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State and Federal Powers

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State and Federal Powers†

BY WALTER B. FRANKLIN*

Most of us were exposed to government and politics in our formal education at a time when we had no experience and little interest in either. Since then we have been so busy, or think we are, that we have neglected politics, leaving government to others, only to complain that they are not running it as we think they should. Democracy, more than any other form of government known to man, needs strong leadership from the people most qualified for leadership. When we fail to be interested and exert influence upon government we have no one to blame but ourselves if the results in government are not satisfactory to us.

Too many of our people who have capacity for leadership neglect both national and state politics. We are members of service clubs and similar organizations which, either by provision of a written constitution or by tacit understanding, are non-political, and in adhering to this principle we become impotent individually and collectively in most, if not all, controversial issues. We permit intolerable conditions to exist in some of our state institutions; we permit party politics to play havoc with our state merit system, the civil service; we under-pay our public school teachers and at the same time complain about the quality of the teaching in our public schools; we spend our money to advertise the state as a fisherman's paradise and permit the hands of the state game and fish commission to be tied while the best part of our streams are closed to public fishing. We complain about the inroads of federal authority in the regulation of local matters and at the same time allow conditions to continue which make it improbable if not impossible for our state legislative body to properly discharge its duties. We are penny wise and pound foolish. We provide that the state legislature shall meet once in two years and we pay our state legislators the munificent sum of $1,000 for this important function of state government. At the same time we think congress should be constantly in session. It is surprising that the legislature does as well as it does under the circumstances. To correct this I believe our legislature should meet each year and, even better, that it should meet continuously with compensation adequate to at-

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tract qualified and competent men to our legislative halls. Only by so doing can be expect the state to exercise the power which inherently belongs to it.

For fear of offending someone or because we are timid to challenge what we think is wrong we permit such things as an amendment to the state constitution providing for old age assistance. Not that we are opposed to old age assistance but it should never have been a part of the constitution; rather it should be a matter subject to the control of the state legislature.

We see many of our people willing to trade economic and political independence for promises of security from a presently benevolent government, and while doing so create a political atmosphere in which man may again become the victim of government rather than the master of it.

We are alarmed at the top heavy structure of government, particularly the national government, with its innumerable bureaus, commissions and administrative bodies; its hordes of administrative personnel who swarm us under with directives, regulations and required reports, and who, it seems, increase in numbers at an alarming rate; who delve increasingly into our every day affairs telling us what we can do, what we must do. We shudder at the prospect of the tax burden which we must endure to pay the increased overhead of a federal government which has become a little dizzy in its power and more and more regards the states as unnecessary evils in present day government.

Originally the federal government existed only for the benefit of the states. The constitution of the United States still indicates this theory but there has been a shift in power so that more and more the once proud sovereign states become subervient to a government from Washington.

How did this happen? Who did it? Where will we wind up?

The shift in power from the states to the national or federal government cannot be laid to any single factor.

Business interests are partly to blame. It was business which, unable or unwilling to govern itself, asked for government intervention by approving and enforcing codes of fair practice, got them in the N.I.R.A., but as is usually the case got more than they asked for and paved the way for federal regulation through the National Labor Relations Act and the Fair Labor Standards Act.

It was business which caused a corporation to be classed as a person under the fourteenth amendment and thereby make corporations subject to federal authority when it was never intended that the fourteenth amendmnt should include any one but a natural person.

States, by failing to exercise their sovereign powers in dealing with matters of public interest (which failure was due in part at least by the failure of state legislatures to meet the additional responsibilities imposed upon them by changing conditions), have created a vacuum into which it was natural

that the federal power would move. Merely putting a law on the state statute books is by no means full exercise of the state power. There must be enforcement of state laws and in this respect many states fail miserably.

Congress has played its part by passing laws not within the expressly enumerated powers of congress and which by fair interpretation or implication are not included within the incidental powers of congress.

The Supreme Court of the United States has had a lion's share in the process of expanding the federal power and in degrading states power by making itself an appellate court from state supreme court decisions, by reading into laws intentions which cannot be drawn from the law itself, and by upholding laws of congress which are outside the letter and outside the spirit of the constitution as that spirit was conceived by its framers.

