
Marx
Machiavelli
Chesterton
Emerson
Joyce
Abbott
Hardy
Montaigne
Cooper
Austen
Defoe
Melville
Haggard
Hugo
Carroll
Christie
Eliot
Grimmer
Stoker
Molière
Wilde
Maupassant
Byron
Einstein
Fitzgerald
Engels
Schiller
Garnett
Hawthorne
Smith
Kafka
Goethe
Dostoyevsky
Cotton
Hall
Baum
Kipling
Doyle
Willis
Henry
Leslie
Dumas
Nietzsche
Flaubert
Turgenev
Balzac
Stockton
Vatsyayana
Crane
Burroughs
Verne
Curtis
Tocqueville
Whitman
Gogol
Vinci
Homer
Widger
Tolstoy
Busch
Darwin
Thoreau
Potter
Freud
Zola
Twain
Scott
Lawrence
Plato
Kant
Jowett
Stevenson
Dickens
Harte
Andersen
Burton
Hesse
London
Descartes
Cervantes
Poe
Aristotle
Wells
Voltaire
Hale
James
Hastings
Cooke
Bunner
Shakespeare
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Our Changing Constitution

Charles Wheeler Pierson

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PREFACE

Citizens of the United States are wont to think of their form of government, a political system based on a written constitution, as something fixed and stable. In reality, it is undergoing a profound change. The idea which constituted its most distinctive feature, and in the belief of many represents America's most valuable contribution to the science of government, is being forgotten. Formed to be "an indestructible Union composed of indestructible states," our dual system is losing its duality. The states are fading out of the picture.

The aim of this volume is to point out the change and discuss some of its aspects. A few chapters have already appeared in print. "Our Changing Constitution" and "Is the Federal Corporation Tax Constitutional?" were published in the *Outlook*. "The Corporation Tax Decision" appeared in the *Yale Law Journal*. "Can Congress Tax the Income from State and Municipal Bonds?" was printed in the New York *Evening Post*. All of these have been more or less revised and some new matter has been added.

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OUR CHANGING CONSTITUTION

I

THE SALIENT FEATURE OF THE CONSTITUTION

Few documents known to history have received as much praise as the United States Constitution. Gladstone called it "the most wonderful work ever struck off at a given time by the brain and purpose of man." The casual reader of the Constitution will be at a loss to account for such adulation. It will seem to him a businesslike document, outlining a scheme of government in terse and well-chosen phrases, but he is apt to look in vain for any earmarks of special inspiration. To understand the true greatness of the instrument something more is required than a mere reading of its provisions.

The Constitution was the work of a convention of delegates from the states, who met in Philadelphia in May, 1787, and labored together for nearly four months. They included a large part of the best character and intellect of the country. George Washington presided over their deliberations. The delegates had not been called together for the purpose of organizing a new government. Their instructions were limited to revising and proposing improvements in the Articles of the existing Confederation, whose inefficiency and weakness, now that the cohesive power of common danger in the war of the Revolution was gone, had become a byword. This task, however, was decided to be hopeless, and with great boldness the convention proceeded to disregard instructions and prepare a wholly new Constitution constructed on a plan radically different from that of the Articles of Confederation. The contents of the Constitution, as finally drafted and submitted for ratification, may be described in few

words. It created a legislative department consisting of a Senate and a House of Representatives, an executive department headed by a President, and a judicial department headed by a Supreme Court, and prescribed in general terms the qualifications, powers, and functions of each. It provided for the admission of new states into the Union and that the United States should guarantee to every state a republican form of government. It declared that the Constitution and the laws of the United States made in pursuance thereof, and treaties, should be the supreme law of the land. It provided a method for its own amendment. Save for a few other brief clauses, that was all. There was no proclamation of Democracy; no trumpet blast about the rights of man such as had sounded in the Declaration of Independence. On the contrary, the instrument expressly recognized human slavery, though in discreet and euphemistic phrases.

