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"THE AMERICAN CONSTITUTIONAL METHOD"

Address

by

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The American Constitutional Method

In the 147 years which have elapsed since its adoption the Constitution of the United States has probably been the subject of more controversy than any other great document of human history.

The framers of the Virginia-Kentucky Resolutions of 1798 took one view of its meaning, while the Federalists took another. The friends of the Bank of the United States thought that the Constitution conferred powers on the Federal Government which the opponents of the Bank, with equal earnestness, denied. The South Carolina Nullifiers of 1833 believed that a protective tariff was unconstitutional, while Judge Story and Daniel Webster were firm in the opposite belief. After the close of the Civil War, the so-called Radicals thought that the new amendments conferred on the Congress power to protect civil rights within the several states, while their opponents gave to the amendments a narrower construction, which was afterwards confirmed by the Supreme Court.

And yet, in the face of this series of examples, which might be multiplied almost indefinitely, there is nothing more characteristic of constitutional controversy than the recurrent assumption on the part of the disputants that their own construction alone, has a sole and exclusive title to correctness, and that whoever disputes that construction, or argues against it, is guilty of no lighter offense than that of laying impious hands on the Ark of the Covenant. This attitude is, perhaps, a natural consequence of man's insatiable desire for certainty, which he seeks to satisfy by convincing himself that he already has certainty in his grasp. This tends to increase the heat, as well as the scope of the

debate. Men are apt to become irritated when they find their own certainties challenged, and to that extent shaken, by the existence of other and inconsistent certainties on the part of other men. But, as Mr. Justice Holmes admonishes us, "Certainty, generally, is an illusion and repose is not the destiny of man"; and it was George Meredith who, referring to this human frailty, exclaimed:

> "Ah, what a dusty answer gets the soul
> When hot for certainties in this our life."

The Constitution is a fundamental document, speaking for the most part, in general principles and couching its precepts in language designed to make possible the attainment of the great ends of government.

Mr. Justice Story, in delivering the opinion of the Court in Martin v. Hunter, 1 Wheaton, page 326, said:

> "The Constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen, that this would be perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be forseen, what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence, its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model, the exercise of its powers, as its own wisdom, and the public interests should require."

A similar thought was expressed by Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. at page 407.

The process of constitutional construction relies for its validity on the relative weight to be given to this or that factor in a chain of inference. One mind will be impressed by the need of centralized power, another by the value of local self-government; one by immediate governmental necessities, another by the danger of governmental abuses; one by the rights of property, another by the claims of human sympathy; one by the sanctity of contracts, another by the requirements of essential justice. The interplay of these conflicting concepts, and the predominance of one or another at different periods of national development, are illustrated throughout the long history of judicial decisions and should serve to convince us that within the great house of the Constitution there are many mansions, and that the questions which are left open within its four corners are frequently susceptible of more than one solution based upon reason.

The Supreme Court does not operate in a legalistic vacuum of abstract propositions. On the contrary it is part and parcel of an organic process of government which comprises the constitution-making process, the legislative process and all the other processes through which, in a government resting on popular sovereignty, public opinion is enabled to register itself in governmental acts. Moreover, the cases which come before the Supreme Court are, for the most part, presented by the exigencies of litigation, not cases selected to round out the symmetry of a theory. Such cases are created by the accidents, or the pressures, or the changing ideals of national life. In this welter of facts and circumstances there is a place for logic and the Court has applied it; but there is a place, too, for that "inarticulate premise" to which Mr. Justice Holmes referred when he

deprecated "a system of delusive exactness".

Shifting national needs and maturing national ideals have, at times, resulted in reversals of previous decisions. At the outset the Supreme Court held that the admiralty powers of the Constitution extended only to navigable waters within the ebb and flow of the tide. This ruling excluded, of course, the Great Lakes; and it was reversed in 1852 in the leading case of The Propeller Genessee Chief (12 How. 443). Referring to the earlier decisions, Chief Justice Taney said:

> "The conviction that this definition of admiralty powers was narrower than the Constitution contemplated, has been growing stronger every day with the growing commerce on the lakes and navigable rivers of the western States."

It was, perhaps, natural for the courts of the United States, in an early period, to adopt the limited definition, for until the invention of the steamboat there could be nothing like extended navigation upon waters with an unchanging current resisting the upward passage, but the Chief Justice went on to point out that at the time of such decisions

> "the commerce on the rivers of the West and on the lakes was in its infancy and of little importance and but little regarded compared with the present day."

