Volume 41 | Issue 1 Article 2

December 1934

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WEST VIRGINIA
LAW QUARTERLY
and THE BAR

VOLUME XLI DECEMBER, 1934 NUMBER 1

STATE AND NATION IN A FEDERAL SYSTEM

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One of the fundamental problems in a federal system is the problem who should have the deciding voice in the question of the division of power between the State and the Nation. This problem is twofold: First: Is this question to be decided by the component "states" or by the nation or confederacy as a whole? Second: What organ — legislative, executive, or judicial, — should be entitled to speak in the name of the deciding authority, whether that be "state" or "nation"? It is generally assumed that the United States Constitution has solved this problem by giving the United States Supreme Court final authority to decide all questions arising out of the distribution of power between State and Nation, just as it has given it the power to decide all questions arising out of the distribution of power in the Federal government itself between its legislative, executive, and judicial organs. Both branches of this assumption are, in my opinion, erroneous. In my *Government by Judiciary* I have endeavored to prove, by an examination of the history of the United States Constitution, and of the history of the United States under the Constitution, that our present system of government, which is virtually a Government by Judiciary, instead of a government by the people as is commonly supposed, was not authorized by the Constitution, and was not foreseen by its framers or early interpreters. That work has dealt, however, primarily, with the question of the distribution of power within the federal government itself, and within the states themselves as far as judicial control is concerned, and only touched incidentally upon the problem of

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distribution of power between State and Nation, — this problem being touched upon only insofar as it illustrates the main question of judicial control of the legislative and executive departments in our system of government. This led to some curious misunderstandings as to my position on the question of the proper method of determining the distribution of power between State and Nation.[1] I am therefore grateful for the opportunity given me in this article of clarifying my position on this subject. It is the purpose of this article to treat this subject, as far as possible, without complicating it with the greater problem discussed in my *Government by Judiciary*. I must, therefore, refer my readers to that work for any phase of the subject which involves the major question of our constitutional system.

I

At the very outset of any discussion of the problem of the distribution of the powers of government, we are met with the assumption, prevalent alike among lawyers and historians, that the distribution of the powers of government is a concomitant of modern democracy. Nothing could be further from the truth. The fact is that the notion of the distribution of the powers of government is a survival of the Middle Ages, when the notion of modern democracy, which is based on the sovereignty of the people, was utterly unknown. When, in fact, the very notion of *government*, in the modern sense of that word, was unknown. We cannot here go into any lengthy discussion of the notions of government prevalent in the Middle Ages. Nor of the various stages on the road which the western world has travelled intellectually from those notions to the conception of democracy which now prevails in such countries as England, where government, at least formally, ex-

[1] One reviewer of my "Government by Judiciary" seemed to think that I was writing an anti-Federalist treatise but did not quite succeed. Another one was puzzled over the high praise which I gave to Marshal's opinion in McCulloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579 (1819), although opposed to the line of cases, discussed further below in the text, dealing with the exemption from taxation of so-called "governmental instrumentalities". This reviewer, although a professor of government in one of our leading universities, evidently could not see the difference between the necessity for the Federal Government to possess the power to resist encroachments of the states on the proper federal domain, and the necessity of such power being exercised by the courts in the absence of any other instrumentality whereby such encroachments could be prevented, on the one hand, and the right of an *individual* or private corporation to claim exemption from state taxation because such taxation infringes upon the prerogatives of the Federal Government, or exemption from federal taxation on the ground that such taxation infringes upon the *prerogatives* of the states, on the other hand.

presses the will of the people. Suffice it to say, that the basic notion by which the relations between individuals and groups composing society were regulated, was that of *compact* or *contract,* — a notion that is the very antithesis of the modern notion of the sovereignty of the people.[2] The road from the mediaeval system of social relations based on contract to the system of government based on the sovereignty of the people had two main divisions. The first division consisted of the building up of the notion of *sovereignty,* and was itself subdivided into two divisions, usually running concurrently: That of the emergence of the territorial entity and intellectual concept of the *nation;* and that of the emergence of the institution of absolute monarchy as representing the nation. The other half of the road led through the various stages of transference of power from the absolute monarchy to the people, which took the form of "constitutional limitations" upon the will of the monarch. The first important transfer of power from the monarch to the people was the power of making laws.[3] Thus arose the first distribution of the powers of government, — that between legislative and executive. The legislature was to

[2] The prevailing opinion that the notion of the "social contract" was first developed by Rousseau is entirely erroneous as far as its basic idea is concerned, — namely, the idea that government is the result of contract. As a matter of fact, the idea of contract as the basis of social relations is the basic idea upon which all social and governmental relations in the Middle Ages were founded. The only difference between the basic idea of the Middle Ages and that of Rousseau consisted in the fact that during the Middle Ages, when the notion of "government" as such was unknown, social relations were supposed to be based on individual contracts, while Rousseau, living in a period when the notion of government was completely developed, conceived of this contract as involving society as a whole instead of being an individual contract between a particular person and his lord or master. The idea of government involved in the social contract was new, although not invented by Rousseau. But the idea of "contract", which is supposed to be the distinctive Rousseau-ist idea, was merely a carry-over from medieval times when it embraced the entire domain of social relations, including what we now call government. A curious illustration of this idea of contract or agreement as the basis of government during the Middle Ages is shown by the legal notion of English law, which survived into modern times, that one could not be tried for a crime unless he consented to enter a plea. The basis of this curious notion was the idea that no one could be tried by any tribunal unless he agreed to such trial, — the plea being the formal consent to such trial. And back of that was the notion that no power could be exercised by any person or body of persons over another except as the result of some previous consent or agreement.

[3] The notion of law-making in the modern sense was utterly unknown in the Middle Ages. Social relations, as stated in the preceding footnote, were supposed to be governed by contracts, — usually contracts supposedly made at some previous time. Whenever the notion of law as such was involved, it was "The Law", — and was usually the result of an agreement between those subject to the law and some divine force: like "The Law" of the Jews

make the laws; while the executive was to govern according to the laws thus made. At that period the judiciary was still part of the executive, and but the instrument and servant of the executive. In the struggle that ensued in England, the mother of modern democracy, between the legislature as representative of the people and the monarch, the judiciary gradually emerged as a semi-independent organ of government. This gave Montesquieu, working for the introduction into France of the rudiments of modern democracy then already established in England, his opportunity of proclaiming the three-fold division of the powers of government with which we are familiar, as the true form of "free" government.[4] Montesquieu's assertion that such was then the actual distribution of the powers of government in England was entirely unfounded, as is well known to all students of the condition of England at the time when Montesquieu wrote his *Esprit des Lois.* And the history of the western world since Montesquieu wrote his great work has proven that a real distribution of the powers of government is neither feasible nor desirable under the complex conditions of what we call Modern Civilization.

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which was the result of a compact between Jehovah and his Chosen People. The Law was therefore immutable, — and the notion of the continual making of laws by ordinary mortals was contrary to the very notion of The Law. This notion of law was well suited to an unchanging or slow-changing social system, in which the law if it changed at all, changed by such small degrees as to be imperceptible. The notion of law as being made as we go along to meet changing conditions is the result of our modern world, which has developed since the disappearance of the practically stagnant society of the Middle Ages. And it is curious that as late as the early seventeenth century there were still outstanding English lawyers who conceived of law as something immutable. Such, for instance, was Coke's notion of the common law.

[4] Besides the assumption that the distribution of powers generally is favorable to liberty, noted in note 6, *infra,* there is a special belief generally entertained that the *independence* of the judiciary is favorable to liberty. This belief is entirely erroneous, and is a generalization founded on the consideration of a small segment of English history, when "independence" meant independence of the Crown, at a time when the people were engaged in a struggle with the Crown and endeavoring to limit its powers. Before, therefore, the question as to whether or not the independence of the judiciary is favorable to liberty can be determined, the question must be put and answered: *independent of whom?* If of the Crown, the answer is: Yes. If of the people, the answer is emphatically: No. In this connection it is well to recall a curious and rather instructive instance of an attempt to create an independent judiciary in France, at about the time Coke was trying to establish one in England, known as the *Paulette.* In 1604 the great King Henry IV of France determined to convert the judicial offices of France into heritable property. In consideration of certain payments, the judicial offices were to be confirmed to the then holders as heritable property, descending to their heirs, with the right to bequeath by will, subject to the sole provision that the new owner should prove himself qualified. "The measure", says a noted historian, "was expected to create a caste of magistrates, *proud of their independence* and of their traditions".