Wherein, then, did the novelty and greatness of the Constitution lie? Its novelty lay in the duality of the form of government which it created—a nation dealing directly with its citizens and yet composed of sovereign states—and in its system of checks and balances. The world had seen confederations of states. It was familiar with nations subdivided into provinces or other administrative units. It had known experiments in pure democracy. The constitutional scheme was none of these. It was something new, and its novel features were relied upon as a protection from the evils which had developed under the other plans. The greatness of the Constitution lay in its nice adjustment of the powers of government, notably the division of powers which it effected between the National Government and the states. The powers conferred on the National Government were clearly set forth. All were of a strictly national character. They covered the field of foreign relations, interstate and foreign commerce, fiscal and monetary system, post office and post roads, patents and copyrights, and jurisdiction over certain specified crimes. All other powers were reserved to the states or the people. In other words, the theory was (to quote Bryce's "The American Commonwealth") "local government for local affairs; general government for general affairs only."

The Constitution as it left the hands of its framers was not entirely satisfactory to anybody. Owing to the discordant interests and mu-

tual jealousies of the states, it was of necessity an instrument of many compromises. One of the great compromises was that by which the small states were given as many senators as the large. Another is embalmed in the provisions recognizing slavery and permitting slaves to count in the apportionment of representatives. (The number of a state's representatives was to be determined "by adding to the whole number of free persons … three-fifths of all other persons.") Another was the provision that direct taxes should be apportioned among the states according to population. With all its compromises, however, the Constitution embodied a great governmental principle, full of hope for the future of the country, and the state conventions to which it was submitted for ratification were wise enough to accept what was offered. Ratification by certain of the states was facilitated by the publication of that remarkable series of papers afterward known as the "Federalist." These were the work of Alexander Hamilton, James Madison, and John Jay, and first appeared in New York newspapers.

One of the objections to the new Constitution in the minds of many people was the absence of a "bill of rights" containing those provisions for the protection of individual liberty and property (e.g., trial by jury, freedom of speech, protection from unreasonable searches and seizures) which had come down from the early charters of English liberties. In deference to this sentiment a series of ten brief amendments were proposed and speedily ratified. Another amendment (No. XI) was soon afterward adopted for the purpose of doing away with the effect of a Supreme Court decision. Thereafter, save for a change in the manner of electing the President and Vice-president, the Constitution was not again amended until after the close of the Civil War, when Amendments XIII, XIV, and XV, having for their primary object the protection of the newly enfranchised Negroes, were adopted. The Constitution was not again amended until the last decade, when the Income Tax Amendment, the amendment providing for the election of Senators by popular vote, the Prohibition Amendment, and the Woman Suffrage Amendment were adopted in rapid succession. Some of these will be discussed in later chapters.

It is interesting to note that two of the amendments (No. XI, designed to prevent suits against a state without its permission by

citizens of another state, and No. XVI, paving the way for the Income Tax) were called forth by unpopular decisions of the Supreme Court, and virtually amounted to a recall of those decisions by the people. These instances demonstrate the possibility of a recall of judicial decisions by constitutional methods, and tend to refute impatient reformers who preach the necessity of a more summary procedure. Such questions, however, lie outside the scope of this book. We emphasize here the fact that the great achievement of the Constitution was the creation of a dual system of government and the apportionment of its powers. That was what made it "one of the longest reaches of constructive statesmanship ever known in the world."[1] It offered the most promising solution yet devised for the problem of building a nation without tearing down local self-government.

[Footnote 1: Fiske: "The Critical Period of American History," p. 301.]

John Fiske, the historian, writing of the importance of preserving the constitutional equilibrium between nation and states, said:[1]

> If the day should ever arrive (which God forbid!) when the people of the different parts of our country shall allow their local affairs to be administered by prefects sent from Washington, and when the self-government of the states shall have been so far lost as that 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 come to an end, and the hopes that have been built upon it for the future happiness and prosperity of mankind will be wrecked forever.

[Footnote 1: Id., p. 238.]

If allowance be made for certain extravagances of statement, these words will serve as a fitting introduction to the discussions which follow.

II

THE SUPREME COURT OF THE UNITED STATES

The Constitution effected an apportionment of the powers of government between nation and states. The maintenance of the equilibrium thus established was especially committed to the Supreme Court. This novel office, the most important of all its great functions, makes the Court one of the most vital factors of the entire governmental scheme and gives it a unique preëminence among the judicial tribunals of the world.

