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Repository Citation

Albert K. Stebbins LL.B., *The "Vested" Powers of the United States Supreme Court*, 10 Marq. L. Rev. 204 (1926).
Available at: <http://scholarship.law.marquette.edu/mulr/vol10/iss4/3>

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THE "VESTED" POWERS OF THE UNITED STATES SUPREME COURT

ALBERT K. STEBBINS, LL.B.*

WHEN the great Mirabeau was born he was a weak, puny and hideous thing—considered almost a monstrosity. "Don't be frightened," the nurse said to the stern old self-styled "Friend of Men" in preparing him to see his new-born son, almost prophetically possessing two premature teeth. Surely none imagined that this creature would become the inspiration and the moving force of the French Revolution. Perhaps if this had been imagined his somewhat querulous father would have smothered him in infancy. Yet Carlyle finds the strength of the man in the fact that he possessed a strong, living soul—"a reality, not an artificiality, not a sham."

So when the Supreme Court of the United States was designed by the framers of the Constitution there was but little to indicate its future greatness in the words employed—

The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.¹

The Constitution proceeded to designate the particular subjects within the jurisdiction of the United States courts, and then, as though fearful that too much, by possible inference, had been granted to the Supreme Court, the grant was immediately limited by the words—

In all cases affecting ambassadors, other public ministers and consuls and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before-mentioned the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make.²

This Supreme Court, then, had sole and untrammelled jurisdiction of cases involving diplomatic officers and the States alone—all else was subject to the control and regulation of Congress.

No Convention advocate was moved to say "Don't be frightened." Well might John Jay believe that it offered no career for a man of his

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¹ U. S. Constitution, Article III, Section 1.

² U. S. Constitution, Article III, Section 2 (2).

standing and ability. It required all of the foresight and philosophic optimism of a Franklin to imagine that it might become an institution of some importance.

That it has grown with our growth, and achieved its position in our scheme of government, is because it too had a strong, living soul—"a reality, not an artificiality, not a sham."

At this late day it would be idle to speculate relative to what would have happened to America if the Congress had been derelict in its duties and failed either to create the inferior courts to exercise the general grant of judicial power or to provide for the appellate jurisdiction of the Supreme Court as required by the Constitution—for it did both.

The general jurisdiction of the courts of the United States and their position in our scheme of government have been heretofore considered in this REVIEW by the writer.³

The Constitutional Convention was not prodigal in its grants of power to the sovereignty which it created, but that which was granted was fully granted and without reservation. In each instance, when endowing the three several branches which in their entirety were to constitute the sovereign state, the old phrase of the English law "vested" was employed with all that that term implies. So when the judicial power was declared to be "vested" there was an element of finality and perpetuity in the grant—a something which, vesting then, was to continue vested for all time.

It may properly be said that while the definite powers vested were meager, the judicial branch as created nevertheless possessed a vested right in its share of the sovereignty, and that the Congress was placed under an immediate obligation—moral and understood—to create the judicial agencies in which the whole judicial power might be vested and by which it might be exercised, and further to enact the necessary laws to define that power and to give life to that which, in the Constitution, remained a naked right.

Mr. Justice Story admirably expressed this thought relative to the Supreme Court in *Martin v. Hunter's Lessees*.⁴ This case arose on a writ of error directed to the Supreme Court of the State of Virginia, the principal point for decision being whether or not such a review was included within the appellate powers of the Supreme Court. Before considering the principal question, Mr. Justice Story discussed generally the extent of the judicial power under the Constitution, and while

³ *Courts of the United States under the Constitution*, 7 MARQUETTE LAW REVIEW 28; *Removal of Causes to United States Courts*, 8 MARQUETTE LAW REVIEW 63;—the purpose of this article being to show briefly the nature of the powers of the Supreme Court as the judicial tribunal of last resort in our composite sovereignty.

