THE STATES AND THE FEDERAL GOVERNMENT

FROM THE "NORTH AMERICAN REVIEW," MAY, 1908, VOL. CLXXXVII, PP. 684-701.

THE question of the relation of the States to the Federal Government is the cardinal question of our constitutional system. At every turn of our national development we have been brought face to face with it, and no definition either of statesmen or of judges has ever quieted or decided it. It cannot, indeed, be settled by the opinion of any one generation, because it is a question of growth, and every successive stage of our political and economic development gives it a new aspect, makes it a new question. The general lines of definition which were to run between the powers granted to Congress and the powers reserved to the States the makers of the Constitution were able to draw with their characteristic foresight and lucidity; but the subject-matter of that definition is constantly changing, for it is the life of the nation itself. Our activities change alike their scope and their character with every generation. The old measures of the Constitution are every day to be filled with new grain as the varying crop of circumstances comes to maturity. It is clear enough that the general commercial, financial, economic interests of the country were meant to be brought under the regulation of the Federal Government, which should act for all; and it is equally clear that what are the general commercial, financial, economic interests of the country is a question of fact, to be determined by circumstances which change under our very eyes, and that, case by case, we are inevitably drawn on to include under the

established definitions of the law matters new and unforeseen which seem in their magnitude to give to the powers of Congress a sweep and vigor certainly never conceived possible by earlier generations of statesmen, sometimes almost revolutionary even in our own eyes. The subject-matter of this troublesome definition is the living body of affairs.

It is difficult to discuss so critical and fundamental a question calmly and without party heat or bias when it has come once more, as it has now, to an acute stage. Just because it lies at the heart of our constitutional system, to decide it wrongly is to alter the whole structure and operation of our government, for good or for evil, and one would wish never to see the passion of party touch it to distort it. A sobering sense of responsibility should fall upon every one who handles it. No man should argue it this way or that for party advantage. Desire to bring the impartial truth to light must in such a case be the first dictate alike of true statesmanship and of true patriotism. Every man should seek to think of it and to speak of it in the true spirit of the founders of the government.

Almost every great internal crisis in our affairs has turned upon the question of State and Federal rights. To take but two instances, it was the central subject-matter of the great controversy over tariff legislation which led to attempted Nullification and of the still greater controversy over the extension of slavery which led to the war between the States; and these two controversies did more than any others in our history to determine the scope and character of the Federal government.

The principle of the division of powers between State and Federal Governments is a very simple one when stated in its most general terms. It is that the Legislatures of the States shall have control of all the general subject-matter of law, of private rights of every kind, of local interests and of everything that directly con-

cerns their people as communities,—free choice with regard to all matters of local regulation and development, and that Congress shall have control only of such matters as concern the peace and the commerce of the country as a whole. The opponents of the tariff of 1824 objected to the tariff system which Congress was so rapidly building up that it went much beyond the simple and legitimate object of providing the Federal Government with revenues in such a way as to stimulate without too much disturbing the natural development of the country and was unmistakably intended to guide and determine the whole trend of the nation's economic evolution, preferring the industries of one section of the country to those of another in its bestowal of protection and encouragement and so depriving the States as self-governing communities of all free economic choice in the development of their resources. Congress persisted in its course; Nullification failed as even an effectual protest against the power of a government of which General Jackson was the head,—never so sure he was right as when he was opposed; and a critical matter, of lasting importance, was decided. The Federal Government was conceded the power to determine the economic opportunities of the States. It was suffered to become a general providence, to which each part of the country must look for its chance to make lucrative use of its material resources.

The slavery question, though it cut deep into the social structure of a great section of the country and contained such heat as could not, when once given vent, be restrained from breaking into flame, as the tariff controversy had been, was, after all, a no more fundamental question, in its first essential form, than the question of the tariff. Could Congress exclude slavery from the Territories of the United States and from newly formed States? If it could, manifestly the slavery system, once restricted in territory, would in time die of the strictures which bound it. Mr. Lincoln was

quite right when he said that no nation could exist half slave and half free. But that was only by consequence. The immediate question was the power of Congress to determine the internal social and economic structure of society in the several States thereafter to be formed. It is not to my present purpose to trace the circumstances and influences which brought on the Civil War. The abolition of slavery by war, though natural, was not the necessary legal consequence of the contention that Congress possessed the power which it had exercised in the constitution of the Northwest Territory and in the enactment of the Missouri Compromise. What happened before the momentous struggle was over came about by the mere logic of human nature, by stress of human passion. What concerns me in the present discussion is that here, again, as in the building up of a fostering tariff, what turned out to be a far-reaching change in the very conception of Federal power had as its central point of controversy the question of the powers of the States as against the powers of the Government at Washington. The whole spirit and action of the Government were deeply altered in carrying that question one stage further toward a settlement.

