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The recent decisions of the Supreme Court of the United States in the liquor cases, *Mugler* v. *Kansas*, and *Kansas* v. *Ziebold* (1887), 123 U. S. 623, and *Kidd* v. *Pearson* (1888), 128 Id. 1; and in the oleomargarine cases, *Powell* v. *Pennsylvania*, and *Walker* v. *Pennsylvania* (1888), 127 Id. 178, are of much interest to constitutional lawyers, as indicating the wide scope of the legal functions of government by the States. The first three of these cases decided that statutes prohibitory of the manufacture and sale of intoxicating drinks, except for certain special purposes, did not contravene any provisions of the Constitution of the United States. The other cases ruled that a statute of Pennsylvania, which absolutely prohibited the manufacture and sale of oleomargarine throughout the State, was not unconstitutional.

The constitutional provision invoked by the assailants of the statutes in question was the familiar injunction of the first section of the Fourteenth Amendment: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The contention before the court was chiefly confined to the latter part of the section in question, namely, to the inhibition on a State's deprivation of liberty or

property without due process of law, and on its denial of the equal protection of the laws. The earlier provision, against a State's abridging the privileges or immunities of citizens of the United States, received a construction in the *Slaughter House Cases* (1872), 16 Wall. 36, which practically eliminated it from discussions relating to the power of the States, as governments, to legislate concerning their own citizens. A distinction was there for the first time made, judicially, between citizenship in the State and in the United States [see 27 AMERICAN LAW REGISTER, "Citizens"], and the privileges or immunities within the protection of the earlier portion of the Fourteenth Amendment were confined to those which arise out of the nature and essential character of the national government, the provisions of the Constitution, or its laws and treaties made in pursuance thereof. The privilege of the writ of *habeas corpus*, of protection while on the high seas or within a foreign government, of the use of the navigable waters of the United States, and the like, were named as instances of such immunities. The fundamental rights of the individual as such—the right to acquire property and pursue happiness without molestation—were declared to be privileges and immunities of citizens of the States, and, as such, without the sphere of the protection of the clause under consideration. The definite protection of the Federal Constitution against State interference with the citizen's fundamental rights, from the time of this decision, has accordingly been sought in the later provisions of the section, where the States are prohibited from taking life, liberty or property without due process of law, and from denying to persons within their respective jurisdictions the equal protection of the laws.

The significance of the liquor and oleomargarine cases referred to is in the extent to which they have recognized the broad functions of the States, as governments, to legislate concerning their own internal affairs, without antagonizing these specific restraints upon the impairment of individual rights.

The six cases known as the *Granger Cases* (1876), beginning with *Munn* v. *Illinois* and ending with *Stone* v. *Wisconsin*, reported in 94 U. S. pp. 113 to 187, marked an era in the

constitutional law of the land. They asserted, and applied new conditions, the principle of the common law, that, where private property is devoted to a public use, it is subject to State regulation in respect to the rates or charges for such use imposed upon the public by the owner. The court, in the leading case of *Munn* v. *Illinois*, upon this principle, sustained a State law fixing a maximum of charges for the storage of grain in warehouses in Chicago and elsewhere in Illinois. The other decisions declared the validity of State laws, fixing a maximum rate for transportation of freight and passengers on certain railways. The inhibition of the Fourteenth Amendment against the deprivation of property, without due process of law, was held as of operative effect upon private property only, and not upon property affected with a public interest, as that of public warehousemen and common carriers. It was said in the first of these cases, however, that, even as to property which was strictly *juris privati*, the right of regulation of its use and of the price of its use always existed, the only effect of the Amendment, as to it, being to prevent the State from regulation to the extent of deprivation. The special significance of the *Granger Cases* is, that in them the Supreme Court, for the first time since the adoption of the latest amendment to the Constitution, directed marked attention to the scope of the State's sovereign powers affecting the liberty of the individual, and affirmed the existence of broad and wide powers of legislation.

