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BICENTENNIAL SYMPOSIUM

CONSTITUTIONAL GOVERNMENT— STRENGTHS, WEAKNESSES, FUTURE

INTRODUCTION: CONSTITUTIONAL GOVERNMENT AND THE PURSUIT OF JUSTICE

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In one of his Federalist Papers, James Madison wrote: "Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit."¹ We Americans presently are celebrating our 200th year of such pursuit; still we have not attained our goal. It is helpful, however, in this our bicentennial year, to pause to study the beginnings of this quest, and it is most fitting that such meditation be sparked by the Symposium on constitutional government offered by the *William and Mary Law Review*. No publication can lay claim to a more auspicious heritage than can this *Review*, for its lineage goes back to the great intellectuals who not only forged the principles of our constitutional government but put them on parchment for all of God's creatures to emulate.

A quartet of learned professors brings to us their comprehension of our constitutional beginnings and of the domestic and international implications of this heritage. Professor Hood Phillips leads the Symposium with "The British Constitution: From Revolution to Devolution,"² Professor Ammerman follows with "The British Constitution and the American Revolution: A Failure of Precedent,"³ Professor

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1. THE FEDERALIST No. 51, at 324 (C. Rossiter ed. 1961) (J. Madison).

2. 17 WM. & MARY L. REV. 423 (1976).

3. 17 WM. & MARY L. REV. 473 (1976).

Swindler then deals with the "Seedtime of an American Judiciary: From Independence to the Constitution,"⁴ and Professor Humphrey traces the development of "The International Bill of Rights: Scope and Implementation."⁵ In the words of Walt Whitman, these dissertations illustrate the "evolutionary outcome"⁶ not only of English tradition but of English bull-headedness as well. At the same time, the articles give us a picture of early American life as seen through its constitutional window, a perception that has been imparted through the United Nations back across the oceans of the entire world. The shapings of our political foundations, as traced by Professors Hood Phillips and Ammerman, and the early development of our unique judicial system, as related by Dr. Swindler, furnish a perfect gateway to the present international effort of which Dr. Humphrey writes.

H. L. Mencken said that nothing—including man—endures for more than a generation. He was bent on liquidating the past. Others say that we new Americans have lost the old world culture of our forebears. In my opinion, both views are wrong. Rather than being composed of cultural tramps, our generations sparkle with achievements in political science, literature, and law, as evidenced by this Symposium. These distinguished scholars completely demolish Mr. Mencken's theory by use of the experiences of generation after generation of peoples as stepping stones to the attainment of a more effective and equal administration of justice under law. Certainly, as Mr. Madison said, "[L]iberty may be endangered by the abuses of liberty as well as by the abuses of power . . ."⁷; thus, the Founders sought to reconcile the yearning for individual liberty with the necessities of law and order. In short, as Mr. Madison emphasized, in a free society the government not only must be able to control the governed but also it must be obliged to control itself.⁸ Failure in the latter, as we have recently experienced, inevitably destroys the efficacy of the former.

The concept of constitutionalism is not of modern origin. Ancient Greece gave us some of the basic characteristics of constitutionalism, one of which was that acts of government be judged according to a standard

4. 17 WM. & MARY L. REV. 503 (1976).

5. 17 WM. & MARY L. REV. 527 (1976).

6. "As America fully and fairly construed is the legitimate result and evolutionary outcome of the past" W. WHITMAN, *A Backward Glance O'er Travel'd Roads*, in 2 COLLECTED WRITINGS OF WALT WHITMAN 721 (F. Stovall ed. 1964).

7. THE FEDERALIST No. 63, at 387 (C. Rossiter ed. 1961) (J. Madison).

8. See *id.* No. 51, at 322 (J. Madison).

of quality. Even though by that standard the law be bad, it was not illegitimate. The Romans adhered to the principle that the people alone were the source of law and continued to accept this doctrine even when Caesar's will became Roman law.

