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THE CONSTITUTION AND SOCIALISM

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In all the welter of words indicating opposition to the growth of Socialism in the United States and especially through the extension of Federal power, it has seemed to me to be remarkable that no attempt has been made to point out simply and in a few words how the socialists have been able to attain their ends.

Total power was divided in the Constitution between the States and the Federal government, and power in the Federal government was again divided between the Executive, Legislative, and Judicial Departments. This division of power was not an accident but was deliberately made to avoid the danger of concentrated power which historical study had disclosed and which, as we know too well, current history confirms.

I shall try by referring to a few cases and by considering the effect of the 16th Amendment to point out how power has been concentrated in the Federal government, how the purposes of the framers of our Constitution have been set aside, and how the way has been cleared for the socialistic planners.

I make no claim to being a constitutional lawyer and indeed I think it accurate to say that there are no constitutional lawyers practicing today in the sense in which we understood and respected such practice in times recently passed and though some of the great ones remain, their learning is now of no avail.

It is worth noting too that all of the mischief to our form of government was not accomplished by what is known as the "new" court but some of the unfortunate decisions which paved the way for later gross extensions of Federal

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power were made by the Supreme Court at a time when it was composed of able, experienced, and conservative judges.

McCray v. U. S.,[1] involved the constitutionality of the Federal tax on oleomargarine. The argument against the tax was that the law was not passed in the exercise of the Federal taxing power because both on its face and as shown by the Congressional debates, the so-called tax was passed not to raise revenue but to destroy or to injure the production and sale of oleomargarine, a cheap and healthful item of food. The opinion was written by Mr. Justice White and three of the justices dissented. Mr. Justice White in his opinion had this to say:

> "It is, however argued, if a lawful power may be exerted for an unlawful purpose, and thus, by abusing the power, it may be made to accomplish a result not intended by the Constitution, all limitations of power must disappear, and the grave function lodged in the judiciary, to confine all the departments within the authority conferred by the Constitution, will be of no avail. This, when reduced to its last analysis, comes to this, that, because a particular department of the government may exert its lawful powers with the object or motive of reaching an end not justified, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power wherever it seems to the judicial mind that such lawful power has been abused. But this reduces itself to the contention that, under our constitutional system, the abuse by one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department.
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> "The proposition, if sustained, would destroy all distinction between the powers of the respective departments of the government, would put an end to that confidence and respect for each other which it was the purpose of the Constitution to uphold, and would thus be full of danger to the permanence of our institutions."[2]

Yet, in the same case Justice White refers to the fact that the Judicial Department is charged with the duty of "enforcing" the Constitution. Thus, the court failed in its

[1] 195 U. S. 27 (1904).
[2] *Ibid*, 54.

duty of enforcing the Constitution and closed its eyes to the obvious subterfuge in the oleomargarine act. One may well wonder what Justice White would think of the "permanence of our institutions" if he were here today? And would it be unfair at this point to quote Bentham's jibe that "The law is the science of being methodically ignorant of what everybody knows."?[2a]

Block v. Hirsh,[3] had to do with the Emergency Rent Law in the District of Columbia and the opinion is by Justice Holmes with three justices dissenting. It was a so-called "emergency" law which was to expire in two years and which took away from property owners the right to fix the rent for their property. The war power of the Federal government was not invoked and the law was held to be constitutional. As a result of it, we have today another "emergency" law with the Federal government regulating rents in every State in the Union; which is as close to a constitutional farce as can well be imagined.

Even Justice Holmes, however, noted that there were limits to the legislative powers and declarations of Congress saying:

> "No doubt it is true that a legislative declaration of facts that are material only as the ground for enacting a rule of law, for instance, that a certain use is a public one, may not be held conclusive by the Courts."[4]

and again

> "The only matter that seems to us open to debate is whether the statute goes too far. For just as there comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded that regulations of the present sort pressed to a certain height might amount to a taking without due process of law."[5]

In plain language this means that the Supreme Court must scrutinize acts to determine their constitutionality and must

[2a] See, too, Powell v. Pennsylvania, 127 U. S. 678 (1888), and the article on the great lawyer David T. Watson who lost that case, in 32 Am. Bar Ass'n. J. 537 (1946).