Two different and, in some respects, antithetical forces or tendencies are noticeable in the development of the law of constitutional limitations upon the States. The first is what might be called the centripetal tendency, or tendency towards the emphasis of the Federal, rather than the State, functions of legislation under our dual systems of government, State and National. This tendency prominently appears through all the years of the formative period of our body of constitutional law. Marshall and his associates were making the nation. A constitution framed in a time of weakness, for the purpose of welding together into one sovereignty a number of independent autonomies, was being tested. If the new government was to live and grow strong in the midst of thriving commonwealths, it was necessary that the powers given to it should be liberally

construed in accordance with the purpose of those who called it into being. Accordingly, a series of decisions, great in the principles they declared, and far-reaching in their effect upon our national life, early put beyond the reach of successful assault the doctrine of the supremacy of the Federal government. Many of these decisions, as *McCulloch* v. *Maryland* (1819), 4 Wheat. 316; *Gibbons* v. *Ogden* (1824), 9 Id. 1; and *Brown* v. *Maryland* (1827), 12 Id. 419, directly discussed the relations between Federal and State authority. Of the first of them William Pinckney said, "It is a pledge of the immortality of the Union." Other decisions, as *Fletcher* v. *Peck* (1810), 6 Cr. 87, and *Dartmouth College* v. *Woodward* (1819), 4 Wheat. 518, concerned only the relations of the individual to the State, in the light of the Federal limitations upon the State, as contained in the Constitution of the United States. The latter, however, as effectually as the former, tended to the dominance of National power, by declaring the value to the citizen of the United States, of the specific limitations upon State action which the National Constitution established.

But through all this period of development of the nation, as well as later, there was full recognition of the State's broad governmental functions. This is particularly noticeable in *New York* v. *Miln* (1837), 11 Pet. 102, and *The License Cases* (1847), 5 How. 504. These cases were decided by a court constituted very differently from that of the period of the dominance of Marshall and Story. But its utterances, in so far as they consider the scope of State legislative power, unaffected by the grant of power to the United States, are wholly in accord with those of the earlier time.

The court in *New York* v. *Miln* stated these as impregnable positions: That a State has the same undeniable, unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States; that, by virtue of this, it is not only the right, but the bounden and solemn duty of a State to advance the safety, happiness and prosperity of its people, and to provide for its general welfare by any and every act of legislation which it may deem to be conducive to those ends, where the power

over the particular subject or the manner of its exercise, is not surrendered or restrained in the manner just stated.

Upon the general question of the extent of the grant of power to the Federal government, the decision in the *Passenger Cases* (1849), 7 How. 283, is perhaps more satisfactory than the opinion in this case, and more in accord with the law as laid down by the great Federalist judges, who gave to the Supreme Court its early character. But no dissent is possible from the statement of the law made by Mr. Justice BARBOUR in *New York* v. *Miln*, regarded as an expression of the principles of government by the State, when unaffected by the limitations of the Federal constitution.

Notwithstanding these views as to the extent of State power, the great struggle for the first seventy years of our national life was for supremacy of the Nation over the State. This supremacy was secured in its amplest form, and with the adoption of the Fourteenth Amendment the Federal Constitution became more than ever, a thing of dignity and worth, by whose words the validity of every action of a State or its officers might be tested.

The Supreme Court, as constituted since the civil war, has faithfully maintained, and indeed extended, the National principle. In *Juilliard* v. *Greenman* (1883), 110 U. S. 421, the latest Legal Tender case, it has affirmed the power of Congress to make the treasury notes of the United States a legal tender in payment of private debts, in time of peace as well as in time of war. It has stricken down State laws, otherwise clearly within the power of the State to enact, because they trespassed, though never so slightly, upon the grant of power to the Federal government. The many instances where State tax or police laws directly affecting interstate commerce have been overturned, are in point. *Philadelphia Steamship Company* v. *Pennsylvania* (1886), 122 U. S. 326; *Western Union Telegraph Company* v. *Pendleton* (1886), Id. 347, and *Bowman* v. *Chicago and Northwestern Railway Company* (1887), 125 U. S. 465, are very recent cases in illustration.