Any discussion of federal power and states rights must, of necessity, revolve around the constitution of the United States, the events which preceded its adoption, and the events which have occurred since its ratification.

There is no document so extolled by our people, perhaps by the literate people of the world, as is the constitution of The United States. Every public official and quasi public official is sworn to uphold it. There are probably more speaking acquaintances with it than with any other document in the world. Other nations have used it as a pattern. Mexico's constitution is remarkably parallel and I am told that even the dormant constitution of Russia is strikingly similar. It is quoted and misquoted, paraphrased and referred to by people of all walks of life; by politicians, preachers, reformers; by teachers, business men, students, workmen, farmers, and even by criminals. It is relied upon by proponents of license as well as by truthful advocates of freedom. It is held up to the world by the dogmatists as the panacea for all human ills, as a pattern for all peoples in the quest of protection of individual and human rights against tyranny, and as recipe to all nations who would live in peace with their neighbors.

Yet for all these evidences of familiarty there is so little specific, concrete, accurate knowledge of that great chart of government; so little realization that its guarantees of liberty are not grants of liberty by the government to the people but limitations upon the exercise of governmental power—limitations which the people themselves put there and should ever safeguard. The very foundation for that much vaunted "American Way of Life" is badly neglected and misunderstood by our people; we are far too prone to take the blessings of liberty for granted.

The constitution of The United States is relatively short, it is written in comparatively simple language, it has been read and reread by many people, including teachers, who have taken its simple words at their face value, with little or no knowledge of the political atmosphere in which it was born, of the struggle between advocates of strong centralized power and the advocates of strong state power, of the political theories argued and deliberately

discarded by the convention before the delegates affixed their signatures to its final draft, and with little understanding of the fear by Americans that the proposed new government would be just another tyrant to oppress the common man of this continent. This feeling was perhaps best exemplified by Rhode Island, the state founded by Roger Williams, one of our greatest advocates of individual freedom. Rhode Island refused even to send delegates to the convention; she was the last state to ratify the constitution and then only after the people had once rejected ratification by a substantial majority.

North Carolina and Virginia, too, were slow to ratify the constitution feeling that the rights of the states and of the people were not sufficiently safeguarded. Each proposed many amendments; and, as we know, the bill of rights, consisting of the first ten amendments, was adopted within three years and are considered as a part of the original constitution.

In 1793 the states were shocked by the federal court decision (Chisholm vs. Georgia) which recognized a power in the federal courts to entertain a case against a state by one not a citizen of the state and, jealous of this infringement upon the sovereignty of the states, were quick to ratify the eleventh amendment in 1795 which forbade the recurrence of such an event.

Reading the constitution and rereading it is only the first step in constitutional law study. Practically every sentence of the constitution, one might almost say every word, has been the subject of controversy and ultimate interpretation by court decisions. No study of the constitution is worthy to be called such without a study of these cases. Many teachers, without knowing it, are guilty of giving out much misinformation about the constitution.

When political union of the states occurred in 1777 thru confederation, the states had already been engaged in the war of independence for more than two years. It was quite natural that the people of the states should distrust strong government and that in the Articles of Confederation only a loose union was effected. The Articles of Confederation are in many provisions strikingly similar to the constitution and it is obvious, even to the casual reader, that they were drawn upon heavily by the framers of the constitution. The articles formed merely a league of friendship for the common defense against foreign invaders. There was no power to collect taxes for the support of the federal government and therefore the federal government was almost powerless. Some provisions of the articles are worthy of notice in this discussion. The second article, for instance, stated that each state *retained* its sovereignty, freedom and independence and every power, jurisdiction, and right which is not by this confederation *expressly* delegated to the United States. Except for the deletion of the word "expressly" this is very much the language of the tenth amendment adopted in 1793, but of course the omission of that word is highly significant.

