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Judiciary and Politics

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Editorial Comment

THE JUDICIARY AND POLITICS

Those familiar with our federal Constitution know that its framers intended that the three departments of government provided for therein—legislative, executive, and judicial—should ever remain separate and distinct in their respective functions. They know, too, that each was to be a check on the other, and that no one department was to be supreme. The fathers of our constitutional system—men of the caliber of Jefferson, Hamilton, Madison, Wilson and Randolph—were profound students of the science of government, men who had assiduously studied the governments of all of the nations of the civilized world. In framing our Constitution these men sought—and with what measure of success is attested by our phenomenal rise under the government they founded to a position of importance second to none among the nations of the world—to establish a government which would be free from that evil which their observations had taught them was the principal source of weakness in the governments of the other nations of the world—despotism. This they sought to do by establishing a constition purporting to limit government, state and federal alike, to the exercise of functions which would never interfere with the unalienable personal rights of man. Their theory was that government is created to subserve the interests of man, not man to subserve the interests of government. The Constitution which sprang from the prolific minds of these immortals has withstood the test of time and, by the large, remains today what they intended should ever remain—a citadel of liberty. Our government is unique among those of nations of the world in that it secures to the individual certain rights and liberties of which the government may not deprive him.

Our Constitution gave to the judicial department of government the power of interpreting the laws passed by the legislative department. It imposed on that judicial department the duty to declare void (and here we might cite

the familiar case of *Marbury v. Madison,* 2 Law Ed. 60) any legislative enactment inconsistent with the Constitution —the supreme law of the land. In order that the judges whose duty it would be to see that the legislative branch did not exceed its constitutional grant of powers, should be free from the influence of popular demand and from the fear of public disfavor, so that they might determine fairly and impartially whether or not a given legislative enactment encroached upon the unalienable rights of the individual secured from impairment by the Constitution, the Constitution provides that the judges in the federal courts shall hold office by appointment, their tenure being for life or during good behaviour. The framers of our Constitution realized that an all-powerful legislature would be prone to become as despotic, or more so, than would a monarch. Madison wrote in "The Federalist" that the legislative department "is inspired by a supposed influence over the people with an intrepid confidence in its own strength," and that it has an "enterprising ambition" to extend its own power, against which "the people ought to indulge all their jealousy and exhaust all their precaution."

The Constitution, however, failed to provide that judges of the state courts should hold office by appointment. This, in the writer's opinion, was a mistake for the reason that state courts, as well as federal courts, have jurisdiction to determine whether or not an enactment of a state legislature interferes with the unalienable rights of the individual preserved from impairment by the federal Constitution. Since these judges in the courts of the several states are human, and since their continuance in office depends upon their keeping in the good graces of the voting public, their natural propensity is to compromise what they know to be their duty to render their decisions in conformity with the spirit of the Constitution, and not to pervert the natural meaning of the plain language of the Constitution and construe it in that light which will gain the greatest possible public favor. This tendency, as well as resulting in a departure from the basic theory of our government, causes an unnecessary crowding of the dockets of our federal courts, since nearly all cases involving federal constitutional questions which are decided against the litigant who claims

he has been deprived of a constitutional right, are appealed to the federal courts. The writer believes that judges of state courts should be chosen by the Bar, the members thereof alone being qualified to choose a candidate upon his merits.

While the judges in our federal courts, as before pointed out, are not dependent upon public favor for continuance in office, yet they too, especially within the last twenty-five years, seem to vacillate in their decisions with changes in the political winds. The Supreme Court of the United States—our court of last resort in all federal questions—seems to have lost that courage and independence which characterized it in its early day. Since the case of *Mugler v. Kansas,* 123 U. S. 623, handed by the Supreme Court of the United States in 1897, where that august body in passing upon the constitutionality under the state police power of a state statute forbidding the sale or transportation of intoxicating liquors within the state of Kansas, refused to define what the word "liberty" meant as used in the Fourteenth Amendment, saying that whether the "liberty" of the individual was infringed depended upon the facts of each individual case, they have, it occurs to the writer, fallen into the error when passing upon similar cases involving the police power and "liberty" (and surely political expediency must have been the motivating cause for that decision) of sitting as a sort of superior legislature, passing upon facts rather than law. In many decisions of the Supreme Court based upon the precedent of the Mugler case, one finds statements to the effect that the legislature is the best judge as to what restrictions on the personal rights of the individual are or are not necessary in the exercise of the states' police power.

Surely the immortal fathers of our Constitution never intended that our courts should thus interpret our laws, as constitutional or unconstitutional, with changes in public whim. No, the judicial department was to act as a check upon the legislative department—to keep it within its constitutional bounds—for, as the immortal Jefferson once said, "An elective despotism is not the government we fought for."

—F. T. R.