Medieval kings claimed to be chosen by God and accountable only to him, as James I asserted in 1598 in *The Trew Law of Free Monarchies*.⁹ The Church of England also taught the divine right of Kings; James I articulated its doctrine in an address to Parliament: "Kings are in the word of God it selfe, called Gods, as being his Lieutenants and Vice-gerents on earth, and so adorned and furnished with some sparkles of the Divinitie. . . ." ¹⁰ The people owed allegiance to the person of the King; in *Calvin's Case*, the idea was spawned that Scots were under the personal dominion of the King, rather than under the authority of the Parliament.¹¹ The power of the King was absolute in his sphere; at the same time, however, he was not to transgress the sphere of private right that sprang from Magna Carta. From the conflicts between divine right and private right emerged the doctrine that the Crown was responsible not only to God but to the law. Parliament, as Dr. Hood Phillips points out, began assuming duties and rights formerly enjoyed by the King, and in the following century most of the present relationships between the two were effected.

The American colonies, in comparison with other British territories, enjoyed considerable independence. The concepts of constitutionalism, embodying freedom, proved too much, however, and dissension increased rapidly during the time of James I and his immediate successors. The issue of the legitimacy of parliamentary action as well as that of the King's representatives brought on a crisis that was incapable of resolution through negotiation. Professor Ammerman discusses the reasons for the failure of *stare decisis* that led to revolution.

After achieving independence, the colonists found it necessary to have a written constitution. In America there were no centuries of precedent as England enjoyed; the creation of a single written document that would bind all was, indeed, a monumental task. The genius of the resulting document is that it achieves a delicate balance between permanence and flexibility. The proof of high attainment in this regard is the comparatively small number of amendments that have been found

9. THE POLITICAL WORKS OF JAMES I at 53 (C. McIlwain ed. 1918).

10. JAMES I, *Speech of 1605 to Parliament*, in *id.* at 281.

11. 77 Eng. Rep. 377, 7 Co. Rep. 1a. (Ex. 1608).

necessary: only 26. Statesmen and scholars alike hail the result as the major contribution to constitutional government in history.

The language of the Soviet Constitution recognizes and honors all of the fundamental rights that are the essential elements of a free society.¹² In application, however, these rights cherished by all freedom-loving people are recognized only in the breach. This is because the Soviet judicial system is not a separate, equal, and coordinate branch, but is dominated by the Politburo.¹³ Our Founders were aware of the pitfalls of a judiciary that is not a separate branch of government. Indeed, in the Declaration of Independence they objected strenuously to the influence of the King on British courts.¹⁴ In writing our Constitution, therefore, they made the judicial branch secure as the third equal, separate, and coordinate system.¹⁵ Dr. Swindler traces the steps that the Founders took to prevent a repetition of these grievances. Beginning with the closing of the Royal Courts, he describes the development of the Judiciary Act of 1789,¹⁶ the most important piece of legislation ever adopted by Congress; with remarkably few changes,¹⁷ it stands in its original form as a bulwark of protection to the freedom of the people.

12. SOVETSKAYA KONSTITUTSIYA (Constitution) arts. 118 (right to work), 119 (right to rest and leisure), 122 (equal rights for women), 123 (equal rights despite race and nationality), 124 (freedom of religion), 125 (freedoms of speech, press, assembly, and street demonstration), 126 (right to unite in mass organizations), 127 (inviolability of the person), 128 (inviolability of homes) (U.S.S.R., 1936).

13. *Id.* arts. 104, 113, 114.

14. "The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. . . —He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers.—He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." U.S. DECLARATION OF INDEPENDENCE PAR. 2 (1776).

15. U.S. CONST. art. III, §§ 1-2; *cf.* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (Marshall, C.J.): "It is, emphatically, the province and duty of the judicial department, to say what the law is."

