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THE PROGRESSIVE UNFOLDING OF THE POWERS OF THE UNITED STATES

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SIMEON E. BALDWIN

When the Constitution of the United States was pending for ratification, its supporters, in their public utterances, were disposed to minimize the powers which it conferred. This was the general tone of the *Federalist*. How far they might reach, indeed, was a question that only the future could fully answer. A set of traditions and usages and precedents must first grow up, under the Constitution, but outside of it.

Every one saw that much would depend on the views of Washington. Every one looked forward with confidence to his unanimous election as the first President. Every one saw that it would be left to him to decide whether he should be re-elected. His refusal to stand for a third term founded a usage that has become as controlling as an express constitutional provision.

Washington took care that the judiciary should be composed of men who believed that Congress was not confined to the exercise of the powers expressly granted to it.

It is a remark of one of our associates, Mr. Herbert Croly,

that, when Americans talk about a government by laws, they really mean a government by lawyers. A solid truth lies behind the epigram.

The Constitution of the United States, being the supreme law of the land, any statute inconsistent with it cannot be law. If such a statute be relied on to support a disputed claim of right, and the parties to the controversy cannot agree that it is not law, that must ultimately be determined by the courts. All the higher courts are manned by lawyers. Their decisions therefore are the decisions of lawyers, and a government by laws that are expounded by lawyers is, in effect, a government by them.

It is such, in another sense, because in the executive and legislative departments of both state and nation, the influence of lawyers has proved largely predominant. Statistics have recently been published showing that during a long period in the history of the United States eighty-nine per cent. of the cabinet officers of the United States were of the legal profession. Most of our Presidents have belonged to it, and a very large proportion of the Governors of our states. The lawyers are always well represented in Congress and the state legislatures. The London *Times* recently stated that there are now 212 of them in the Senate of the United States and the House of Representatives. According to this, one out of every 640 lawyers in the United States is in one or the other house. In the body whose business it is to make laws, naturally those have the greatest influence who know best, or ought to know best, what are the laws already existing.

The bar, then, in executive and legislative office, are in a position to confirm the authority of judicial decisions; and all their traditions and education tend to make them assume that what courts conclude as to any question is a finality.

John Marshall found rules of action in the Constitution of the United States which a very large part of the people had not thought were contained there. During the life of a whole generation he kept finding such rules, and each thus took the place of a new section or article.

In this way was developed the power of Congress to charter private business corporations; to control navigation within a state, when part of a voyage is out of the state; to govern the territories with little regard to the provisions of the Constitution concerning acts done in a state of the United States; and the right of the United States, by treaty, to dictate law to the states, as to the tenure of lands by foreigners.

Meanwhile Congress moved more slowly in exercising its power to give the Constitution a practical exposition. In the main it kept within undisputed bounds, until the outbreak of the Civil War.

One prominent exception was that in respect to commerce on the lakes, which Congress, in 1845, put on the same footing, as to federal remedies, as commerce on the sea. The Supreme Court, in upholding this Act at the expense of overruling one of its former decisions, held that admiralty jurisdiction in the United States was wider than that in England, and covered all waters navigable in fact, whether subject to the ebb and flow of the tides or not.

Another, passed in 1842 (Rev. Stat., §753), in consequence of the McLeod Case, was one granting a summary remedy in the federal courts to one taken into custody under state authority, in violation of a treaty or the law of nations.

The Civil War brought Acts authorizing the issue of legal tender currency; taxing the state banks of issue out of existence in order to make room for national banks; authorizing the President to suspend the privilege of the writ of *habeas corpus;* and making his orders a defence for any act of a military character done during the war.

These were all measures designed to support the perpetuity of the Union against strong attack. But there soon followed legislation having no connection with the national defence.

First came the Act of 1866, which put all interstate railroads, to a certain extent, beyond the control of a state government. This was the first substantial regulation by the United States of commerce by land. Interstate telegraphing received attention next.

Unquestioned powers of the United States, which had long been suffered to lie dormant, were thus exercised and the authority of the states so far forth displaced. Next came a far greater and deeper inroad upon it. In 1868 there was a radical revolution in our constitutional theories.