The development of industrial and commercial activities has been so great during the last twenty years, and there has been such a growing necessity, because of the complex social and

business life of the people, for the exercise of governmental functions by the States, that we would naturally expect that more particular attention would have to be given by the courts to the State's powers under our scheme of government. The present era, therefore, while showing no relinquishment or abatement of the nation's acknowledged claim to an undivided sovereignty within the sphere of its grant of powers, has been eminently fruitful of inquiry into the scope of the State's functions.

It is the era of the *centrifugal* tendency.

The *Granger Cases* were the first marked expression of this tendency under the new conditions. It is said that, when *Munn* v. *Illinois* was first considered in conference by the Supreme Court of Illinois, it was agreed that the particular exercise of legislative power there attempted was clearly unconstitutional. It was remarked by one of the justices, who afterwards saw no objection to the act on constitutional grounds, that the legislature might as well prescribe by law the price he should pay his tailor for his coat, as to pass an act of that kind. See Paper of James K. Edsall, in Reports of American Bar Association, 1887, pp. 288, 298.

The Supreme Court of the United States not only sustained the law then under consideration, but has since gone far towards making the sartorial figure of the Illinois justice something more serious than a jest. It is possible the Court may yet say, not only that the price of coats may be fixed by law, but that the propriety of wearing coats at all may be determined by the legislature. Since the decision in *Powell* v. *Pennsylvania* (the soundness of which is not here questioned), it is difficult to tell, in advance, at what point the Court will stop the exercise of the discretion of the legislature of a State, when the occasion for legislating at all upon the subject exists.

The latest statement by the Supreme Court of the law of the particular questions discussed in the *Granger Cases* is found in *Dow* v. *Beidelman* (1887), 125 U. S. 680. From that case it will be seen that the State legislatures may regulate the charges of public corporations to any extent, short of confiscation of their property. And the Court will not let "water"

pass for money, in determining whether any particular act reducing the charges, and consequently the income, of corporations, works a confiscation of their property by impairing their dividend-earning or interest-earning capacity.

The history of the liquor cases is familiar. *Bartemeyer* v. *Iowa* (1873), 18 Wall. 129, was the first of the series decided after the adoption of the Fourteenth Amendment. The Court passed upon the Iowa prohibitory law of 1851, sustaining it as a proper legislative measure, within the State's comprehensive police powers. It appeared that the specific liquor in question was not shown to have been owned by the defendant before the passage of the law, and the Court declared that there was no protection for him in the Fourteenth Amendment. In the opinion, delivered by Mr. Justice MILLER, it was said, however, that if the question were fairly before the Court that the glass of liquor was in existence at the time the State of Iowa first imposed an absolute prohibition on the sale of such liquors, two very grave questions would arise, namely, *First*, Whether this would be a statute depriving him of his property without due process of law; and, *Secondly*, whether, if it were so, it would be so far a violation of the Fourteenth Amendment in that regard, as would call for judicial action by the Court. These expressions of doubt as to the possible extent of State power in dealing with the subject matter were repeated in the next case of the kind, *Beer Company* v. *Massachusetts* (1877), 97 U. S. 25–32. The point decided in that case was that no charter right to manufacture intoxicants could protect against the subsequent prohibition of all such business. But the Court was careful to express no opinion as to whether liquor actually in existence when the law was passed or took effect, was subject to practical destruction at the hands of the State, without compensation.

In *Foster* v. *Kansas* (1884), 112 U. S. 201, the Court reaffirmed the doctrines of *Bartemeyer* v. *Iowa* and *Beer Company* v. *Massachusetts*.

