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Dual Sovereignty and the Supreme Court

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DUAL SOVEREIGNTY AND THE SUPREME COURT.

THE Articles of Confederation were little else than a treaty of alliance between thirteen wholly sovereign states. The National Government operated solely upon the States. It had no power over the citizen. His contracts and his allegiance were solely with and to his State. An Act of Congress was a law without a sanction, since the National Government had no judiciary to construe it, no executive to enforce it. Congress had none of the powers of a sovereign government. It could only recommend. Disorder was rife. A total separation of the States seemed imminent, yet union there must be if the hopes of the Revolution were to be realized.

The grave situation of the States and of the people presented a problem almost unique; the solution of that problem by the Constitutional Convention was wholly so. It was without precedent in the annals of mankind. Leagues of independent sovereign entities bound together by treaty compact for the common weal, there had been; completely unified nations having central governments vested with the full sovereignty there were; but "an indissoluble Union composed of indestructible States" based on the concept of a dual sovereignty, there was not, nor ever had been. This is not intended as an assertion that the Constitution was an original production. Its framers gleaned much from history, much from the two centuries of institutional growth of England and took many provisions from various state constitutions. But the basic principle of dual sovereignty, a dual citizenship carrying a two-fold allegiance, combining national strength and individual liberty, the citizen amenable to both state and national laws, was an original concept.

In the National Government were vested those powers of which the exercise pertains to the whole people; such as dealing with foreign nations, establishing a uniform currency, waging war, laying tariffs and regulating affairs between the States, thus creating a government strong enough to meet external aggression and to preserve internal order.

To the States severally were reserved all those powers the exer-

cise of which is essential to the control of their domestic affairs, thus leaving with the people of each state the regulation of all matters of local concern, preserving a close contact of the citizen with the more intimate processes of government and insuring that diffused political life without which despotism in some form is certain to develop.

The historian, Elson, speaking of our Constitution, says:

> "It created, without historic precedent, a federal-national government. It combined national strength with individual liberty in a degree so remarkable as to attract the world's admiration. Never before in the history of man has a government struck so fine a balance between liberty and union, between state rights and national sovereignty. The world had labored for ages to solve this greatest of all governmental problems, but it had labored in vain."

The governmental machinery devised to maintain this nice balance between the two sovereignties was not original. In its general design it followed the division of powers advocated by Montesquieu in his *Spirit of Laws*.

The powers of the National Government were distributed among three great equal and coordinate departments, Legislative, Executive and Judicial, each to operate within the limits prescribed for it by the Constitution. Manifestly so long as each of these departments shall function only within those circumscribed limits there can be no usurpation of despotic powers and no invasion of the rights reserved to the States and to the people. Manifestly, also, in order to confine each of these departments to the exercise of only such powers as are assigned to it, and to restrain the Federal Government on the one hand from any invasion of the reserved rights of the States, and the State Governments on the other hand from any invasion of the powers granted to the National Government, the power to construe the Constitution and measure all laws, both State and Federal, by the standard of the Constitution had to be reposed in some person or tribunal. That power is essentially judicial and was, by a necessary implication of the "supreme law" clause of the Constitution, reposed in the Judiciary. It is by virtue of this clause that the Supreme Court exercises the power to pronounce upon the constitutionality of laws and to declare void any legislative act repugnant to the Constitution, a power never exercised by any other judicial body in the world. That is not because of any new power invented and reposed in that court. It arises *ex necessitate* from our unique system of dual government, from the distribution of the

powers of the National Government among coordinate departments, from the fact that the Constitution is the supreme law of the land, and from the ordinary power and correlative duty of every court to construe and apply the law. There is nothing new or strange in the relation of the Supreme Court to the Constitution. It is the universal relation of courts to law.

Just so long as the Constitution shall be "the supreme law of the land" will the Supreme Court possess this power. The two things are correlative and inseparable, for it is of the very essence of a court to construe and apply the law. When, if ever, this power shall be taken from the Supreme Court, either the Constitution will have ceased to be the supreme law of the land, or the Supreme Court will have ceased to be a court. The defense of this power by Chief Justice Marshall in *Marbury v. Madison* is unanswerable. He said:

> "It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or that the legislature may alter the Constitution by an ordinary act.
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> "Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.
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> "If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable. * * * *
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> "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."