⁴ Wheat. 306, 328.

this discussion was something more than obiter it was in a sense collateral, and the exact line beyond which congressional regulation might not pass may not have been clearly defined, but, as a general exposition of the judicial power, it has never been surpassed. In the course of the opinion it was said, after quoting Article III of the Constitution:

Let this Article be carefully weighed and considered. The language of the Article throughout is manifestly designed to be mandatory upon the Legislature. Its obligatory force is so imperative that Congress could not, without a violation of its duty, have refused to carry it into operation. The judicial power of the United States shall be vested (not may be vested) in one Supreme Court and any such inferior courts as Congress may from time to time ordain and establish. Could Congress have lawfully refused to create a Supreme Court or to vest in it the constitutional jurisdiction? But one answer can be given to these questions. It must be in the negative. The object of the Constitution was to establish three great departments of government: the legislative, the executive, and the judicial departments. The first was to pass laws, the second to approve and execute them, and the third to expound and enforce them. Without the latter, it would be impossible to carry into effect some of the express provisions of the Constitution. . . . The judicial power must, therefore, be vested in some court by Congress, and to suppose that it was not an obligation binding on them, but might, at their pleasure, be omitted or declined, is to suppose that, under the sanction of the Constitution, they might defeat the Constitution itself. A construction which would lead to such a result cannot be sound. The same expression, "shall be vested," occurs in other parts of the Constitution in defining the powers of the other coordinate branches of the government. . . . If, then, it is a duty of Congress to vest the judicial power of the United States, it is a duty to vest the whole judicial power. The language, if imperative as to one part, is imperative as to all. If it were otherwise, this anomaly would exist, that Congress might successively refuse to vest the jurisdiction in any one class of cases enumerated in the Constitution and thereby defeat the jurisdiction as to all; for the Constitution has not singled out any class on which Congress are bound to act in preference to others. . . . But the whole judicial power of the United States should be, at all times, vested either in an original or appellate form, in some courts created under its authority.

The members of the First Congress brought the same lofty, creative spirit to their task which had inspired the efforts of the members of the Convention. They were assembled to give life to that form which had been created, and this they did, with no captious desire to limit those powers to less than the intent of the grant.

It was the mission of that Congress to perfect the scheme of the Constitution, to create the machinery of that triune sovereignty so that each branch might assume its designated duties, exercise its vested powers, and be so coordinated that the sovereign state, complete in all of its powers, might be promptly realized.

So far as the judicial power was concerned, this was effected by the Judiciary Act of 1789.

By this Act an institution was created in which became vested the powers designated in the Constitution and which had remained in abeyance until such an institution had been brought into being in which, by the terms of the Constitution, such powers were to vest.

By this Judiciary Act the Congress exercised a power of appointment, and, by familiar legal analogies, it may well be said that upon the exercise of that power the rule of *functus officio* applied and that the Congress thereupon lost its control and retained no power to divest that which had become vested under the Constitution.

The constitutional theory of independent or coordinate branches of sovereignty would seem to compel this conclusion as a necessary consequence of the exercise of the delegated congressional power.

Congress may, "from time to time, ordain and establish" inferior courts by the terms of the Constitution, but the Constitution does not confer upon Congress the power "from time to time" to except from the appellate powers of the Supreme Court, or to interfere with the orderly performance of its vested powers by continued regulations.

The full judicial power of the sovereign state having been vested, that power must remain vested in said institution. One "inferior" court may "from time to time" be substituted for another, but the powers must at all times be fully vested in some "inferior" court, and so far as the jurisdiction of the Supreme Court is concerned, that which has been vested must, under the Constitutional theory, remain vested unless the people, by the exercise of their supreme power according to the method prescribed by the Constitution, shall otherwise definitely determine.

The judicial power is not dependent upon the whim or passion of the legislative power—the powers are coordinate and of equal dignity. If Congress can "from time to time" diminish the jurisdiction of the Supreme Court, it can destroy that court or leave it with empty dignity, and no jurisdiction whatsoever, excepting only over controversies involving diplomatic officers and the several states. A retrenchment of the jurisdiction of that court by Congress after the original appointment constitutes an usurpation unwarranted by the Constitution and can be accomplished solely by revolutionary means.

No submission to such a pretended control can either justify or legalize it—the court may at any moment appeal to the Constitution and assert its institutional and "vested" sovereign powers.

