Back to the Constitution

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Law was long ago defined as "a rule of action prescribed by the supreme power in the state, commanding what is right and prohibiting what is wrong." Which is the body in this country that has the last supreme word in legislation? Under our form of government we have an executive, a legislature, and a judicial department. The theory taught in the schools is that each of these is separate and distinct and that neither can interfere with the other. Laying aside preconceived opinions and deceptive forms of expression, what is the real government which we have?

The legislative is understood to be the lawmaking body, as its name imports. If so, it should be the supreme power here, as in England. In what ways do the Constitution of the United States and the constitution of the states place any restrictions upon that body? According to the federal constitution and that of nearly all the states, there is only one restriction that another department can place upon the lawmaking body and that is that the executive can interpose his veto upon any legislation which does not seem good to him, but the constitutional convention did not see fit to make this an absolute veto. For that would have placed the supreme power in the executive. The executive was not given the last word, but it was provided that by a certain vote, which is two-thirds in the federal constitution and varies in the different states, the veto can be overruled by the lawmaking body if it adheres to its views. This is in accordance with the theory of our government, which is that the lawmaking body is one of restrictions; that is, that it represents the people and has all power that is not denied it by the organic law, whereas, the executive and judicial are grants of power and have no authority except that conferred by the constitution. This is the statement made by Black* and sums up correctly the analysis of our state and federal constitutions as they are written. In the federal government, which is not an original sovereignty, but the creation, after the revolution, of the states, the authority of the federal lawmaking body is also a grant of power, for it has, or correctly should have, no powers except those expressly conferred or necessarily inferred from those that are given.

Now, as to the executive (both state and federal), its only powers are those which are expressly given or derived by necessary inference from those that are conferred. The only authority given this department to interfere with the others in any way is the veto already mentioned, and that is not absolute, but subject to be overruled by a legislative vote. In four states—Rhode Island, North Carolina, West Virginia, and Ohio—the governor was even denied any veto power, though in some of these in later years it has been conferred.

As to the judicial department the power of the executive over it was in the appointment of the judges. This at first was very general, but now the number of states in which they are appointed by the governor, with the consent of the senate, has been reduced to seven. The control of the judiciary department by the legislative was made more complete in that in those states where the governor appoints the upper house can affirm or reject his nomination, and in all of them the legislative department has supervision of the conduct of the judges and can remove them by impeachment. In three of them —Massachusetts, New Hampshire, and Rhode Island—the legislature, as in England, can remove the judges without trial, by a majority vote.

It may be mentioned here that the common idea that the judges in England hold absolutely and for life is a mistake. Up to the revolution of 1688 they held at the pleasure of the King, who could remove any judge at any time without a trial. Since 1688 the judges in England, as in the three American states above named, hold at the King formerly did, at will and without trial.

This being the status of the other two departments of the government, as expressed by the organic law, what is the place contemplated for the judiciary department, taking the constitutions as they are written? There was given to the judicial department no authority whatever over the other two departments of the government. There was not conferred on it, as upon the executive, any veto over the action of either of the other two departments, not even the suspensive veto conferred on the executive. Its members were originally appointed in all the states by the executive, save in those in which such appointment was subject to confirmation by the legislative department and a few states in which the judges were elected by the legislature. It was thus the creature of one or the other, or both the other departments jointly, and the members of the judiciary were made removable, as already said, by the legislative department, while in three of them they still hold at the pleasure of the legislature. In the federal government all the judges of the circuit and district courts hold subject to the right of congress to legislate them out of office at any moment. In 1802, 16 circuit judges were thus legislated out of existence by congress, and at sundry times since district courts have, in like manner, been abolished. As to the federal supreme court, it holds its appellate jurisdiction "with such exceptions and under such regulations as congress shall make."* Indeed, as to the reconstruction act congress enacted** that the courts could issue no writ to construe the validity of such statutes, and the court held that it could issue none.*** The United States judicial department, therefore, is the creature of the legislative department, which, from time to time, can increase or diminsh the number of the judges inferior to the supreme court. The number of judges on the federal supreme court is not fixed by the constitution but by congress, which, from time to time, has increased or diminished the number when it thought the public interest demanded; for instance, when it was thought desirable to change the ruling of the court as to the legal tender act.

The court being the creature of the legislature and subject to it for the extent of its jurisdiction and for its existence to a large degree, whence comes it that the court has been exercising the supreme power in our government—i. e., the last word in legislation?