Up to that time there were no guaranties of individual right for the enforcement of which, as against state action, there could be an appeal to the United States. By the Fourteenth Amendment to the Constitution of the United States such an appeal was given.

This brought the states at once into subjection, to this extent, to an exterior sovereignty. Their police powers shrank correspondingly. The bounds of political independence and local autonomy were narrowed and a large portion of what had been the inherent sovereignty of each disappeared forever.

This constitutional change of relations made it natural that statutory changes in similar lines should follow. They followed fast.

In dividing the powers of commercial regulation between the United States and the states, Congress now began to take a large and ever larger share. The Courts moved in the same direction, though more slowly.

One effective mode of commercial regulation is by taxation. In 1872, the Supreme Court of the United States, speaking through the Chief Justice, unanimously held that taxation by a state for the privilege of doing interstate business there, was permissible.[1] In 1888, the same court unanimously held that such a tax was not permissible, because it burdened what Congress had by its silence declared should be free to all.[2]

By a similar reversal of judicial opinion, the general power of Congress to lay taxes was, as to the right, extended though by the effect of practical conditions, decreased.

That power was given to Congress very unwillingly by most of the states, and only on the condition of uniformity, except as to direct taxes. Those, it was generally assumed, were to be confined to a few subjects, and in 1880 the Supreme Court of

[1] Osborne *v.* Mobile, 16 Wall. 479. [2] Leloup *v.* Mobile, 127 U. S. 640.

the United States expressly held that these were only polls and real estate.[3] But in 1895 the same Court decided that they also comprehended personal estate and the income from any kind of property.[4] As Congress has unquestioned power to lay duties, imposts and excises, there would seem to be nothing on which it cannot lay its hand, except the means of sustaining the governments of the states.

It follows that it can tax the property of citizens of a young and poor state in a proportion determined by the amount of its population, not by the value of what is subjected to the burden. Take for illustration, a tax on all incomes of private individuals, in excess of $5,000, derived from investments. Such a state might have but a hundred citizens having such an income, while one of the older states might have five thousand, and the whole country a hundred thousand. If each of the two states described had an equal population, say of one-fiftieth of the population of the United States, and the total tax were $10,000,000, the capitalist in the young state would pay a fiftieth of the entire tax on all the hundred thousand, that is $2,000, while each of the capitalists in the older states would pay but $40. Enormous injustice would thus result; but the law would be quite within the powers of Congress.

For the first eighty-three years of their history the United States never attempted to exercise the right of taking property for public use. They asked the state in which the property might be situated to take it, and repaid its cost. In 1872 came the first Act of Congress in which the right of condemnation was asserted.[5]

In the same year it was made a crime, punishable in the United States courts, to use the mails in aid of a scheme to defraud, and under this statute District Attorneys can draw indictments against the promoters of any corporation who, they think, are puffing its securities by false representations.[6]

[3] Springer *v.* U. S., 102 U. S. 586, 602.

[4] Pollock *v.* Farmers' Loan & Trust Co., 157 U. S. 429, 579; 158 U. S. 601.

[5] Kohl *v.* United States, 91 U. S. 307.

[6] U. S. Rev. Stat. 4580; 25 Stat. 873; Durland *v.* United States, 161 U. S. 306.

The Interstate Commerce Act of 1887, followed up by the Sherman Act of 1890, has revealed powers which the United States have always possessed, but never before thought it wise to exercise.

The Supreme Court has recently decided that cars on any railroad which constitutes part of a route of interstate commerce must be constructed and equipped in the manner required for such commerce, although in fact used only in commerce wholly confined to a single state.[7]

This looks towards a unification of all American commercial rules by sweeping them into the hands of Congress.