[3] 256 U. S. 135 (1921).

[4] *Ibid*, 154.

[5] *Ibid*, 156.

not accept at face value legislative declarations, but we must ask ourselves whether that language used by Justice Holmes has any real meaning today. Also, is this not strange language coming from Justice Holmes who concurred in *McCray v. U. S.*[6]

In *Massachusetts v. Mellon and Frothingham v. Mellon,*[7] considered and disposed of together, the Commonwealth of Massachusetts filed an original suit in the Supreme Court. The court held under the special provision of the Constitution, Article 3, Section 2, that Massachusetts had no right to institute judicial proceedings in the Supreme Court to protect its citizens.

Mrs. Frothingham, however, was not only a citizen and taxpayer of Massachusetts but a Federal taxpayer as well, who had filed her bill in the lower court and her case went to the Supreme Court on appeal. Mrs. Frothingham had sued as a taxpayer and such suits are common in many states, including Maryland, being brought in order to check illegal payments by public officers.

The act attacked by Mrs. Frothingham was known as the Maternity Act. The decision in that case was made at a time when experienced constitutional lawyers held that the act was unconstitutional because it provided for appropriations from the Federal Treasury for a purpose which was not within the constitutional powers of Congress. Since that decision, other cases, which will be referred to, have so broadened the power of the Federal government that it is hard to conceive of a case where an act passed by Congress for any such purpose would be declared unconstitutional by the Supreme Court.

The case hinged on the procedural question of whether or not the Supreme Court would pass on the constitutional question or would evade it. Up to the time of the decision in that case, there were no adverse holdings on the point of procedure; that is, as to whether or not a taxpayer could file such a bill. Justice Sutherland who wrote the opinion said:

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[6] *Supra*, n. 1.
[7] 262 U. S. 447 (1923).

> "The right of a taxpayer to enjoin the execution of a federal appropriation act, on the ground that it is invalid and will result in taxation for illegal purposes, has never been passed upon by this Court. In cases where it was presented, the question has either been allowed to pass *sub silentio* or the determination of it expressly withheld."[8]

Nevertheless, the court refused to pass on the constitutionality of the act and disposed of the case by the old technique of saying that it had no jurisdiction; in other words, by a "judge made" rule the court again, as in the *McCray* case, abdicated its constitutional function.[9]

In *Houston & Texas Railway Co. v. U. S.*,[10] Justice Hughes wrote the opinion, which, on the admitted facts appears to be entirely sound, and yet this case has been used of late as an authority for purposes which are destructive of the Constitution. In the *Shreveport* cases, two Texas railroads discriminated in favor of Texas shipping points as against Shreveport, Louisiana, in their interstate rates to and from points in Texas to Shreveport. After being ordered by the Interstate Commerce Commission to desist, they finally abandoned their objections to the Commission's order as to "class" and "standard" rates and complied with the order. However, the Texas Railroad Commission had fixed "commodity" rates for intrastate haul through Texas towards Shreveport at rates relatively lower than the interstate rates. The result was to continue to maintain unfair rates with respect to Shreveport shippers as against Texas shippers. All the court decided in that case was that the Interstate Commerce Commission had the right to stop this discrimination by fixing the relation between the intrastate rates and interstate rates so as to make the latter uniform.

Wickard v. Filburn,[11] in which Justice Jackson wrote the opinion, is a great extension of the *Shreveport* cases and in it the theory of "affecting" interstate commerce is greatly expanded.

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[8] *Ibid*, 486.

[9] See Sutherland, *Due Process and Disestablishment*, 62 Harv. L. Rev. 1306, 1332 (1949), to the effect that "The rule in the *Frothingham* case is judge-made . . ."

[10] (Shreveport cases) 234 U. S. 342 (1914).

[11] 317 U. S. 111 (1942).

The case involved the Agricultural Adjustment Act which was intended to limit the production of wheat by the use of quotas and penalties. Filburn, a farmer in Ohio, planted 23 acres in wheat which it was customary for him to use on his own farm for feeding poultry and livestock. The court, referring to the *Sheveport* case as authority, held that Filburn's actions "affected" interstate commerce in such a way as to bring Filburn within the penalty of the act. The court refers slightingly to its own former rulings where the distinction between "direct" and "indirect" interference with interstate commerce had confined the Federal power within reasonable limits, and concludes that the power to regulate interstate commerce includes the power to fix prices in such commerce.

