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THE PROPER LIMITS BETWEEN STATE AND NATIONAL LEGISLATION AND JURISDICTION. SPECULATIONS AND MONOPOLIES IN THE STAPLES OF SUBSISTENCE. RAILWAYS A MATTER OF NATIONAL INTEREST.

1. The general disposition, before the war, to depreciate the national authority.

2. The United States courts, at an early day, denied themselves all prerogative and common-law jurisdiction. But assumed it for the courts of the District of Columbia, with no just reason for the distinction.

3. There is no good reason why the national courts, in their limited sphere, should not possess all the implied and prerogative powers of the superior courts in Westminster Hall, at common law.

4. The form of the national powers, being paramount and self-measured, naturally led to the apprehension, on all sides, of the danger of centralization, which compelled the national courts to assume less than their due.

5. The residuum of governmental authority remaining in the states led to the construction, that all doubtful powers should be yielded to them.

6. The late attempt to overthrow what remained of national authority, very generally excited painful apprehensions for the result.

7. The danger now is that in a moment of generous enthusiasm, we shall concede all state authority to the national government.

8. Hence we find projects on foot for establishing national Bureaus, upon Insurance and many other matters of strictly local concern.

9. The combinations and monopolies in raising the prices, most exorbitantly, of the staples of subsistence, call loudly for redress.

10. These call more loudly than any other evils of trade for correction. But they are exclusively of state cognisance, and not within the jurisdiction of national authority.

11. But now that the tendency is towards national supervision of business interests, we desire to urge some which seem specially to require it.

12. Rail-way interests especially demand national supervision. This is indispensable to secure promptness, uniformity of charges, and safety.

13. Promptness and despatch can only be secured by national supervision.

14. Uniformity of charges is of the same character: indispensable both for the roads and the public, and impossible of attainment by state supervision.

15. Security in passenger transportation is of a similar character.

16. The interests of the stockholders and of the public are the same: but still there is need of stringent national supervision to secure promptness, uniformity of charges, and safety.

17. There can be no reasonable doubt that the national government might properly take the control of railway supervision.

18. It seems far more indispensable to national security, that the railways should be under national supervision than the banks.

19. Uniformity in the laws of marriage and divorce is of great national concern.

20. The tendency of evil practices in this respect is towards national reproach and degradation.

21. Judge BRADWELL'S decision on slave marriages. The invalidity of polygamous marriages and ex parte divorces.

1. THERE is probably no subject of more engrossing interest and importance, at the present moment, than that which we have ventured to place first at the head of this paper. The precise line of demarcation between the authority of the state and the nation, it will always be difficult to define. Until the late war there was a general disposition everywhere, and especially at the South, to underrate the importance of the national authority, both in regard to legislation and the jurisdiction of the courts. The national authority seems to have been considered, by almost every one, a kind of necessity in regard to certain national functions, but one to be watched with narrow circumspection, and to be resisted, in all possible attempts at enlargement of its powers, with the keenest jealousy and the utmost effort.

2. The result of this feeling was, that we came to treat the national legislature and the national courts with a kind of supercilious contempt, not allowing them even those constructive and implied powers and functions, which become indispensable to the healthy growth of all liberal institutions, of whatever character. Even the national courts denied themselves all implications of ancillary jurisdiction, however important or indispensable to the carrying out and perfecting of those functions which the national constitution and the national legislature had expressly conferred upon them. Those courts even went so far, at an early day, as to hold that Congress cannot confer upon the national courts any original jurisdiction: *Marbury* v. *Madison*, 1 Cranch 137.

And in *Kendall, Postmaster-General, in error*, v. *The United States, on the relation of Stokes et al.*, 12 Pet. 524, the same general doctrine is maintained, in regard to the ordinary jurisdiction of the United States courts, although the majority of the court, the Chief Justice and Justices BARBOUR and CATRON dissenting, held that the Circuit Court of the District of Columbia, having acquired the common-law powers and jurisdiction of the courts of Maryland, at the time of the cession of the District to the national government, was not restrained within the same narrow limits which confined the jurisdiction and powers of the Circuit Courts in other districts, and therefore held that the Circuit Court of the District of Columbia might grant a peremptory mandamus, controlling the official conduct of the postmaster-general, in a matter purely ministerial. If anything were wanted to show the unreasonableness of the short limits within which the United States courts have restricted their prerogative and incidental jurisdiction, throughout the country, it will be found in the refinements by which the majority of the court here attempted to vindicate, for the Circuit Court of the District of Columbia, a prerogative jurisdiction to control the ministerial action of the heads of departments in the national government, while at the same time they deny the same jurisdiction to the national court of last resort, where, if anywhere, such a transcendent power should reside.