There is certainly no express authority for "judicial supremacy" or the "judicial veto," by which that department assumes the irreviewable and therefore the absolute supremacy over the other two departments. There is not a line in the constitution of any state or in the federal constitution to authorize it. If there were, it would only be necessary to point to the words and end all debate. There would be no necessity for sophistical argument, and we would be saved the absurd spectacle of attempting to support the authority of the court upon the fact that some other court, at some other time, had made the same assertion. The former assertion is as groundless as one made now, unless the authority can be found in the constitution.

It would be very strange, indeed, if any constitutional convention had conferred the last and ultimate power of sovereignty upon a majority of a board of appointive judges, an authority which was denied to the legislature by the suspensive veto given the executive; and when it had denied an absolute veto to the executive. Yet the judiciary was the creature of the other two departments until, in more recent years, in a majority of the states, but not yet in the federal government, the judges have had the dignity conferred upon them of a direct mandate from the people by election at the ballot box. It may be noted also that this change from an appointive to an elected judiciary was brought about as a check upon the irreviewable and irresponsible power assumed by the courts of setting aside the action of the legislative, approved by the executive department.

It would consume too much space to discuss the assumption of this power by the state courts, as it has been more flagrant in some states than in others. Latterly there has been a further curb sought to be imposed upon the assertion of this supreme power in the courts by the adoption of the "recall of the judges" in the state constitutions in eight states. Those who, like the writer, do not think the "recall of the judges advisable, may well consider the fact that a free people will not willingly consent that the action of their duly elected representatives empowered to make their laws and of their duly elected executive shall be brushed aside by a bare majority of a board of lawyers without any authority conferred in the constitution.

Have the courts assumed this irreviewable power and asserted for a majority of the court an infallibility which they have denied to the minority of the court, and to the other two departments of the government?

Taking the federal court as an example, a few instances will make reply. Not long after the federal supreme court was created—and it will be remembered that it was created and its jurisdiction fixed by an act of congress, the judiciary act of 1789, and not by the constitution— that court haled a sovereign state before it and passed sentence in Chishold v. Georgia.* Immediately the people took alarm and the eleventh amendment was passed to prevent the repetition of the right of a sovereign state being brought into court at the suit of a private individual. It was fortunate that this was done, for otherwise the docket would have been crowded since with actions by the American Tobacco Co., the Standard Oil Co., and various railroad companies, bringing into court states whose legislation was not acceptable to those great aggregations of wealth.

The next assumption of power was in Marbury v. Madison.** John Marshall was secretary of state. In January, 1801, he was appointed chief justice and qualified as such and took his seat on the bench January 30, 1801, still retaining, however, his position as secretary of state. President John Adams having been defeated for re-election, at midnight on March 3, John Marshall as secretary of state was signing and sealing commissions when, as the clock struck the hour of 12, Levi Lincoln (as Parton tells us), with President Jefferson's watch in hand, forbade Secretary of State and Chief Justice Marshall to deliver the commissions then upon the table already signed. Among them was one to Marbury as justice of the peace of the District of Columbia.

Soon thereafter there was brought before the supreme court, of which Marshall was still chief justice, a proceeding to compel Mr. Madison, the new secretary of state, to deliver to Marbury the commission which Marshall himself had signed while occupying the double position of secretary of state and chief justice.

Instead of declining to sit in judgment upon his own act, Marshall as chief justice wrote a long decision in which he asserted that the courts had the power to set aside an act of congress, but wound up finally with dismissing the proceedings upon the ground that the court had no jurisdiction to issue mandamus, as the congress had not conferred such power. Thus, in an obiter dictum, this vast and irreviewable power, which places in a majority of the supreme court the ultimate sovereignty of the nation, became a precedent. It was known that if the court had directed the writ to issue Mr. Jefferson would not have obeyed it. By announcing the doctrine and refraining from any exercise of authority under it, the powerlessness of the court was veiled, while its assertion of supremacy was distinctly made. Later when Chief Justice Marshall in another case did assert the power to issue a writ of ejectment in derogation of a statute of Georgia, Andrew Jackson pithily said, "John Marshall has made his decision, has he? Now let us see him execute it." It was never executed and has remained as so much blank paper. The evil from the assertion of the doctrine of ultimate supremacy of the courts has, however, abided with us.

It was not again asserted as against any act of congress, however, for 54 years, and then in

*Black, Constitutional Law, sec. 100.

*United States Constitution, Art. III, sec. 2.
**Act 27 Mar., 1868.
***Ex parte McCardle, 74 U. S. (7 Wall.), 506.

*2 Dall., 419.
**1 Cranch, 137.