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A Law Student Looks at the Supreme Court

gates emerging from Independence Hall after the Constitution has been signed and final adjournment had. You will observe that Madison is treated with the general respect due to his character, his ability and his political wisdom. You will watch the venerable Dr. Franklin as he is accosted by a lady in the crowd of onlookers and you will overhear their conversation. 'Well, doctor,' she asks, 'what have we got—a republic or a monarchy?' 'A republic', replies the doctor, "if you can keep it.'

"I commend this observation of Dr. Franklin's to your thoughtful consideration."

Credit to the 1936 Year Book of the New York County Lawyers Association.

A LAW STUDENT LOOKS AT THE SUPREME COURT

It has been said that the constitution of the United States cannot function as the rule of Government without the Supreme Court, or the Supreme Court without the constitution, any more than either of the other departments could; and that to exercise their powers fully, justly and fairly each must be independent and uninfluenced by the other in the control thereof.

That the head of the executive department of our government is now planning on doing that directly as announced by his special message to Congress on reform of the Supreme Court is hardly open to debate.

That the older men in our profession are not alone in their respect for the Supreme Court is evidenced by expression from the younger men in their publications, and to substantiate that statement I quote from an article appearing in the January number of The Law Student by William N. Hensley, Student, John K. Weber School of Law, San Antonio, Texas, and only regret that lack of space prevents my publishing it all; it is entitled, "A Law Student Looks at the Supreme Court."

> "I cannot conceive of anything more grand and imposing in the whole administration of human justice, than the spectacle of the Supreme Court sitting in solemn judgment upon the conflicting claims of the national and state sovereignties, and tranquillizing all jealous and angry passions, and binding together this great confederacy of states in peace and harmony, by the ability, the moderation and the equity of its decisions." — James Kent, in "Commentaries on the American Law," (Eighth Edition), Volume One, page 490.

"During its seven score and seven years of existence, the Supreme Court of the United States has never loomed so predominant in public thought as it does today. A compendious commentary upon the enunciations of the Court, with recourse to its expressed opinions, suffices to convince both dogmatist and skeptic of the proper assertion of judicial power by the supreme

tribunal on Earth. At the outset it is to be remarked that it would seem difficult — nay, impossible — to substitute words and statements which are more intelligible, more luminous, or less susceptible to misconstruction, than those which are to be explained. Thoughts and expressions are carried in the decisions of the Court to the utmost perfection of which human genius is capable.

"The people of the United States have confided the articulate voice of the Federal Constitution in the Supreme Court of the United States. In consonance with the power conferred by article three of the Constitution, and in vindication of that magnificent document, that sonorous and authoritative voice has apotheosized a government of laws, and proscribed a government of men. An independent judiciary, venerable by its dignity, gravity, and acumen, and deliberating with entire serenity and moderation, is qualified as perhaps no other instrumentality for the exalted task of expounding the Constitution.

"Assiduously eschewing all polemics, the Court has compesced its authority to a scrutiny of power rather than policy. In United States v. Butler, 80 L. Ed. 287, 293 (Adv.), 56 S. Ct. 312, 102 ALR 914, 923, the Court, speaking through Mr. Justice Roberts, stated: 'There should be no misunderstanding as to the function of this court in such a case. It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the government has only one duty, — to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and having done that, its duty ends. The question is not what power the federal government ought to have but what powers in fact have been given by the people.'

"In Norman v. Baltimore and Ohio Railroad Co. (The Gold Clause Case) 79 L. Ed. 885, 897, 294 U. S. 240, 297, 55 S. CT. 407, Mr. Chief Justice Hughes said: 'We are not concerned with their wisdom. *The question before the court is one of power, not of policy.* And that question touches the validity of these measures at but a single point.' (Italics are mine.)

"In Railroad Retirement Board v. Alton Railroad Co. (The Railroad Pension Case) 79 L. Ed. 1468, 1474, 44 S. Ct. 758, 295 U. S. 330, 346, it was declared: 'Our duty, like that of the court below, is fairly to construe the powers of Congress, and to ascertain

whether or not the enactment falls within them, uninfluenced by predilection for or against the policy disclosed in the legislation. The fact that the compulsory scheme is novel is, of course, no evidence of unconstitutionality. Even should we consider the Act unwise and prejudicial to both public and private interest, if it be fairly within delegated power our obligation is to sustain it. On the other hand though we should think the measure embodies a valuable social plan and be in entire sympathy with its purposes and intended results, if the provisions go beyond the boundaries of constitutional power we must so declare.'