After the War of Independence trade between the states and with for-

eign countries was obstructed by barriers and handicaps created by the states and by the helplessness of the states against marauders flying the flag of foreign nations. It was primarily to correct this bad situation in trade that the second continental congress approved a convention to amend the Articles of Confederation but with no thought in mind of revolutionary changes in the federal system. The delegates to this meeting, which we now call the Constitutional Convention went considerably astray from the task which they had been called upon to perform. When the delegates, after much debate, decided upon the bold stroke of revamping the system of government, several delegates left the convention, refusing to participate in any such departure from their stated instructions. The story of the convention with its heated debates and ultimate compromises forms an interesting chapter in our national history. So do the events between its proposal and ratification of the constitution. Some historians tell us that had it not been for the great confidence in George Washington and the general belief that he would be our first president the states would probably have refused to ratify the proposed constitution.

In the first twelve years of our history under the constitution there was little debate over the division of state and federal powers. The United States Supreme Court had not played a conspicious part in these twelve years; but during the last weeks of his term as president John Adams appointed John Marshall to be the third Chief Justice of The Supreme Court and things began to happen. Marshall was a Federalist. He had served in the revolutionary forces with Washington, had seen the suffering of our armies and had long since recognized the need for a strong national government if the United States was to become a power among world nations. By a series of decisions lasting thru his thirty-five years as Chief Justice, his court fixed the power of the Supreme Court to declare unconstitutional laws of congress and of the state legislatures, (Marbury vs. Madison, 1 Cranch 137, 1803), and set the pattern by which incidental and implied powers of the national government were to expand the national powers far beyond anything dreamed of by the states when they ratified the constitution, (McCullock vs. Maryland, 4 Wheat. 316, 1819).

The die was cast and the battle between advocates of state power and strong central government entered upon a new phase. With each court decision which strengthened the national power, and there were quite a few of them, the states fumed and there were threats of secession.

Looking back from our present perspective, Marshall has taken on the roll of the greatest of all of our Chief Justices. He performed a great service to the country, and had the recognition of incidental powers, as stated in McCullock vs. Maryland, never occurred, we might yet be a hodgepodge of small nations, with little to pull us together but a common language and a common fear of the great foreign powers. However, Marshall was quite

meticulous to distinguish between strictly local matters and matters which of necessity called for national power, but even this effort at careful discrimination was not enough to win for him or his court the confidence of the states.

The states which were the first members of the union were intensely jealous of their sovereignty. They believed that the union existed for the benefit of the states and for no other reason. The generally held theory that a sovereign was not bound, except morally, to its contract was believed in to the extent that the states considered themselves free to renounce their membership in the union at their own pleasure. This attitude epitomized the extreme position with respect to states' rights and it took a civil war to settle, we hope for all time, this aspect of states' rights.

Not always has the court used the logic and meticulous care of Marshall. Had it done so there would no doubt still have been criticism from some states' righters. There does seem to be a basis for criticism of the court the logic of which is difficult to combat. I refer to the technique of reading into the constitution national powers for which the intelligent reader, even by fair implication can find no basis and in which the conservative contends the court throws out a lot of verbage as camouflage to cover the preconceived belief of the court that such matters should be within the federal jurisdiction.

May I quote from the court language which makes subsequent language of the court sound like double talk?

"When the people create a single, entire government they grant at once all the rights of sovereignty . . . . . But when a federal government is erected with only a portion of the sovereign power, the rule of construction is directly the reverse and every power is reserved to the members that is not, either in express terms or by necessary implication, taken away from them and vested exclusively in the federal head. This rule has been acknowledged by the most intelligent friends of the constitution but is also plainly declared by the instrument itself." (9 John, N.Y., 507, 1812)

Also:

"The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now . . . . . Those things which are within its grants of power, as those grants were understood when made, are still within them and those things not within them remain still excluded." (So. Carolina vs. U.S., 199 U.S. 347, 1905).

Also:

"Historical origin may be considered and historical evidence may be resorted to as aids in the construction and application of words and provisions. What went on before the adoption of the constitution may be resorted to for the purpose of throwing light upon its provisions." (Marshall vs. Gordon, 243 U.S. 521, 1919).

Again:

"The law existing at the time the constitution and amendments were adopted and ratified, is often the best basis for ascertaining the scope and effects of a constitutional provision." (Mattox vs. U.S., 156 U.S 237, 1895).