Another instance in which the Court, during the same period of its history, reversed its previous holding has to do with the question of whether foreign corporations have a right of access to the Federal courts under the diversity of citizenship provision of the judiciary article of the Constitution. The original rule laid down by Marshall in Bank of United States v. Deveaux (5 Cranch. 61) was that a foreign corporation

had no such right, unless all its stockholders were citizens of a State other than that of the opposing party in the suit. This decision was reversed in 1844 in Louisville, etc., R.R. v. Letson (2 How. 497), which held that, for the purpose of a suit in a Federal court, a corporation must be presumed to be a citizen of the State in which it was incorporated. The Court said in its opinion that the old cases "had never been satisfactory to the Bar" nor "entirely satisfactory to the court that made them." The vast growth and extension of the corporate method of doing business had obviously produced its effect on the judicial mind.

Instances in quite recent years of definite reversals by the Court of important decisions in the field of taxation come readily to mind, notably Blackstone v. Miller, (188 U.S. 189), overruled in Farmers Loan Company v. Minnesota, (280 U.S. 204 - 209) and Long v. Rockwood, (277 U.S. 142), overruled in Fox Film Corporation v. Doyal, (286 U.S. 123).

The history of the Court is not free from examples of reversals, or substantial modifications, of its position in cases involving issues of far wider public interest and more general controversy than those which I have mentioned. An outstanding illustration was the important modification of the doctrine of the Dartmouth College case, after a change in the personnel of the Court, by the Charles River Bridge case. The Dartmouth College case had held that a corporate charter was an inviolable grant which could not constitutionally be impaired by subsequent legislation. The question raised in the Charles River Bridge case was whether the constitutional guarantee extended beyond the express terms of the grant to the implications of exclusiveness to which it owed, in large measure at least, its financial

value. When the case was first argued in 1831, while Marshall was still Chief Justice, the Court apparently had no doubt that the guarantee did cover such implications. When the case was finally decided six years later, however, the ruling was to the opposite effect, over a strong dissent from Judge Story. It was in this case that Chief Justice Taney voiced the memorable sentiment:

> "While the rights of private property are sacredly guarded, we must not forget that the community also have rights and that the happiness and well-being of every citizen depends on their faithful preservation." (Charles River Bridge v. Warren Bridge, 11 Peters 420 at 548).

It was this decision which called forth from Judge Story the gloomy remark that "The old constitutional doctrines are fast fading away and a change has come over the public mind from which I augur little good." (Warren's History of the Supreme Court, Vol. 2, page 302). In his dissenting opinion he said that the very raising of the contentions which had received the support of the majority of the Court was "sufficient to alarm every stockholder in every public enterprise of this sort throughout the whole country." Daniel Webster complained that "the decision has completely overturned a clear provision of the Constitution" and reported that "Judge Story thinks the Supreme Court is gone and I think so too, and almost everything else is gone or seems rapidly going." Chancellor Kent wrote that he had reperused the Charles River Bridge decision with increased disgust and, that "It abandons or overthrows a great principle of constitutional morality.... It injures the moral sense of the community and destroys the sanctity of contracts."

Yet, within 15 years, a later Judge, who was himself no ineffective defender of property rights, speaking of this decision was able to say, "No opinion of the Court has more fully satisfied the legal judgment of the

country and consequently none has exercised more influence upon its legislation." (Campbell, J., in State Bank v. Knopp, 16 How. 409).

A more recent instance in which the Supreme Court, on an issue of great public importance, originally took a position from which it was later to recede is afforded by the famous E.C. Knight case (156 U.S. 1 (1895)), the first to come before that tribunal under the Sherman Anti-trust Act. It was held that a monopolistic combination of manufacturers could not be constitutionally reached by the anti-trust laws since manufacture was not commerce and, therefore, was exempt from control by the Congress. The decision, while it stood, effectively paralyzed the operation of the anti-trust laws for a number of years and drew sharp criticism from many commentators. One of them, writing in the American Law Review in the year when the decision was handed down said that "The Sugar Trust decision and the Income Tax decision", - rendered the same year, - "counter-balance all the good the Court has done in seventy years and inflict a wound on the rights of the American people." Within a few years, however, the Court reconsidered its position and held that while the Sherman Act might affect local conditions it could nevertheless be constitutionally applied even to transactions local in character if they operated to effect a restraint on interstate commerce. (Northern Securities Company v. United States, 193 U.S. 197 (1904)). This decision revitalized the anti-trust laws and rendered them, once more, serviceable.

