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United States--A Union or a Unity

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Editorial Comment

THE UNITED STATES—A UNION OR A UNITY

We, the people of the United States in order to form a more perfect union . . . do . . . establish this Constitution for the United States of America.—*Preamble to the Constitution.*

The Constitution in all its provisions looks to an indestructible union of indestructible states.—C. J. Clase in *Texas v. White,* 7 Wall, 724.

There is before the House of Representatives at the present time a measure known as the Porter bill which in terms provides for the establishment of a bureau or commission for the regulation and control of narcotics. The bill has aroused much adverse criticism especially among physicians. This criticism has assumed two general forms: First, it is argued that the present Harrison act has proved quite satisfactory and that the further regulation of narcotics by the new act is entirely unnecessary; secondly, the power of the government to pass such a law is questioned, it being contended that it would involve a serious invasion of the power of regulation which inheres in the state.

It may at first blush appear reactionary to question the power of the Federal Government to pass such regulations as the Harrison act and the Porter measure. The course of legislation of Congress during the last half century certainly sustains this view. But it is well at times to pause in the headlong rush of the present toward the future and look back in retrospect into the past to obtain some indication of trends and tendencies; to view our future through the eyes of the past.

With this in mind we may view the attitude of mind with which the Supreme Court has dealt with the most fundamental of constitutional questions.

In 1803 the power of the Supreme Court to review Congressional legislation was determined in a lucid and

logical opinion by Chief Justice John Marshall. *Marbury v. Madison,* Cranch. 137. Sixteen years later, the Supreme Court had occasion to pass upon an act of Congress which had established a federal bank. Now there had been no power expressly granted to Congress to establish a bank; but, the court, again through the mouth of Marshall, upheld the act as constitutional under the "necessary and proper" clause. *McCullough v. Maryland,* 4 Wash 316. The decision standing alone was right and proper, although it came as quite a shock to Jefferson and the Democratic-Republicans; but it bespoke a tendency; the issue of liberal or strict construction had been resolved in favor of liberalism. The foundation had now been laid for a wholesale invasion of the rights of the several states which had been received to them under Tenth Amendment, and the invasion was not long in coming, and it came through the aperture of the taxing power. A congressional act was passed imposing a tax upon bank notes issued by state banks, and the rate of which was so high as to drive those notes out of existence. This act was upheld by the Supreme Court in an opinion which created a further potential source of the invasion of state rights; for the court laid down the principle that when Congress acts within the limits of its Constitutional authority, it is not within the province of the judicial branch of the government to question its motives. *Veajie Bank v. Fenso,* 8 Wall 533. That principle was far reaching; it would justify the invasion of the police power of the state under the guise of taxation or any other specific grant of power. Nor was Congress unappreciative of its prolific authority, for forthwith it passed an act imposing upon colored oleomargarine a tax which was clearly prohibitive. The Court, not receding from the principle of the Feno case, supra, had no hesitancy in sustaining the tax by a 6 to 3 decision. *McCray v. United States,* 195 U. S. 27. The court in rendering this decision was either unaware or felt itself unaffected by the dictum of Marshall in *Gibbons v. Ogden,* 9 Wheat 1, that "Congress is not empowered to tax for those purposes which are within the exclusive province of the states." Great strides had been taken now in the building up of a national unity—a usurpation of the reserved police power of the states. Was there to be a limit? The answer

was the decision of *Bailey v. Drexel Furniture Co.*, 259 U. S. 20, where an act of Congress purporting to be an excise tax was held invalid as interfering with the police power of the states. The act was one requiring an exaction from all persons employing children under the prescribed ages, and the court held this to be in a nature of a penalty rather than as an excise, and so held that as the Act *on its face* bears testimony of its own invalidity it could not be upheld. The very ingenious distinction was made between this case and the *Fenno v. McCray* case on the ground that the tax law involved in those cases did not show their invalidity on their face, and therefore they were presumed valid. The distinction is well drawn, but the decision may lose its force in future if the centripetal spirit continues to move the Court.

But the rights of the state are not prejudiced by the taxing power alone; the power to regulate commerce between the states has gone even further in unifying the union and in reducing the reserved power of the states to a shadow of their former sovereignty. These seemingly innocuous words "the power to regulate commerce" have been construed so liberally as to bestow upon Congress, under that provision, the authority to regulate almost everything conceivable related to interstate commerce. Under this power there has been building a Federal police power, rivalling in its extent that of the very states from which it has, by degrees, built up. The first act of this nature was passed in 1895 when Congress enacted a law forbidding the interstate shipment of lottery tickets. The act was held valid by the Supreme Court in the so-called *Lottery Cases*, 188 U. S. 321. The decision was five to four. The contention that admitting that Congress had the power to prohibit the carriage in interstate commerce, Congress could regulate any article so sent, the court dismissed with "it will be time enough to consider the constitutionality of such legislation when we must do so. The dissenting justices faces all the consequences of the decision for they declared that "the necessary consequence [of the decision] is to take from the states all jurisdiction over the subject so far as interstate commerce was concerned." Congress here also sensed with keen delight its untold power. The Lottery Act was fol-