Its power of taxation may also be used to further such a result. If a state engages in trade, though in an endeavor to better conditions of internal police, or from adopting principles of socialism, the United States can tax it, precisely as they would a private individual. Under a decision of the Supreme Court, pronounced in 1905, South Carolina was thus forced to pay license fees to the United States in the character of a liquor dealer.[8]

The right to abrogate a franchise for cause naturally belongs to the sovereign granting it. It was, until recently, deemed to belong to that sovereign exclusively.[9] But in cases in equity under the Sherman Act, the Courts of the United States, apparently assume that they can virtually dissolve a corporation, which constitutes a combination by which it has been violated, although its franchises came from a state. One of the prayers in the suit against the Steel Company is for such a dissolution. The Act does not give such jurisdiction in terms and, if it exist, it must be implied from a general power to prevent and restrain violation of its provisions.[10]

Proceeding in the same line, state corporations were made, in 1909, subject to an annual Federal tax, which is in substance a tax on their franchises.

[7] U. S. *v.* Southern Railway, October Term, 1911.

[8] South Carolina *v.* United States, 199 U. S. 437.

[9] Hart *v.* Boston, Hartford & Erie R. R. Co., 40 Conn. 524, 530.

[10] 26 U. S. Stat. 209, Sec. 4.

They are thus also incidentally brought under the inspection and visitation of the United States, and the Federal Commissioner of Corporations is given large powers of investigation in these directions.

This bureau is but one of many among which, since 1870, the newly developed functions of the general government have been distributed. Each has a single head in close touch with the head of a cabinet department and having the direction of numerous subordinates.

During the same period, the authority of minor executive officials generally has been steadily and rapidly advanced by statutory enactment.

Custom-house officers have been, and may lawfully be, invested with authority to impose fines against shipowners and collect them by refusing the ship a clearance, until they are paid, with no opportunity for a judicial review.[11] Such petty officials as immigration inspectors have been, since 1892, made final judges of the facts on which may turn the deportation of an alien, who claims that he is entitled to remain by lawful treaty, or even that he is an American citizen.[12]

In 1892 also Congress forbade dumping on tidewater flats or any wharfing out into navigable waters, except by permission of the Secretary of War.[13]

The courts, in defining their own jurisdiction, have shared in the general movement towards emphasizing or enlarging the functions of the United States.

It would seem to follow from the principle of the sovereignty of each state that its internal law must be finally declared and enforced by its own authorities, except so far as the Constitution of the United States may otherwise provide. Most of the internal law of most of the states is customary and unwritten. To know what this common law on any subject is, one looks

[11] Oceanic Navigation Co. *v.* Stranahan, 214 U. S. 321, 339; United States *v.* Grimaud, 220 U. S. 506.

[12] Fong Yue Ting *v.* United States, 149 U. S. 698; United States *v.* Ju Toy, 198 U. S. 253.

[13] 27 U. S. Stat. 110; 28 Stat. 363; 30 Stat. 1151.

naturally to the decisions of its higher courts. In 1840, however, under the lead of Justice Story, the Supreme Court of the United States held that there were some questions of general jurisdiction belonging to the domain of common law which the courts of the United States could decide for themselves, although they might thus differ from those of the state in which the particular question arose.[14] Actions are thus repeatedly sustained in the Federal courts which, if brought between the same parties in a state court, would have failed.

In 1906, the Supreme Court held that it had jurisdiction in a suit by Kansas against Colorado, to determine whether water was diverted from the Arkansas river in Colorado, to the enjoyment of which Kansas had a vested right.

Mr. Justice Brewer, in giving the opinion, took the ground that as the grant of legislative powers to Congress was one of enumeration, while that of the judicial power of the United States was not, the latter embraced "all controversies of a justiciable nature arising within the territorial limits of the Nation, no matter who may be the parties thereto." In measuring judicial functions, he continued, the question was not, whether a power claimed to exist in the courts of the United States was granted by the Constitution, but whether it was excluded "by any limitation expressed in the Constitution on the general grant of national power."[15]

It seems to me that these positions are not fully tenable, and that it was not necessary to decide them in order to support the judgment rendered. But, thus far, they have not been disaffirmed. If they are well founded, the judicial power of the United States would apparently extend to any justiciable controversy arising in any of the United States, although pertaining to a mere matter of local concern.[16]

The people are becoming impatient with the control of the state authorities by inferior courts of the United States.