The outstanding instance in which the Supreme Court has reversed itself was when, in the Legal Tender cases (12 Wallace 457 (1871)), it overruled its

prior decision in Hepburn v. Griswold (8 Wallace 603 (1870)). The Hepburn case, which was decided by a vote of four to three, represented a recognition, in the minds of a majority of the Court, of a body of economic doctrines resulting from the contact of certain economists with the bullion question as it had presented itself in England at the close of the Napoleonic wars. The economic soundness or unsoundness of these doctrines was, no doubt, a question of importance for legislative consideration. To read them, however, into constitutional requirements, as the majority of the Court did, imposed an unwarranted limitation upon an essential power of sovereignty. The decision met with some favor on economic grounds, but even its supporters referred to "the impropriety of taking from Congress and committing to a Court of Justice a task so plainly legislative in its nature."

The New York Times stated that "The effect of the decision if allowed to stand strips the Nation of one of its means of warfare and defense."

The doctrines of the Legal Tender Cases were reaffirmed, in the broadest terms, twelve years later in Juilliard v. Greenman, (110 U.S. 421), with but one dissent; and, in the recent Gold Clause cases, they have been extended still further. In numerous instances, without overruling particular decisions, the Court has shifted its emphasis from one class of guiding considerations, to another. The trends which lawyers attempt to deduce therefrom are, of course, of the utmost importance in determining the law for future cases and in advising clients in pending matters.

Nevertheless, the history of the decisions indicates that few such trends have been sufficiently continuous to supply a basis of certainty as to their indefinite projection into the future. On the contrary, there has been, naturally and properly, an ebb and flow, with a conspicuous lack of basis for assurance as to when the ebb will cease and the flow set in.

Outstanding examples are to be found in the construction of the commerce clause, from Gibbons v. Ogden (9 Wheat. 1) to Leisy v. Hardin, (135 U.S. 100); and the course of decisions in cases of legislative price fixing from Munn v. Illinois (94 U. S. 113), to Nebbia v. New York (291 U. S. 502). In Gibbons v. Ogden the Court had plainly indicated its view that the Federal Power to regulate interstate commerce is exclusive, with the result that all regulation of such commerce by the States is invalid. In the License Cases, (5 How. 504), however, the Court upheld a State regulation of liquor imported from other States. A satisfactory line of demarcation between State and Federal police regulations seemed ultimately established by Cooley v. The Port Wardens, (12 How. 299), but this line was again unsettled by Leisy v.

Hardin, supra, which once more cast doubt on the validity of state regulations affecting articles moving in interstate commerce.

The relation of legislative price fixing to the due process clause seemed settled, on the basis of public interest from the time of the Munn case in 1876 to German Alliance Ins. Co. v. Kansas, (233 U. S. 389), in 1914, but there followed, in the nineteen-twenties, a series of cases like the Employment Agency Case (Ribnick v. McBride, 277 U.S. 350), and the Theatre Ticket Case (Tyson v. Banton, 273 U.S. 418), which seemed to stand for some narrower doctrine, until the authority of the earlier decisions was re-established and extended, two years ago, in the Nebbia case.

Shifts in the trend of the Supreme Court's opinions have been noted by the great commentator on American institutions, James Bryce. He says:

> "The Supreme Court has changed its color, i.e., its temper and tendencies, from time to time according to the political proclivities of the men who composed it. . . Their action flowed naturally from the habits of thought they had formed before their accession to the bench and from the sympathy they could not but feel for the doctrines on whose behalf they had contended." (American Commonwealth, 3d Ed., Vol. 1 pp. 274-5.)

And again,

> "The Supreme Court feels the touch of public opinion. Opinion is stronger in America than anywhere else in the world and judges are only men. To yield a little may be prudent, for the tree that cannot bend to the blast may be broken. There is, moreover, this ground at least for presuming public opinion to be right, that through it the progressive judgment of the world is expressed." (Bryce, ibid., p. 273.)

In view of the close and inevitable connection which thus exists between the questions which the Court has to decide, and the great issues which agitate public opinion, it is not unnatural that the decisions and doctrines of the Court should be the subject of wide-spread public interest. The Constitution is supreme simply because it expresses the ultimate will

of the people. The people are, accordingly, the masters of the Constitution and their mastery is expressed in the power of amendment, which, it must not be forgotten, is as much a part of the Constitution as any other provision. This power has been exerted three times in our history for the deliberate purpose of overriding a previous decision of the Supreme Court.

