 54 L. Ed. 307, 30 Sup. Ct. Rep. 179 (1910); *Van Brocklin* v. *Tennessee,* 117 U. S. 151, 29 L. Ed. 845 (1886).

[17] *Utah P. & L. Co.* v. *United States,* 243 U. S. 389, 61 L. Ed. 791, 37 Sup. Ct. Rep. 387 (1917).

[18] *Pensacola Tel. Co.* v. *Western U. Tel. Co.,* 96 U. S. 1, 24 L. Ed. 708 (1877).

[19] *Missouri* v. *Holland,* 252 U. S. 416, 64 L. Ed. 641, 40 Sup. Ct. Rep. 382 (1919).

[20] *Miller* v. *U. S.,* 78 U. S. (11 Wall.) 268, 20 L. Ed. 135 (1870).

has been by the sovereign people themselves as contemplated by the original Constitution; and while the earlier changes were made because of fear of the states as such, the later amendments have been made because of fear of individuals. These recent amendments, especially the Eighteenth Amendment, have still further tended to break down the dual character of our form of government, until now it is little more than a shadow. It was contended that the Eighteenth Amendment was unconstitutional in that it was legislation rather than fundamental law, in that it was not an amendment of any other provisions in the Constitution but new matter introduced therein, and in that, if constitutional, it made it possible to destroy the state sovereignties; but the Supreme Court has upheld the constitutionality of the amendment in every respect.[21] Hence it now seems to be constitutional to destroy the fundamental characteristic of our dual form of government either by judicial fiat or by constitutional amendment. It is true that the legislatures of the states have rejected the Twentieth, or Child Labor, Amendment, and the Supreme Court has declared two child labor laws[22] unconstitutional on the ground that they were invasions of states' rights, both of which indicate a revulsion against the constitutional growth which has recently been taking place; but, while no one can speak with assurance, the probabilities are that these occurrences are only temporary manifestations, and that sooner or later there will set in again the trend in the direction of destroying our dual form of government until not a vestige of it remains.

All of which raises the profound question of whether or not a dual form of government is a desirable form of government. Who were right, the founders of our government who gave it the characteristic of two sovereignties, one within the other, or those who more recently have been changing the form of our government into a strong centralized government with the states mere administrative units thereof? It is an anomalous form of government. Is it without philosophical basis? Should the ten-

[21] *National Prohibition Cases*, 253 U. S. 350, 64 L. Ed. 946, 40 Sup. Ct. Rep. 486 (1919).

[22] *Hammer* v. *Dagenhart*, 247 U. S. 251, 38 Sup. Ct. Rep. 529 (1918); *Child Labor Tax Case*, 259 U. S. 20, 66 L. Ed. 817, 42 Sup. Ct. Rep. 449 (1921).

dencies which have been prevailing for the past fifty years be-encouraged, or should an effort be made to return our government to its original foundation?

The chief reasons for and advantages of a dual form of government are the following:

(1) There is a sentimental reason. This was a strong reason at the time of the making of our Constitution. The states were first; although, as Abraham Lincoln has shown, they were dependent colonies, not sovereign states. The people of each states had acquired a loyalty for and pride in their state. They had not as yet any such pride and loyalty for the central government. The Constitution would never have been adopted had it provided for the destruction of the sovereignty of the states. But this sentimental reason, once strong, is of little force today. People have now acquired a pride and loyalty for the national government. They have moved from one state to another more and more. They have interests in many states. Railways, automobiles, the telegraph, and the radio have further tended to obliterate state lines. As a consequence no one, except the politician, cares much whether he is governed by an administrative unit or by a sovereignty.

(2) The best reason for a dual form of government is probably the maintenance of local self-government and the prevention of a bureaucracy. But in this respect our dual form of government has hopelessly failed. It has not prevented bureaucracy; and local self-government, especially in our cities (where the city manager form of government has not been adopted) has not proven a great success. So far as the prevention of a monarchy is concerned, what is wanted is not a dual form of government, but a separation of the powers of government. Perhaps bureaucracy is inevitable. Local self-government is desirable, but it can be obtained in other ways than under a dual form of government.

(3) Another reason for a dual form of government frequently given is that it allows opportunity for experiments on a small scale. The advantages of such experimentation may be somewhat questionable, but even if they are desirable it does not follow that a dual form of government is necessary for them.