The truth of this statement may not be admitted by the supporters of that super-constitutional wave of "pure democracy" with which the country is at present afflicted, but, as long as the Constitution remains

unamended, it is logically incontrovertible and no attempt curtailment of that "vested" judicial power should be tolerated by any believer in Constitutional government.

The menace is phrased too loudly to be ignored, but the danger lies in the opening wedge.

Under the masterful leadership of Chief Justice Marshall, supported by the keen analysis and scholarly attainments of Mr. Justice Story, that institution, in which was vested the powers designated in the Constitution by the Judiciary Act of 1789, reached its full development.

It required not merely wisdom and learning, but bravery, honesty of purpose, and judicial poise to confirm and strengthen, beyond successful dispute, that vested right, but the end had been accomplished before Chief Justice Taney wrote the opinion in the *Dred Scott Case*—which, while bravely and correctly stating the law, was an important factor in precipitating the Civil War.

Through the four years of that struggle, the Supreme Court lost not one iota of its dignity, authority or power—it remained with that government to which the rule of the *Dred Scott Case* was anathema, but it never receded from its statement of the law. Perhaps, in the clash of arms, courts were, by the multitude, forgotten, but the fact that the court remained unharmed and unchallenged through it all is the best evidence of its enduring strength and constitutional power. Partisan threats might have been made, but no Congress was sufficiently hardy to demand the recall of the decision in the *Dred Scott Case* or to restrict the powers of the court—the people, in the exercise of their sovereignty, changed the status of the individuals to which that case referred, but what is writ is writ, and the decision remained. We find in very truth that that court possessed a strong living soul—a reality, not an artificiality, not a sham.

In defining the classes of cases to which the judicial power shall extend, the significant words "in law and equity" were employed. The full meaning of these words as used must be that when Congress, in the performance of its constitutional duties, vested in a certain court jurisdiction over a certain class of cases, enumerated in the Constitution, then, by virtue of the Constitution itself, said courts acquired full power "in law and equity" over the subject matter vested.

This carried with it, for a single example, in courts of original jurisdiction in equity, the power to issue temporary injunctions, for the protection of the rights of parties litigant, pendente, according to the recognized practice in equity, in cases "arising under the laws of the United States,"—the vesting of the jurisdiction, necessarily included, as a part of the power to exercise, all of the incidental agencies for the purpose of carrying that jurisdiction into effect.

In the same manner, the vesting of the constitutional appellate power in the Supreme Court carried with it the means recognized in the chancery practice of England for the securing of a complete and effective review.

This so far as positive jurisdiction and potential rights are concerned.

Procedural laws primarily affect the litigant, of themselves do not impose restrictions upon the jurisdiction of the courts as such, and, if the position here taken is correct, cannot divest any of that power which has become vested.

Procedural statutes regulate the processes which a litigant must observe in order, normally, to "get into court." But if the court, upon a presentation of the facts, determines that it must assert its vested powers in order to protect itself, then it has full power to act, even in non-compliance with directory statutes prescribing the procedure. It may be a subject of present controversy, but the logic of the situation demands that, if Congress should specifically deny to litigants the right to any injunction in a suit in equity, such statutes would not be binding upon the courts, and, upon a proper presentation of facts entitling a litigant to injunctive relief, the court, in the exercise of its vested powers in equity, might properly issue the writ.

To particularize, if a court has a vested jurisdiction in patent cases, it might, in a proper case, protect the rights of a litigant by injunction, regardless of prohibitory statutes. As Mr. Justice Story said in the *Martin* case, supra:

If, then, it is a duty of Congress to vest the judicial power of the United States, it is a duty to vest the whole judicial power.

If it is a duty to vest jurisdiction in patent cases (for the reason that they arise "under the laws of the United States,") then full jurisdiction must be vested—if the power of the court extends "to all cases in equity" then the full power of the court must so extend. The Congress, in the exercise of its power of appointment, "vested" jurisdiction in patent cases and "vested" the power to adjudicate such cases in equity—being "vested," it attaches fully and completely, including the power to issue injunctions, and cannot be divested by legislative caprice, —different courts created "from time to time" may be designated as the particular agencies for the exercise of that jurisdiction, but, jurisdiction having been "vested" in the judicial branch of the government, there must at all times be some court with the full power to exercise it.