In England itself, the course of historical development has gone from a distribution to a unification of the powers of government. Whatever may have been the true condition of England about the middle of the eighteenth century, there can be no doubt of the fact that in the twentieth century the English are sovereign, and that the power of the English Parliament, as the representative of the English people, is unlimited. The English legislature has absorbed all the powers which formerly resided in the other organs of government, and today the English executive and the English judiciary have only such powers as the legislature may be willing to let them have either by specific grant or by acquiescence in powers actually exercised. That a real distribution of powers is impossible under modern conditions is also proven by the history of the United States. In this country, there has been no formal unification of power such as has taken place in England. But, as I have shown elsewhere, the distribution of powers in this country is purely formal, and the real power of government, that is to say, — the ultimate decision of all important questions, — resides in the judiciary. *This is proven by the fact that it is the judiciary that determines what powers the legislature and the executive may possess.* For the test of all true power in any system of government is not what power is actually exercised by its various organs but *what organ* determines in the last resort upon the distribution of power, — *who has the right to decide upon the limits of power of the various organs of government.* This power to decide upon the distribution of power among the organs of government, — what the Germans call *Kompetenz der Kompetenz,* — is the true touchstone of the power of sovereignty. In England, and in all other modern democracies except the United States, that power resides in the legislature. In the United States that power resides in the judiciary.[5] It may, therefore, safely be said that the distribution of powers of government has proven itself impossible in the modern world. Whether or not it is desirable that this unified power should be lodged in the legislature, is a problem with which we are not concerned here, and has been dealt with by me at some length elsewhere.[6]

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[5] See BOUDIN, GOVERNMENT BY JUDICIARY (2 vols. 1932).

[6] The question of the desirability of the distribution of powers generally is obscured by the fact that in autocracies there is no such distribution, and that in some countries in which apparently some form of democracy or freedom prevails there is such a distribution. Such, for instance, are the so-called "democracies" of the Middle Ages, and some of their modern sur-

The foregoing discussion relates to the distribution of powers of government generally. But it applies very largely also to the distribution of powers between "state" and "nation" in a federal government. To begin with, it applies to the failure of the framers of the United States Constitution to provide "controls": for there are no controls either as between the different organs of the federal government, or as between nation and states. The United States Constitution prescribes the respective powers of the federal legislature, the federal executive, and the federal judiciary; but it does not provide for the manner of the settlement of disputes in case of collision between these departments. We need not rehearse here the contradictory inferences drawn from this lack of provision by various historians and the various schools of thought in the domain of our constitutional law. We know how history has solved the problem, and we also know that this solution is not in consonance with the opinions of at least some of the framers. We also know that this solution was not adopted until after a long struggle, in which such noted figures in our history as Jefferson and Jackson among Presidents and an array of noted names among lawyers and judges were ranged on the other side.

The situation is duplicated in the case of the question of the distribution of powers between states and nation, — with one notable exception which merely adds to the proof of the futility of a formal distribution of the powers of government on paper. The United States Constitution itself prescribes for the distribution of powers between the Federal Government and the State Government by enumerating the powers of the first and inferentially leaving all other powers to the second. And the Tenth Amendment specifically provides that all powers not granted to the Federal Government belong to the States. But neither the

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vivors. An examination of these will show, however, that these "democracies" were not really democratic, and that the "freedoms" enjoyed by some of the social groups in these alleged democracies were really privileges, — privileges utterly incompatible with real democracy, which is based on the sovereignty of the people. A true evaluation of the desirability of the distribution of the powers of government is also hampered by the prevalent notion that "the less government the better". The distribution of the powers of government tends to "lessen" government by preventing quick and unified action. But the notion of the "less government the better", although a modern notion, in this form at least, really feeds on two sources: One of these is a lingering survival of the medieval notion of an unchanging society; the other is the notion of a harmonized stability of the "natural" economic order involved in the doctrine of *laissez faire*. But even this modern doctrine will be found, on further analysis, to be twin-sister to the doctrine of a closed system of law which was involved in the medieval notion of The Law.

Constitution itself nor the Tenth Amendment says who should decide in case of conflict between state and nation: either as to which government should decide, or as to what organ of either government should be the organ of decision.

To us, at the end of the course of development which lasted nearly a century and a half and involving one actual and several potential civil wars, the actual historical solution that the *Kompetenz der Kompetenz* resides in the judicial branch of the Federal Government seems a matter of course. But a study of our history will show that this solution was stubbornly resisted for about one half of our existence under the Constitution, and that many of our statesmen, among them some of our most noted judges, could find nothing in the Constitution to justify it. Since the Civil War, at least, there has been no serious attempt to dispute the power of the Federal Government to decide on the distribution of power between itself and the States; and, since by the time the Civil War was over the judiciary was fairly well on the road of its ascendency over the legislative and executive departments, the right of the United States Supreme Court to determine this question along with the other questions of distribution of powers of government came to be taken for granted. But a glance at our judicial history will show that there is considerable force on the other side of the argument; and an examination of current judicial decisions will show that our actual solution was less than fortunate.

In order to avoid misunderstanding, I would like to state right here that I personally believe that the National Government must, and should, have the power of determining any dispute as to sphere of competency between itself and the States. Furthermore, I believe that many more things than are now within the sphere of competency of the National Government should be within it. But historical truth compels me to state that very few of the "framers" shared my view on the second half of the question, at least, and that the views of those of the framers who did agree with me on the subject did not prevail in the Constitutional Convention.[7] As to the first half of the question, it is anybody's guess as to what the real intentions of the framers were. The chances are that there was no consensus of opinion on the subject, — that there were many divergent currents of opinion within the Consti-

[7] The current view, due largely to the influence of the writings of Dr. Charles A. Beard, that the Constitution was the result of the activities of reactionaries led by Alexander Hamilton, is, in my opinion, entirely erroneous. See *op. cit. supra* n. 5, vol. 1, appendix D.

tutional Convention, and that the framers considered it prudent to say nothing about it, for fear that any attempt to say something would render abortive the attempt to frame any constitution. It must also be conceded that the failure to specifically name the organ of the Federal Government which is to have the power of determination in this respect, — assuming that that determination properly belongs to the Federal Government, — naturally led to the assumption of power by the federal judiciary, which was the only department of the Federal Government furnished with the mechanism for such an assumption of power. And that in this respect the actual use of the power by the federal judiciary is not subject to some of the serious objections to which its power over the federal legislature and executive is subject. There certainly can be no question of the usurpation of power here. Although there may be injudicious use of power, and at times abuse of power, as there certainly has been during the past thirty or forty years under the due process clause of the Fourteenth Amendment. In considering these matters we must remember that the framers could not possibly foresee the Fourteenth Amendment. But this illustrates the danger of leaving such matters unprovided for. There can be no doubt that had the United States Constitution expressly placed the function of guarding against infractions by the State of the Federal Constitution where it belongs, none of the abuses under the due process clause would have been possible.

II

"Of all sad words of tongue or pen,
The saddest are these: 'It might have been!' "
—JOHN GREENLEAF WHITTIER.

The sad fact is that the Constitution made no provision of any kind in this respect. This created the impression that the states were "sovereign", and that they were, in a sense, *equal* to the nation from a constitutional point of view. The way it is usually put is, that each is "supreme in its own sphere". This sounds very good, — provided there is an outside power which can decide as to what is meant in each case by "its own sphere". Where there is no such outside power, — and in the nature of things there *can not* be, — that power is really supreme which has the power to decide what is the sphere in which each is to be supreme. If there is doubt as to which power has the power of

decision in this respect, there will be stalemate or conflict. That was usually the situation in the Middle Ages. A situation which was tolerated because in a stationary or slow-moving society the power of tradition and the dangerous consequences of conflict usually lead to adjustment. When adjustment fails there is conflict,— which largely accounts for the almost continuous state of war which prevailed in the Middle Ages.[8]

When social progress assumed a faster pace, permanent organs of decision emerged through the growth of nations, — the "equality" between the component parts and the entity embracing them, which was the normal condition in the Middle Ages, being destroyed forever. It was, therefore, inevitable, as well as desirable, if this country were to keep abreast of modern progress, that the nation should assume the right to decide in all disputes as to spheres of competence between itself and the States, no matter what the true meaning of the United States Constitution in this respect. Unfortunately, the Nationalists, or Federalists as they were then called, speaking through John Marshall, had announced an official constitutional theory which put obstacles in the course of this development. This is the official theory upon which the Judicial Power, — which is the central point of our constitutional system, — is based, namely, the theory that an act of legislation in contravention of the Constitution is a nullity. I have elsewhere shown the absurd consequences to which this theory is bound to lead. As regards the question now in hand, the absurdity of this