"The government of the United States is one of delegated, limited and enumerated powers. Every act of congress must find in the constitution a warrant for its passage. By ratifying the constitution the states carved from their powers such portions as they thought advisable to vest in the national government. In the field of external power of the United States is complete but in internal matters the United States is not completely sovereign." (U.S. vs. Curtiss Wright Export Corp., 229 U.S. 334, 1936).

These are but a few of the many similar quotations which could be cited from opinions of the court.

Stare decisis, a maxim of the common law of the United States and approved by the Supreme Court as well as by state courts, is a principle that a point of law once settled by decisions of a court with final jurisdiction forms a precedent not thereafter to be lightly discarded or reversed. This principle assumes especial significance in constitutional law.

In 1798 the Supreme Court held that a person who had had his day in court, by the ordinary procedure of the state where his case was tried, had had the benefit of due process of law and the federal courts would not review his case on a lack of due process contention. This attitude of the Supreme Court (Calder vs. Bull, 3, U.S. 386) was consistently held for 100 years and in reaffirming the principle in 1874, (Gilpin vs. Page, 85 U.S. 350), the court said: "The Circuit Court possesses no revisory powers over decisions of the Supreme Court of a state, and any arguments to show that the (state) court mistook the law, and misjudged the jurisdictional fact, would have been out of place."

This remained the rule of the Supreme Court until 1894 when by its decision, (Scott vs. McNeal, 154 U.S. 34), the court constituted itself an appeal court from every decision of a state supreme court whenever the question of jurisdiction was involved.

In 1888, (Pembina Consolidated Mining and Milling Co. vs. Pennsylvania, 125 U.S. 181), though the question was not involved, the court, in its dictum, had said: "Under the designation of person there is no doubt that a corporation is included." The historical setting of the fourteenth amendment and the words of the amendment when intrepreted in the light of this setting certainly do not indicate that there was any person except a natural person to be included within it provisions. Yet the court in 1889, (Minneapolis Railroad Co. vs. Beckwith, 129 U.S. 26), stated that corporations are persons within the fourteenth amendment and since that time has never waivered from that position. This inclusion has created a great mass of litigation for the federal courts, and by making the federal

courts available to corporations on grounds never intended by the fourteenth amendment has not only extended the power of the federal government but has operated to deny states their rightful power over corporations.

The expansion of federal power by court decisions which have interpreted the commerce clause of Article I, Section VIII, of the constitution, presents a long and interesting story. The provision is short and in rather plain language. It says: "Congress shall have the power to regulate commerce with foreign nations, and among the states, and with the Indian Tribes." What is the meaning of the word "commerce" and of the word "regulate?" Around these two words and this section is built much of the power of the federal government. Webster and the court have repeatedly defined commerce as trade, traffic, exchange, and intercourse. To be interstate, or in the language of the constitution, "among the states," there must be trade, traffic, exchange or intercouse across state lines, and only when this combination occurs does the constitution confer power upon the federal government to regulate.

It is under this enumerated power to regulate commerce that congress has enacted all of the federal anti-trust laws, and pure food and drug acts, created the Federal Trade Commission, the Federal Communications Commission, the Interstate Commerce Commission, the Securities and Exchange Commission, a host of other bureaus and commissions and enacted most of the federal labor legislation. Many of our citizens labor under the delusion that much of our federal legislation, particularly that dealing with labor, is enacted under a federal police power derived through the general welfare clause. The term "general welfare" appears only twice in the Constitution, once in the preamble, from which the federal government derives no substantive power, and again in the first paragraph of Article I, Section VIII, which reads: The congress shall have the power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States. Arguments have waxed and waned and waxed again as to whether this provision confers a power upon the federal government to legislate generally for the welfare of the United States or merely to lay and collect taxes for the general welfare of the United States. It would seem to me that reasonable construction can only result in the latter interpretation so I join with that faction.

The United States does exercise a power over commerce, which is so similar to police power as to defy distinction, when it excludes from interstate commerce such things as lotteries and goods manufactured with child labor.