How the office has been performed, and whether the constitutional equilibrium is actually being maintained, are the questions to be considered in this book. Before taking them up, however, it will be useful to glance briefly at the Court itself and inquire how it is equipped for its difficult task.

The United States Supreme Court at present is composed of nine judges. The number originally was six. It now holds its sessions at the Capitol in Washington, in the old Senate Chamber which once echoed with the eloquence of the Webster-Hayne debate. The judges are nominated by the President, and their appointment, like that of ambassadors, must be confirmed by the Senate. The makers of the Constitution took the utmost care to insure the independence of the Court. Its members hold office during good behavior, that is to say for life. They cannot be removed except by impeachment for misconduct. Only one attempt has ever been made to impeach a judge of the Supreme Court[1] and that attempt failed. Still further to insure their freedom from legislative control, the Constitution provides that the compensation of the judges shall not be diminished during their continuance in office.[2]

[Footnote 1: Justice Samuel Chase of Maryland in 1804-5.]

[Footnote 2: It is interesting to observe that this Court, safeguarded against popular clamor and composed of judges appointed for

life, has consistently shown itself more progressive and more responsive to modern ideas than have most of the state Supreme Courts whose members are elected directly by the people and for limited terms only.]

From the time of John Jay, the first Chief Justice, down to the present day the men appointed to membership in the Court have, for the most part, been lawyers of the highest character and standing, many of whom had already won distinction in other branches of the public service. The present Chief Justice (Taft) is an ex-President of the United States. Among the other members of the Court are a former Secretary of State of the United States (Justice Day); two former Attorneys General of the United States (Justices McKenna and McReynolds); a former Chief Justice of Massachusetts (Justice Oliver Wendell Holmes, the distinguished son and namesake of an illustrious father); a former Chief Justice of Wyoming (Justice Van Devanter); and a former Chancellor of New Jersey (Justice Pitney).

It is well that the personnel of the Court has been such as to command respect and deference, for in actual power the judiciary is by far the weakest of the three coördinate departments (legislative, executive, judicial) among which the functions of government were distributed by the Constitution. The power of the purse is vested in Congress: it alone can levy taxes and make appropriations. The Executive is Commander-in-Chief of the Army and Navy and wields the appointing power. The Supreme Court controls neither purse nor sword nor appointments to office. Its power is moral rather than physical. It has no adequate means of enforcing its decrees without the coöperation of other branches of the Government.

That coöperation has not always been forthcoming. In the year 1802, Congress, at the instigation of President Jefferson, the inveterate enemy of Chief Justice Marshall, suspended the sessions of the Court for more than a year by abolishing the August term. In 1832, when the State of Georgia defied the decree of the Court in a case involving the status of the Cherokee Indians, the other departments of the Federal Government gave no aid and President Andrew Jackson is reported to have remarked: "John Marshall has made the decision, now let him execute it." In 1868, Congress, in order to forestall decision in a case pending before the Court, hastily repealed

the statute on which the jurisdiction of the Court depended.[1] Such instances, however, have been rare. The law-abiding instinct is strong in the American people, and for the most part the decisions of the Supreme Court have been received with respect and unquestioning obedience.

[Footnote 1: See *ex parte McCardle*, 6 Wall. (Supreme Court Reports), 318; 7 *id.*, 506.]

The chief weapon in the arsenal of the Court is the power to declare legislative acts void on the ground that they overstep limits established by the people in the Constitution. This power has been frequently exercised. It is stated that the congressional statutes thus nullified have not numbered more than thirty, while at least a thousand state laws have been nullified.[1]

[Footnote 1: Brief of Solicitor General James M. Beck in the Child Labor Tax cases. It is to be borne in mind that there are forty-eight state legislatures and only one Congress.]

The assumption of this power in the Court to declare statutes unconstitutional has been bitterly assailed, and is still denounced in some quarters, as judicial usurpation originated by John Marshall.

On the historical side this objection is not well founded. Various state courts had exercised the power to declare statutes unconstitutional before the Supreme Court came into existence.[1] The framers of the Constitution clearly intended that such a power should be exercised by the Supreme Court.[2] Moreover, a somewhat similar power appears to have been exercised long before in England,[3] though it gave place later to the present doctrine of the legal omnipotence of Parliament.