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[8] The complete misunderstanding which prevails generally with respect to the life of the Middle Ages and the then prevalent notions of law, order, and right, is best exemplified by the usual references of the modern historians to the lawlessness of the Middle Ages because of the prevalence of private war. But private war was a "right" in the Middle Ages, and use of that right was no more considered lawless in the Middle Ages than the use of the right of workers to "strike", or of employers to "lock out" their workers, in our modern economic system. In this connection it is interesting to note that one of the "rights" recognized in medieval times was that of a noble vassal to renounce allegiance to his king and then make war upon him, — much as workers now claim the right to cease working for their employer and engage in a strike so as to prevent others from taking their place. A noble vassal who had thus levied war upon his king was not considered a traitor, as he would be in modern society, but as one who was engaged in exercising a right recognized by the social system of which both he and his king were a part. It is also well to remember that the notion of a "national interest", for which nations are supposed to war in modern times, was utterly unknown in the Middle Ages. Wars were not between nations but between individuals, and in vindication not of "national interests" but of strictly individual "rights". Whatever may have been the real underlying causes for the One Hundred Years War between England and France, for instance, — the formal reason for the war was the attempt of the kings of England to vindicate their rights to the crown of France.

theory is illustrated by the very case which established the supremacy of the Nation over the State and the judiciary as the organ of the Federal Government through which this supremacy is to be maintained. That is the case known to fame as *Martin v. Hunter's Lessee.*[9]

This celebrated case was decided in 1816, but it was the culmination point of litigation going as far back as 1791. It involved the very valuable stretch of territory in Virginia known as the Northern Neck, and throughout its long progress it excited considerable feeling in Virginia. Its final decision almost produced a national crisis, and the crisis was only averted by the fact that the United States Supreme Court, after making a brave announcement of national supremacy, retired from the contest, as far as the case is concerned, leaving the field of battle in the hands of the enemy.

The facts in the case were as follows: Lord Fairfax, the owner of the land in question, died during the Revoluntionary War, devising his lands to a nephew named Denny Martin, an Englishman. Under a law of Virginia passed during the Revolution, an alien could not inherit lands in Virginia. The State of Virginia, therefore, claimed that this tract of land had escheated to the State upon Lord Fairfax's death, and proceeded to parcel it out and to convey it by letters patent to various persons, conveying one part to one Hunter, who leased it to the defendant in the case. After the war, the land was claimed by Denny Martin, the plaintiff in the case, and certain Americans under him, among them some of John Marshall's family, who had acted as agents for Lord Fairfax. The legal question involved in the case was, — whether Denny Martin could inherit the lands in question under the devise contained in Lord Fairfax's will notwithstanding the Virginia statute to the contrary. It was claimed, on Martin's behalf, that under the Treaty of Peace with England of 1783, and the subsequent Treaty of 1794, the so-called Jay Treaty, the Virginia statute could not operate as against him. The highest court of Virginia finally decided, in 1810, against this contention, and against the title of Denny Martin and those claiming under him, giving judgment in favor of the defendant in the case, who claimed under the grant from the State, on the theory that the lands had escheated to the State under the statute against inheritance by aliens. Martin thereupon appealed to the United States

[9] 1 Wheat. 304, 4 L. ed. 97 (1813).

Supreme Court, and the United States Supreme Court, by a decision rendered in 1813, reversed the decision of the Virginia courts, holding that because of the treaties in question Martin's title to the land was good. The opinion in this case was written by Mr. Justice Story. Mr. Justice Johnson dissented. The Supreme Court then sent its mandate to the Court of Appeals of Virginia, directing it to give judgment in favor of Martin.[10]

When the mandate reached the Court of Appeals of Virginia, that court refused to obey, claiming that the United States Supreme Court had no jurisdiction in the premises, and relying upon the *nullity* theory advanced in *Marbury v. Madison* for its justification.

It will be recalled that at its first session under the Constitution, the United States Congress passed the Judiciary Act under which the judicial system of the United States was organized. Section 13 of that Act gave the United States Supreme Court jurisdiction in cases of *mandamus*. It also contained a section, section 25, which gave the Supreme Court appellate jurisdiction from certain decisions of the courts of the several States. In *Marbury v. Madison,* Marshall claimed that the Constitution did not give the United States Supreme Court jurisdiction in cases of *mandamus,* and that the provisions of the Judiciary Act which gave the Supreme Court such jurisdiction were, therefore, a nullity. The Virginia Court of Appeals now claimed that the United States Constitution did not give the federal judiciary the right to hear appeals from decisions of state courts, and that the provisions of section 25 of the Judiciary Act, giving the Supreme Court that right, were, therefore, a nullity. From the point of view of logic, the argument was unanswerable: John Marshall, in *Marbury v. Madison,* did not claim that the United States Constitution gave the Supreme Court the power to declare laws unconstitutional. But merely that the law of Congress involved in the *Marbury* case being in excess of the powers granted to Congress by the United States Constitution was a nullity. If this theory be correct, then disobedience to an unconstitutional law is not only the *right* but the *duty* of every person who may be called upon to act under the same. And Associate Justice Wilson of the United States Supreme Court so taught in his famous Lectures on the Law. The Virginia Court of Appeals now claimed this right, and asserted its duty to disobey a mandate of the United States Su-

[10] Fairfax's Devisee v. Hunter's Lessee, 7 Cranch 602, 3 L. ed. 453 (1812).

preme Court given in pursuance to a law of Congress which it, the Virginia Court of Appeals, considered unconstitutional and, therefore, *a nullity.*

Peculiar interest attaches to the position of the Court of Appeals of Virginia, because that Court was presided over at the time by Judge Roane, who would have been Chief Justice of the United States Supreme Court instead of John Marshall, had the vacancy in that office occurred a year later than it actually did, and the office filled by Thomas Jefferson instead of John Adams. The man who might have been Chief Justice of the United States Supreme Court and was actually Chief Judge of the Virginia Court of Appeals, now said:

> "Upon the whole, I am of opinion, that the Constitution confers no power upon the Supreme Court of the United States, to meddle with the judgment of this Court, in the case before it; that this case does not come within the actual provisions of the twenty-fifth section of the judicial act; and that *this court* is both at liberty, and is bound to follow its own convictions on the subject, anything in the decisions, or supposed decisions of any other court, to the contrary notwithstanding."

In this view, all of the other Judges of the Virginia Court of Appeals concurred, and the official judgment of that court was as follows:

> "The court is unanimously of the opinion, that the appellate power of the Supreme Court of the United States, does not extend to this court, under a sound construction of the constitution of the United States; — that so much of the 25th section of the act of congress, to establish the judicial courts of the United States, as extends the appellate jurisdiction of the Supreme Court to this court, is not in pursuance of the constitution of the United States; that the writ of error in this cause was improvidently allowed under the authority of that act; that the proceedings thereon in the Supreme Court were *coram non judice* in relation to this court; and that obedience to its mandate be declined by this court."

Denny Martin thereupon again appealed to the United States Supreme Court. And the United States Supreme Court now decided that not only did it have the right to hear and determine appeals from the state courts in the cases provided by Section 25 of the Judiciary Act of 1789, but also that the state courts must follow its decisions even though they believed such decisions erroneous, and the laws under which they were rendered unconsti-

tutional. This required some very curious logical acrobatics, in the performance of which the spokesmen of the Court were not wholly successful. The truth is, that there was no way of bridging the yawning gulf between the decision and the theory upon which it was supposed to be based.

Mr. Justice Johnson was in a particularly sad plight. It will be recalled that when the original case was before the United States Supreme Court he had dissented from the decision reversing the decision of the Virginia Court of Appeals. Concededly, the United States Supreme Court was not a Court superior to the Virginia Court of Appeals, in the sense that appeals lay generally from the one to the other. Concededly, the right of appeal from the Virginia Court of Appeals to the United States Supreme Court depended upon the State Court's decision being contrary to the provisions of the United States Constitution. If that decision was not contrary to the provisions of the United States Constitution the Supreme Court of the United States had no jurisdiction in the premises, *and its decision was therefore a nullity, because contrary to the United States Constitution.* Therefore, under the accepted theory underlying the right of the judiciary to declare laws unconstitutional, not only was the Virginia Court of Appeals right in asserting that it cannot carry out the mandate of the United States Supreme Court, which was contrary to its own conviction as to the meaning of the United States Constitution, but Judge Johnson was bound to side with it even if he disagreed with it on the constitutionality of Section 25 of the Judiciary Act, for the force of the original decision of the United States Supreme Court depended on an interpretation of the Constitution with which he disagreed. Nevertheless, Mr. Justice Johnson now concurred in the decision of the United States Supreme Court.