[14] Swift *v.* Tyson, 16 Peters 1, 19.

[15] Kansas *v.* Colorado, 206, U. S. 46, 83.

[16] See article on The Extent of the Judicial Power of the United States, in the *Yale Law Journal* for November, 1908.

An Act of Congress passed in 1910 is a striking illustration of this feeling.[17]

No District Court can henceforth issue a temporary injunction to prevent the execution of a state statute on the ground that it is unconstitutional, unless the application for it has been granted by three judges, one of whom shall be a Justice of the Supreme Court or a Circuit Judge, nor unless notice be first given to the Governor and Attorney General of the state.

Another sign of the same impatience is the action taken at the annual Conference of Governors of States, in September, 1911, in regard to an appeal from a Circuit Court of the United States soon to be heard in the Supreme Court of the United States. The judgment of the Circuit Court was that the Minnesota railroad rate law was unconstitutional because it trenched on the authority of the Interstate Commerce Commission. A committee of five Governors (according to the press reports) was appointed, to appear before the Supreme Court and file briefs in behalf of all the states represented at the Conference as a protest against the decision appealed from.

This committee cannot file such briefs without asking the leave of the Court. To move for such leave seems to put the states in behalf of which it is sought, in a position that could hardly have been contemplated by the framers of the Constitution. On the one hand they appear as suppliants for the favor of being heard: on the other they appear as representatives of a combination of the chief executives of a majority of the states, seeking to file a solemn and united protest against a certain disposition of a civil cause to which no state is a party. If the appointment of such a committee for such a purpose was within the authority of the assembled governors, it looks much like an agreement or compact between states, which the Constitution of the United States forbids: if it was not within their authority, the action taken would seem not well advised: but in any event it testifies to a general popular feeling that the regulation of interstate commerce by Federal authority has been pushed beyond due bounds.

[17] 36 U. S. Stat. 539, § 17.

The treaty-making power of the United States has thus far been exercised with much moderation. But it extends to every subject concerning which one sovereign can negotiate with another sovereign, except so far as the Constitution or character of the United States forbid.[18]

The President and two thirds of the Senate could probably thus agree with any nation on a form of marriage between its citizens, which shall be sufficient in law if followed in any part of the United States, and a similar form which shall establish the marriage relation between two American citizens, if followed by them in the territory of the other party to the treaty, however inadequate it might be, according to the statutes of the particular states here, to which they might belong. Such statutes would be superseded by the treaty.

Divorce might, perhaps, in the same way, be regulated by a reciprocal convention, specifying the conditions of jurisdiction, and the causes for which it could be granted, in the courts of one country, to citizens of the other.

Conventions framed by successive international Conferences at the Hague, held from 1893 to 1904, now exist between many of the powers of Europe, making nationality, instead of domicile, the general source of civil *status*. Could not the United States, by treaty with these powers, impose that doctrine upon each of the United States?

Each state may now decide for itself as to the weight which it will give to a foreign judgment. Could not the United States by treaties negotiated with foreign powers bind it to concede conclusive force to it, or conclusive force on the basis of reciprocity?

Large amounts of bonds of some of our states, on which there has been a default are held in Europe. Their owners claim that the United States should see to it that these obligations are discharged, or else pay them out of the national treasury. Would it not be possible in law for the United States to submit this claim to arbitration, with the result that the United States should be held bound to pay the bonds, with recourse for indem-

[18] Geofroy *v.* Riggs, 133 U. S. 258, 266.

nity to the defaulting state? Such a course of proceeding is highly improbable, and would be apt to lead to results dangerous to the stability of our institutions. But the question before us is whether such possibilities are not wrapped up in the treaty-making power and may not be unfolded in a future generation.

I have spoken of the unfolding of the powers of the United States by force of direct legislation. They have unfolded hardly less under the mere influences of national growth. These have necessarily multiplied the occasions for the exercise of federal authority and the extension of federal influence.