[Footnote 1: See Bryce: "The American Commonwealth," Vol. I, p. 250.]

[Footnote 2: See e.g., "Federalist," No. LXXVIII.]

[Footnote 3: See opinion of Lord Coke in Bonham's Case, 8 Coke's Reports, 118, decided in 1610.]

On the side of reason and logic, the argument in favor of the power formulated more than a century ago by Chief Justice Mar-

shall has never been adequately answered and is generally accepted as final. He said:[1]

> The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?… 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. 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.

[Footnote 1: *Marbury v. Madison*, 1 Cranch, 176.]

It would seem at first blush that the power in the Court to declare legislative acts unconstitutional affords a complete safeguard against congressional encroachment on the prerogatives of the states. Such is not the fact, however. The veto power of the Court by no means covers the entire field of legislative activity. In the Convention which framed the Constitution, attempts were made to give to the judiciary, in conjunction with the executive, complete power of revision over legislative acts, but all such propositions were voted down.[1] As matters stand, there may be violations of the Constitution by Congress (or for that matter by the executive) of which the Court can take no cognizance.

[Footnote 1: See e.g., Farrand: "Records of the Federal Convention," Vol. I, pp. 138 et seq.; Vol. II, p. 298.]

For one thing, the Court cannot deal with questions of a political character. The function of the Court is judicial only. Upon this ground it was decided that the question which of two rival governments in the State of Rhode Island was the legitimate one was for

the determination of the political department of government rather than the courts;[1] that the question, whether the adoption by a state of the initiative and referendum violated the provision of the Federal Constitution guaranteeing to every state a republican form of government, was political and therefore beyond the jurisdiction of the Court.[2] In 1867 a sovereign state sought to enjoin the President of the United States from enforcing an act of Congress alleged to be unconstitutional. The Supreme Court, without determining the constitutionality of the act, declined to interfere with the exercise of the President's political discretion.[3] In the famous Dred Scott case[4] the effort of the Supreme Court to settle a political question accomplished nothing save to impair the influence and prestige of the Court.

[Footnote 1: *Luther v. Borden*, 7 Howard, 1.]

[Footnote 2: *Pacific Telephone Co. v. Oregon*, 223 U.S., 118.]

[Footnote 3: *State of Mississippi v. Andrew Johnson*, 4 Wall., 475.]

[Footnote 4: *Dred Scott v. Sandford*, 19 Howard, 393.]

The power of the Court to declare legislative acts unconstitutional is subject to another important limitation. The judicial power is limited by the Constitution to actual cases and controversies between opposing parties. The Court cannot decide moot questions or act as an adviser for other departments of the government. A striking illustration is found in the so-called Muskrat case.[1] Congress having legislated concerning the distribution of property of the Cherokee Indians, and doubts having arisen as to the constitutional validity of the legislation, Congress passed another act empowering one David Muskrat and other Cherokee citizens to file suit, naming the United States as defendant, to settle the question. The Supreme Court declined to take jurisdiction and dismissed the suit, holding that it was not a case or controversy between opposing parties within the meaning of the Constitution.

[Footnote 1: *Muskrat v. United States*, 219 U.S., 346.]

Still another limitation is encountered in cases involving abuse of legislative power rather than lack of power. If Congress passes an act within one of the powers expressly conferred upon it by the Constitution, for example the power to lay taxes or the power to

regulate interstate commerce, the Supreme Court cannot interfere though the incidental effect and ulterior purpose of the legislation may be to intrude upon the field of state power. We shall have occasion to refer to this limitation more than once in later chapters.

An impression is abroad that the Supreme Court has plenary power to preserve the Constitution. Hence the tendency of groups to demand, and of legislators to enact, any kind of a law without regard to its constitutional aspect, leaving that to be taken care of by the Court.

Any such impression is erroneous and unfortunate. It puts upon the Court a burden beyond its real powers. It undermines the sense of responsibility which should exist among the elected representatives of the people. It impairs what someone has called the constitutional conscience, and weakens the vigilance of the people in preserving their liberties. Men and women need to be reminded that the duty of upholding the Constitution does not devolve upon the Supreme Court alone. It rests upon all departments of government and, in the last analysis, upon the people themselves.