But the United States Supreme Court itself had, in fact, made a serious compromise, which has since been overlooked, — as it had to be if we were to be truly a nation. That compromise consisted *in acting upon the strange doctrine that* although the United States Supreme Court had the right to hear appeals from the State Courts *it had no right to enforce its mandate.* It is an interesting fact in the development of our constitutional law that while *Martin v. Hunter's Lessee* is always referred to as the leading case establishing the supremacy of the Federal Courts over the State Courts in matters pertaining to the Federal constitution, very few lawyers or teachers of law, as far as I know, ever refer to the fact that the actual decision, as distinguished from the opinions, was a

draw. The reason for the neglect of the actual decision in this case, from the point of view of the practical lawyer, or the practical teacher of law, is obvious: that decision is not now the law; while the opinions delivered on the occasion are the actual law of the land, notwithstanding their lack of logic and their opposition to the basic theory underlying our whole system of constitutional law. In this connection the following passage from Mr. Justice Story's opinion is particularly interesting, — for it is this passage, and not the arguments from the text or meaning of the United States Constitution, that gives the real reason for the ultimate submission of the state courts to the revising power of the United States Supreme Court. Said Mr. Justice Story:

> "A motive of another kind, perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution. *Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution* itself. If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution.[11]

The establishment of the right of the nation to decide upon the distribution of powers between itself and the States was a mat-

[11] Mr. Justice Johnson's concurring opinion is a very remarkable document, indeed, and should be studied very carefully by all those who are interested in the problem here under discussion. It makes strange, though interesting, reading at this day. Mr. Justice Johnson begins his opinion with the following statement:

> "It will be observed in this case, that the court disavows all intention to decide on the right to issue compulsory process to the state courts; thus leaving us, in my opinion, where the Constitution and laws place us — supreme over persons and cases as far as our judicial powers extend, *but not asserting any compulsory control over the State Tribunals.*"

He then proceeded to state the dilemma as he saw it:

> "On the one hand, the general government *must cease to exist* whenever it loses the power of protecting itself in the exercise of its constitutional powers. . . . . On the other hand, so firmly am I persuaded that the American people can no longer enjoy the blessings of a free government, whenever the state sovereignties shall be prostrated at the feet of the general government, nor the proud consciousness of equality and

ter of necessity, if medieval chaos was to be avoided and modern progress made possible. And since no other provision had been made in the United States Constitution, the present decision became a necessity; and necessity knows no law, whether that of the Constitution or of logic. Necessity, however, as is well-known, makes bad law; and in this case it made some very bad law and worse statesmanship, as our subsequent history has proven. We need only add here, that it took nearly half a century and a civil war before Mr. Justice Story's opinion became the unquestioned law of the land; and that in the years immediately preceding the Civil War, the highest courts of three States defied the United States Supreme Court and refused to obey its decisions.[12]

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security, any longer than the independence of judicial power shall be maintained, consecrated and intangible, that I could borrow the language of a celebrated orator and exclaim: 'I rejoice that Virginia has resisted'."

After having thus stated the dilemma, Mr. Justice Johnson enters upon a long argument the sum and substance of which is that while the United States government must have the right to protect its constitutional powers, as declared by the United States Supreme Court, such right cannot take the form of having the United States Supreme Court make compulsory orders directed to the state courts. This the United States Supreme Court refrained from doing in the instant case, and *no mandate* was ever issued therein.

[12] The three states in question are Ohio, Wisconsin and California. The Ohio Supreme Court refused to recognize the validity of the decision of the United States Supreme Court in the case of the Piequa Branch of the State Bank of Ohio v. Knoop, 16 How. 369, 14 L. ed. 368 (1853), involving the question of corporate charters. The Supreme Court of California refused to recognize the right of appeal from the state courts to the federal courts in the case of Johnson v. Gordon, 4 Cal. 368 (1854). The State of Wisconsin defied the United States Supreme Court in the famous Booth Cases, 3 Wis. 1 (1854), 3 Wis. 145 (1854), 3 Wis. 157 (1854), 11 Wis. 517 (1859), involving the Fugitive Slave Law (1858). In the California case, the Supreme Court of that state held that:

"1. The Constitution of the United States gives no authority to the Supreme Court of the United States to exercise appellate jurisdiction over the State Courts, nor can such authority be derived by implication, or construction.

"2. The State Courts and the Federal Courts are co-ordinate tribunals, with concurrent jurisdiction in many cases, and the decision of the one in which jurisdiction first attaches, is final and conclusive.

"3. No cause can be transferred from a State Court to any Court of the United States.

"4. Neither a writ of error nor appeal lies to take a case from a State Court to the Supreme Court of the United States."

In the Booth cases, the Supreme Court of Wisconsin, in sustaining a writ of habeas corpus issued out of the Wisconsin Supreme Court, setting at liberty a man who had been indicted in the federal courts for violation of the Fugitive Slave Law, in defiance of an express decision of the United States Supreme Court, said:

"This Court has no disposition to interfere with the criminal jurisdiction of the District Court of the United States. *Unless that Court proceeds within the limits which the constitution and laws of Congress have prescribed, its acts are a nullity.* Its jurisdiction is always open to question, and must affirmatively appear. If jurisdiction be wanting, its pro-

III

I have said before that the decision in *Martin v. Hunter's Lessee* establishing in the national government the power to determine the respective spheres of competency between the State and the Nation and placing that power in the hands of the Federal Judiciary was a matter of historical necessity. The nature of this necessity was, however, different in the two branches of the question. That the ultimate decision on all questions of competency should be in the hands of the national government is a *real necessity in the modern world.* By that I mean that we could not have become a really modern nation if that power had not resided in the federal government. This is proven by the fact that such is the rule in all modern countries having a federal form of government. This is true even of the Swiss Confederation, — the least national of all modern countries. Without it a country would of necessity remain in, or elapse into, medieval chaos. On the other hand, the placing of this power in the hands of the Judiciary, was the purely adventitious result of the accidental or designed failure of the United States Constitution to place this power where it ought to be, — namely, in that branch of the government which represents the sovereign power of the people, the national legislature. That is where it is placed in most progressive constitutions.[13]

The familiar seems "natural". To us Americans, the exercise of this power by the federal judiciary seems to be the most natural thing in the world. But a little reflection will show that that is not so. If we do not actually become convinced to the contrary, we will at least have to admit that the matter is involved in very grave doubt. But in order to be able to consider this question in a truly unbiased manner, we must once for all divest ourselves of our habit of thinking of all governmental problems from the point of view of individual rights. It would be well to remember in this connection that the so-called protection of individual rights is not in any way involved in the subject or, if at all in-

cess, judgments and decrees are void. Were it otherwise, that Court might proceed to indict, convict and punish for common assault, libel, breaches of the peace, and so forth, imprison our citizens at its own will and pleasure, administer the whole common law code of offenses and punishments, from whose judgments there could be no appeal, and whose prison doors no earthy power could unlock. Such doctrine is monstrous. We have not yet reached the point of submission."

[13] See further discussion *infra* as to the relevant provisions of the Constitutions of Switzerland, the German Republic, and the Republic of Austria.

volved, plays a most insignificant role. The United States Constitution as originally drawn contained no bill of rights, and its text contains only three provisions with respect to the protection of individuals against state-government action, — provisions which were considered so unimportant that they were hardly debated in the Constitutional Convention.[14] It should also be remembered that the bill of rights, when adopted, was not meant to be a restriction upon the powers of the states. At least, so the United States Supreme Court has held, and such is the law today. The primary question, therefore, was a distribution of the *spheres* of government between the Nation and the States, and the allotment to each of its proper sphere of competence. The danger to be guarded against was that of encroachment by one government upon the proper sphere of the other, that is to say, the problem was not one as to what should be the powers of government as such, but which of the two governments provided for should have the right to act in a given situation.

That there is no way of providing any absolute guarantee against the encroachment by one government upon the proper sphere of the other in a federal system, is conclusively established by the history and the opinions in the *Martin-Hunter* litigation. And the decision in that case, as ultimately shaped by history, was to the effect that because no absolute standards can be set up, the right of decision should lie with the Nation instead of the States, as the least hazardous course to pursue for a nation valuing its unity and its progress. It would seem, therefore, that this power should be entrusted to the policy-declaring branch of the national government, rather than the branch which is occupied with deciding lawsuits between individuals. Once we divest ourselves of the false notion that we are dealing with a *contract* which perpetually and of its own force, — within the confines of its own "four corners", — settles the problem, and realize that we are dealing with a problem of policy, — a *modus vivendi* to be established in cases of doubt and difference of opinion arising in the course of the historical progress of the nation, — it becomes perfectly obvious that we are dealing in fact with a constitution-*making* problem and not a problem of deciding upon rights theretofore accrued. This becomes perfectly clear if we bear in mind the purpose of the Constitution and of the distribution of powers therein contained.

[14] These are the provisions of Section 10 of Article 1, that no state shall "pass any bill of attainder, ex post facto law, or law impairing the obligation of contract".

