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THE FEDERAL GOVERNMENT IN THEORY AND PRACTICE

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The Federal Constitution was declared in effect on the first Wednesday in March, 1789. It consisted of a preamble and seven articles. At the first session of the first congress ten amendments were proposed and they were adopted and declared in force on December 15, 1791. These amendments to the Constitution were adopted "in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added, and as extending the ground of public confidence in the Government will best insure the beneficent ends of its institution." (Preamble and resolution preceding adoption.) The Tenth Amendment reads as follows:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The powers delegated to Congress are enumerated in eighteen short paragraphs (Section 8, Article 1) and Section 9, Article 1 defines, as a further limitation of the powers of Congress, the things it *shall not* do.

No language could express more clearly the desire of the several states to retain their local self-government and to prevent a centralization of power in the federal Government. In theory, the Constitution contemplated the federal Government as agent of the states—not the states, as agents of the federal Government: distinct sovereignties it is true, but the granting of power came from the states and it was not thought that the federal Government could become more powerful than the states which created it.

In practice, however, the federal Government has extended its jurisdiction to such an extent that almost every activity in modern affairs has felt its impress.

The rise of federal power began within a few years of the adoption of the very instrument seeking its prevention. In 1793, the Supreme Court of the United States in *Chisholm v. Georgia*, 2 Dallas, 419, held that a citizen of one state could commence an

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original suit in the Supreme Court against *another state* for breach of contract. The states so resented this decision as an invasion of their sovereign rights, that through their concerted action the Eleventh Amendment to the Constitution was adopted preventing the further exercise of such judicial power. In *Dartmouth College v. Woodward,* 4 Wheat. 518, the court held legislation of New Hampshire amending a private corporate charter was invalid and that the charter was a contract within the meaning of the constitutional clause forbidding the impairment of the obligation of contract. In *McCulloch v. Maryland,* 4 Wheat., 316, the right of the state of Maryland to impose a tax upon the Bank of the United States was denied and the power of Congress to charter a bank as a federal agency upheld. In *Sturgis v. Crowninshield,* 4 Wheat. 122, the New York Bankruptcy Law was declared invalid as impairing the obligation of contract. Time will not permit specific reference to the decisions of the United States Supreme Court restricting the limits of state authority, but each of the several states has at some time been affected thereby. Such restriction at times, provoked open defiance on the part of the states: for instance, Ohio, in its fight against the United States Bank; Pennsylvania, in the Whiskey Insurrection and as a result of the court's decision in *United States v. Peters,* 5 Cranch 115; Georgia in the Chisholm case cited *supra* and the Cherokee cases; South Carolina in its Nullification Ordinance of 1832; Wisconsin in the famous Booth cases; and at one time the Northern States contemplated the formation of a Northern Confederacy because of their opposition to Jefferson's anti-judiciary doctrines and the Embargo Acts.

In the formative period growth of federal power was gradual, due to the fact perhaps, that there was no concerted action on the part of the states to check it. Limitation of state authority did not affect all of the states at the same time and those not affected were indifferent to those so affected, yet history shows that each state in turn resisted an invasion of its rights when legislation or judicial decision affected that particular state. The Slavery Issue precipitated concerted action on the part of the Southern States which resulted in the Civil War. During the Reconstruction period, federal jurisdiction continued to increase. The Northern States were indifferent so far as the doctrine of State Rights is concerned, to any legislation affecting the states which rebelled against the Union.

The two Supreme Court decisions which laid the foundation of federal power were *United States v. Fisher,* 2 Cranch 358 and *Gibbons v. Ogden,* 9 Wheat. 1. In *United States v. Fisher* the court interpreted the "necessary and proper" clause of the Constitution. The court said:

"In construing this clause, it would be incorrect and would produce endless difficulties if the opinion should be maintained, that no law was authorized which was not indispensably necessary to give effect to a specified power. . . . Congress must possess the choice of means and must be empowered to use any means, which are in fact conducive to the exercise of a power granted by the Constitution."

Note the words "to use any" and this language should be kept in mind in further considering the subject under discussion.

Then in *Gibbons v. Ogden* (the Steamboat Case), the court for the first time interpreted the Commerce Clause of the Constitution and said: "Commerce undoubtably is traffic, but it is something more, it is intercourse," and further said that such commercial intercourse among states and nations "is regulated by prescribing rules for carrying on that intercourse."

The most casual reading of the two decisions just referred to suggests an unlimited field for federal activity and yet, strange as it may seem, Congress did not awaken to the possibilities of federal power encouraged by these two decisions until about thirty years ago. While encroachment of federal power upon State Rights was, is and always will be a subject of criticism, yet no reproach can attach to the Supreme Court of the United States for its efforts to hold the Union together. The Supreme Court was confronted with many unsolved problems, and to its honor be it said, that at no time have its decisions been actuated by party prejudices. In the formative period of our Nation, it was the Supreme Court of the United States that held the states together through its interpretation of the Constitution during that stormy period. The interpretation so given was essential to the life of the Nation. The executive and legislative branches of the Government have always been swayed by public opinion, but the Supreme Court—Never.