These things are simple and elementary but the many latter day proposals to so amend the Constitution as to curtail or abrogate this essential power of the Supreme Court seem to call for a continual emphasis of fundamental things if the Federal Republic inaugurated and sustained by the Constitution is to stand.

Until recent times there has been shown little disposition on the part of the people frequently to amend the Constitution, and but slight tendency so to amend it as to disturb the equipoise of the three great coordinate branches of the Federal Government, or to transfer to that government so large a part of the reserved powers of the States and of the people as to endanger the dual sovereignty

on which our institutions rest. But there has been a persistent recurrence of proposals during the last fifteen years to do both of these things.

The first eight amendments comprise the Bill of Rights. The ninth and tenth emphasize the reserved sovereignty of the States. These ten were adopted in 1791, almost contemporaneously with the original Constitution. The Eleventh Amendment withdrew from the Federal Courts jurisdiction of any suit against a State by a citizen of another State or of a foreign nation. The Twelfth, changing the manner of electing the president and vice-president, was adopted in 1804. The next three amendments were the product of the Civil War. No others were adopted till 1913. Since then four amendments have been made. As indicated by Judge Saner in his address as last retiring President of the American Bar Association, during the period from 1804 to 1913, three amendments were made, an average of one to every 36 years. Since 1913 four have been adopted, an average of one in less than three years. There have recently been pending before Congress nearly 100 proposals to amend the Constitution. Many of these seek to transfer to the National Government the control of affairs originally reserved to the States. It has become the fashion for protagonists of Federal legislation found to be invasive of State sovereignty, immediately to wage an intensive campaign so to amend the Constitution as to transfer the obstructing segment of the rights of the States to the National Government. This evidences a most dangerous tendency which if long enough and successfully indulged will eventually wear away all of the reserved powers of the States, transfer the control of all local affairs to Federal bureaus operated from Washington, and ultimately make the States mere administrative subdivisions of a completely centralized nation. Our government will then no longer be a Federal Republic but a centralized bureaucracy.

As said by John Fiske in his *Beginnings of New England*:

> "If the time should ever arise (which God forbid) when the people of the different parts of our country should allow their local affairs to be administered by the prefects sent from Washington, and when the self-government of the states shall have been so far lost as one of the Departments of France, or even so far as that of the Counties of England; on that day the progressive, political career of the American people will have to come to an end, and the hopes that have been built up for the future happiness and prosperity of mankind will be wrecked forever."

This process of revolution by constitutional amendment in detail,

though ultimately destructive of all state sovereignty, would still leave whatever of guaranty against despotism is furnished by the division of the Federal powers among the three coordinate departments. The Legislative department would still be a check upon the Executive; the Executive would still exercise some restraint upon the Legislative; the Judiciary would still serve to confine both the Legislative and the Executive within their respective spheres of constitutional action. The proposals so to amend the Constitution as to take away from the Supreme Court the power to declare an act of Congress unconstitutional, or to curtail that power, would, if successful, destroy or greatly impair the last remnant of our constitutional system.

The proposal to require the concurrence of all, or of more than a majority of the Supreme Court to declare a law unconstitutional carries its own condemnation. It concedes that the question of the constitutionality of a law is a judicial question. It concedes the principle that the Constitution is the supreme law of the land and that legislation in conflict therewith is not the law but void. Yet it would vest the power to determine what is the law, not in the Supreme Court, or in a majority of its members, but in a minority. It would be absurd to assume that a minority, the number and personnel of which would inevitably vary in different cases, would be more able, learned, patriotic or honest, than the majority, or even an equal number of the majority; but it is only on that assumption that even a specious argument can be made in favor of such an amendment. It is no answer to say that it should be made more difficult for the court to hold that a law is unconstitutional than that it is not. Such is already the case. It is and has been the law, as declared by the court from the beginning, that every legislative act is presumed to be constitutional and that this presumption must be overcome before the court will hold to the contrary. This presumption is as binding upon the majority of the Supreme Court as it is upon the minority. We are thus driven back to the absurd assumption that dissent connotes superior learning, patriotism and integrity.