3. The proper view unquestionably would have been, in the outset of establishing and moulding the jurisdiction of the national courts, to have given them, by construction and implication, all the incidental and prerogative powers belonging to the superior courts in Westminster Hall, at common law, so far as the subject-matter of the national jurisdiction extended. There is no sound reason why the national courts, within their limited sphere of jurisdiction, should not have the same prerogative and implied powers of the courts in the several states.

4. And the only reason which can fairly be conjectured why those able and masterly men, first appointed to the bench of the United States Supreme Court, should have assumed such a meagre jurisdiction, so palpably in violation of the maxim that it is the duty and excellence of a good judge so to extend his jurisdiction by construction, as to accomplish its just ends, must be found in the general prejudice against, and jealousy of, the national courts. It

seems to have been supposed, and rightly enough, that the powers conferred by the national constitution upon the national judiciary were broad enough, if artfully wielded for that purpose, to absorb all the powers and functions of the state courts, so far as any concurrent jurisdiction existed between them. For it may readily be conceded, that by giving the national judiciary a supervisory power over the state courts, and the right to grant writs of error and reverse the judgments of the state courts, in regard to all their decisions affecting national powers and functions, whether constitutional or legislative, where the decision in the state court tended to the abridgment of those powers and functions; by conceding such a supervisory power to the national courts, it is obvious enough the national constitution really made the national government paramount and supreme, within the range of its functions, and being so it would, as all sagacious men would at once perceive, place it in the power of the supreme authority to constantly encroach upon all subordinate authority. With the army and navy at its command, and subject to its own discretion, in regard to its existence and extent, it could not require any gift of prophecy to foresee the result of the plastic power of the national judiciary in moulding all the functions of government to the enlargement and aggrandizement of their own jurisdiction. It is but the uniform voice of history, that a self-existent central government, with the unlimited power of taxation, and with the exclusive control of commerce and navigation, and all foreign and international relations, and at the same time being the sole and final judge of the extent of its powers and functions, with this irresistible power to back its claims or pretensions; all this must, in the end, sweep away all obstructions from the subordinate powers of government, unless very narrowly watched. It was just this absorbing and centralizing tendency of the national authority which induced the first framers of the national judiciary, in defining its powers and limits of jurisdiction, to keep far within what might have been fairly and justly claimed. And this readiness in the national courts to deny to themselves all constructive, implied, and doubtful powers, naturally became the rule of action and opinion in the state courts and in the state and national legislatures.

5. And as by express provision of the United States constitution, the residuum of all governmental authority remains in the

states, it became very natural to conclude, that in regard to all doubtful powers, however convenient or necessary to the due exercise of such powers as were expressly granted to the nation, yet no such doubtful powers could be assumed, by implication, in favor of the national government, but must be yielded to the states, in consideration of their holding the residuum of governmental functions.

6. This state of things, and this proclivity, in all directions, to limit and restrict the national authority, continued, without abatement, and in some respects with increasing force, until the inauguration of the late rebellion, which was intended to extinguish what remained of national power and authority. And it is probably just to say, that the test of the power and coherence of the national government was so severe and so sudden, so determined and desperate, that its friends, in all sections, more commonly conceded, or if they did not, in form, concede so much, they generally feared and expected, the anticipated result so eagerly sought by its enemies and opposers.

7. But the result, after a most determined and bloody conflict, has been far otherwise. And now every one is ready and forward in yielding almost everything to the national authority, which proved itself so competent to exercise governmental functions, in so desperate a crisis. The great danger now will be that things will rush in the opposite direction, and the central authority, from being limited and straitened in all its powers and functions, and scarcely able to maintain a precarious existence, will be in danger of absorbing all the important functions of governmental administration.

8. Hence we find projects on foot for establishing a kind of national supervision over many of the ordinary business operations of the country. For instance, there has been a systematic organization, extending over many states, for the purpose of establishing, at Washington, under national sanction and legislative provision, a National Insurance Bureau. Almost every function of government, or business, which becomes ambitious of assuming a national extent and importance, and especially if it desire to become identified, in any form, with the national government, at once assumes the high-sounding appellation of a Bureau, hoping, perhaps, thereby to give itself the form and consistence of an existing institution. How the subject of Insurance, whether

Life, Marine, or Fire, can claim to be of national importance, more than ten thousand other subjects, is more than we can comprehend. That it is a kind of legalized betting, or gaming, no one can question; and that it would prove of some importance to the people to have its tempting and seductive lures, to which every one is so ready to yield, kept under a rigid supervision and surveillance, no one can question. And the same is true of much else, that no one dreams of committing to the guardianship of the national administration.