The first instance occurred at the very commencement of our government when the Eleventh Amendment prohibiting suits by private parties against a State was adopted to undo the effect of the decision of the Supreme Court in Chisholm v. Georgia (2 Dallas 419). The latest instance was the adoption of the Sixteenth Amendment to make a federal income tax possible over the decision of the Supreme Court in Pollock v. Farmers Loan & Trust Co., (158 U.S. 601). The other instance was the adoption of the Thirteenth Amendment to undo the effect of the Dred Scott Decision (19 How. 393).

In discussions of our constitutional system there is no occasion to hurry over the Dred Scott Decision with averted gaze. It holds a lesson for us. Newspapers of the time spoke of the decision as "exerting the most powerful and salutary influence throughout the United States", as "a closing and clinching confirmation of the settlement of the (slavery) issue", and as exerting "a mightly influence in diffusing sound opinions and restoring harmony and fraternal concord throughout the country". In connection with no other opinion was there ever a greater effort, on the part of those who agreed with it, to misrepresent all public expressions of disagreement as blows aimed at the judiciary. And yet, as we look back upon that controversy we cannot doubt that the discussion was salutary, nor can we help feeling that the sound American attitude was that which was expressed by Abraham Lincoln when he said:

> "But we think the Dred Scott Decision is erroneous. We know the Court that made it has often overruled its own decisions, and we shall do what we can to have it overrule This." (Speech at Springfield, Ill., June 26, 1857).

And, again, in his first inaugural:

> "The candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court the instant they are made in ordinary litigation between parties in personal actions, the people would have ceased to be their own ruler, having to that extent practically resigned their Government into the hands of that eminent tribunal."

In a time of Constitutional discussion like the present, when once again, as in so many preceding periods, clashing interests and conflicting ideals are pressing for expression in Governmental action, and seeking to clothe themselves with the mantle of constitutional sanction while fixing the stigma of unconstitutionality on their opponents, it is well for us, as lawyers, to resort to the steadying influence of the historic view. Such consideration should shield us from ill-considered conclusions on, at least, two questions which, for the moment, seem to be creating much confusion of thought in both professional and lay minds.

The first of these has to do with the propriety of public criticism of the decisions of the Courts on constitutional questions.

It seems clear, from the fragments of history to which I have adverted, that such discussion has gone on from the beginning of our Government, and has repeatedly affected the character of judicial decisions or has expressed itself in the form of constitutional amendments. Of course the fact that such criticism has occurred and has produced results is, of itself, no justification of its propriety. If the Constitution imposes, in all instances, a clear and specific mandate upon the judges, leaving them no discretion, and

no room within which reasonable men may differ, then obviously any criticism of decisions so compelled would be grossly misdirected. What I have said should sufficiently indicate, however, that on many great constitutional issues decisions are not thus inexorably required by the Constitution. They proceed rather from a chain of inferences and intermediate reasoning the result of which depends upon the relative weight which one mind or another may give to a variety of competing considerations. If, as Bryce has pointed out in the passage I have read, these considerations are in part drawn, not from the mere private preferences of the judges as individuals, but rather from the impressions produced on their minds by the general public sense of what is just and what is necessary in the public interest, then such public discussion, so far from being unfair to the judges and a hindrance to the performance of their duties, is, on the contrary, an important and valid aid in acquainting them with some of the weighty factors which properly enter into the process of decision.

The second question, is whether the Legislative branch of the Government, and the Executive, in view of their oath to support the Constitution, may rightfully take any action or join in the enactment of any law, the constitutionality of which is doubtful. It has been argued that should the Executive, or a member of the Congress, have serious doubt whether a proposed enactment is constitutional, he would violate his oath of office by assenting to it or voting for it.

This argument rests on a misunderstanding as to the form and nature of the Constitution and as to the function of the Supreme Court with reference thereto. If we are aware, as all students of the Constitution must be, of the sweeping language in which its provisions are couched, and

of the variety of considerations to which the Supreme Court must give weight, it seems clear that practically no new legislation of a controversial character can ever be said to be free from constitutional question. Indeed, the only legislation as to which no doubt can exist is an enactment substantially identical with some previous statute already approved by the Supreme Court; and even here there is the possibility of error in view of the fact that the Court has frequently reversed itself. The theory that any member of the Congress violates his oath who votes in favor of legislation not free from constitutional doubt would entirely exclude the possibility of legislation in new fields or of novel character.