Is this, and much of the labor legislation, regulation of commerce? Are the relations between management and labor commerce? I don't think so and neither do I think the federal government has any police power under the welfare clause to control these matters. You may disagree, or in agreeing say that the ends justify the means. If so, remember what the

court itself has said about a written constitution and be prepared to sanction any usurpation of power which the Supreme Court is willing to sanction.

Raising such a question now may be quite academic, for the Supreme Court seems to have answered it with finality. It justifies its present position by saying that the federal power extends to anything which "affects" commerce or tends to "obstruct the free flow" of commerce. And so our local lumber man or our local retailer may find himself indicted by a federal grand jury for violation of a law which he believes never was intended to apply to his business.

The Supreme Court, in anti-trust cases, for example in E. C. Knight Co. vs. U.S., (156 U.S. 1, 1895), and in Oliver Iron Mining Co. vs. Lord, (262 U. S. 172, 1923), has held that manufacturing might precede commerce or succeed to commerce, but that manufacturing itself was not commerce and that the federal power did not extend to the control of this local economic activity. It has held that child labor and maximum hours are purely local matters not within the federal powers and over which the states had control only by virtue of the police power possessed by those sovereigns. It has even denied, until recently, the power of the states to legislate minimum wages and has frustrated attempts of congress to legislate against child labor under the guise of its taxing power. Despite previous decisions, the Supreme Court has now condoned the power of the federal government in all of these matters under the guise of regulating interstate commerce.

What have we gained and what have we lost by all of this federal encroachment into fields which only so short a time ago were regarded as wholly within the state powers?

Boldly and without batting an eyelash the court has so stretched the elastic qualities of the constitution that by reading its simple words alone one can be only misled as to what it means.

With each newly assumed federal power through acts of congress which are, to put it mildly, of doubtful constitutionality, and with each new interpretation by the court finding new basis for the exercise of federal power, the power of the states is further degraded. Every such act and court decision adds another unit to the army of federal inspectors and agents to interfere, supervise and regulate the daily activities of the citizens of the United States.

Not all of the people, by any means, who are calling these matters to the attention of the people of the states and counselling caution against too great concentration of power in the federal government are alarmists, reactionaries or even in the employ of vested interest as they are accused. Many of them are earnest students of government and constitutional law, imbuded with the idea that it is distinctly, in the long run, in public interest that the safeguards of the constitution for balance of powers between state and national governments be preserved. We think of checks and balances in our

government primarily because of the constitutional provisions creating three equal and coordinate branches of government. We are prone to overlook the checks and balances provided by the framers of the constitution when they consciously and deliberately enumerated the powers of the federal government and, to make sure they were not misunderstood, added an amendment very soon after the adoption of the constitution stating that all powers not granted by the states to the federal government not prohibited to the states by the constitution are reserved to the states.

May I remaind you again that the constitutional guarantees of freedom and liberty are not grants to the people by a benevolent government; they are guarantees by way of limitation which the people put into the constitution to protect themselves from their own government, a government which they hoped and expected to be and remain benevolent but dared not leave to chance.

Changing conditions sometimes give things a queer twist. The earliest conservatives in our national history, the Federalists, led by Hamilton, were strong advocates of centralized power. The liberals of the same period, led by Jefferson, were bitter in their opposition and fought pugnaciously for states' rights on the theory that therein lay the safety of the common man. Now the position is reversed. The liberals of today advocate support of centralized power while conservatives either oppose further strengthening of federal power or hope to give it different direction from the trend of the last several years.

Don't understand from the remarks I have made that I am wholly opposed to what is commonly referred to as our social and economic progress. I admit that, being a constitutionalists, I don't approve of what I consider an unconstitutional usurpation of power by federal government; what I am objecting to mainly is the method by which the federal government has increased its power and the indifference of our people as to what has happened and how it happened.

Perhaps, as Mr. Lilienthal of T.V.A. says, we are a nation of regions and no longer a nation of states. Perhaps from an economic viewpoint state lines are obselete. Even if true, is it license to disregard our written constitution to do the expedient thing? The oath of all public officials, elected or appointed, is to uphold the constitution of the United States and not to uphold the expedient interpretation which they, individually or collectively, place upon it.