In tort cases, the courts have found by experience that the attempt to discover "cause" must in some practical way be restricted and accordingly they have evolved the rule of "proximate" cause which is a well known legal concept.[12] The rule laid down in *Wickard v. Filburn,* however, about the effect of actions on interstate commerce is without limits, though the Supreme Court theretofore had set practical limits in its decisions declaring whether interstate commerce was substantially "affected".[13]

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[12] Smith, *Legal Cause in Actions of Tort*, 25 Harv. L. Rev. 103 *et seq.* and 223 *et seq.* (1911).

[13] One result of the *Wickard* case is shown by what happened in one potato-growing county in Maine as follows:

> "Thirty one farmers got checks ranging from $100,000 to better than $450,000 each; 146 were paid $50,000 to $100,000; 468 got $25,000 to $50,000; and 1200 got $15,000 to $25,000." Am. Mercury, Jan., 1950.

How valuable would it be if someone with the time and patience could prepare a list of these various "welfare state" acts so as to give us a rough idea of their cost and operations.

Frank E. Holman, the late president of the American Bar Association, in his presidential address "Must America Succumb to Statism?" had this to say about the Federal government in business:

> "May I remind you of the extent to which the Government has gone into business? The Federal Government has organized and operates over fifty corporations having assets of over $25,000,000,000, which sum is forty times as great as our biggest public utility, ten times as great as our biggest railroad, ten times our biggest industrial company, and about twice the value of all farm buildings in the United States. Of these government corporations many are not even incorporated under acts of Congress, but government officials have incorporated them under the laws of Delaware and other states. They have the form and structure of private corporations but behind them in their competition with private enterprise they have the credit and finance and power of government." 35 Am. Bar Ass'n. J. 801, 805 (1949).

Gregg Cartage & Storage Company v. U. S.,[14] involved the grandfather clause of the Motor Carrier Act and is referred to because the opinion was also written by Justice Jackson who wrote the opinion in *Wickard v. Filburn*. In the course of the opinion, Justice Jackson had this to say:

> "How far one by an exercise of free will may determine his general destiny or his course in a particular matter and how far he is the toy of circumstance has been debated through the ages by theologians, philosophers, and scientists. Whatever doubts they have entertained as to the matter, the practical business of government and administration of the law is obliged to proceed on more or less rough and ready judgments based on the assumption that mature and rational persons are in control of their own conduct."[15]

Now it seems to me the concepts of "cause" and "affect" are related in thought and that the courts should have made practical decisions in both cases but in the *Filburn* case there was no practical judgment exercised by the court so that what "affects" interstate commerce, instead of being limited by the usual legal methods, appears to be without limits.

The *Baltimore Transit case*,[16] involved the applicability of the National Labor Relations Act to the Baltimore Transit Company, a purely local Maryland corporation. The transit company's lines were confined to Baltimore City and Baltimore County, and at no point came near the boundaries of Maryland. Yet the court held that its activities "affected" interstate commerce and that the act applied to the transit company.

Helvering v. Davis,[17] involved the constitutionality of the Federal Old Age Act. No particular power to pass such an act is to be found in the Constitution. The Federal government under the Constitution is one of enumerated powers only and the 10th Amendment specifically provided:

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[14] 316 U. S. 74 (1942).
[15] *Ibid*, 79.
[16] (N. L. R. B. v. Baltimore Transit Co.), 140 F. 2d 51 (1944), *cert. den.* 321 U. S. 795 (1944).
[17] 301 U. S. 619 (1937).

> "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."

Justice Cardozo, however, writing the opinion of the Court had no difficulty in finding that this act, though not within the enumerated powers, was for the "general welfare" of the country. This expression he took from Article 1, Section 8, Clause 1, of the Constitution as follows:

> "The 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 but all Duties, Imposts and Excises shall be uniform throughout the United States; . . ."