It is of interest to note that the cases of *United States v. Fisher* and *Gibbons v. Ogden* were decided during this formative period; the former in 1805 and the latter in 1824.

It was not until 1887 that Congress sensed the power given to it under the Commerce Clause of the Constitution. In that year

the Interstate Commerce Act was passed. In 1893 came the Safety Appliance Act and in the same year the Harter Act regulating bills of lading and the liability of sea-carriers. From 1903 on we find Congress enacting the Automatic Coupler Act, the Hours of Service Act, the Employers Liability Acts, the Hepburn Act, the Transportation of Explosives Act, the Mann-Elkins Act, regulating telegraph, telephone and cable companies, the Boiler Inspection Act, the United States Shipping Board Act and the Adamson Act, regulating hours of labor and wages of railroad employees. Congress was decidedly active in advancing its powers and in each legislative act the Supreme Court upheld the right and federal power continued to expand.

Under the Commerce Clause, the Sherman Anti-Trust Act was passed. The Clayton Act and the act establishing the Federal Trade Commission were also passed under the alleged powers of this clause. The Federal Income Tax was declared invalid in 1895, but this did not disturb Congress always looking for more power, and, as a result of its activities, we have the Sixteenth Amendment giving Congress the power denied to it by the Supreme Court with respect to a tax upon incomes.

Until 1895 it was generally thought that if any power resided solely in the states, it was that of the Police Power, but in that year under the Commerce Clause, we find Congress passing an act forbidding the transportation of all lottery tickets in interstate commerce. The validity of this act was upheld in *Champion v. Ames,* 188 U. S. 321, and out of this act and decision has arisen the National Police Power. This power has given birth to such legislation as the Pure Food Act, the Meat Inspection Act, the White Slave Traffic Act, the Serums and Toxin Act, the Eighteenth Amendment, the Volstead Act, the Child Labor Act, and many other alleged social service acts, each in turn invading the rights of the states and all looking to a centralization of power in Washington.

As we know, the Supreme Court declared the Child Labor Act unconstitutional, but this decision has not disturbed Congress and the lobbyists fighting for this reform, and, as this article is written, a bill has been introduced to amend the Constitution again so as to give Congress the power denied by the Supreme Court.

In the light of congressional activities within the memory of this article, is it safe to permit further expansion of federal

power? Are reputations, years in building, to be destroyed by federal investigating committees, who not only permit, but compel evidence, which in the last analysis is hearsay, and the most unfortunate part is that the alleged original statement usually comes from one since dead.

What is this legislative branch of the federal Government? Just 435 congressmen and ninety-six senators, a total of 531, and our population in 1920 was over one hundred million. Pause only for a moment and ask: Do these 531 reflect in their actions the opinions of a majority of these one hundred million? Not at all. They are dictated to and accept the will of a well organized minority. Call it group-block or what-not, and this situation is largely due to the expansion of power in the federal Government. This vast extension of federal power, this tendency to centralization, inevitably leads to the subversion of the will of the people. Under the Commerce Clause and assumed Police Power, almost every activity can be regulated by Congress. When checked by the Supreme Court, a constitutional amendment is proposed. In this situation, any group of men well organized, looking to some pet reform, which in their opinion means the salvation of the country, look now only to Washington. No longer must they sound public opinion in each of the several states. They concentrate on that source of all power, Congress, and the majority vote of the 531 lays down a rule for our future guidance, the guidance of over one hundred million people. Where power is centralized, the way of the reformer is made more easy. He has only one legislative body to deal with instead of forty-eight, and should the Supreme Court deny Congress the power necessary to carry into effect his cherished hobby, then of course, comes the constitutional amendment.

The question suggests itself: Why is it that the Supreme Court does not check congressional action when such action encroaches upon State Rights or the rights of the people? It should be remembered that since *Marbury v. Madison* to the present time the legislative branch of the Government has resented the right of the Supreme Court to determine the validity of congressional acts. To its credit be it said, the Supreme Court has fearlessly exercised this right, but an act of Congress is supposed to express the will of the people, and in determining the constitutionality of such an act the Supreme Court is committed

to the doctrine best expressed in *Adkins v. Minimum Wage Board of the District of Columbia:*

"The judicial duty of passing upon the constitutionality of an Act of Congress is one of great gravity and delicacy. This Court by an unbroken line of decisions from Chief Justice Marshall to the present day, has steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt."

Also, to its credit be it said, the Supreme Court has upheld in most instances social legislation on the part of the several states.

