



PennState
Dickinson Law

DICKINSON LAW REVIEW
PUBLISHED SINCE 1897

Volume 42
Issue 4 *Dickinson Law Review* - Volume 42,
1937-1938

6-1-1938

The Judiciary Under the Constitution

John W. Kephart

Follow this and additional works at: <https://ideas.dickinsonlaw.psu.edu/dlra>

Recommended Citation

John W. Kephart, *The Judiciary Under the Constitution*, 42 DICK. L. REV. 171 (1938).
Available at: <https://ideas.dickinsonlaw.psu.edu/dlra/vol42/iss4/1>

This Article is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact lja10@psu.edu.

Dickinson Law Review

VOLUME XLII

JUNE, 1938

NUMBER 4

THE JUDICIARY UNDER THE CONSTITUTION

John W. Kephart*

We are now commemorating the 150th Anniversary of our Constitution. It is fitting and truly appropriate that this College mark that great event today because two of our men signed that document, John Dickinson and James Wilson. They were both among the honored founders of this institution. John Dickinson was the first president of our Trustees and James Wilson served as one of the original members of that Board.

This country has now experienced 150 years under the Constitution. At such a time it is proper to pause and evaluate the results achieved under the structure so established, and to pass critical judgment upon the modus operandi of our government. There is little doubt that these reflections lead to the conclusion that if there are any structural factors to which our government owes its longevity, vitality and security, they are the basic tripartite division of its functions, and the separation of its component powers.

When the Constitutional Convention met in Philadelphia to replace the Articles of Confederation with a lasting compact to assure national cohesion and establish a democratic state that would endure, there were many conflicting theories abroad regarding the distribution of governmental powers. One theory was that of executive absolutism, under which the executive made the laws and enforced them; the legislative power served simply in an advisory capacity to the executive; the judiciary, merely as its agency of enforcement. The great monarchies of Europe were so constituted. The king or prince made the laws by divine right. His parliament or council were not the representatives of the people but his advisors. The judges were merely his delegates. He appointed and removed them at will. Their sole function was to sit for the king in his courts to dispense his justice. The judges of the *King's* Bench were hand-picked royal favorites. The chancellor, presiding over the royal courts of equity, was the keeper of the *King's* conscience. Justice was the whim of the monarch. Political offenders were tried and condemned in star chambers. One

*Address by Honorable John W. Kephart, Chief Justice Supreme Court of Pennsylvania, delivered at Dickinson College, Carlisle, Pennsylvania, on Founders Day, April 30, 1938.

of the greatest English jurists, Lord Coke, boldly protested this judicial subservience. He staked life and career upon his famous dispute with James the First, who demanded the right to try capital cases without the aid of his judges. Coke won for the English courts a limited freedom, but even today they are not entirely divorced from, nor independent of, the other branches of government. The judges are appointed by the Crown, and removed by the Crown upon the address of Parliament. Parliament is the final court of appeal. On the continent of Europe, in similar fashion, the doctrine of the divine right of kings produced a servile judiciary, creatures of the will of the executive.

Another theory of government, often attributed to the fertile brain of John Locke, is that of legislative supremacy. It was the outgrowth of the long struggle between kings and parliaments; between the will of an absolute monarch and the will of a popular assembly. In the great reaction against the evil of autocracy, many philosophers and political economists believed that the legislative should dominate both the executive and the judiciary. By this doctrine the courts and the executive were but arms of the legislature, the law-making body. Their sole function was the articulation and enforcement of the legislative will. So long as the legislators were chosen by the people and subject to recall, the theory represented an advance in government. But once the legislators assumed to themselves the right of self-perpetuation and independence of recall, the tyranny and despotism was no less. This theory, however, found many adherents in the convention of American statesmen to whom the people had entrusted the delicate task of creating a stable, popular government.

There was still a third theory, a theory first enunciated by the French philosopher Montesquieu in his *Spirit of Laws*, as yet untried in practical government. This was the doctrine of the separation of powers, and the placing of the judiciary upon an equal footing with the other branches of government. Montesquieu said: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor."

The founders of our Nation desired neither executive nor legislative absolutism. They desired limitations upon the positive powers of each of these departments to avoid their ultimate merger and the destruction of constitutional democracy. Montesquieu's doctrine was the only one which could accomplish their purpose. While the framers of the Constitution realized that the powers could never be completely isolated because they are all, by their very nature, interdependent, they drew a clear line of demarcation between them.

