

THE GROWTH OF NATIONAL POWER

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At no time since 1787 has it been more important than now to re-examine the relationship between state and national power in the United States. Since the foundation of this government there has been a steady increase in national powers and activities; but not until recently has this increase endangered the efficiency of the national government and the existence of the federal system.

National power has steadily increased through (a) the broad judicial construction of the constitution of the United States; (b) the amendment of the United States constitution; and (c) the more complete exercise of its authority by the nation. These three factors are merely parts of a common development, for broad judicial constructions have come as the result of conditions seeming to demand that the United States itself exercise broad powers; and constitutional amendment has been forced by conditions seeming to require that new lines be drawn between state and national power as to matters where desired results were not or could not be accomplished by judicial constructions.

Early in the history of this country the United States Supreme Court established its power as the authoritative interpreter of the constitution; as the final arbiter for the determination of the line separating national and state powers under the terms of a written document.¹ Into this judicial function has gone statesmanship of a high character. As an organ of the national government, familiar with the needs of that government, this court throughout the course of its history has been favorable to constructions supporting national power; but has at the same time protected the federal system. Under Chief Justice Marshall the court laid firmly the foundations of national power, but in doing so restricted too severely powers which the states must continue to exercise. Under Taney the court somewhat moderated the undue severity of previous decisions, but without reducing national authority in any material respect. On the whole the court's attitude has been consistent and recent decisions show a desire to permit proper extensions of national power while protecting the states as units in the federal system.

The national government has increasingly come to exercise the powers vested in it under the constitution of the United States. In the days of the stage coach and the sailing vessel, there was little possibility of a developed and elaborate system of interstate commerce. With the development of rapid means of transportation and increased ease of communication, interstate commerce has become increasingly important. With the development of this commerce, national power has increased step by step with the enormous increase in the transactions

¹ *Martin v. Hunter's Lessee* (1816, U. S.) 1 Wheat. 304.

to be controlled. And the increased complexity of these transactions has necessarily forced a more complete exercise of this power.

At the time when the issue first presented itself, it seemed proper for the United States Supreme Court to hold that the admiralty jurisdiction of the federal courts extended only to the waters in which the tide ebbed and flowed.² But with the development of the steamboat, such a doctrine became a bar to progress, and was discarded in the case of *The Genesee Chief v. Fitzhugh*.³ Had the United States Supreme Court not changed its original attitude, steam transportation on the waterways of the United States would be subject to federal regulation in parts of many streams, and to state regulation in other parts. This situation would have been difficult and dangerous. Constitutional amendment would soon have become necessary, had the court not wisely abandoned the view of an earlier day.

With the development of interstate commerce by railroad it has become increasingly necessary that the United States government assume practically complete authority over the regulation of interstate carriers by land, just as in an earlier period it became necessary by judicial construction to extend the federal authority over substantially the whole field of commerce by water. The chief steps in this extension of national authority over railroads may be traced in *Southern Ry. v. United States*,⁴ the *Shreveport* case,⁵ and *Railroad Commission of Wisconsin v. C. B. & Q. Ry.*⁶ Railroad transportation is necessarily a problem national in its scope, and the recent decision rendered through Chief Justice Taft is as necessary a development with respect to that transportation as was the case of *The Genesee Chief* in 1851. Intra-state rates bear such a close relationship to the regulation of interstate rates that the final step taken in the *Wisconsin Railroad Commission* case was necessary in the proper development of national authority.

Other tendencies in judicial construction, however, presented dangers to the federal system. Pushed to its logical extreme, the view taken in the *McCray*⁷ and *Doremus*⁸ cases would have been destructive of state power. If the United States government could, by levying a tax or something in the name of a tax, take under its control matters otherwise not under the authority of the national government, no limit would exist as to national authority to encroach upon state activities. For this reason Chief Justice Taft and his colleagues took the proper view in the recent cases of *Bailey v. Drexel Furniture Co.*⁹ and *Hill v. Wallace*.¹⁰

² *The Thomas Jefferson* (1825, U. S.) 10 Wheat. 428.

³ (1851, U. S.) 12 How. 443.

⁴ (1911) 222 U. S. 20, 32 Sup. Ct. 2.

⁵ *Houston, E. & W. T. Ry. v. United States* (1914) 234 U. S. 342, 34 Sup. Ct.

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⁶ (Feb. 27, 1922) 42 Sup. Ct. 232.

