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Historical Myth and Constitutional Absolutism

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I AGREE with much that Mr. Harding had written but I must express some disagreement with his position. I agree with so much of his article and am in such hearty sympathy with the general tone of it that I hesitate to criticize it at all. Yet if I am to comment on his article, I feel that honesty requires me to state my entire position. I do not object to his definition of the myth of constitutional absolutism as being the belief that the constitution is “a basic body of law which, objectively and impersonally interpreted, is capable of telling us the legal right from the legal wrong.” I agree with his description of the judicial process. I am in hearty sympathy with his general viewpoint. I concur in his final conclusion that constitutional absolutism is a myth.

But I disagree with him most emphatically in his fundamental assumption that our constitution, whatever its nature, is the document created in the constitutional convention and nothing more. On pages 76 and 77 Mr. Harding almost sees the fallacy of his own assumption but otherwise his whole article is permeated with this notion. I believe that this is a mistake. If this is a mistake, Mr. Harding is guilty of making at least half the mistake that has been made by the people whom he criticizes. Because I disagree with him as to this fundamental assumption, of course, I have also to disagree with much of his line of reasoning. Since he is limited by this assumption he can not do as perfect a job in destroying the myth of constitutional absolutism as he could do if he did not believe in this myth.

Of course, the belief that our United States Constitution consists only of the document put forth by the constitutional convention is a common belief. It is evidently the belief of those who talk so glibly about “going back to the constitution.” It is a popular notion that generally prevails. Even many lawyers seem to have this uninformed opinion. A president of the American Bar Association in a recent speech in Indiana said that he did not believe “in the constitution which Mr. Hugh Johnson was expounding” but he believed “in the constitution which was made in that convention which was presided over by

George Washington," and then he proceeded to name different things in that constitution in which he believed; but none of the things which he named are found in that constitution made by the constitutional convention over which George Washington presided, but they are all found in the amendments to that constitution. The fact that a man occupying a position so prominent as the presidency of the American Bar Association should make such a clumsy mistake as this is not so bad as the fact that practically none of the lawyers listening to him recognized the fact that he had made a mistake.

Even Justices of the United States Supreme Court frequently seem to labor under this assumption. Mr. Justice Roberts in his opinion in the AAA decision clearly was guilty of doing so when he said, "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." The reason why the particular act of Congress involved in the AAA decision was declared unconstitutional was because the Supreme Court said that Congress could not in exercising its own power of taxation exercise what would otherwise be a general police power of the states. This doctrine was the doctrine which Mr. Justice Roberts laid down beside the statute and which made the statute unconstitutional because it did not square with it. Yet this doctrine is not found either in the original constitution or in any of the amendments. It was a doctrine created and written into the constitution by the United States Supreme Court itself. Not only that, probably Justice Roberts and those of his associates agreeing with him were the Justices who wrote it into the constitution. Of course, the Supreme Court can declare any act of Congress unconstitutional when it has the power to lay down this sort of a constitution beside the statute, but the Supreme Court should not try to leave with us the impression that this constitution was made in the constitutional convention. In spite of Mr. Justice Roberts, American Bar Association Presidents, and any other popular notions to the contrary, the fact remains that the notion that the United States Constitution is now the document that was made in the constitutional convention is also a basic myth.

This truth is capable of easy demonstration. In the first place, it was not the intention of the founding fathers that the original constitution should be our complete and final fundamental law. It was for this reason that they provided for amending the constitution. The constitution has actually been amended twenty-one different times and as much of our present constitution is found in the amendments as is found in the original constitution itself. Those people who talk about our constitution as though it was made in the constitutional convention are very likely to enforce their remarks by referring to provisions in the XIV Amendment which did not go into force until 1868.

But the constitution created by the amendments is nothing to the constitution created by the Supreme Court itself. Only two of our important constitutional law doctrines are found in the original constitution. These are the doctrine of separation of powers and the doctrine of amendability of the constitution,
although two or three other doctrines are slightly forecasted. The doctrine of universal citizenship and suffrage, and the doctrine of protection of personal liberty against a social control by constitutional limitations are found for the most part in the formal amendments. The doctrine of the supremacy of the Supreme Court was created entirely by the Supreme Court. The doctrine of a dual form of government was also created by the Supreme Court. Even the doctrine of the sovereignty of the people was created by the Supreme Court. In addition, the doctrine of separation of powers, the doctrine of amendability of the constitution, the doctrine of universal citizenship and suffrage, and the doctrine of protection of personal liberty against social control by constitutional limitations have all been so modified, or made over, or added to, that most of these doctrines are also the work of the Supreme Court.

As an example of this work of the Supreme Court attention will be called to the limitation of due process. This limitation is found in the Fifth Amendment as a limitation on the Federal Government and in the Fourteenth Amendment as a limitation on the State Governments, but in the beginning this constitutional limitation had no such scope as it has at the present time. At first it applied only to legal procedure and the limitation in the Fourteenth Amendment protected only negroes. Now the limitation protects everyone, even corporations as to their property rights, and it protects them not only in the matter of legal procedure but also as to matters of substance. But it was not until the eighties or nineties that due process of law was extended to matters of substance. This consummation came to pass only when Justice Field came into the ascendancy on the Supreme Court. When the Supreme Court did this it did not apply a constitution found in the amendments but it applied a constitution which it made itself. This shows that the doctrine of protection of personal liberty against social control by constitutional limitations is very largely a doctrine created by the Supreme Court.