A glance at the United States Constitution will show that its general purpose is to assign to the Federal Government those "spheres of influence" which are truly national, and to allow the States to retain those spheres of influence in which they are most competent to act. Such, indeed, must be the purpose of all such documents. But this is of necessity a changing problem in a progressive society; its solution is of necessity a problem of policy with which only the policy-making branch of the government is competent to deal. Indeed, the great mass of litigation under the commerce clause of the United States Constitution, to take the most conspicuous example, and the tortuous course of judicial decision thereunder, is due entirely to the fact that the judicial arm of the government is utterly incompetent to deal with problems which predominantly involve questions of policy.

Without going into details which will easily suggest themselves to anyone familiar with this branch of our Constitutional Law, I will call attention here to two cases which arose long before the modern avalanche of decisions under the commerce clause, — two decisions now mostly forgotten but which excited great attention at the time they arose, and which still stand as monuments to the unfortunate lack of foresight in the framers of the United States Constitution, which resulted in the failure to place this power where it properly belongs. I am referring to the Ohio River Bridge case and the admiralty jurisdiction cases.[15]

In the first of these cases, the United States Supreme Court, in a decision rendered in 1852, ordered the abatement of a railroad bridge over the Ohio River at Wheeling as a nuisance. The bridge was situated in the State of Virginia, and was built under a charter granted by that State. It was built by the railroad interests, and its erection was fought by the river-traffic interests. The legal point of attack was that its erection under state authority was an infringement of the federal government's right to regulate commerce on the navigable waters of the country. Had the decision of the United States Supreme Court prevailed, the economic development of the country would have been arrested for generations, if not forever. Fortunately, Congress, by an Act specially passed, and unique in our history, overruled the decision and legalized the bridge. And it is but one more illustration of

[15] Pennsylvania v. The Wheeling & Belmont Bridge Co., 13 How. 518, 14 L. ed. 249 (1851); The Propeller Genessee Chief v. Fitzhugh, 12 How. 433, 13 L. ed. 1058 (1851); Jackson v. Steamboat Magnolia, 20 How. 286, 15 L. ed. 909 (1857).

the absurdity of our entire conception of how such things should be dealt with, that at least one of the judges of the United States Supreme Court, urged the Court to disregard the act of Congress legalizing the bridge, although the original decision declaring it a nuisance was based on the theory that Congress had the sole authority to permit its erection.[16] Passing the absurdity of this judge's position, and reverting to the original problem as it stood before the Court when the matter first came before it, one may well ask: Would it not be more logical that this problem of policy should be regulated in the first instance by the body whose authority and supposed intentions in that regard are the decisive factor in the situation? Lawyers will recall the numerous cases in which astute lawyers and learned judges argued *pro* and *con* as to the inferences to be drawn from the fact that Congress did not act in a certain situation, or acted in a particular manner. I am sure that the men from Mars, or from some other country on our own globe where people are not fed at their mother's breast with the milk of judicial decisions, would say that the only body competent to deal with such questions is the body whose acts or intentions are supposed to be the decisive factor in the situation.

The admiralty jurisdiction cases referred to involved the question as to whether or not the admiralty jurisdiction of the United States extended to the non-tidal navigable waters of the United States. The real question, — and a very important one it was, — was whether the admiralty jurisdiction of the United States extended to the Great Lakes and the great river-systems of the West. By a series of decisions, the most important one of which was rendered in 1825 in the case of *The Thomas Jefferson,*[17] the United States Supreme Court had declared that the admiralty jurisdiction of the United States as granted by the United States Constitution was limited to tide-water, thus excluding the Great Lakes and the great inland river-systems of this country. In two decisions rendered in 1851 and 1858, respectively, the earlier decisions were overruled, and the admiralty jurisdiction of our federal courts extended to the great avenues of trade and commerce which had in the meantime come to play a great part in the life of this country. Before these decisions had been rendered, Congress had passed a law which gave the federal courts this extended jurisdiction, but this law was attacked as unconstitutional on the

[16] Pennsylvania v. the Wheeling & Belmont Bridge Co., 18 How. 421, 15 L. ed. 435 (1855).
[17] 10 Wheat. 428, 6 L. ed. 358 (1825).

ground that the extent of the admiralty jurisdiction of the federal courts had been settled by the Constitution itself. Of course, the Constitution itself had done nothing of the kind, but what was meant was that it was settled by the Constitution as interpreted in the series of decisions culminating in the case *In re The Thomas Jefferson.* The Supreme Court, in two remarkable decisions, — remarkable for their boldness of attack and the absence of the usual resort to the making of distinctions that make no difference, — decided that a change of circumstances changed the meaning of the Constitution. No one can quarrel with the decisions, but one may well doubt the wisdom of leaving the decision of such questions to a Court bound by precedent and theoretically limited to declaring the meaning of the Constitution as it was understood in 1787, rather than to the policy-making arm of the Federal Government, whose duty it is to shape the nation's policy in accordance with the needs of the times.

IV

Such questions should not be decided on *a priori* reasoning alone. The real test here, as elsewhere, is that of history. And it is my considered judgment that history has pronounced against it. This pronouncement was made in two ways: first, by exposing the shortcomings of our system; and, second, by the lack of significant imitation on the part of other nations. The first assertion can, of course, be substantiated only by an exhaustive review of the pertinent decisions and their results, which cannot, of course, be done in the space of an article such as this. I may, however, point to a few decisions by way of illustration, and in order to further clarify my thought on this subject. To begin with, there is the question of *exclusiveness.* Under our system, the Courts are the exclusive organ for the review of state action. I do not mean to insist that the legislature ought to be the exclusive organ of such action. It may be advisable to permit the Federal Courts to exercise that power where Congress had no opportunity to speak its mind. But the power primarily belongs to Congress and where Congress has spoken, that should be determinative of the issue. Failure to speak should, on principles recognized in our courts, create a presumption at least that Congress desired to give the State a free hand. On such principles, the great welter of decisions on the subject would completely disappear. The great judgment in *McCulloch v. Maryland*[18] might

[18] *Supra* n. 1.

still be needed. But we may very well doubt whether *Brown v. Maryland*[19] would be necessary or should have been decided the way it was. I do not mean to suggest that it was improperly decided under our Constitution as it stands, although great and good men have had their doubts about it, and some have changed their opinion on the subject in the course of time, as did Chief Justice Taney.[20] But under a constitution as it should have been written, the question decided in *Brown v. Maryland* would have been left to Congress, and in the absence of action by Congress the action of the State would have been permitted to stand. The same is true of the questions involved in such cases as *The Mayor of New York v. Miln,*[21] *The License Cases,*[22] and *The Passenger Cases.*[23] All of these cases involved questions of policy which could be determined properly only by the federal legislature. It was, therefore, a most inefficient way, to say the least, to leave the judgment on such questions to judges who must speculate on the true intentions of Congress in the premises.

But our actual system is not merely an inefficient way of determining policy. It is that at best. At its worst it is downright vicious. This is best illustrated by the development of our law of taxation, which has become such a scandal that it has been found necessary to propose a constitutional amendment to remedy the evil. I am referring to the series of cases dealing with the taxation, or exemption from taxation, of so-called *governmental instrumentalities.* I have dealt elsewhere at some length with this

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[19] 12 Wheat. 419, 6 L. ed. 419 (1827).

[20] In his capacity of Attorney General of the State, Taney argued Brown v. Maryland, *supra* n. 19, on behalf of that State, contending that the Maryland statute there under consideration was constitutional. But he subsequently changed his mind on the subject. As Chief Justice of the United States Supreme Court he said, in his opinion in the Lincense Cases, 5 How. 504, 575, 12 L. ed. 256 (1847), referring to Brown v. Maryland:

> "I argued the case in behalf of the State, and endeavored to maintain that the law of Maryland, which required the importer as well as other dealers to take out a license before he could sell, and for which he was to pay a certain sum to the State, was valid and constitutional; and certainly I at that time persuaded myself that I was right, and thought the decision of the court restricted the powers of the State more than a sound construction of the Constitution of the United States would warrant. But further and more mature reflection has convinced me that the rule laid down by the Supreme Court is a just and safe one, and perhaps the best that could have been adopted for preserving the right of the United States on the one hand, and of the States on the other, and preventing collision between them."

[21] 11 Pet. 102, 9 L. ed. 648 (1837).

[22] 5 How. 540, 12 L. ed. 272 (1847).

[23] 7 How. 283, 12 L. ed. 702 (1849).

subject.[24] I shall therefore limit myself here to a brief reference to a few of the cases illustrative of the subject.