⁷ *McCray v. United States* (1904) 195 U. S. 27, 24 Sup. Ct. 769.

⁸ *United States v. Doremus* (1919) 249 U. S. 86, 39 Sup. Ct. 214.

⁹ (May 15, 1922) 42 Sup. Ct. 449.

¹⁰ (May 15, 1922) 42 Sup. Ct. 453.

The court was clearly right in its statement that the taxing power "must be naturally and reasonably adapted to the collection of the tax, and not solely to the achievement of some other purpose plainly within the state power." However much one may sympathize with the desire to abolish child labor throughout the whole territory of the United States, such abolition would be purchased at too dear a price, were it accomplished by the destruction of the powers of the states. It is interesting and characteristic that the United States Supreme Court at the same term and through the same spokesman should have declared invalid the federal tax upon child labor; and have sustained federal authority to control intrastate rates of railroads as incident to the regulation of interstate commerce.

The judicial function of interpreting the constitution is steadily in use. Constitutional amendments are much less frequent, and only since the Civil War has there been a tendency to increase national power through changes in the text of the constitution itself. The Fourteenth Amendment to a large extent nationalized the protection of individual rights. The Fifteenth and Nineteenth Amendments substantially (though not in legal theory) took over as a matter of federal control the regulation of the right to vote both for state and for national offices. The income tax amendment, by giving to the national government a large additional source of revenue, has made it possible for the nation to embark upon a system of subsidies to the states, through which the nation has come to a large extent to determine state policies as to education, highway construction, and other matters. Through the popular election of United States senators, established by amendment to the constitution of the United States, the states as such have become less important organs in the operation of the federal system. The prohibition amendment has transferred to the national government responsibility for the enforcement of an important policy of police regulation.

It has been suggested that national power has increased by means of constitutional amendment, constitutional construction, and the more complete exercise of its recognized powers by the government of the United States. These three developments are so closely interwoven that the effect of one upon the other cannot be separated. The national government has not sought to exercise its powers fully until conditions have developed requiring such exercise. The regulation of commerce by water came with the development of the importance of such commerce. The regulation of interstate commerce by land began in 1887, and has extended with the need for the federalization of the control of that commerce. The same is true of the development of the postal system and of control over migratory birds.

The more complete exercise of national authority has naturally come only with the demand for new federal functions. Broadened constructions of national powers by the courts have also come only when the needs of the situation have forced and justified such constructions. Amendments to the constitution of the United States have come slowly

and only as they have seemed to be necessary to meet new needs. With the increase of national authority and an increased national consciousness has naturally come a tendency to saddle new burdens and responsibilities upon the nation. It is easier on the whole for those in favor of a particular reform to obtain federal legislation for the country as a whole, than to make their views prevail through the actions of forty-eight separate state legislatures. It is in some cases easier to obtain an amendment to the constitution of the United States than to obtain the success of movements through separate state jurisdictions.

It is impossible to draw any definite or permanent line between national and state functions. Railroad regulation began with the states, and has properly tended to come under national control. The line separating state and national functions must and will shift. In the readjustment of functions as between state and nation, the United States is but doing what is going on in other federal systems. In Switzerland there has been a steady tendency toward the enlargement of federal powers as against those of the cantons, though little of value can be drawn for the United States from the experience of a small and compact territory such as that of the Swiss federal republic. In Germany, before the fall of the empire, there was also steady development toward an increase of imperial as against state powers; and this development has been carried still further by the constitution of the present German republic. In Australia, there have for years been efforts to amend the commonwealth act so as to enlarge the powers of the commonwealth as against the states. These efforts at constitutional amendment have failed, but a recent decision of the High Court of the Commonwealth of Australia gives the supporters of increased national authority much for which they fought.¹¹

The most recent increase of national authority in the United States has been through subsidies to state and local governments. Congress appropriates a large sum of money to be distributed among the states, the states or their local communities meeting federal appropriations by an equal sum, and being controlled to a large extent by federal law and federal administrative regulations in the expenditure of the money so obtained. With respect to agricultural education, vocational education, highway construction, and maternity and infant welfare, a definite system of federal subsidies has been built up; and constant pressure is being placed upon Congress to establish new plans of the same character.¹²

National subsidies are limited only by the extent of federal revenue, and by the limits if any upon the persistence with which new subsidy schemes are urged upon Congress. With respect to matters judicially cognizable, the Supreme Court of the United States may be relied upon

¹¹ *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.* (1920, H. C. of Australia) 28 Com. L. Rep. 129.