With the complexities of modern life in a country so large as ours, the field of national interest is naturally expanding. Some matters which once were of purely local concern are not longer such. Were there determination on the part of states to do so, regional matters could be directed and controlled by the states concerned without dictation from the federal government

at Washington which has little knowledge and less understanding of local or regional matters.

Over and above the state and regional interests there is, no doubt, a public interest which is national in scope. That national interest includes all of us and the national power when exercised should be for the benefit of all of us and not for powerful or well organized minority interests alone.

What are the direction signs on the path that lies ahead? Certainly the future lies in action. If the states' rights advocate would defend his position he must snap out of his lethargy and cause the states to exercise the power which the states have. He must demonstrate in state action that the states are capable of doing what the public interest demands. Could the states be effective in dealing with these matters of public interest? If the federal government exists for the benefit of the states and will exercise its powers on that basis and if the states will work together I believe the states can take care of the public interest and at the same time preserve our constitutional government. Elective officials, both state and federal, are generally more responsive to public opinion than appointive officials. Generally local administration is more responsive than administration removed from the people. If these premises are sound, administration by the states is preferable to administration from Washington. We have had a few examples in our state government to indicate that appointive officials can be quite arbitrary but none to compare with examples in our federal administration with its three million or more appointees. The federal government can and should exercise its taxing power for the general welfare of the United States, but with a minimum of bureaus and personnel, leaving administration to the states. To a degree we have seen this operate in old age assistance, unemployment insurance and some other matters which are of general public interest.

What are the other alternatives?

At various times in our history, one within my own memory—during the Roosevelt Supreme Court packing controversy—it has been advocated that the constitution be amended to give the federal government police power. Such an amendment would no doubt constitutionalize most of the things which the federal government has done in the field of social legislation. However, such an amendment would so broaden the power of the federal government as to practically do away with the state power and is therefore not acceptable to the conservative who is afraid of a strong central government. It would increase tremendously the number of administrative bureaus and commissions and in so doing increase the most dangerous hazard to our future freedoms.

During the war, war powers enabled the federal government to cope with the emergency. Except where military necessity dictated otherwise, publicity was given to the measures taken and the interested public knew

pretty well what was going on. Appointments were for the duration of the emergency and we expect a termination of those appointments just as soon as conditions permit. Strangely, and though the present court would probably not hold the same, the Supreme Court, during the N.I.R.A. crisis, said that emergencies do not increase the power of congress. I agree that under a strict interpretation of the constitution this is true. There are, however, national emergencies almost as critical as war and which, for our people at home, could be even more disastrous than any war in which we have ever engaged. Congress should have the power to declare the existence of an emergency and, with proper safeguards for the termination of emergency administrative bureaus and boards, be empowered to take such steps as are necessary to remedy the conditions. I would even favor an amendment to this effect in the belief that public opinion could be mustered at the end of the emergency to terminate federal agencies no longer necessary.

It has not been may purpose to be an alarmist but to call to your attention trends which pose danger for the future of democracy under our constitution. As a middle of the roader I am concerned, for with increasing concentration of power in Washington it seems to me we are creating conditions in which usurpation becomes ever more possible. Through our schools and through organizations like this our citizens must be prepared to make an intelligent choice between the roads which lie ahead.

The conservative who tries only to preserve the status quo is doomed to lose out. The laws of nature constantly remind us that nothing stands still. There is constant change, growth or decay. The conservative who would preserve our constitutional way in American government must have a plan of action and not a plan of obstruction.

Patton on Titles Missing from Denver District Court Library

The Book Patton on Titles has been withdrawn from the Denver District Court library without notifying the librarian. This book is in great demand and additional copies cannot be purchased. All attorneys are requested to check their desks and libraries to see if this book has been inadvertently misplaced. Anyone finding the missing volume is requested to notify the district court librarian.

New Members of Denver Bar Association

The following were admitted to membership in the Denver Bar Association at the May 6, 1946 meeting:

VIRGIL A. LININGER DONALD C. MCKINLAY
LON J. PUTNAM