In *Mugler* v. *Kansas*, *supra*, the whole general question came before the court upon facts requiring the determination of the points considered doubtful in the earlier cases. Mugler was indicted under a rigid prohibitory act, passed February

19, 1881, which took effect May 1, 1881. One of the counts in the indictment was directed against his sale, after the act took effect, of liquor manufactured by him before its passage. The decision, which was rendered by Mr. Justice HARLAN, in a very comprehensive way established the State's right to legislate so as to deprive of value the liquor actually in existence before the passage of the act.

Another point, not definitely raised in the previous cases, was also raised and decided here, namely, whether the law's impairment in, or deprivation of, value of property, real and personal, adapted chiefly or solely for brewery purposes, was a *taking* without due process. The lower courts had been divided in opinion. The Supreme Court of Kansas, in *Kansas* v. *Mugler* (1883), 29 Kan. 252, and the Circuit Court of the United States for the Northern District of Georgia, in *Weil* v. *Calhoun* (1885), 25 Fed. Rep. 865, had sustained the State's power to pass such laws; whereas, Judge BREWER, of the Circuit Court of the United States for the District of Kansas, had held in *State* v. *Walruff* (1886), 26 Fed. Rep. 178, and in the *Ziebold Case* (1886), that such a law was a clear invasion of individual rights of property. The Supreme Court held that all such property rights must give way, or rather that they did not exist, before the State's sovereign right, under its police power, to protect the health, morals and general welfare of the people. The court said (p. 669): "The power which the States have, of prohibiting such use (for certain forbidden purposes) by individuals, of their property, as will be prejudicial to the health, the morals, or the safety of the public, is not, and, consistently with the existence and safety of organized society, cannot, be burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain by reason of their not being permitted by a noxious use of their property to inflict injury upon the community. The exercise of the police power, by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance is

abated; in the other, unoffending property is taken away from an innocent owner."

It was objected in *Kansas* v. *Ziebold, supra*, decided with the Mugler case, that the legislature could not arbitrarily declare that to be a common nuisance which had theretofore been recognized by the law, and wipe out of existence *bona fide* investments, made upon the faith of such recognition. The court answered: "The statute is prospective in its operation, that is, it does not put the brand of a common nuisance upon any place, unless, after its passage, that place is kept and maintained for purposes declared by the legislature to be injurious to the community." This decision declared legal the confiscation and absolute destruction, by the court officers, of the glasses, bottles and other property of the kind in liquor establishments, after the law went into effect. It also took away, perhaps, nine-tenths of the value of the machinery and fixtures used in the manufacture and sale of the prohibited articles.

Finally, in *Kidd* v. *Pearson, supra*, all the doctrines of *Mugler* v. *Kansas* and *Kansas* v. *Ziebold* were restated and reaffirmed.

The difference between the *Granger Cases* and the *Liquor Cases* is, that in the former cases the right of State regulation of a public business was extended to *limiting* the prices to be charged in conducting it, while, in the latter, the right of absolute *destruction* of the business and of the value of the property invested in it was recognized. The latter cases were therefore a very material advance upon the former.

The extension of the State's power over the property and occupations of its citizens, in these cases, was of course made with reference to the particular facts before the Court—the grave and serious menace of the liquor traffic to the public interests, and the common knowledge of the demoralization of the people from the excessive use of intoxicants.

The court, however, did not stop at the liquor cases. Within a few months of the decision in *Mugler* v. *Kansas* came that of *Powell* v. *Pennsylvania, supra*, wherein the State was declared competent to prohibit the manufacture and sale of oleomargarine, to take from the manufacturer his property by depriving it

of all value, and from the seller, as well as the manufacturer, his business, by enjoining him from continuing in it. Large investments were shown to have been made in machinery specially adapted for the manufacture of the prohibited article, and valuable only as old iron with the law in force. It was held the State's arm could not be stayed by the requirement that compensation be made for this loss.