¹² See Paul H. Douglas, *The Development of a System of Federal Grants-in-Aid* (1920) 35 POL. SCI. QUART. 255, 522.

to protect state powers. But no organization exists for the restriction of the evils of the subsidy plan. The development of this plan is dangerous to the national treasury; but in favor of any proposed subsidy it is possible to organize a mass of state and local pressure not capable of effective political resistance. Unfortunately neither state governments nor their local subdivisions can be expected to resist encroachments upon state and local authority through the subsidy plan, for governments are usually willing to surrender control over policy in return for additional and immediate revenue.

No function national in its character will remain permanently under the control of state and local authority, nor should it so remain; but any development which may without limit supersede state authority is dangerous both to the nation and the states. When a problem is national it must be dealt with by the nation, and to meet it the nation may often have to readjust its administrative and judicial organization. A national policy once adopted must be efficiently enforced. National prohibition found the federal government unprepared for enforcement, though recent judicial reorganization may in part remedy this situation.

Though the nation must and will finally deal with problems of a national character, the presumption must be against the assumption of a new national function, unless it may be clearly recognized as one properly to be withdrawn from state and local control. This view is not based upon theory, but upon the need for efficient enforcement of governmental policy. The undue assumption by the national government of detailed governmental tasks leads to inefficiency because (a) it makes the federal administration less effective, (b) it removes a feeling of local responsibility for law enforcement.

A governmental organization may readily become so large as to be inefficient, and the danger of this is the greater if the government controls a wide expanse of territory and governs a large number of people. State governments are perhaps now less efficient than the national government, though this statement may be challenged. Yet the national government has tended to become less efficient as it has assumed new and diverse functions, to be performed in detail throughout the whole country.

Not only this, but when responsibility for a policy is transferred to the national capital, the interest and responsibility of local governments is to that extent reduced. The establishment of national prohibition has in some respects weakened not merely the respect for law, but the enforcement of law, because weakening the responsibility of other governments. A community enforcing prohibition within its borders as the result of a periodical local option vote had more feeling of responsibility for law enforcement than if the duty is upon a distant government. Some specific local interest in law enforcement is necessarily lost when the determination of a policy shifts first from the locality to the state, and then from the state to the nation.

No one sympathizes with lynch law in any portion of this country;

and every citizen desires that effective action be taken to punish those engaged in mob violence. Yet the proposed congressional legislation seeking to a large extent to turn over to the national government responsibility for the prevention of lynching and for the punishment of those engaged in such unlawful acts is of doubtful wisdom. The national government is remote in many ways from the individual citizen, and the more tasks of local government which it undertakes the less effectively will it be able to perform the important functions for which it was established. The Dyer bill, if passed (as is now doubtful), may in many cases accomplish good by bringing to justice leaders of mobs who would otherwise go unpunished. But the efficient enforcement of law in this country depends not upon the national government but upon the states and upon local governments; and an effort to have the national government take over the responsibility in this respect may in the long run lead to worse conditions by relieving the states and the localities from direct obligations which they should bear.

Whether a policy be local, state, or national, its effective enforcement must in the long run depend upon local sentiment and a feeling of local responsibility. Local sentiment and local coöperation are the more difficult to develop, the farther the control of and the responsibility for law enforcement is removed from the communities themselves. The steady overburdening of the national system will break down the efficiency of that system, and will necessarily result in less adequate enforcement of the policies determined upon. From the standpoint of the supporters of a particular policy, it is possible oftentimes to get a prompter legal recognition of that policy through the national government than through the states; but the transfer of control over that policy from the smaller to the larger area of government may in the long run defeat many of the purposes of those advocating the policy. Although proposals of federal action either through subsidies or otherwise may often involve dangers to the federal system and to the very movement sought to be encouraged, yet such proposals are difficult to oppose on their merits, because they seek some immediately desirable results.