Probably less than one-fourth of our present constitution is found in the original constitution. Nearly another one-fourth is found in the amendments. More than half of our constitution is not found in either one of these places but in the reports of the decisions of the United States Supreme Court and they make over one-half of our United States constitution.

With the explosion of the myth that our constitution is the original document formulated in the constitutional convention it is very easy to dispose of the myth of constitutional absolutism.

Is the original constitution of the constitutional convention absolute? Of course it is not, for the reason that it is not our constitution. A constitution which could not remain our constitution any better than the original constitution did certainly cannot be called absolute. This disposes of the myth of constitutional absolutism so far as concerns the original constitution.

Is our actual constitution including the original constitution, the amendments, and the constitution made by the Supreme Court absolute? The answer to this question also will have to be in the negative. The more this constitution is examined in operation, the more it will be discovered that there is nothing fixed or final in any part of this constitution. The doctrine of separa-
tion of powers was established by the original constitution if that document established anything. Yet the doctrine of separation of powers has been so changed by the Supreme Court through the years that our present doctrine bears no more resemblance to what apparently was the original doctrine than does our present common law resemble the common law of the time of William The Conqueror. The original constitution contains a clause forbidding the impairment of the obligation of contracts (one of the few constitutional limitations found in the original constitution). Yet this contract clause has a very different meaning today from what it had in the beginning. At first according to the interpretation of the Supreme Court this was an absolute guarantee in the case of corporate charters granted by states. Today it protects these contracts from impairment only when it is not an exercise of the power of eminent domain, or the police power, and soon doubtless will be added the power of taxation.

In the same way none of the provisions in the amendments have continued through the years to have the same connotation. This perhaps has been already sufficiently illustrated by the discussion of the due process clause.

The constitution made by the Supreme Court has no more stability and permanency than the other parts of the constitution. The Supreme Court has sometimes followed its prior precedents and it has sometimes overruled them. It has made so many conflicting decisions that majority and minority members of the Supreme Court can practically always find sufficient precedents from which to choose. The numerous five to four and six to three decisions which the Supreme Court has rendered show how little the members of the Supreme Court are controlled and governed by prior decisions. Precedents can always be found, but the justices of the Supreme Court can not always agree on matters of policy. This shows that the only constitutional absolutism is one that the Supreme Court makes as it goes along. This is an absolutism not of the constitution but of the Supreme Court.

The truth of this statement can be demonstrated by one illustration. I will take the illustration of the commerce power of the federal government. This is a phase of the doctrine of a dual form of government. This doctrine we have already noted was one which was really made by the Supreme Court. Of course, the constitution apparently gave Congress the power to regulate commerce, but it has been the Supreme Court which has really determined the scope of this power and the manner in which it may be exercised. Before 1851, the Supreme Court took the position that the power was a concurrent power of the federal governments and the states. Between 1851 and 1894 the Supreme Court took the position that where interstate commerce concerned a matter national in scope needing one uniform method of regulation, the federal government's power was exclusive and that the states could not even incidentally regulate it in the exercise of their general police power, but that where it related to other matters, the power continued to remain concurrent. After 1894 the Supreme Court modified the doctrine which obtained between 1851 and 1894 so as to allow the states to exercise their general police power when it only indirectly or incidentally affected interstate commerce. At first, the
Supreme Court was sure that commerce included traffic but was not sure that it included transportation, although in the case of *Gibbons v. Ogden* it held that it did. More recently the Supreme Court has in a number of decisions taken the position that commerce includes transportation and apparently nothing more. In recent decisions the Supreme Court has held that Congress could not forbid the shipment in interstate commerce of goods manufactured by child labor, on the theory that that was a regulation of something which was not interstate commerce and perhaps not even commerce; but that Congress might subject prison-made goods shipped in interstate commerce to state laws after they have arrived in the state but are still articles of interstate commerce because still in the original package, and undoubtedly the Supreme Court will hold that Congress may prohibit the shipment of prison-made goods into states which have laws against the sale of such goods in those states. At least the Supreme Court held that Congress had the power to do this in the case of intoxicating liquors. If Congress can prohibit the shipment of prison-made goods upon this condition there is no rational reason why it could not prohibit the shipment of these goods without this condition, and if it can prohibit the shipment of prison-made goods it should be able to prohibit the shipment of child-made goods. These are sufficient illustrations of the inconsistencies of the decisions of the United States Supreme Court on questions of interstate commerce and of the changes which have occurred in the law as to interstate commerce and the federal government’s power thereover. They show that there is nothing absolute in the decisions of the United States Supreme Court.

These three lines of proof are sufficient to show that there is nothing absolute in the United States Constitution. It is a myth. Mr. Harding is correct in his position on this point. The founding fathers never had any such notion. The Supreme Court has pretended frequently to have this notion but in fact has always repudiated it. Presidents of the United States have criticized both the formal constitution and the constitution made by the Supreme Court. Students and teachers of constitutional law have done the same thing. None of these people believe in the myth of constitutional absolutism. Apparently this myth is believed in only by those who know very little about our constitution. It is true that these people are the ones who are talking most vociferously about saving our constitution. It is a strange thing to have so many people undertaking to save something when they do not know what it is that they are undertaking to save. Of course, what they are really undertaking to save is not the constitution but something else, but apparently they do not know this.

The myth of constitutional absolutism will probably die hard but Mr. Harding’s article will help to bring that demise to pass.