Let it be remembered, moreover, that the Supreme Court has not, nor has it ever assumed to have any general veto power over the legislation of Congress. It does not pass upon the constitutionality of legislation in the abstract, but only when that question is involved in bona fide litigation between competent parties, much more often than otherwise in cases touching the life, liberty or property of

the citizen. The proposed amendment would make the rights of one citizen dependent upon the judgment of a minority of the Court and of another citizen dependent upon the judgment of the majority of that body, merely because the one claimed a right guaranteed by the Constitution while the other claimed a right under common or statutory law. Such a discrimination is shocking to the moral sense.

The most recent proposal is so to amend the Constitution as to permit Congress to pass upon the constitutionality of its own acts. This would, at one stroke, destroy our system of constitutional government, substituting therefor a purely parliamentary system like that of England. In *The American Commonwealth,* James Bryce, perhaps the most profound student of political history since Madison, says:

> "If such a body as Congress were permitted to decide whether the acts it had passed were constitutional, it would of course decide in its own favor, and to allow it to decide would be to put the Constitution at its mercy."

Contrasting our government with that of England he points out that the whole sovereignty of the English people is vested in the British Parliament and that Parliament is a sovereign constituent assembly, irresponsible and omnipotent.

> "It can make and unmake any and every law, change the form of government or the succession to the crown, interfere with the course of justice, extinguish the most sacred rights of the citizen."

All executive functions, though exercised in the name of the crown, are actually exercised by the ministers who sit with and are in fact a committee of parliament chosen by the majority for the time being.

To give to Congress the power to pass upon the constitutionality of its own acts would at once eliminate the Judiciary as one of the three coordinate departments of our Federal Government. Of the two then remaining, the Executive would have no protection against the encroachments of the Legislative. Remembering the many bitter contests between these two departments which our history presents, can anyone believe that, possessing the unlimited power which such an amendment would give, Congress would long leave with the Executive a vestige of the power reposed in that department by the Constitution? All the executive powers would soon be exercised by Congress through one or more of its committees. The President of

the United States would inevitably become as completely a mere figurehead as is the King of England or the President of France. Now and again a strong and popular President, backed by an overwhelming public approval, might for the time being successfully assert some measure of his constitutional authority, but since every Act of Congress, when declared constitutional by a majority vote of that body would in itself operate as an amendment to the Constitution, it is obvious that in the long run there would be left no constitutional authority for any president, however able or popular, to assert.

More slowly but as surely would disappear the dual sovereignty upon which our Federal Republic rests. The growing tendency to cut into the reserved powers of the States and of the people by constitutional amendment in detail, which is hardly restrained by the present deliberative method of amendment, could be so easily indulged that the progress of centralization would be greatly accelerated. The States would eventually become mere administrative entities; a State Governor would have less actual power than the mayor of a city; a State Legislature fewer subjects of legislation than a town council. Fiske's prophecy would become reality.

It is no answer to say that the members of Congress are elected for given terms and are presumably patriotic men. This may be granted, but if there is any one thing that history teaches it is the fact that unlimited power will, sooner or later, be exercised to the full. As said by Bryce:

> "Men come and go, but an assembly goes on forever; it is immortal, because while the members change, the policy, the passion for extending its authority, the tenacity in clinging to what it has once gained, remain persistent."

In this connection let us recall Judge Saner's remark that an English Parliament, contrary to a long established custom, once extended its own life from three to seven years. It may be added that it was only dissolved by a military dictator.

Such an amendment would not be evolution but revolution. It would not be progress but a reversion to an earlier type of government. There are many who earnestly believe that a pure parliamentary government is the best government, because it is the most quickly responsive to the popular will. But again history shows that a quick response usually registers the emotions as contrasted with the mature judgments of a people. The fact that parliamentary

government has worked well in England, "a tight little island" with a homogeneous population having a close unity of interests and traditions, is no earnest that it would even be tolerable for a people so widespread, so diverse in character and interests as our own. Ours is a country almost as large as the continent of Europe, with economic and social characteristics almost as varied as its climate and its soil. The parliamentary system has never been tested under such conditions. Our Federal system has been so tested. Under its sheltering egis our people have reduced a vast wilderness to a noble collection of separate, self-governing States, united in all things that pertain to the people as a whole. If we abandon that system we shall lose measurably in the beginning, but immeasurably in the end.

TAÇOMA *Overton G. Ellis.*