As the full original jurisdiction has been "vested" in the "inferior courts" of the Constitution, so the power to review the action of such courts by appeal to the Supreme Court has been similarly "vested."

To simplify such review and, so far as litigants are concerned, to eliminate costly and vexatious appeals, procedural statutes may be and have been enacted and the rights of parties limited to a review by certiorari. This remedy, as at present understood, may in practice be found to be inadequate, in which event the Supreme Court will have the power, in the exercise of its "vested" rights, to allow an appeal or to treat a certiorari as an appeal for all purposes in order to see that justice is done.

Conflicts on questions of power between the several branches of our triune sovereignty are to be deprecated, and the courts are ever reluctant to raise such an issue or to assume to act in disregard of a statute designed to regulate their exercise of jurisdiction, but the power remains and the recognition of congressional control of the means lies exclusively in comity.

The courts do formally recognize congressional rules of procedure in limitation of their vested powers by the observance of them; frequently the rules are wise in a general way and aid the courts in expediting business without seriously impairing either their powers or the rights of litigants. Such observance must not, however, be taken as a judicial submission to legislative attempts to restrict the vested powers of the judicial branch of the government.

It is a fact that through the years the Supreme Court has been increasingly burdened by inexcusable and vexatious appeals; that many appeals taken in perfect good faith do not involve questions properly requiring a determination by that court. The situation presented is a practical one, viz.: How to so relieve the Supreme Court of unnecessary burdens that it may devote its entire time to questions of large importance, the prompt decision of which is demanded by a public necessity.

In order to secure, if possible, that result, and with the tacit consent of all three branches of the government, Congress revised the appellate procedure by the Act of February 13, 1925.

This act virtually substituted the writ of certiorari for the writ of error and appeal for the purpose of reviewing the decisions of the lower courts with a few specific exceptions, chief of which was the retention of the writ of error for the purpose of carrying to the Supreme Court for review the decisions of "the highest court of a state" substantially as that power was vested by Section 25 of the Judiciary Act of 1789.⁵

The purpose of this legislation was praiseworthy. It is to be hoped that that purpose will be effected and the procedure will unquestionably be gladly followed by the courts—it is nevertheless in derogation of the vested appellate jurisdiction of the Supreme Court and will be followed

⁵ Judicial Code, Sec. 237, as amended by the Act of February 13, 1925.

solely because of comity between the several branches of the government and in order to accelerate the decision of those questions of public importance which are constantly being presented to that court and not as a recognition of the right of Congress to limit the vested powers.

As a member of the faculty, writing primarily for the student body, I must emphasize the fact that the conclusions above reached are not *stare decisis*, and, happily, may not so become for many a year.

We must, however, admit that the courts are objects of present popular attack—many who know better, and from whom we have a right to expect better things, make their gibes against these institutions, which are peculiarly unfitted to either resent or refute them. We must understand that there is a well-organized propaganda insidiously at work to undermine the dignity and power of the courts of the United States.

Constitutional amendments impairing the powers of the courts are difficult to secure, but bills are at least introduced at every session of Congress to reach the same results by legislation. The success of such efforts will be fatal to our constitutional, representative democracy. The situation demands that every citizen interested in the perpetuity of our institutions should be on the alert to defeat such attacks, and, if legislative success should be gained by those who would undermine, it must be understood that the Supreme Court of the United States has the unquestionable jurisdiction to defend its powers under the Constitution. We may rely upon that wisdom and high patriotism which has impelled the Supreme Court to defend the rights of others, by presently unpopular decisions against wanton or partisan attack, to likewise impel it to protect the powers of the judicial branch against similar attacks, at which time it will be entitled to receive the full support not only of every lawyer but of every citizen who understands and appreciates that the guaranties which preserve the power of the judiciary are the same guaranties which protect the rights and the liberties of the citizen.