In the past national functions have developed haphazard, and without conscious policy. This development involved no dangers so long as the United States was merely occupying recognized fields of federal power, whose boundaries were subject to judicial delimitation. But there is no body whose duty it is to check new ventures under the plan of federal subsidies. A conscious policy must now be developed as to the future relationships between state and nation, if the two are to be effective, if the national treasury is to be protected, and a truly federal system preserved. No hard and fast line can ever be drawn between functions that are national on the one side and those belonging to the states on the other. But at the present time some lines can be drawn. The national government can never take over and exercise effectively the detailed control of police regulations within the state; and the general

administration of civil and criminal justice will long remain with the states. It is now clear that the states rather than the national government may more properly handle such matters as education, highway construction, health, and labor legislation. This enumeration of matters of internal administration may be continued indefinitely.

What is the function of the national government with respect to activities which more properly belong to the states? A subsidy plan leaves the detailed administration to the states but subordinates the policy of that administration to the national government. It appears to leave authority in the states without doing so. There is, however, an important sphere of desirable coöperation between state and nation—an important function of the national government with respect to the state governments themselves, as to which the nation may be highly useful, without encroaching upon powers which it should not exercise.

One of the most important needs of state and local government is something of standardization and coördination. In order to meet its problems, each should be able to call upon the accumulated experience of other states. No one state has the means nor could it effectively set up the machinery for a careful comparative study of institutions in all the states. The national government has to some extent attempted to inform the states about the activities of other states, but little has been done effectively in this field. Each state needs for example to know the experience of every other state in the fields of taxation and budget administration. Through its Bureau of the Census, the United States government actually publishes an annual volume of financial statistics of states, and this volume is of some help to the several states, although its helpfulness may be easily exaggerated. The Bureau of the Census published for a number of years an annual bulletin on the financial statistics of cities of a population over 30,000; and these volumes were also of aid although the activities of the national government in this field as well were not as useful as they might have been.

In the field of labor, the national government has done useful and effective work and has had some real influence upon state legislative and administrative policy. The movement for workmen's compensation has been a rapid one in the states of this country, and within a short period has completely transformed the relationship between employer and employee in the case of accidents. The United States department of labor has performed useful and important services in this connection through the preparation of studies, and through the publication of the proceedings of the International Association of Industrial Accident Boards and Commissions. One of the latest important services performed by this department is a careful and detailed study of workmen's compensation insurance and administration.¹³

In the field of judicial administration and in the enforcement of criminal law, no single state can take an effective leadership in the

¹³ *Comparison of Workmen's Compensation Insurance and Administration* (1922) Bulletin of U. S. Bureau of Labor Statistics, No. 301.

development of judicial statistics and the careful study of methods of judicial administration. In this field alone national action may accomplish more to aid in the improvement of government than through the passage of a half-dozen Dyer anti-lynching bills.

Even though it be admitted that state governments are less efficient than the nation and that local governments are to a large extent inefficient, the remedy is not to deprive these governments of control over matters of state and local policy; but rather a systematic effort to improve conditions in these governments themselves; for, however much the national government assumes new functions, the effective enforcement of policy will depend upon the sentiment in the states and local communities. Upon the preservation of state governments depends the continuance of our federal system of government. A concentration of authority in the national capital is sure in the long run to lead to less efficient government, to a high degree of bureaucracy, and to a lessening of the democratic spirit in the national, state, and local governments. The function of the nation in acting as an investigating and coördinating agency, and in reporting upon the results of experience in state and local government, is more important than is the taking over of activities which may more properly be handled through local agencies. And the national government may in the long run be more efficient and more of an aid in the establishment of efficient government throughout the nation by means of activities which will aid the states to solve their own problems, than through plans which seek to take these problems from the states themselves. There must be a halt and an immediate halt in the present development of federal subsidies unless the national treasury is to become bankrupt and the states cease to be effective agencies of government in this country. And the national government must cease the assumption of new tasks involving detailed administration unless it is to become highly inefficient.

The national government deals with and must continue to deal with many of the same problems as do state governments. In many cases close relationships now exist between state and national administrations. Such relationships are beneficial to the states where they do not lead to the possibility of national dominance over state policy. Only a few of the cases of federal coöperation and helpfulness are noted above. It may almost be said that so many federal agencies in Washington have relations with state government, that the comparative operation of state governments may best be studied through such agencies, rather than in the states themselves. This would be largely true if the student could know all of the federal offices having relations with the states. Unfortunately the relations between the national departments and the states are scattered and uncoördinated. If the national government is not itself to take over the functions of state and local government, but is to aid effectively in their performance, it may wisely set up something in the nature of a department of state relations to coördinate its own relations with the states and to advise them in their problems.