The fundamental right to pursue a lawful calling was insisted upon in argument against the law. The Court answered that the right to pursue ordinary callings or trades and to acquire, hold, and sell property is subservient to the State's right, through the legislature, to protect the public health and morals. It was declared to be entirely a matter of legislative discretion, what measures to take, to remedy or remove, a particular evil which seemed to exist; the only qualification being, that an act of legislation having no possible relation to the objects sought by the legislation, could not be sustained. The Court was unable to declare, in the face of the recognized presumptions in favor of the *bone fides* of acts of the legislature, that the traffic in oleomargarine was not an injury to the public, or that the legislature, in forbidding it, did not intend to remedy what it deemed, and what was, a public evil.

These cases came to the Supreme Court, as did the liquor cases, with judgments of the lower courts opposed to each other on the questions in dispute. The Court of Appeals of New York had, in *People* v. *Marx* (1885), 99 N. Y. 377, held such laws to be unconstitutional, as unwarrantably interfering with the liberty of the citizen. The Supreme Court of Missouri, in *State* v. *Addington* (1882), 77 Mo. 110, and the Supreme Court of Pennsylvania in the cases under review, had sustained them.

The distinct advance here made upon previous adjudications of the kind, was in the affirmance of the right of the State absolutely to deprive of all value and to destroy property connected with a business which was not clearly and unmistakably inimical to the interests of the public.

The latitude that was here given to the legislature, to declare not only the extent to which it will exercise its power of redressing a conceded public wrong, but also to declare the

existence of the wrong to be redressed, makes these last cases advanced landmarks of the State's governmental power affecting individual rights.

That the decisions are sound and right is not questioned by the writer, although the principle upon which they were ruled has met with disapproval by at least one eminent writer on constitutional law: See 2 Hare's American Constitutional Law, 773–776 (1889). It seems more in accordance with the American theory of popular government through representatives, that the legislature, rather than the courts, should determine questions of public policy as to the possession of property and the exercise of personal liberty. The courts, it is true, are the conservators of individual rights protected by the constitution. But they are not to set up their own theory of government, outside of the written constitutions, and test legislative acts by that theory. In a complex social system, such as ours is getting to be, the tendency necessarily must be towards affirmative exercise of governmental powers. The clashing of diverse individual interests is anarchical in tendency.

A *laissez faire* democracy is not a practical democracy. Sixty millions of people must have laws. When interests clash and laws are demanded, the practical question is, not whether a State may act by its legislature for the purpose of declaring or redressing a wrong, but whether it is prohibited from so acting. The Supreme Court of the United States, in the decisions considered, has merely given the benefit of the doubt to the State, rather than to the individual; to the people, rather than to the person.

The limit to State action that is insisted upon by that court is stated and illustrated in *Yick Wo* v. *Hopkins* (1885), 118 U. S. 356, 369, where the Court said: "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power." In this case a municipal ordinance of California, which made it possible for the city authorities, whose duty it was to license laundrymen, to

withhold licenses from persons of a certain race, arbitrarily and without reference to the qualifications of applicants, was held to be clearly within the inhibition of the constitution. See *Dent* v. *West Virginia* (1889), 129 U. S. 114, 124, where this principle is very recently recognized.

The broad sovereignty of the State within the Nation, thus recognized, is the true State sovereignty of the Constitution. It was left for great justices of the Federalist school to declare these "State rights" as legitimately belonging in our system of government.

Calhoun and the doctrinaires of his school would have erected the State upon the ruins of the Nation. Had they succeeded, they could have built no fairer structure than that which has since been raised by those whose theories they condemned. The phrase "State sovereignty" has been rescued from its friends, and given its true meaning in our governmental scheme.

> "Defamed by every charlatan
> And soil'd with all ignoble use,"

its legitimately wide scope has been declared, and its rightful domain established. It is the best tribute to the genius of HAMILTON and MARSHALL, that a government of their creation, after achieving its own promised destiny of strength and vigor, should be able, through its courts, to declare, and by its arm to enforce, that comprehensive sovereignty of the States which belonged as essentially in their system as that of the supremacy of National authority itself. There was needed the triumph of their principle of nationality, before the principle of sovereign statehood could be broadly declared and worked out.

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