lowed in rapid succession by the Pure Food and Drug Act, the Mann White Slave Act, the Harrison Narcotics Law, and the proposed Potter bill. All of the acts and laws mentioned have been sustained as valid by the Supreme Court. The stream of this type of legislation had become a raging cataract, and the question arose here as it did under the taxing power: Will there be a limit? Strangely enough, child labor stemmed the tide here as it did in the taxing power, the Supreme Court holding such legislation invalid as an interference with the right of the state. *Hammer v. Dagenhart,* 247 U. S. 251. The distinction drawn between this act and those mentioned before was that in the former class the regulation extended only to an article of commerce while here the regulation was of that which preceded the interstate shipment, and the regulation was therefore not proper. So for a time, at least, the encroachment upon federal territory has been delayed so far as the interstate commerce power is concerned.

We come now to a third manner in which the federal unity is made possible: that is under the treaty making power. The Constitution provides, it will be recalled, that treaties are made by the President with the concurrence of two-thirds of a quorum of the senators. There is a further provision relating to what constitutes the law of the land, Art. VI, Sec. 2; it is as follows: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made . . . under authority of the United States, shall be the supreme law of the land." In the case of *Missouri v. Holland,* 252 U. S. 416 in which the Migratory Bird Treaty Act, passed pursuant to a treaty with Canada for the purpose of preserving our birds, was sustained, Mr. Justice Holmes in delivering the opinion pointed out the difference between the foregoing provisions of Act VI and concluded that by that provision no restriction was imposed by the Constitution upon the treaty-making power, that the act passed pursuant to the treaty was not forbidden by an "invincible radiation from the general terms of the Tenth Amendment"; he admitted that there may be "qualifications of the treaty-making power, but they must be ascertained in a different way." Then comes a sentence which casts an ominous cloud over state sovereignty:

". . . there may be matters of the sharper exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found." Now the whole tendency of the opinion is to further limit and diminish the effect of the Tenth Amendment. What requires national action, who determines the question, whether the treaty-making power is limited to matters requiring national action—these questions are not touched upon. The generality of the opinion is typical of Supreme Court pronouncements—but it must be said, on the other hand, in all fairness, that no greater delineation of the subject was called for than that presented.

At any rate the decision presents a third direct method which may be productive of state invasion.

But there has been no criticism on the part of the people; no great voice raised in protest against this wholesale usurpation. Docility and apathy on the part of the people have marked the progress of the unifying movement. Economic and social activities have been too all-pervading to allow the individual to give more than a fleeting thought to the political factor.

There has perhaps been more than apathy. Due to ignorance of fundamental principles the average citizens have not only permitted but even been actually responsible for increasing the strength of the federal government and bringing about a further stage of weakness in the state government. This he has done in two ways: 1, Constitutional Amendment; 2, Federal subsidies to states.

Constitutional amendments which lapped off huge portions of state soveignty began after the Civil War. Before the passage of these amendments there were relatively few restrictions placed upon the state. Perhaps the amendments were beneficial, they may have even been necessary, but they help to make state legislatures feel the overpowering mastery of the Supreme Court, and their own subordinate position.

The eighteenth and nineteenth amendments further operated to diminish the power of the states. The eighteenth operated to further extend the federal police power which had been developed under the Commerce clause. The nineteenth tolled from the state the power to determine who may or who may not vote to a further extent than was done by the fifteenth.

The amendments being the exercise of the sovereignty of the people no more need be said of them than that they indicate the will of that people that the nation shall be a unified whole.

Of the national subsidies—the method of the federal government in aiding state projects by matching the state government dollar for dollar—their effect on the centralized integration by way of increased state dependency is so obvious that with that effect noted, they may be passed over.

The ultimate decision rests with the "people" who, in theory, are sovereign. They must determine whether our dual system of government, established by the Constitution, is a feasable, workable system or whether it is the product of an ancient time and should be discarded. It is readily apparent that the present drift toward a centralized system is contrary to the principle of the dual system, and demands that the will of the people be consulted on the question: Shall we continue as "an indestructible union of indestructible states" or shall we be integrated into a national unity? If the decision is in favor of the latter, then must our Consituation be scrapped as archaic and obsolete for the condition upon which it rests—the basic principle of states' rights—will have ceased to exist. —R. B. Y.