Jefferson, with prophetic foresight, had considered this Article. His thought was that if the broad view were taken of these particular words, then Congress "could do whatever they may think or pretend would promote the general welfare, which construction would make that of itself a complete government without limitation of power". Such a construction of the words "general welfare" the Court of Appeals of Maryland has said would make of the Constitution so much "waste paper".[18]

These cases and others which could be cited show that the Federal government instead of being a government of limited and enumerated powers is now, in effect, a government of general powers. As the powers of the Federal government when exercised are paramount, it follows that

[18] "In many of the cases in which the nature and extent of the police power have been considered, the words 'general welfare' have been added to that definition and there has been a tendency in some courts to treat that expression as enlarging the scope of the police power so as to reach an infinite variety of objects which could not be referred to any one of the objects definitely specified in the definition we have given. But in our opinion the words 'general welfare,' as used by this Court and other courts in defining the scope of the police power, do not have that effect, but are synonomous with and referable to the specific objects enumerated in the definition given above . . ."

"If this were not so, and if the police power were superior to the constitution and if it extended to all objects which could be embraced within the meaning of the words 'general welfare,' as defined by the lexicographers, the constitutions would be so much waste paper, because no right of the individual would be beyond its reach, and every property right and personal privilege and immunity of the citizen could be invaded at the will of the state, whenever in its judgment the convenience, prosperity, or mental or physical comfort of the public required." Tighe v. Osborne, 149 Md. 349, 356-7 (1925), Offutt, J.

the Federal government has or can draw to itself total power.

For the Supreme Court today to strike down an act of Congress as unconstitutional is so unlikely as to be unbelievable. The role of the Supreme Court now, so far as it affects the Federal government, has been reduced to the construction or interpretation of Congressional acts and the results reached have hardly added to the Court's prestige.

In *Loewe v. Lawlor*,[19] the court held that the Sherman Antitrust Act applied to a labor boycott, the effect of which was to prevent the transportation of hats in interstate commerce.

In *Apex Hosiery Company v. Leader*,[20] however, the court held that while the Sherman Antitrust Act applied, yet the act could not be invoked to prevent interference by a labor union; the result of which was to prevent the shipment of $800,000 worth of stockings in interstate commerce.

16TH AMENDMENT

The powers of the Federal government having been thus extended it was necessary for the socialistic planners to find the means to carry out their plans. This they were able to do conveniently because of the passage of the 16th Amendment which became effective February 25, 1913.

This amendment was passed apparently in order to overrule the decision of the Supreme Court in *Pollock v. Farmers Loan & Trust Company*.[21]

The amendment was hastily drawn and its drafting has been criticized: "Thus the proposed amendment presents the anomaly of a Federal power of taxation absolutely unrestricted and entirely opposed to the principle of the Constitution requiring either the rule of apportionment or the rule of uniformity to govern in every instance."[22]

The Internal Revenue Acts, passed pursuant to the 16th Amendment, have, in effect, siphoned into the United States Treasury a large part of the annual net income of individuals and corporations all over the United States. Useful

[19] 208 U. S. 274 (1908).
[20] 310 U. S. 469 (1940).
[21] 158 U. S. 601 (1895).
[22] 23 Harv. L. Rev. 49, 50 (1909); See also 15 Va. L. Reg. 737, *et seq.* (1910).

as the amendment was in providing for the costs of war, emergencies, and for the cost of government operations, its use today in implementing plans for socialistic schemes can be accurately described, by those who believed in the Constitution, as unfortunate.

The situation has come to this: that raids on the United States Treasury cannot now be stopped by invoking constitutional limitations, so that all the raiders have to do is to force through Congressional Acts.

Pressure group organizations form the battering-rams and Federal laws are so cunningly drawn that states which oppose them eventually are made to submit to them, for a state which refuses its quota gets nothing and finds its quota paid out to the other states. Maryland is a good illustration of how such things work. Maryland actually gets back in Federal grants less than it pays the Federal government in taxes, so that Maryland sustains a net loss, and yet when it receives these grants it becomes a party to the perversion of our constitutional system.