In *Dobbins v. Erie,*[25] decided in 1842, the United States Supreme Court declared unauthorized a tax attempted to be collected by a state on an internal-revenue official who had been taxed on his *office as such;* on the ground that by taxing this federal official *in the form* that the tax was imposed, that is to say, by taxing *the office eo nomine,* the State was taxing a governmental instrumentality of the United States. The soundness of this decision is open to question, but the decision is comparatively unimportant, and of itself would merit little attention. But in 1871, in the very important decision of *Collector v. Day,*[26] it was held that a state judge is exempt from a general income tax levied by the Federal Government, on the ground that in *McCulloch v. Maryland* and *Dobbins v. Erie,* it had been established that a State cannot tax an instrumentality of the Federal Government, and that the alleged *equality* of the state governments with the Federal Government required that a similar principle should be applied to the instrumentalities of the state governments. Since then the exemptions have multiplied to such an extent that they have become a separate branch of our law, and the amount involved in these exemptions has become a serious menace to the taxation system of the country.

The curious thing in all this is that neither the federal nor the state governments have asked for these exemptions for individuals or private corporations, at least as far as is disclosed by the cases. And it seems never to have occurred to any one of the judges sitting in these cases to inquire whether the government whose instrumentalities are supposedly being taxed, whose rights are supposedly being infringed upon, and in order to preserve whose rights the taxation is being invalidated, has asked for the exemption, or is in any way interested therein.[27]

The fact is that the Federal Government, whose rights were supposedly being encroached upon in the taxing of Mr. Dob-

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[24] Boudin, *The Taxation of Governmental Instrumentalities* (1934) 22 GEO. L. J. 1-40, 254-292.

[25] 16 Pet. 435, 10 L. ed. 1022 (1842).

[26] 11 Wall. 113, 11 L. ed. 122 (1871).

[27] In the case of Willcuts v. Bunn, 282 U. S. 216, 51 S. Ct. 125 (1930), in which a dealer in securities sought to be exempted from general income tax on so much of his income as was derived from dealing in municipal securities, on the ground that municipal securities are State "governmental instrumentalities", two States, New York and Massachusetts, actually appeared and filed briefs through their attorneys general as *amici curiae, in opposition*

bins, did not object to his taxation, as far as we know. Nor has the State of New York, whose "instrumentality" was being taxed in *Collector v. Day,* and whose rights were supposed to have been encroached upon and its sovereignty diminished by such taxation, asked for that exemption, as far as we know.

This involves another question which we shall consider further below, namely, *at whose instance, and in the presence of what parties,* ought this question of distribution of governmental powers between State and Nation be determined, assuming that it is to be determined by courts? At this point, we merely desire to state that all of this excrescence upon our constitutional law would have been impossible had the question been left to the determination of that branch of the government to which it properly belongs, — namely the legislature. It was for the federal legislature to say, *as a matter of policy,* whether or not it would permit the states to tax its officials; and it should have been left to the legislatures of the states to claim such exemption, assuming that the states were entitled to it. It is interesting to note in this connection that in the first of these taxation cases, namely, *Dobbins v. Erie,* the judgment was placed upon the ground that the Federal Government through its legislature, determined what compensation Mr. Dobbins should get for the services he rendered to the Federal Government, and that the state taxing powers could not, therefore, diminish that compensation. It did not occur to the Judges of the United States Supreme Court to ask themselves whether the Federal Legislature, whose prerogatives were supposed to have been invaded, had objected to the invasion. But there would have been no necessity for either asking or deciding the question, had the matter been originally placed in the hands of the Congress for determination. In countries where that is the case, no such tragically absurd situations arise as that with which we are confronted in this country in the domain of taxation because of the line of decisions following *Collector v. Day.*

V

It is, of course, impossible in an article like this, to give even a summary of the practices in this respect in other countries. We

to the exemption. This evidently impressed the Supreme Court, and the decision denied the exemption, at least as to securities not issued at a discount. In the course of his opinion in this case, Mr. Chief Justice Hughes remarked: "No state has ever appeared at the bar of this court to complain of this Federal tax, and it is not without significance that in the present instance the States of New York and Massachusetts do appear here as *amici curiae* in defense of the tax".

shall, therefore, only review here briefly the provisions of the three constitutions which we consider significant in this connection. These are: The Constitution of Switzerland, the Constitution of the German Republic (Weimar), and the Constitution of the Republic of Austria.

In view of the notion prevailing in this country that somehow the exercise of supervisory control by a federal agency other than a court is peculiarly derogatory to the sovereignty of a State, it is interesting to note that the Federal Constitution of Switzerland specifically provides that the cantons are sovereign in so far as their sovereignty is not limited by the Federal Constitution, and it also contains a provision similar to our Tenth Amendment, to the effect that all powers not delegated to the federal government are reserved to the cantons.[28] It should also be noted here that the Swiss Constitution contains provisions similar to those contained in the Fourteenth Amendment to the United States Constitution, except that the provisions of the Swiss Constitution are couched in much broader language and have been construed to place in the keeping of the federal government the protection of the liberties and rights of the individual citizens against infringement by the cantonal governments. The Swiss Constitution also expressly provides that the Federal Tribunal, which corresponds to our Federal Supreme Court, has the power to decide conflicts of authority between the Confederation and the canton.[29]

Nevertheless, the Swiss Federal Tribunal is by no means the only, or even the most important, arm of the federal government to decide the question of competence between the federal government and the cantons. The most important questions, those which make up the backbone of a system of constitutional law, are decided by the Federal Council, which is the executive branch of the government, and the Federal Assembly, which is the legislature of the Swiss federal government. And since under the Swiss Constitution, the Federal Council is not really an independent branch of the government but merely *the executive arm of the legislature,* corresponding very largely to the position of the Cabinet in the British government, the real power of decision on this all important question of competence resides in the legislature. This is

[28] Article 3 of the Swiss Constitution provides as follows: *"Les cantons sont souverains entant que leur souverainete n'est pas limitee par la constitution federale, et, comme tels, ils exercent tous les droits qui ne sont pas delegues au pouvoir federal."*

[29] Swiss Constitution, Art. 113.

due to the fact that under the Swiss Constitution the Federal Tribunal has no power, such as our Supreme Court has, to declare a federal law unconstitutional, but must carry out all laws made by the Federal Legislature. The Federal Legislature is, therefore, the court of last resort as to what matters should be left to the competence of the Federal Tribunal and what should be excluded from it, — exactly the reverse from the situation in this country, where it is the United States Supreme Court that decides this all important question of the distribution of federal powers. The Swiss federal legislature is in a position to determine by legislation what questions of conflict between the federal government and the cantons should be left to determination by the Federal Tribunal, and what questions should be determined by other branches of the federal government.[30]

The so-called Weimar Constitution of the German Republic divides the supervision of this question of competence between the federal legislature and a special federal tribunal, which, under the Constitution, was to be organized under a law of the legislature. But here again, and perhaps even more so than in the case of Switzerland, the real power of decision is in the hands of the federal legislature. The court in question is not an ordinary court, but a special court created for the decision of political questions, the particular subject here under consideration are limited to cases where there is *any doubt as to whether or not a state law infringes upon a federal law.* Under the Constitution of the German Republic, no court can declare a law of the federal legislature unconstitutional. In the nature of things, therefore, no federal court could declare that a federal law infringes upon the rights of a state. The only question that could come before such a court would be whether a state law infringes upon the rights of the federal government. If there is a federal law on the subject that settles the question, if the meaning of the law is clear. We have, therefore, this situation: In the first place, the ordinary courts have apparently no right to pass on any such question at all, the question being reserved to the special tribunal contemplated by the Constitution to be created under a law of the federal legislature.[31] And the latter court is limited to passing upon one of the following questions: (1) Whether under the Constitution, in the absence

[30] See Art. 113 of the Swiss Constitution.