The President of the United States at first had but few offices to appoint, either directly or indirectly.

He had but four heads of departments, and each of them had a comparatively narrow field. Now he has nine and they have long been consolidated into a cabinet, sharing with him the responsibilities of government. They are ready defenders of his policies and promoters of his political ambitions. Instead of a few hundreds of Federal officers there are as many and more tens of thousands, and the adoption of a Civil Service Examination policy became long since an absolute necessity.

The courts of the United States had at first little business to do, and the highest of them hardly anything. Now the Supreme Court of the United States finds it difficult to keep up with the increase of its docket, although its jurisdiction has been shared since with a newly created court of appeals, and is now mostly confined to causes involving questions of constitutional construction. Many of these would until 1868 have been beyond its power.

The powers of the United States were unfolded in arithmetical progression until 1861, and since then in geometrical progression.

How far will this process of expansion go on?

Let us consider a few of the measures that probably might be adopted.

Would it not be an admissible regulation of interstate commerce to forbid any person to engage in it, without a

certain equipment, involving the possession of a considerable capital?

Or to forbid any corporation to engage in it, without a capital stock of say $10,000,000?

Or to give a monopoly of any particular kind of such commerce to a particular person or class of persons?

New York apprehended the possibility of such action in 1788, when in her vote to ratify the Constitution of the United States she insisted on the necessity of an amendment to it providing that "the Congress do not grant monopolies, or erect any company, with exclusive advantages of commerce." Similar action was taken by Massachusetts, New Hampshire and North Carolina.

Would it not, again, be an admissible regulation to provide that no goods should be the subject of interstate commerce until they had been inspected by Federal officials? Or unless, if manufactured goods, they had been manufactured at an establishment conducted in a way approved by Federal authority? Long steps in these directions have indeed already been taken by the Acts of Congress as to "Pure Food," and the inspection of packing houses.[19]

In a recent work by one of my predecessors in this office,[20] statutes going even farther than this are pronounced necessary to square our political system with the economic conditions of the times.

I should not agree with all his conclusions, but the Constitution of the United States is, in my opinion, flexible enough to bear a construction supporting legislation by Congress in such directions far in advance of anything hitherto attempted.

The Supreme Court of the United States has recently found one point of flexibility, which has long lain undiscovered. There may be another of quite a different character: there is, if the courts choose to say so.

In arranging the mechanism of the Constitution, three possible safety valves were provided.

[19] 34 U. S. Stat. 674, 1260, 768.

[20] Frank J. Goodnow, *Social Reform and the Constitution.*

One is calculated to prevent an explosion in consequence of the pressure of public opinion in favor of placing undue burdens on property. It is the provision against taking property without due process of law, which has been adjudged to invalidate a tax by the state of the owner's domicile on his personal property, kept elsewhere.[21]

The two others are calculated to prevent an explosion in consequence of the pressure of public opinion in favor of legislation in new fields of political science. They are, first, the guaranty by the United States to each state of a republican form of government, and, second, the provision that Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; when taken in connection with the preamble, stating that among the purposes of the Constitution are to establish justice, and to provide for the common defence and to promote the general welfare.

A guaranty imports the existence of a principal obligation. The primary duty rests upon the state. Its authority must be exercised under republican forms. Its judges, under their oath to support the Constitution of the United States, must recognize and respect, in the decision of causes, this fundamental obligation. Arising by necessary implication, it stands on the same footing as would an express provision of the Constitution of the United States that every state in the Union shall always maintain a republican form of government, and do no act inconsistent with the essential nature of a republic.

The construction of the "common defence and general welfare" phrase, first used in the Articles of Confederation, which has been generally accepted has been that laws to that end must be confined to taxation, and to taxation for purposes such as fall within one, or a group of, the specially enumerated powers of Congress. It is quite within the range of possibility that the courts will abandon this position (which the Supreme Court has never, I believe, formally adopted), and hold that any law is valid which Congress deems appropriate to provide for the

[21] Union Transit Co. *v.* Kentucky, 199 U. S. 194, 202, 211.

common defence and to promote the general welfare, provided it contravene no particular provision of the Constitution.