9. If the state or the national governments possessed sufficient energy to make and enforce penal laws against the terrible monopolies which are now practised in the leading staples of food, such as flour, sugar, &c., there can be no question vast benefits would accrue to the people thereby. We believe the American republic is the only civilized and commercial country in the world, where the dealers in the great and indispensable staples of subsistence would be allowed, by mere combinations and conspiracies, to enhance the price nearly twofold, above what the natural laws of trade, the demand and supply, would produce, and thus, by their own unlawful operations, to levy a tax of hundreds of millions of dollars annually upon the head of every consumer, rich or poor; the most iniquitous of all capitation taxes. And this results from no defect in the law, since the common law of England prevails in all of the states, with one exception, and is amply sufficient to reach all such combinations and conspiracies against the rights of the public; but it results from the want of an energetic enforcement of the laws, caused mainly, no doubt, by the large number and extensive influence of the persons interested in such monopolies, so that almost every one either is, or hopes to be, profited by the speculation, as much against law as it is against reason and decency.

10. If the national government could apply any effectual corrective to this widespread and destructive evil, it would cure an extent of wrong and injustice in comparison with which those attending speculative and irresponsible insurance are as nothing. But we have no expectation that the national government will ever be induced to adventure in any such Quixotic enterprises; partly for the reason that the evil lies deeper than any merely legislative remedies can ever penetrate, in that the people like to be gulled and cheated, provided only that they can have the

privilege of gulling and cheating their fellows in turn, but chiefly because it does not come in any sense within the range of national administration to control and equalize the local business and enterprises of trade and speculation, whether in stocks, or flour, or in insurance. The national government might with the same propriety assume the control of all lotteries and other gambling enterprises, or even of the crimes of obtaining goods by false pretences, or of theft and forgery, all of which may be regarded as in some sense of a kindred nature with speculations in the indispensable staples of subsistence, and of speculative or fraudulent insurance. We have no apprehension that any such mad enterprises will be urged upon Congress by persons whose recommendation, coming from disinterested sources, can alone be expected to prove effectual in that direction.

11. But now that the tendency is evidently setting in the direction of centralization of governmental administration, so clearly indicated by small matters, in no sense connected with legislation or judicial administration, such as making our annual festivals and fasts, the few we have, like Thanksgiving and the Lenten Fast, national instead of local; since then the tendency is so manifestly in that direction we desire to name some subjects, in regard to which it seems to us there should be a national supervision, even at the cost of making an alteration of the United States constitution to effect it if necessary.

12. We refer first to railways, which we have made in our studies almost a specialty for the last ten years or more, as is well known to the profession. There is confessedly a necessity for some legislative and judicial control of the railways in the country, which shall bring them all to the same point, that of promptness, uniformity of charges, and safety. These three things, with some others, perhaps, which might be named, but especially these three, promptness, uniformity, and safety, have become a necessity to the public interest. By promptness we do not mean rapidity of movement, but regularity and system, so that the public can know what to expect and what they can depend upon. This can only be effected by some very stringent system of supervision, by which all the rolling-stock can be kept in the most perfect condition, as well as the road-bed and track, and that the rolling-stock shall be kept fully up to the business demands of the line. And this supervision can only be effected by stringent laws, stringently enforced. And to be of any prac-

tical avail it must extend throughout the whole country, and be able to build up a public opinion which shall override and control that local and self-interested public sentiment, which is ready to sacrifice everything to the hope of obtaining dividends. Railways must be regarded as indispensable public interests, before they can be put under such management and supervision as to secure the public accommodation, as a leading and primary motive to action. So long as obtaining the largest dividend at the end of the next half-year is the leading principle of action with railway managers, it will be impossible to secure proper arrangements of all the appliances of the line so as to afford the greatest public accommodation.

13. But it should also be borne in mind, that it is only by maintaining all the structures and all the rolling-stock of a railway, at all times, in the most perfect condition, that high dividends can be permanently secured. So that the highest amount of public accommodation and the greatest rate of remuneration to the shareholders, is only to be secured by the same stringent supervision. And all experience shows, that it is impossible to secure this on most of our extended railway lines, which reach through several states and sometimes from one end of the Union to the other, unless we have a more extended supervision than that of the states.