At a recent annual conference of Governors there was a strong undercurrent against these Federal practices, in which the Governor of Maryland concurred, but yet it was found impossible to adopt a resolution condemning them.[23]

In Maryland, the State Superintendent of our schools, though affirming his belief in the Constitution and his opposition to Socialism, was able in a recent legislature to defeat Joint Resolution No. 5 which protested against Federal controls and Federal subsidies.

That we are on the way to Federal control of schools seems certain and as private institutions of learning are finding it difficult to maintain themselves, the future of education in America presents an ominous picture.

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[23] COTTON CONSISTENCY. N. Y. World Telegram, Feb. 24, 1950.
More than 100 delegates to a National Cotton Council Meeting in Memphis have voted resolutions condemning:
Government deficit spending, the Brannan farm plan, compulsory government health insurance, the FEPC, and other legislative proposals by President Truman "which invade the rights of individuals and the states."
The National Cotton Council delegates also voted in favor of:
A $1,500,000,000 government revolving fund to finance cotton exports when the Marshall Plan ends.

The concentration of power and the control of education seem to go hand-in-hand, as witness Hitler, Mussolini and Stalin. Our public leaders continue to give lip service to the Constitution and deny belief in Socialism but what they do in fact is either to float with the socialistic tide or actually become active in carrying out socialistic practices.

America was able to stand the shock of four years of a great Civil War and to emerge without substantial injury to our American constitutional system, yet one serious business panic in the 1930's accompanied by the sudden infiltration of alien ideas into the Executive, Legislative and Judicial Departments of the Government was the occasion for the collapse of our constitutional system described by Gladstone, the great Prime Minister of England, as follows:

> "As the British constitution is the most subtle organism which has proceeded from the womb and long gestation of progressive history, so the American Constitution is, so far as I can see, the most wonderful work ever struck off at a given time by the brain and purpose of man."

We Americans had thought that our constitutional system was such as to save us from the eternal circle in which government seems to move from authority to freedom and from freedom to authority and so on *ad infinitum.* However, we must remember that Spinoza, the great philosopher, concluded that "experience had revealed all possible commonwealths which are consistent with men living in unity and also the methods by which people may be guided or kept in fixed bounds", and he was cautious "in holding out any hope for improvement of the social lot of men".[24]

At last we look back to the ancient times in Greece which had been studied by our constitutional fathers and we are reminded of the words of Polybius who said that man, apparently the wisest, is really the silliest of all animals because he is always being deceived by the same snares and devices; they still have their effect and delude men as perfectly as if they were never used before.[25]

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[24] CAIRNS, LEGAL PHILOSOPHY FROM PLATO TO HEGEL (1949).
[25] MAHAFFY, GREEK LIFE AND THOUGHT.

In the light of what has happened and of the position in which we now find ourselves it seems to be just a little absurd to talk about the Constitution as though it were still in full effect. The great and fundamental division of power between the national government and the states has been destroyed, property rights have been subjected to a ceaseless and continuing attack in various ways: By the false use of the taxing power, by setting up of so-called "classes" for unjust legislation and in many other ways.

The stage for socialism has been perfectly set in the ways heretofore outlined and yet we know that socialism has everywhere been a failure when tried in important countries. Thus in Germany it degenerated into dictatorship, not unlike the present situation in Russia. In England where economic troubles were already great the Socialists have made them still greater and England with socialism is floundering on a declining path in the view of all who will open their eyes to see.

Of Jefferson's "Life, Liberty and the Pursuit of Happiness" and his later "Life, Liberty and Property" only the protection of personal liberty, important as that protection is, remains though some of the Supreme Court's latest applications of the doctrine press it to its extreme limits.[26]

Eventually, however, it will be found that there can be no personal liberty without the protection of private property.

Thus the "new" thinkers of the nihilistic school have done their worst but the problem still remains and is certain in the end to become practical and that problem is this: (1) How can socialism be stopped before it degrades us as it has degraded others, and (2) how can the rights of the states be restored, so as to create that balance between the powers of the national government and the governments of the states which was intended by the framers of the Constitution, to the end that the citizens of this great country shall cease looking in childlike faith to a "Great Father" in Washington who knows best what to do for all of us?

[26] Cassell v. Texas, 339 U. S. 282 (1950).