"A statute is constitutional if it is in apposition to the Constitution and a statute is unconstitutional if it is opposition to the Constitution. The various utterances of the Supreme Court on this point are legion. 'Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.'

"Declining to administer the law with pedantic stringency, the Supreme Court has resolved every doubt in favor of the validity of the challenged legislation. 'In the discharge of that duty, the opinion of the lawmakers, that a statute passed by them is valid must be given great weight . . . but their opinion, or the court's opinion, that the statute will prove greatly or generally beneficial, is wholly irrelevant to the inquiry.' Carter v. Carter Coal Co., 56 S. Ct. 855, 80 L. Ed. 749, 762 (Adv.) Again, 'Every presumption is to be indulged in favor of faithful compliance by Congress with the mandate of the fundamental law. Courts are reluctant to adjudge any statute in contravention of them. But, under our frame of government, no other place is provided where the citizen may be heard to urge that the law fails to conform to the limits set upon the use of a granted power. When such a contention comes here we naturally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress. How great is the extent of that range, when the subject is the promotion of the general welfare of the United States, we need hardly remark. But, despite the breadth of the legislative discretion, our duty to hear and render judgment remains. If the statute plainly violates the stated principle of the Constitution we must so declare.' United States vs. Butler, 56, S. Ct. 312, 80 L. Ed. 287, 296 (Adv.) 102 ALR 914, 926. 'We pointed out in the Panama Refining Co. Case that the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and

practicality, which will enable it to perform its function.' Schechter v. United States, 79 L. Ed. 1570, 1580, 55 S. Ct. 837, 295 U. S. 495, 530.

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"The great portals that mark the entrance to this sacred shrine of justice, located at Washington, D. C., depict events of signal significance in man's progressive dissemination of law and equity — The shield of Achilles, to show the origin of custom and law; the praetor promulgating his edict, to signify the authority of the court in the pristine days of civilized conduct; Julian discoursing to his pupils, to acknowledge the development of law by scholar and lucubration; Justinian and the Corpus Juris Civilis; King John signing Magna Charta at Runnymede; the Chancellor publishing the statute of Westminster in presence of Edward I; King James forbidden by Coke from sitting upon the bench as a judge, thereby establishing the independence of the court from the pernicious influence of executive authority; and John Marshall delivering his opinion in the case of Marbury v. Madison — all involving in their consequences the longevity of the State. Time, with its inexorable logic and eloquent silence, will add a panel to this concatenation depicting Chief Justice Charles Evans Hughes delivering the unanimous opinion of the Court in Schechter v. United States.

"As the entity upon whom devolves the exegesis of the Constitution, Mr. Justice Stephen J. Field had this to say of the power of the court: 'As I look over the more than a third of a century that I have sat on this bench, I am more and more impressed with the immeasurable importance of this Court. Now and then we hear it spoken of as an aristocratic feature of a republican government. But it is the most democratic of all. Senators represent their States, and Representatives their constituents, but this Court stands for the whole country, and as such it is truly of the people. It has, indeed, no power to legislate. It cannot appropriate a dollar of money. It carries neither the purse nor the sword. But it possesses the power of declaring the law and in that is found the safeguard which keeps the whole mighty fabric of government from rushing to destruction. This negative power, the power of resistance, is the only safety of a popular government.'

"Some antagonists resort to the banal complaint that the Court is without power to declare Acts of Congress unconstitutional. Even a superficial examination of the authorities will convince one that this attitude is untenable. The leading members of the Constitutional convention asserted the doctrine that the judiciary was to utilize a prerogative of outlawing legislative enactments irreconcilable with the Constitution . . . Elbridge Gerry of Massachusetts, James Madison of Virginia, George Mason of Virginia, Gouverneur Morris of Pennsylvania, and Luther Martin of Virginia were among those that consistently reiterated that belief. The arguments in the various state conventions called for the purpose of the ratification of the Constitution indicated that it was beyond cavil. As early as August of 1792, the Supreme