Thus three great component elements formed the structure of the newly-created nation's governmental scheme — the legislative, the executive and the judiciary — the legislative power to make the laws by which the State is

governed; the judicial power to interpret them and apply them to the lives of the people, determining within legislative limits, the penalties for disobedience; the executive power to execute and enforce the laws. Each power stood and stands upon an equal plane. Each is, within its proper sphere, independent of the others.

The position of our judiciary under the Constitution was and is unique in history. The equality it shares with the other branches of government, its complete independence, found and finds no counterpart in other countries.

While fear of the other two branches of government played a large part in persuading the framers of our Constitution to elevate the judiciary to a position of equal governing power, there was a more important reason for placing in it this trust. The judiciary had the confidence of the people through the courts, bred of close, long and intimate association. The colonial judge knew the persons who came before him; he had known their families and their backgrounds; they knew his. They mingled on the streets, in places of business and in places of worship. Thus there was present a confidence in the courts and an understanding and sympathy between the judiciary and the people. And thus, albeit the heat of contemporary political philosophies and controversies, there was fused between the judiciary and the people the lifeblood of American democracy.

In those early days it was regarded an eventful occasion to go to court, to see the justice of the peace, as a judge, on the bench, hear the witnesses, and, when the jury system was evolved, the addresses to the jury—generally by laymen for there were few lawyers—and finally the verdict and the judgment. This occurrence, repeated often in a community, permitted the judge to grow into the confidence of his people. He was *their* judge, and to his door people in distress would often go for advice. He became more intimately associated with their life than the Governor or any member of the executive or legislative departments of the government. He became a greater factor for peace, order and good government than any other factor could be. Then, too, these officers performed certain administrative functions, many of which were of a quasi-judicial nature. When the law judges, as such, were introduced, with their higher dignity, they took up much of the work of the justices of the peace, but with the same constant intercourse with the common people. They formed in reality a governing force built up partly by law and partly through common consent.

As the colonies grew in population so did the courts in power and influence. It is little wonder therefore that in providing a check to the legislative and executive branches of government, the framers of the Constitution depended upon the judicial agency for that purpose, knowing that in it they had a full-functioning governmental force, one that understood the people's hopes, their

aspirations and life; one that stood close to the people and in whom the people placed their trust; one that could be depended on to be responsive to the people's will as expressed in the Constitution. The framers could have adopted other means of checks and balances, or reposed that power in the several States. When the judiciary was selected and elevated to its high function as a coordinate branch of government, the courts which exercised a powerful influence on the life of the citizens of the young Republic, accepted a sacred trust to preserve liberty.

As might be expected, the courts were at first timid to assert the right to take it upon themselves to preserve the separation of governmental powers. Having come a long way through the centuries to their new position of power, how should the judiciary respond to the people's will? How should they proceed in deference to the basic idea that gave birth to their power and encouraged its growth? The courts felt circumscribed by an inherent weakness—the inability to enforce their decrees against an unwilling executive or an unyielding legislative body. Many of the pioneer American jurists feared such efforts would be met, not only with defiance, but with the destruction of the independence of the judiciary. In 1780, the highest court of New Jersey made the great experiment. It declared void an act impinging the constitutional right of trial by jury. The precedent provoked mingled reactions. They insisted that each department of government was the sole judge of its own constitutional limitations. Even our learned Chief Justice Gibson maintained this view until, in 1795, the Supreme Court of our State followed the New Jersey precedent. It was not until 1803 that the Supreme Court of the United States declared its power to strike down acts of Congress which violated the Constitution. The great Chief Justice, John Marshall, met executive defiance and legislative reproach for his fearless pronouncement of the doctrine. Many times during the history of our nation it has been subjected to challenge. Yet there has always been popular support of the courts in the exercise of this prerogative. Only recently we have seen the entire force of public opinion rally to prevent its abridgement. Through the exercise of this power our judiciary has passed from sterile inferiority in the governmental function to a position equal to the other branches, with equal duties in its own sphere and equal responsibilities in the fabric of government.

Today the position of the judiciary in America is as unique in the world as it was 150 years ago. It has come down the stream of time freighted with the precious cargo of democracy and stands in sharp relief when compared with the servile judiciaries of nations now in the grasp of dictatorship.

Why?

The answer can be found in the continuance of the very factors which gave birth to an independent and equal American judiciary. The people today, as

in colonial times, fear the tyranny of an unrestrained executive or legislative branch. The judiciary today still maintains a closeness to the people and a sympathy for its desires. A charted course of judicial decisions will indicate that law is not and has not been immutable, or immune from the contemporary economic and social needs of the people.