Cities conduct such experiments, and yet they are not sovereignties.

(4) Another argument for a dual form of government is that it tends to prevent crises. It is impossible to say whether or not this is true. All that we know is that we have had a great many crises which a dual form of government has not prevented, and countries without a dual form of government seem to prevent crises as readily as we do.

(5) Another argument is that property and other individual rights are better protected under a dual form of government than they would be under a central government. The first answer to this is that it is not true. Today the United States Supreme Court is the great bulwark of property interests. The second answer is that today in the United States property does not need protection so much as people need protection against property.

(6) The real present reason for a dual form of government is the selfish one of escape from all government. The principal advocates of a dual form of government today, among those who think and did not merely inherit the idea, are the natural and artificial persons who for some reason or other desire to evade some law and who find a dual form of government a convenient aid to their purposes. This is hardly a worthy argument.

(7) A final possible argument for a dual form of government is that such form of government is the only way to protect the states from liability for their wrongs and liabilities. The answer to this argument is that they should not receive such protection. City, state, and national governments should be under the same liability as individuals, and, though this is not yet the law, there is promise that it may in time become the law and already much progress has been made in this direction.[23]

The arguments against and disadvantages of a dual form of government are:

(1) The lack of efficiency on the part of the states in the enforcement of law and the administration of justice. States and city governments are failing in the primary duty of protecting

[23] See article upon this subject by Edwin M. Borchard, Yale Law Review, 1924-25.

the life and property of their citizens, who as a consequence are going back to mercenaries. Express companies are employing their own guards, and banks are relying upon their own force. The difference in efficiency in these respects between the state and national governments has become almost a by-word. Yet, even as administrative units, the states would have duties to perform, and they might be as inefficient in one capacity as another.

(2) The corruption of state governments. There have been scandals in connection with the general government, but they have been unusual and no scandals to compare with those connected with state administration in the bribery of officials, the waste of public money, and the repudiation of public debts. Of course there would be a possibility of some of this corruption if the states were administrative units, but there would also be the possibility of eliminating some of it.

(3) One of the greatest evils incident to a dual form of government is the lack of uniformity of laws. With each state a separate sovereignty, its legislature enacts and its supreme court formulates laws differing from those of the other states, although there is nothing in the local conditions of the state to call for such action. The result is always hopeless confusion, and often actual injustice. The people of one state are for the most part no more interested in the laws of their own state, and frequently are no more subject to them, than they are to the laws of other states. As above pointed out, they are constantly moving from one state to another. They do business in many states. They have property in different states. They are all anxious to know the law, in order to obey it and to receive its protection. But they are not anxious to obey and receive the protection of the laws of forty-eight states. In addition there are federal laws and the country as a whole is constantly building up a general common law. The statutes and decisions of all of the states and of the federal government must be available in every first class law library, and lawyers and courts have to try to familiarize themselves with them. This is an impossible task. Neither attorneys nor their clients can ever master the great mass of law in the United States. The situation in England should be compared with this. There, there is not only no difficulty in knowing

what law applies but in knowing all the law. The situation is much as though we had in this country only the law of one state, or of the federal government, and this would be the situation if our dual form of government were abandoned. Attempts have been made to accomplish a reform of this situation without the abolition of the states as states. The Conference of Commissioners on Uniform State laws has for years been drafting and recommending for adoption uniform acts. The American Law Institute is now engaged upon the monumental task of restating a United States common law. But nothing would facilitate the reform like the abolition of the sovereignty of the states. Good illustrations of injustice are found in the operation of our inheritance tax laws, marriage and divorce laws, and law forbidding the sale of pistols.

(4) Incident to our dual form of government we have two judicial systems, one state, the other federal. This is not a necessary incident of a dual form of government, but we shall probably never be able to get one judicial system so long as we retain our dual form of government. Our courts need reorganization. Out state judges should be selected in a different manner. Our legal procedure everywhere needs reformation. The educational qualifications of many attorneys and judges are inadequate. But, so long as we retain two judicial systems in this country all these reforms are practically impossible; and we will retain our judicial systems so long as we retain our dual form of government. With our dual form of government abolished and one central government, it would follow inevitably that we should have but one judicial system and all the other legal reforms would easily follow. We should be free to adopt and would adopt the modern English system of courts and legal procedure. Then there would be no more branding of litigants back and forth from one court to another. No more delay, technicality, and expense. But our courts and legal procedure would become in fact real instruments for the administration of justice on earth.