Court, in the second Hayburn case, expressed the policy of declining to enforce the provisions of an invalid enactment. Again, in April, 1795, this doctrine was approved to a more intense degree and with less ambiguity. In number 78 of the Federalist, Alexander Hamilton stated: 'If there should happen to be an irreconcilable variance between the two . . . the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.' Marbury v. Madison, 1 Cranch 138, 2 L. Ed. 60, is the monumental and epochal enunciation by which the Court has been led, but the case was the articulation of the Constitution and its framers, and not usurpation, as some contemporaries maintained. The sententious declaration of John Marshall was a complete refutation of calumny in 1803; it still maintains its vigour: 'That this court dares not usurp power is most true. That this court dares not shrink from its duty is not less true.' 4 Cranch 507, 2 L. Ed. 702. Calvin Coolidge tersely remarked that 'It is frequently charged that this tribunal is tyrannical. If the Constitution of the United States be tyranny; if the rule that no one shall be convicted of a crime save by a jury of his peers; that no order of nobility shall be granted; that slavery shall not be permitted to exist in any state or territory; that no one shall be deprived of life, liberty or property without due process of law; if these and many other provisions made by the people be tyranny, then the Supreme Court when it makes decisions in accordance with these principles of our fundamental law is tyrannical. Otherwise it is exercising the power of government for the preservation of liberty.'

"It is peculiarly within the province of lawyers and students to see that public opinion is not perverted as to the contemplation of the Supreme Court. To the uninformed, strictures directed to the Supreme Court militate against the majesty of the Supreme law of the land; to the informed, such censures militate against the intelligence and integrity of the sponsors of these animadversions. The vindication of the Supreme Court is not the concern of an hour, a day, a year ,or an age; the whole of prosperity is involved, even to the end of time. With Europe embroiled in conflict between dictators afflicted with monomania, soulless serfs, heathen, denatured minds, regimented bodies, and Godless hypocrites, it is refreshing and edifying to observe that America stands as the only hope for an enlightened and assured future, but John Marshall's laconic admonition can never be untimely: 'We shall remain free if we do not deserve to be slaves.'

"It is irrefragable that the adjudications and demeanor of the Supreme Court should have the subvention, ratihabition, and asseverance of the bar and the embryo bar — the attorneys and the students — against the anathema of those insouciant of public responsibility, who resort to an attemped debilitation, denigration, and stultification of the Supreme Court to achieve their invidious ends.

"To the Supreme Court I am indebted for an appreciative knowledge of the Constitution (not as some mystic instrument, to

be chiefly utilized as something to read at a Fourth of July celebration) but as the congenial companion and guiding star of my life, embracing the divine, pervasive simplicity and the enduring rectitude of the Ten Commandments; aglow with the ruddy vigour of immortal life; as the conservator of my life, my liberty, and my pursuit of happiness, and as the epitome of the transcendent genius of our Fathers . . . conceived in liberty, born in the travail of conflicting political thought, nurtured by John Marshall from an infancy of doubt to a youth of certainty, this Constitution of which I speak rises to its full and imposing stature under the benign guidance and guardianship of the present Court. The life of our government has been sustained solely by the Court; in this Supreme Court resides unceasingly the peace, the prosperity, and the existence of the State.

"I regard the Supreme Court with reverence and affection; the erudition, the dignity, the austerity, the perspicacity, and the integrity which it encompasses are without counterpart in the history of man. The significance of the seven wonders of the world — the temple of Diana at Ephesus, the Mausoleum, the Lighthouse of Ptolemy Soter, the Hanging Gardens of Babylon, the Pyramids of Egypt, the Colossus of Rhodes, the vocal Memnon — is as nothing compared with these nine guardians and arbiters of the Supreme Law of the Land — Chief Justice Charles Evans Hughes, Justices Willis Van Devanter, James Clark McReynolds, Louis Dembitz Brandeis, George Sutherland, Pierce Butler, Harlan Fiske Stone, Owen Josephus Roberts, and Benjamin Nathan Cardozo — who toil without thought of that day when generations yet unborn will rise up and call them blessed!

"For the last one hundred and seventeen years the Supreme Court of the United States has consistently adhered to the perspicuous shibboleth of Chief Justice John Marshall in McCulloch v. Maryland, 4 L. Ed. 579, 604, 4 Wheaton 314, 419; 'Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.' "

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