Today more than ever, the contact of the judiciary with the common people is a startling yet gratifying fact. This is not because people are litigious, but because in the courts they find satisfactory answers to many of their serious problems; the courts guide and control from birth to death; from cases involving adoption to cases involving inheritance taxes; from cases involving the living to cases concerning the dead.

An excellent illustration is furnished by a brief analysis of the cases that came before the Philadelphia Courts in the year 1936. In that city of 2,000,000 people, in that year alone there was a total of 98,979 lawsuits and matters for legal determination which passed before courts of record; there were 27,366 cases before the Court of Common Pleas; 7,447 before the Orphans' Court; 11,733 criminal prosecutions, from the smallest breach of the peace to murder, were brought into the Courts of Quarter Sessions and Oyer and Terminer. The same court disposed of 844 other legal matters, not criminal in nature. In the Municipal Court, 51,589 suits of every description were decided, in the Domestic Relations, Civil, Criminal, Juvenile and Small Claims Divisions. Imagine if you will the number of persons that passed before the Judges. In each case there were at least two parties, in most of them, many more. In one single case before the Orphans' Court there were 23,000 claimants. In addition to the parties to the lawsuits, there are those whose interests are vitally affected by the decision of the courts; relatives of the parties, creditors and dependents of the litigants. To all these must be added the vast army of persons who participate in the trial — the witnesses and the jurors who sit in judgment. Day in and day out the courtrooms echo with the outpourings of every human emotion. Love and greed, jealousy and hatred, passion and ingratitude, envy and hope, sorrow and joy, all are laid bare in stark realism before the judge. Spectators through the courts, interested, curious, anxious. Think, for a moment, how many lives are touched in but one city, in one single year, by the judicial function! Yet staggering though this thought may be, we must multiply our illustration by the number of the courts in the cities and counties of the nation to understand the place of the judiciary in American life. What you now see is what the framers of the Constitution saw when that document was written, though in a ratio comparable to the population—then less than four million—now more than one hundred and twenty million — a free and untrammelled judiciary—in whom the people could and did put their trust.

The responsibility of the courts has been great, and its fulfillment has, at times, subjected them to criticism and abuse. But the regard of the American

people and their confidence in the judiciary has grown steadily. Had the judiciary yielded to every voice that bade them ignore the tenets of the Constitution, our democratic form of government would have inevitably been destroyed.

We have seen in other lands the evils of unbridled power centered in one man or one party. We have seen the enslavement and persecution of racial and religious minorities. We have seen the inalienable rights of freemen surrendered to the popularity of dictatorship. It was to protect us from this that our forefathers drew the Constitution. For this self-same reason the courts have steadfastly declared their equality and freedom in the role of government. As I had occasion to remark a few years ago "The Constitution was itself a strange concept of government to be hurled into a world of despotism and absolutism. Though its life was predicted to be short, it has stood the test of time and has guided our country through disheartening political and social conflicts. With knowledge of the past, with fear for the present and with hope for the future, the Constitution was created of vital, living principles, hopes and desires. It must not be considered a dead instrument, with the inert hand of the past reaching into the future, pressing hard to impede progress and thwart advancement. It is a living instrument, growing with time and extending its beneficent influence into a changing world so that we, who live under it, may partake of its blessings. It must not be restrained nor restricted by the judiciary in rigid and unyielding shackles of interpretation, but must be left free by the tolerant interpretation intended for it by its framers, so that its inspired purpose may continue to be fulfilled. With such an approach to its articles, our Constitution will continue to safeguard the Republic, and the bedrock of the true liberty it created will not be disturbed. We need have no fear for the Constitution while its great underlying structure is left intact and untouched."

The three governmental departments together form the mighty arch of our Republican system. The legislative and executive are the great arcs, joined, yet separated by the keystone. The judiciary is that keystone. So long as it stands, the entire structure will stand. When it is removed, the structure will fall.

Secure in the confidence of the people, enshrined in their hearts, the courts of America have grown powerful beyond the dreams of Montesquieu and Coke. So long as they do not abuse that power, so long as they faithfully protect and defend the Constitution, holding themselves within its limitations on their own authority, America, under the Constitution, need not fear the future.

The Constitution must, and will, live as an organism devoted to the best and truest ideals of society. Its benefits must be for all the people, not for a few to wrap its folds about them and declare its protection for their own selfish interests or purposes. Its beneficent aims and purposes are for all

mankind within its encircling grasp, and its enlightened process is such that it may helpfully minister to all within the ever changing scope of human endeavor. Let us keep it so.

Ebensburg, Pa.

John W. Kephart.