16. Ch. 20, 1 Stat. 73.

17. The judicial structure established by the Judiciary Act of 1789, ch. 20, 1 Stat. 73, is similar to the current system. The Act created 13 district courts with limited original jurisdiction and 3 circuit courts with original jurisdiction in diversity and criminal cases and appellate jurisdiction in civil cases. Further, a Supreme Court was vested with original jurisdiction as provided for in the Constitution, with appellate jurisdiction over federal circuit courts if the amount in question exceeded \$2000, and with appellate jurisdiction over state court controversies raising a federal question. The Act also provided for removal from state to federal courts in certain cases and incorporated the Rules of Decision Act, directing federal courts to use applicable state law.

Although the federal court system has been changed many times, as to revise jurisdictional limits, only a few amendments since the Judiciary Act are of major signifi-

It was only natural as well as human that, upon the cessation of hostilities in World War II, statesmen began thinking of the extension of constitutional government to world affairs. The result was the Charter of the United Nations.¹⁸ Although Woodrow Wilson failed in a similar effort after World War I, world leaders have been able to maintain at least an international sounding board through the United Nations. In addition, the International Bill of Rights, encompassing the Universal Declaration of Human Rights¹⁹ and its implementing Covenants,²⁰ has been promulgated under the authority of the United Nations. As a member of the President's Commission for the Observance of Human Rights Year (1968), I was privileged to observe firsthand the progress made in the area of international human rights. As Dr. Humphrey portrays, there are those among us who prayed for more accomplishment. The Connally Amendment²¹ and other obstacles, however, have

cance. Original federal question jurisdiction first was granted to the federal courts in 1875, Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470; the current circuit courts of appeals were created in 1891 by the Evarts Act, Act of March 3, 1891, ch. 517, § 2, 26 Stat. 826; the circuit courts instituted by the Judiciary Act of 1789 were abolished, and their jurisdiction transferred to the district courts, by the adoption of the Judicial Code in 1911, Act of March 3, 1911, ch. 231, § 24, 36 Stat. 1091; the direct review jurisdiction of the Supreme Court largely was replaced by discretionary review by writ of certiorari, Act of Feb. 13, 1925, ch. 229, § 237, 43 Stat. 936. See C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* § 1 (2d ed. 1970).

18. June 26, 1945, 59 Stat. 1031, T.S. No. 993.

19. G.A. Res. 217A, U.N. Doc. A/810 at 71 (1948).

20. International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. 16, at 49, U.N. Doc. A/6316 (1966).

21. In 1946, the United States accepted the compulsory jurisdiction of the International Court of Justice, which was established by the United Nations Charter, in legal disputes concerning interpretation of treaties, questions of international law, breaches of international obligations, and the nature and extent of reparations for such breaches, by filing a declaration under article 36(2) of the Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 1060 (1945), T.S. No. 933. As originally written, however, the Senate resolution giving its consent to the declaration contained a proviso that the declaration did not apply to disputes regarding matters "essentially within the domestic jurisdiction of the United States"; the Connally Amendment to the resolution further limited the jurisdiction of the court by reserving to the United States the authority to decide what matters lay within its domestic jurisdiction. The resolution as amended stated that the declaration did not apply to "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States as determined by the United States." The resolution incorporating the Connally Amendment was passed by the Senate on August 2, 1946. S. Res. 196, 79th Cong., 2d Sess., 92 CONG. REC. 10706 (1946). The declaration under article 36(2) appears at 61 Stat. 1218 (1946).

prevented the United States from participating in an effective system of international implementation. When the Covenants to the International Bill of Rights come into force, those states that are parties will be bound to respect the human rights protected by the Covenants. Unfortunately, no implementation or enforcement machinery has been adopted, and none is in the offing.

It is hoped that this Symposium, by bringing attention to the development of constitutional government since the Revolution, in this, the 200th year of our independence, will prove beneficial to the continual struggle to attain equal justice under law for all peoples throughout the world.