(5) The expense of government is another evil of the dual form of government. The people are often governed twice. Two governments, in many respects duplicate, are maintained, where for a great many matters (as in the administration of justice)

one government could do all the work better. The people have to pay for this useless expense. It is not socially justifiable.

(6) A dual form of government encourages wrongdoers, and functions badly. Criminals escape from one state to another, and can be brought back for trial only by extradition. Laws like a law forbidding the carrying of concealed weapons, enacted for the protection of the people of one state, can be nullified by simply crossing the state line. It is often impossible to tell when commerce is interstate and when intrastate; when federal courts have jurisdiction and when the states. Not only ordinary criminals but public callings and other big corporate enterprises are learning to take advantage of this situation.

(7) The dual form of government tends to develop factions. It has developed one secession.

(8) The dual form of government tends to embarrass us in our foreign relations. Each of the states is a sovereign, and it can behave in many respects like a sovereign to foreign nations. Yet it cannot make treaties with foreign countries, and when it is guilty of legal wrong to other countries the national government is helpless to bring it to account.[24]

(9) Perhaps one of the greatest arguments against the dual form of govemnment is that it is in process of disappearing anyway, and it probably would be impossible to restore it. This is not only the position of the Supreme Court; it is political sentiment of the land. Starting with the formation of the Union, when the sentiment of the people was almost evenly divided, the tide of United States political development has run steadily in the direction of the increase of federal power and responsibility. "Little by little the United States has changed from a federation of territorial, individualistic democracies into a highly organized social democracy which could not escape the conscious assumption of a collective responsibility for the popular welfare."[25] Hence it would seem that it ought not to be difficult for the people of the United States to reconcile themselves to a formal change in government.

[24] One of the most recent illustrations of this has arisen in connection with the abandonment and divorce of French war brides, due to the fact that the states control the subject of marriage and divorce.

[25] 12 New Republic, 211.

(10) The last argument against a dual form of government is that it is no longer adapted to conditions in the United States. A centralized government is demanded. Past political developments has only been in line with social necessity. The original reasons for a dual form of government no longer exist. Most good inherent in the original system has long since perished. The evils largely remain. What we notice now are, expense, lack of uniformity of laws, failure in the administration of justice. embarrassment in our foreign relations.—all due to the fact of a dual form of government. New reasons for a centralized government have arisen. Not only have the sentimental reasons for a dual form of government changed, but business conditions have changed. With the industrial revolution, business has ceased to be individualistic and local and has become collective and national. Economic tendencies are bringing about a centralized and specialized organization. Business is becoming interstate in character. Not only are the operations of great business enterprises carried on in many states, or throughout the Union, but ownership itself is becoming national in character. It is in the hands of vast trusts and corporations, whose shareholders are not citizens of any one state, but are scattered all over the United States. No one of these shareholders has much control over his own life, as a result of his ownership of stock, but the corporation has an immense influence over the lives of those not stockholders—employees and consumers. The federal system was planned with reference to a different property and business situation. With the change in business should come a change in the political situation. Centralization in business should be met by centralization in government. In no other way will democracy learn how to control business. But this spells the death of our dual form of government.

Yet this should not be a cause for worry. When there is conferred upon the federal government functions which the states cannot, or cannot adequately perform, powers are not taken away from the states so much as new powers are given to the national government. Under a centralized government the states, as administrative units, would still exercise all the functions, or powers, which they should legitimately exercise. They simply would lose some of the privileges and immunities, like

that of sovereignty, and some of the powers, like that of the administration of courts of justice, which they now possess, and which there is no good reason for them to retain. The states would no more be destroyed by the Nation than are cities by the states, but there would be only one sovereignty in the United States. It may be doubtful whether the finite earth is large enough for more than one infinite, sovereign nation. Certainly the United States is too small for forty-eight sovereign states in addition to the federal government. With such a change, government in the United States would be placed on a plane higher than it has even been before. We are now one country—one people. Our government might, in very truth, become one gov-government of one people, by one people, for one people.

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