[31] See Art. 13 and 108 of the Weimar Constitution and notes to the same in Arndt's Edition of that Constitution.

of any federal law, the state law would be valid; (2) whether there is a federal law on the subject; and, (3) whether, if there be a federal law on the subject, the state law in question is in conflict with the same. But even with these limitations, the matter is not left entirely to this special federal tribunal. For, under the Weimar Constitution, the vast subject of socialization of natural resources, and a wide power of control over the economic life of the country generally, is committed to the federal government; and the Constitution expressly provides that as regards this vast subject, the federal government has a direct veto over state legislation. This veto, according to the most authoritative commentators, is to be exercised by the federal "Government", which is responsible to the federal legislature.[32]

The Constitution of the Republic of Austria is supposed to have been drafted by a man who was an admirer of the United States Constitution.[33] It was, therefore, to be expected that here, if anywhere, our own manner of disposing of the problem under consideration would have been adopted. An examination of the Constitution of the Republic of Austria will show, however, that while there is a certain formal imitation of our own Constitution, the substance of its provisions are utterly at variance with our own practice at the most crucial points. The Constitution of the Republic of Austria specifically provides that the ordinary courts shall have no power to examine into the validity of laws duly proclaimed,[34] but it creates a special Constitutional Court to which that function is delegated. The Constitutional Court is, however, both in its composition and its functions, really a political body rather than a court. It is empowered, among other things, to decide upon questions of conflicting claims of jurisdiction between administrative authorities and the ordinary as well as the administrative courts. In passing, it is well to note that the Constitu-

[32] Article 7 of the Weimar Constitution, Section 13, provides that the Federal Legislature has the right to legislate on "*die Vergesellschaftung von Naturschaetzen und Unternehmungen sowie die Erzengung, Herstellung, Verteilung und Preisgestaltung wirtschaftlicher Gueter fuer die Gemeinwirtschaft.*" Article 12 of this Constitution provides: "*Gegen Landesgesetze, die sich auf Gegenstaende des Art. 7, Ziff. 13, beziehen, steht der Reichsregierung, sofern dadurch das Wohl der Gesamtheit im Reiche beruehrt wird, ein Einspruchsrecht zu.*" Commenting on this provision Arndt says: "*Dieses Einspruchsrecht ist ein vollstaendiges Veto, Darueber entscheidet kein Gerichtshof, sondern allein die dem Reichstage verantwortliche Reichsregierung.*"

[33] Dr. Hans Kelsen, the noted Austrian jurist.

[34] Constitution of the Republic of Austria, Art. 89 (1). See also Art. 140 (4).

tion of the Republic of Austria does not contain[35] anything in the nature of a bill of rights, and the laws of the Austrian federal legislature cannot, therefore, be attacked on the ground of "unconstitutionality" in the ordinary acceptation of the word in this country, — that is to say, for alleged infringement of individual rights. The most important function of the Constitutional Court lies in the realm of the very problem here under consideration, namely, the decision of questions of competency between the federal and state governments, including questions of conflict between federal and state legislation, as well as the infringement by state legislation on the federal constitution. The manner of the disposition of this problem by the Constitution of the Republic of Austria is, therefore, of particular interest in our discussion.

The first thing to be noted in this connection is the provision as to *who* may invoke the authority of the Constitutional Court by questioning the validity of any law. On this point, the Constitution as originally adopted, provided that the authority of the Constitutional Court can be invoked by a federal ministry on the question of the constitutionality of a state law, and by a state government on the question of the constitutionality of a federal law.[36] These provisions proceed upon the theory that the question involved is not one of individual right. Therefore, the government whose sphere of competency has been encroached upon is the only aggrieved party, and the only party to complain. By an amendment passed in the year 1929 it is provided that either of the two ordinary federal supreme courts, — the Supreme Judicial Court and the Supreme Administrative Court, — may invoke the authority of the Constitutional Court, by referring to it the question of the constitutionality of any law which is involved in any case before them as to the constitutionality of which the inquiring court is in doubt. By this amendment, the two ordinary high courts of Austria, which are themselves arms of the federal government, may raise the question of constitutionality for their own enlightenment. But still, no provision for the raising of the question by an individual, — for the notion of an individual hav-

[35] This constitution ought really to be referred to in the past tense, as it has recently been supplanted by a so-called corporate or Fascist constitution.

[36] Art. 140 (1) of this constitution provides that "The Supreme Constitutional Court shall render judgment, on application of the federal ministry, upon the constitutionality of state laws; on application of a state government, upon the constitutionality of federal laws." Subdivision (2) of the same article provides: "The ministry that makes the application must communicate it immediately to the competent state government or the federal ministry, as the case may be."

ing the right to raise the question of the infringement by either the federal government upon the powers of the states, or by a state upon the powers of the federal government, was utterly foreign to either the original drafters of this Constitution or of those who were responsible for the amendment just referred to.

Another point, which should be considered in this connection, is that under the provisions of this constitution, as amended and supplemented by legislation, the government likely to be aggrieved by any proposed legislation, need not wait until the damage is done, but may invoke the power of the Constitutional Court in advance of the passage of such legislation. The government likely to be affected may bring the question to an issue by attacking before the Constitutional Court any "project of law destined to be submitted to the decision of a legislative body".[37] Clearly, this is a much more sensible way of meeting the situation than our own practice of either waiting for years before a decision can be obtained from the United States Supreme Court on the question of the constitutionality of a law, permitting all the harm of a possibly unconstitutional law to be wrought in the meantime, or of enjoining the operations of government, thus suspending the operation of a possibly constitutional law pending the decision.

The purely political character of the Constitutional Court, and the utterly different point of view from which the entire subject of constitutionality is viewed in this Constitution from that prevailing in this country, is best seen by a third provision of this Constitution which deserves our attention. That provision has to do with the effect of a decision of the Constitutional Court on the law declared unconstitutional. As already pointed out, the underlying theory of our notion of "unconstitutionality" is that of a *contract* either between the federal government and the states, or between the individual and the government, — a contract the violation of which makes the action of the government involved a *nullity*. Under this theory, the decision of necessity goes to the question of enactment, and a decision that a certain law is unconstitutional renders it void *ab initio*, so that, theoretically, there has never been such a law. Such is not the theory of "unconstitutionality" under the Constitution we are now considering. Under this Constitution, what we call the "basic law" is not a contract either between the federal government and the states or between the people and the government. The Constitutional

[37] Laws of 1930, art. 54.

Courth created by this Constitution, is, therefore, not conceived, as with us, as a court of law expounding a *contract* between *parties,* but rather as a political Council of Revision, empowered to distribute the powers of government between the federal and state governments in accordance with the spirit of the Constitution and the requirements of the times. The Constitutional Court's declaration that a law is unconstitutional, does not, therefore, automatically render the law of no effect. When a law is held by the Constitutional Court to be unconstitutional, the judgment of the Court is certified to the government whose legislature passed the law, and *that government* thereupon publishes a *decree annulling the statute.* The law does not, in fact, become annulled until such a decree of annulment is published by the government whose law is involved. And when the law is thus annulled, its annulment *does not go back to the time of its enactment.* On the contrary, up to the time of its annulment by such decree, it is considered to have been a valid law, and everything done under it remains unaffected by the decree of annulment.[38] Furthermore, the Constitutional Court is empowered to decree *annulment from a future date.*[39]

It will be seen from the foregoing, that whatever resemblances there may be between the provisions of the Austrian Constitution with respect to unconstitutional legislation and our own practice on the subject, such resemblances are purely superficial, and that the provisions of the Austrian Constitution proceed upon a theory diametrically opposed to that upon which our own practice is based. There is, however, one point at which the two opposing theories may be harmonized, and the Austrian practice might be adopted in this country with considerable advantage to our system of government.

Notwithstanding our theory of the absolute nullity of unconstitutional legislation, our actual practice is to the contrary, as we have seen in the discussion of *Martin v. Hunter's Lessee* and as I

[38] Constitution of the Republic of Austria, Art. 140 (3). These provisions do not apply to a case, under the constitution as amended, in which one of the ordinary Supreme Courts raises the question of constitutionality of a law involved in a case pending before it for adjudication. In such a case, the inquiring court determines the case before it as if the statute had never been passed.

[39] As the constitution stood before amendment, the Constitutional Court had the right to annul as of a future date up to six months from the time of the rendering of the decision. By an amendment passed in 1925, this period was increased to one year.

have shown at greater length elsewhere.[40] The fact is, that the theory of absolute nullity is so utterly absurd that no system of government could exist for a day were the theory to be carried into actual practice. In practice, therefore, we have departed from it very widely in order to avoid the chaos which Mr. Justice Johnson said in his concurring opinion in *Martin v. Hunter's Lessee* must ensue if this theory be followed to its logical conclusion. For instance: The United States Supreme Court has limited its own power in this connection by declaring that it has no right to declare a state law unconstitutional for repugnancy to the state constitution.[41] The United States Supreme Court has also held that it will not consider the problem of constitutionality where the party attacking the law is not an aggrieved party.[42] All that is necessary, therefore, to make our practice similar to that provided for under the Constitution of the Republic of Austria, with respect to the particular question here under consideration, is for the United States Supreme Court to declare that the only really aggrieved party is the government whose domain has been invaded, powers infringed, or dignity impaired. If the United States Supreme Court were to say tomorrow, as it should have done in 1842, that only the federal government can be heard to complain if its dignity has been invaded by taxing Mr. Dobbins, and that Mr. Dobbins is, thus, not an aggrieved party, then the flimsy legal structure of the exemption from taxation of so-called "governmental instrumentalities" would fall of its own weight, and no constitutional amendment such as was introduced by Senator Hull

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[40] See Boudin, *The Problem of Stare Decisis in our Constitutional Theory* (1931) 8 N. Y. U. L. Q. REV. 589-639; Boudin, *Stare Decisis, State Constitutions, and Impairing the Obligation of Contracts by Judicial Decisions* (1934) 11 N. Y. U. L. Q. REV. 31-47, 207-235.