Gouverneur Morris, in preparing the final report of the Committee on Style, in the Convention of 1787, gave this clause the form of a distinct and separate grant, and while it was immediately, on the objection of Roger Sherman, put back into its previous and present position, there have never been wanting those who have contended that Morris was right in his view of its legal effect. The point was made by Richard H. Lee in October, 1787; considered by the Federalist, and discussed at great length by Madison in 1830.[22] It presents a disputable question obvious to every one who reads the section. The framers of the Constitution no doubt inserted this clause out of abundant caution, to cover taxation to pay the war debt incurred under the old government. But what did the plain people understand by it, when they voted to ratify the work of the Convention of 1787? How this question may be answered by the Supreme Court of another century, no one can now be sure.

The present court has significantly said, this year, that the grant to Congress of power to regulate interstate commerce has resulted in securing "a new welfare, a welfare which transcends that of any state," or rather one "constituted of the welfare of all the states." [23]

Abraham Baldwin of Georgia stated on the floor of Congress, in 1799, that the members of the Convention of 1787, of whom he was one, did not anticipate that Congress would exercise each of the powers that were conferred upon it, but thought their mere existence would sufficiently obviate abuses that might otherwise be feared.[24] His anticipation has certainly been so far realized, that Congress has refrained from doing many things which it can do.

Consider for a moment the undeveloped possibilities of its powers under the XIVth Amendment. Suppose a state vio-

[22] Farrand, Records of the Federal Conventions, III, 483, 379.

[23] Oklahoma *v.* Kansas Gas Co., 221 U. S. 229, 255.

[24] Farrand, Records of the Federal Convention, III, 380.

lates one of its prohibitions. Could not Congress make such violation by a state official, whether the Governor or one of his subordinates, a crime?

Could not Congress provide a special form of procedure, under which any state statute might be summarily and directly impeached as unconstitutional before the Supreme Court of the United States, and the President directed, should the court support the attack, to issue a proclamation that the law is void?

We need not disturb ourselves over the possibility that Congress may abuse its powers so as avowedly to promote injustice. As James Wilson observed in the Pennsylvania Convention in 1787, it is not to be presumed that it will ever prove "an association of demons."[25]

But it well may happen that it may extend the exercise of its powers unwisely. The success of our scheme of government depends on preserving the sovereign control of each state over most of the relations of its inhabitants whether between themselves or with others. We have too vast a country to be governed wholly, or even largely by a central authority. Our rulers would be too remote from most of the people affected by their action to understand their wants or to act under the full force of those restraints that ought always to accompany representative responsibility. Popular sentiment, thus far, has generally indicated a repugnance to unnecessary extensions of federal authority.

But it is from the future unfolding of executive, rather than of legislative power, that the perpetuity of our government can be said to remain in doubt.

A President of the United States declared, if correctly reported, in a public address, within the last few years, that he was for the Constitution, when it preserved the people's rights, but not when it perpetuated the people's wrongs.

After all allowances for the liberty of the platform, such an utterance from such an officer of state indicates the existence of a real danger. It is one that the framers of the Constitution foresaw. Soon after their work was done, a lady, meeting

[25] Farrand, III, 163.

Franklin, said, "Well, Doctor, what have we got, a republic or a monarchy?" "A republic," replied he, "if you can keep it."[26]

Hamilton predicted[27] the coming of a time "when every vital interest of the state will be merged in the all-absorbing question of who shall be the next President." Half of next year will witness such a merger.

The existence of so great an office brings with it a certain danger. It is that this chief magistrate—who, during his term of office, is an emperor in all but name,—may from urging revolutionary changes in his communications to Congress, or by some stretch of his executive or military authority, come to play the part of a dictator.

It is, in my judgment, only a remote possibility, but that science which we in this Association profess warns us that great powers are apt sometimes to be abused, and that the fathers were right when they declared that eternal vigilance was the price of liberty.

[26] Farrand, Records of the Federal Convention, III, 85. [27] 26. 409.