As heretofore indicated, constitutional objections have been raised as to nearly every important piece of legislation enacted since the beginning of the Government. The constitutionality of a protective tariff was questioned when the first tariff act was proposed and was bitterly debated for many years; the constitutionality of national banks was contested; the constitutionality of Federal expenditures for internal improvements, roads, canals and railways, was vigorously assailed; the constitutionality of the Interstate Commerce Act was the subject of long discussion; and the constitutionality of the Acts establishing the Department of the Interior and the Department of Agriculture was vehemently denied. Speaking of the bill to establish the Interior Department, John C. Calhoun said:

> "This monstrous bill will turn over the whole interior affairs of the Government to this Department and it is one of the greatest steps ever made to absorb all the remaining powers of the States."

Certainly, no one, however, who is familiar with our history, and assuredly no lawyer, would undertake to argue that, because the Court ultimately determined that a particular enactment was constitutional, there

was no reasonable ground for doubt at the outset. President Taft, for example, vetoed the Webb-Kenyon Act on the ground that his oath of office did not permit him to give his assent to an Act of doubtful constitutionality. In fact, he went rather far in admonishing the Congress as to its duty in the premises. The Act, however, was passed over his veto, and, in due course, the Supreme Court pronounced it constitutional. (Clark Distilling Co. v. Western Maryland Ry., 242 U. S. 311).

The doctrine expressed by President Taft would, if applied, require that doubts be resolved by the Congress adversely to constitutionality, thereby bringing many essential processes of the government to a standstill.

If no Act of the Congress of doubtful constitutionality were ever passed, the Supreme Court would have little or no occasion to exercise any function in the matter of constitutional interpretation.

The correct course would seem to be that the executive and the members of the legislative branch, when not clearly convinced of the unconstitutionality of a measure otherwise desirable, should not necessarily regard themselves as thereby deterred from enacting it, but should consider the advisability of leaving the doubt to be determined where it can be determined authoritatively, namely by the Supreme Court. This was the position of Senator Fessenden of Maine in the debate on the Legal Tender Acts, when he said:

> "I have not touched the constitutional question. *** We may well leave that question to be settled by the courts, and not attempt to settle it ourselves." (57 Congressional Globe, 767.)

It was, also, the position of Madison during the first Congress when called upon to vote on the bill for the encouragement of the cod fisheries. Madison felt that the bill was unconstitutional in certain respects, and

favored an amendment to eliminate such provisions. The amendment failed, and it is interesting to note that notwithstanding his conscientious view that the bill was in the main probably unconstitutional, he nevertheless voted for it on its final passage.

As has been heretofore noted Lincoln was not prepared, in certain instances at least, to let such a question rest, even after the Supreme Court had spoken.

Of late, however, we have been confronted with the further assumption that a correct understanding of the meaning of the constitution is revealed not merely to the Supreme Court, but to certain individuals who, from time to time, deplore the course of events and express an exaggerated anxiety as to the safety of our institutions. The precise meaning of the Constitution becomes, therefore, the particular meaning which they, as an esoteric group of specially endowed individuals, have elicited by their own efforts and their own processes of inference from the previous decisions of the courts. This would seem to present a somewhat novel phenomenom in the matter of constitutional interpretation. It may well be asked, however, what intellectual, professional, or political right has any individual, or any group of individuals, thus to proclaim in advance, and as if from on high, a constitutional interpretation which can be authoritatively supplied only by the Supreme Court itself, which has so frequently confounded by its decisions, the forecasts and opinions of Congresses and Presidents, as well as of private critics and commentators?

The absolute theory of one and only one rational construction of the Constitution renders impossible any proper understanding of the nature of our American constitutional method and of the functions of our Supreme Court.

With us, the people have established a constitution which is supreme over all the acts of Government, legislative, executive, and judicial alike, because it is the highest expression of the popular will. Of necessity, it employs broad language which leaves a wide area for legitimate differences of opinion. Within this arena of debate all voices must be heard. The courts may give, and as a rule do give, less weight to what they feel to be temporary currents of opinion, casual pressures for reform, evanescent aspirations or mementary ideals as contrasted with what they may properly regard as the confirmed and enlightened sense of justice developed by the changing life of a vital and growing nation.

If the courts prove mistaken in their reading of this ultimate will, or if the Constitution itself in some clearly expressed provision no longer conforms thereto, then, by its very terms, the people are guaranteed the right to make their desires effective through the solemn process of amendment.

Our Government is not a logical, a documentary, a political or a judicial absolutism. The American constitutional method is a process of adaptation and growth, as well as a means whereby wrongs may be corrected and governmental measures may be attuned to the essentials of justice, through the orderly ways of discussion and education, as opposed to the violent changes and intolerable tyrannies by which absolute governments are inevitably characterized. Were this not true the Constitution would be a dam against which the waters of life would beat in vain, rather than a directing channel through which the stream of national existence may safely pass.