[41] Elmendorf v. Taylor, 10 Wheat. 152, 6 L. ed. 289 (1825); Bank of Hamilton v. Lessee of Ambrose Dudley, 2 Pet. 492, 7 L. ed. 497 (1829).

[42] See Massachusetts v. Mellon, 262 U. S. 447, 43 S. Ct. 597 (1923). In these cases, the United States Supreme Court refused to consider the consitutionality of the Federal Maternity Act of 1921, saying: "In the first case, the State of Massachuetts presents no justifiable controversy entiher in its own behalf or as representative of its citizens. The appellant in the second suit has no such interest in the subject matter, nor is any such injury inflicted or threatened, as will enable her to sue." On the question of the right of the state to bring the action the Court said: "In the last analysis, the complaint of the plaintiff state is brought to the naked contention that Congress has usurped the reserve power of the several states, by the mere enactment of the statute, though nothing has been done and nothing is to be done without their consent." Thus, this is a clear intimation that the distribution of powers between the Federal and State governments is a matter which concerns only the governments involved, and that this distribution of powers may therefore be changed by their consent.

would be necessary in order to abate the nuisance which has become so serious a menace to the health of our public finance.

VI

This question of a possible revision of our concepts of "constitutionality" in the domain of the division of power between federal and state governments is of critical importance at this time and deserves the attention of all thoughtful lawyers. The crying evil in the domain of taxation which has grown up since the decision in *Collector v. Day* is only one reason why that is so. Important as that subject is, it is of comparatively minor importance when compared with the much more serious problem presented by the question of legislation on the subject of *commerce,* — involving as that does the entire subject of experimental legislation exemplified by the so-called National Industrial Recovery Act. Unless we are definitely convinced that the economic ideas underlying that legislation are utterly wrong, and cannot possibly become right at any future time, — in other words, unless we are absolutely convinced that the *laissez faire* system is the only *possible* economic system, — and are, therefore, definitely committed to a course which must bring us back to the condition of the law which existed before any of the new experimental legislation was passed by Congress, we must cast about for a way of revising our old concepts upon which we based the division between interstate and intrastate commerce, and find a method of making these new concepts effective under the commerce clause of the United States Constitution.

We need not go here into a discussion of the subject as to whether or not under present-day conditions there is such a thing as purely intrastate commerce. Whatever economists may think on the subject, it will probably suffice for the majority of lawyers that the Constitution says that there is such a division, and that, therefore, this division must continue to exist. Some of us may think that if we follow the example of the United States Supreme Court under the leadership of Chief Justice Taney in the admiralty cases, we might re-define the concept of *interstate commerce* in accordance with present-day conditions in a manner which would not interfere with experimental legislation of the type involved in the National Industrial Recovery Act and the practices attempted to be set up thereunder. It is doubtful, however, whether the profession or the courts could be persuaded to adopt such a radical redefinition of commerce as would practically do

away with the distinction between interstate commerce and intrastate commerce. But some such result is absolutely imperative if experimental legislation of the type involved in the National Industrial Recovery Act is to be made possible. For, clearly, the very basis of that legislation, — that is to say, the economic theory underlying it, — is such as to do away with the old time distinction between interstate and intrastate commerce. And the practical situations which have arisen under the codes set up under that Act, as shown by the litigation which has come before the courts, demonstrate to superfluity that, with the possible exception of what is called the service trades (and there is some doubt even as to those), there is no longer any such thing as purely intrastate commerce. When a manufacturer in Connecticut brings an action to restrain the code authority in the garment industry from enforcing its provision with respect to differentials in wages which places Baltimore in the Southern Zone instead of the Northern Zone, on the ground that the Baltimore clothing manufacturer competes with him in the New York market, there is hardly any room left for doubt that our notions on the subject of interstate commerce are thoroughly antiquated and cannot stand up against the actualities of present-day economic conditions.

Some means of harmonizing the Constitution with present-day economic conditions must, therefore, be found, unless we are resigned to give up the attempt to get out from under the depression.

Under these circumstances, I submit that the least revolutionary way out is to redefine not so much the concept of interstate commerce, as the notion as to who is the "party aggrieved" in the question of the distribution of powers of government between Nation and State. Once we accept the opinion of the responsible jurists who framed the Constitution of the Republic of Austria, our troubles are largely at an end. If Messrs. Jones and Robinson cease to be "parties aggrieved" when the federal government invades the sovereignty of the States by passing a law, or permitting the setting up of a code, which regulates what to Messrs. Jones and Robinson seems to be intrastate commerce, the chances of the law or of the codes being upset at the suit of some State are so infinitesimal, that we would not have to lie awake of nights worrying over the problem. The fact of the matter is, that the States and the Nation are interested in setting up some form of control over business which would enable us to regulate economic matters which have hitherto been left unregulated. The difficulty

is that present-day economic life is so complicated that there is really no way of telling what is interstate commence and what is intrastate commerce.[43] As a result, whichever government sets up the controls, the legislation or whatever form the controls assume, will be attacked on the ground that the matter really belongs in the domain of the other government. If the controls are federal and set up under a federal law, Messrs. Jones and Robinson will claim that the sovereignty of the States is infringed upon; while if the individual States set up these controls, some other Jones and Robinsons, — and not infrequently the very same ones, — will contend that the States have no such powers, because, forsooth, under the United States Constitution such things belong within the sphere of competency of the federal government. The judges, before whom these contentions come up, are of necessity at a loss how to decide since we are dealing with abstract notions which have no counterpart in the realities of actual life. And so long as an individual can compel a court to decide whether a certain economic activity belongs in *either inter*state commerce *or intra*state commerce, so long chaos will reign, and impede or render nugatory

[43] The case of Seeling v. Baldwin, 7 F. Supp. 776 (1934), deserves particular attention in this connection. This was a suit against the Commissioner of Agriculture of the State of New York to enjoin the Commissioner from refusing to issue to the plaintiff a license for the sale of milk unless he complied with the so-called Milk Control Act. License had been refused, or was threatened to be refused, because the plaintiff was selling milk imported from other states into the State of New York, in violation of the provisions of the Milk Control Act. The milk was resold in the original cans, and the prices paid therefor in the state from which it was imported was below the price established for payment to the producer by the Milk Board established under the law. The case was heard by a statutory court, and an injunction *pendente lite* granted, in a very interesting opinion written by Learned Hand. Judge Hand commences his opinion by stating that Congress had not legislated on the subject, and but for previous decisions of the United States Supreme Court, it might well be argued that Congress not having legislated on the subject, the states were free to legislate; that the question whether the regulation in question was a *direct* burden upon interstate commerce could well be doubted, but for decisions of the United States Supreme Court to the contrary. The question of the propriety of the legislation in itself was not doubted, as this particular law had been approved by the United States Supreme Court in the case of Nebbia v. New York, 291 U. S. 502, 54 S. Ct. 505 (1934). The only question, therefore, was whether the feature attacked in this case was invalid because it was a regulation of interstate commerce. On this question, Judge Hand wrote: "We do not of course mean that the plan is not commendable in itself, or that the means are not well adapted to the end. *Nebbia v. New York, supra,* has authoriatively settled the state's power, and *it is easy to see how the whole scheme might be imperiled, and conceivably wrecked, unless foreign milk, bought at cut price, could be kept out of competition with the domestic supply.* Furthermore, though a complete exclusion would *give even* greater security, it might have been open to a charge of unfair discrimination, which cannot be made as it is. The act does not try to circumscribe the 'milk-

all attempts at real experimentation in the domain of economic legislation. The only remedy is to say to Messrs. Jones and Robinson that *since it is not a question of the powers of government in general, but only as to which government should exercise the power in question,* they are not really aggrieved when either of these governments does the job, and that the only aggrieved party is the government whose sphere of competency is supposed to have been invaded.

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shed' as equal competition defines it; it merely prevents price-cutting throughout its area. *So put there is much to be said for the propriety of the extra-territorial feature, and Congress might well be induced to sanction it as it stands.* But that sanction is, we think, eessential to its validity.'' Judge Hand also intimated that the Supreme Court might adopt a ''more realistic'' canon applicable to the subject, but felt that an inferior court should not venture to do so. ''So far'' said the, ''as we are to have *a more realistic canon,* it must be worked out step by step in the Supreme Court.''