We are living in a crowded world. We must recognize and meet the changed conditions. Living is far more complicated to-day than when the Constitution was framed, and the individual must pay the price of civilization. One cannot do as one pleases in a complex world. Police regulations are necessary and, with increasing complexities, will become even more so. We are living in a transition period. The law must keep abreast of the times. This is an age of social justice and thinking men recognize the problem and are seeking a solution. To-day law is measured in terms of social utility. The law cannot stand still but must change with changing conditions and the Supreme Court of the United States has been quick to sense the living law and the social trend and has consistently upheld laws seeking to promote social justice. Such is the aim of all law in the present age, and although such legislation may be overdone, it is not the fact of increasing regulation which gives the alarm—it is the fact that Congress under its assumed Police Power is attempting to regulate in matters solely within the sovereignty of the several states.

Perhaps it may be urged that the Police Power in the several states is not abridged by congressional action covering the same subject matter, that there is concurrent jurisdiction, so to speak. Such is not the case in practice, however, in that the states can pass only such laws as are not inconsistent with the federal law. Note the practical application of the "concurrent clause" in the Eighteenth Amendment and the Volstead Act. We hold no brief against social legislation. The sole question is one of administration. This power should remain exclusively in the several states. The legislative bodies therein best understand local conditions and needs, and frequently, conditions in one state differ materially from those in another. Congress cannot efficiently cope with the internal policies of the states. Our whole system of government

was framed upon the idea of local self-government, but the present tendency is to centralization of power in the federal Government.

We may differ in our views as to the wisdom of such a change, but that such was not the conception of the federal Constitution cannot well be denied. Centralization of power in Washington does not seem consistent with the character of the American people. The idea of almost unlimited federal control is as objectionable to the average citizen of to-day as it was when the Constitution was first drafted. This conclusion is forced upon us in reviewing the thoughts of those with whom we chance to talk upon this subject.

Congress itself does not undertake to provide rules and regulations for the administration of social welfare legislation.

The task would prove an impossible one. Therefore, this authority is usually delegated to a bureau or to a commission. The rules and regulations of these various bureaus have the force and effect of law until reversed by the courts. This system tends to create autocratic domination and encourages centralization of power. Each bureau so created necessitates additional federal employees and greatly increases the operating expenditures of the Government.

The records disclose that in 1871, civil service employees numbered 53,900 and to-day they number 560,863. Based upon the 1920 census giving 105,710,620 as the population of the United States, we find that we have a federal employee for approximately every 192 people in the United States. In 1870, our population was 38,558,371. The cost to the people of supporting this vast army of federal employees is indeed staggering, and if federal power continues to expand, the expense incident thereto must of necessity increase.

Congress has been so bold as to introduce an amendment to prevent the issuance of tax free securities on the part of the states and municipalities. Pause for a moment and consider the effect of such an amendment. It would practically center state financing in Washington, and in view of recent disclosures, can one well imagine the abuses such legislation would lead to?

Perhaps the writer has not sensed public opinion and it is the desire of the great majority of voters to centralize powers in Washington; perhaps it is their wish to have agents of an invisible government pry into their most private affairs; perhaps it is their desire to be regulated and controlled by those not familiar

with their local needs; perhaps they enjoy supporting one in every one hundred ninety-two citizens; and perhaps they prefer the form of paternalism arising out of increased federal power. If so, all right. Then the sooner we abolish the fiction of a dual sovereignty, the better for all concerned. If the great mass of voters prefer to be regulated by federal bureaus and enjoy paying for such regulation, such is their privilege and the Constitution can be amended to satisfy their desires. But somehow, the thought is ever present that the people are to-day as they were when the Constitution was framed and the idea of local self-government is just as strongly entrenched now as it was then. Federal power has expanded, due largely to indifference and ignorance on the part of the states and the people thereof. The people do not wish to be regulated from birth to death and thereafter by an impersonal, centralized organ, but it was not until the Income Tax Law and the Prohibition Act that the people began to realize the extent of the powers given to or assumed by the federal Government. The question of federal power is decidedly a live issue to-day. It is indeed true "not only eternal vigilance but eternal effort is the price of liberty." It is to-day as in the past; the average citizen is indifferent to political activity until he himself is directly affected thereby. If the increase of federal power is obnoxious to the people of the several states, they and they alone can check its trend, but it means active participation in governmental affairs. It means action—not words. The power is in the people to have the form of government they desire. We cannot sit on the side lines and criticize. If we believe in a dual sovereignty, there must be individualistic participation in the functions of government. There is an awakening of public opinion at the present time and a greater interest in public questions is being manifested. If centralization of power is desirable, let us work to that end; if, as is the opinion of the writer, centralization is destructive of democratic principles, let us now, before it is too late, concentrate our efforts in checking this continual expansion of federal power. The courts do not make the laws—they construe them, and, if further growth of federal power is to be controlled, the instrument of such control is to be found in awakened public opinion and the ballot. As said by the Supreme Court of the United States in *Munn v. Illinois*, 94 U. S. 113:

"For protection against abuses by Legislatures, the people must resort to the polls, not to the Courts."