14. The same thing is true in regard to uniformity of charges for freight and passengers. It is undeniable that this is one of the impossible things to be effected, upon our American railways which extend through different states, in all of which the laws are different, and in none of which has this matter of uniformity of charges been sufficiently regarded. It is the one thing which alone will enable the railways and the people both to live, and to conduct business upon fair grounds. And the want of some such stringent system of supervision, which should bring all charges to a uniform standard and a reasonable limit, is the very thing which has ruined many of the most productive lines of railway in the country.

15. The matter of safety, too, in the passenger traffic upon railways, is one of almost frightful importance, and at the same time one where there is absolutely no corrective except in the way of penalties, and pecuniary mulcts, by way of damages for injuries inflicted through defective apparatus and want of due care, at the time, in passenger transportation. There should be

some power able to insure the public of the perfect condition both of the track and the rolling-stock, at all times.

16. And it is certain that although the interests of the shareholders, when properly understood, and of the public, upon all the questions alluded to, are absolutely concurrent and the same, it will be impossible to establish any supervision which shall be effective in securing promptness in the despatch of duty, uniformity of charges, and entire security for life and limb, except through the agency of the national government.

17. And of the right of the national government to control the railways in the country there can be no question. The transportation of troops and the munitions of war, in time of civil commotion, and of the public mails, at all times, are matters exclusively of national importance and concern, and they are of such magnitude, as to justify the national authority in the construction of entire lines of railway at the public expense. And if the national government may do that, then it is certain it may create corporations for that purpose, or delegate the same powers and functions to individuals. For there is nothing in the grant of power to build and operate a railway, which of necessity requires it to be made to a corporation: BENNETT, J., in *Bank of Middlebury* v. *Edgerton*, 30 Vt. R. 182. The same view was taken in regard to the right of the national government to charter the United States Bank. It was regarded as incidentally important and necessary to enable the government to carry forward those governmental functions which the constitution had delegated to them. This rule was established in *McCullough* v. *Maryland*, 4 Wheaton 316; *Osborne* v. *The Bank of the United States*, 9 Id. 738. And now, upon the same principle, it is held lawful and necessary for the national government to absorb all the banking institutions in the country.

18. But there can be no question, upon any fair principle of reasoning, that the management and control of all the railways in the country are far more important as an aid or safeguard to the national authority, than that of the banks. And we believe no one will question that it would be far more important to the interests both of the railways and the public, to have them under national supervision and control, than to have the banks. We hope to see some movement made in this direction, so soon as the present all-absorbing topics of interest, at the capital, shall be satisfactorily adjusted.

19. We desire, too, to suggest here that there are other subjects of such absorbing interest and concern to the nation, that they will deserve to be brought under national supervision. We here refer to that of marriage and divorce, and especially the latter. It is one of the standing subjects of national reproach and ignominy, that while we have for centuries allowed millions of our inhabitants to subsist without any just security for the permanence of the family relation, we now tolerate within our national limits an extensive and fertile territory, of many hundred miles in extent, where polygamy is systematically practised and vindicated by formal legislative sanction. And in addition to all this, which has hitherto been regarded as of an exceptional character, to some extent, it has now come to be of almost daily occurrence, in some of the states, that divorces are granted upon *ex parte* applications, without any permanent residence of either party, and without the presence or appearance of more than one party, and in numerous instances, without the actual residence or even presence within the state of either party!

20. It scarcely needs comment to show the national degradation which must speedily supervene, where polygamy is openly tolerated and publicly vindicated in one section, and where divorces may be obtained on such easy terms for all, without residence or lawful jurisdiction of the parties; and where by consequence we must soon become an asylum for the desperate and dissatisfied with all human ties and obligations of however sacred a character.

21. We are glad to have it in our power here to refer to the able opinion of Judge BRADWELL, of the Cook County Probate Court, Illinois, in which, by sound logic and substantial precedent and authority, the learned judge has maintained the validity of slave marriages and the legitimacy of the offspring. The result of the same salutary course of argument must, we feel confident, be to show the invalidity of all polygamous marriages and the illegitimacy of the offspring. And we have in a former article attempted to show the entire invalidity of all decrees of divorce obtained without the proper jurisdiction of the court passing the decrees over both parties. We need not delay here to enlarge upon the evil consequences to a state or nation of granting formal decrees of divorce which the parties will be ready to act upon and which, at the same time, are of no more validity, as a dissolution of the bonds of matrimony, than the release of one of the parties to the other. I. F. R.