And I am particularly interested to point out that here again, as in the tariff question, it was an inevitable controversy, springing, not out of theory, not out of the uneasy ambition of statesmen, but out of mere growth and imperious circumstance. Population was spreading over the great western areas of the country; new communities were forming, upon which lawyers could lay no binding prescription as to the life they should lead; new Territories were constantly to be organized, new States constantly to be admitted to the Union. A choice which every day assumed new forms was thrust upon Congress. Events gave it its variety, and Congress could not avoid the influences of opinion, which altered as circumstances changed, as it became more and more clear what the nation was to be. It was

of the very stuff of daily business, forced upon Congress by the opinion of the country, to answer the question, What shall these new communities be allowed to do with themselves, what shall they be suffered to make of the nation? May Congress determine, or is it estopped by the reserved powers of the States? The choices of growth cannot be postponed, and they seem always to turn upon some new doubt as to where the powers of the States leave off and the powers of the Federal Government begin.

And now the question has come upon us anew. It is no longer sectional, but it is all the more subtle and intricate, all the less obvious and tangible in its elements, on that account. It involves, first or last, the whole economic movement of the age and necessitates an analysis which has not yet been even seriously attempted. Which parts of the many-sided processes of the nation's economic development shall be left to the regulation of the States, which parts shall be given over to the regulation of the Federal Government? I do not propound this as a mere question of choice, a mere question of statesmanship, but also as a question, a very fundamental question, of constitutional law. What, reading our Constitution in its true spirit, neither sticking in its letter nor yet forcing it arbitrarily to mean what we wish it to mean, shall be the answer of our generation to the old question of the distribution of powers between Congress and the States? For us, as for previous generations, it is a deeply critical question. The very stuff of all our political principles, of all our political experience, is involved in it. In this all too indistinctly marked field of right choice our statesmanship shall achieve new triumphs or come to eventual shipwreck.

The old theory of the sovereignty of the States, which used so to engage our passions, has lost its vitality. The war between the States established at least this principle, that the Federal Government is, through its courts,

the final judge of its own powers. Since that stern arbitrament it would be idle, in any practical argument, to ask by what law of abstract principle the Federal Government is bound and restrained. Its power is "to regulate commerce between the States," and the attempts now made during every session of Congress to carry the implications of that power beyond the utmost boundaries of reasonable and honest inference show that the only limits likely to be observed by politicians are those set by the good sense and conservative temper of the country.

The proposed Federal legislation with regard to the regulation of child labor affords a striking example. If the power to regulate commerce between the States can be stretched to include the regulation of labor in mills and factories, it can be made to embrace every particular of the industrial organization and action of the country. The only limitation Congress would observe, should the Supreme Court assent to such obviously absurd extravagances of interpretation, would be the limitations of opinion and of circumstance.

It is important, therefore, to look at the facts and to understand the real character of the political and economic materials of our own day with a clear and statesmanlike vision, as the makers of the Constitution understood the conditions they dealt with. If the jealousies of the colonies and of the little States which sprang out of them had not obliged the makers of the Constitution to leave the greater part of legal regulation in the hands of the States it would have been wise, it would even have been necessary, to invent such a division of powers as was actually agreed upon. It is not, at bottom, a question of sovereignty or of any other political abstraction; it is a question of vitality. Uniform regulation of the economic conditions of a vast territory and a various people like the United States would be mischievous, if not impossible. The statesmanship which really attempts it is premature and unwise.

Undoubtedly the recent economic development of the country, particularly the development of the last two decades, has obliterated many boundaries, made many interests national and common which until our own day were separate and distinct; but the lines of these great changes we have not yet clearly traced or studiously enough considered. To distinguish them and provide for them is the task which is to test the statesmanship of our generation; and it is already plain that, great as they are, these new combinations of interest have not yet gone so far as to make the States mere units of local government. Not our legal conscience merely, but our practical interests as well, call upon us to discriminate and be careful, with the care of men who handle the vital stuff of a great constitutional system.

The United States are not a single, homogeneous community. In spite of a certain superficial sameness which seems to impart to Americans a common type and point of view, they still contain communities at almost every stage of development, illustrating in their social and economic structure almost every modern variety of interest and prejudice, following occupations of every kind, in climates of every sort that the temperate zone affords. This variety of fact and condition, these substantial economic and social contrasts, do not in all cases follow State lines. They are often contrasts between region and region rather than between State and State. But they are none the less real, and are in many instances permanent and ineradicable.

From the first the United States have been socially and economically divided into regions rather than into States. The New England States have always been in most respects of a piece; the Southern States had always more interests in common than points of contrast; and the Middle States were so similarly compounded even in the day of the erection of the government that they might without material inconvenience have been treated as a single economic and political unit. These first mem-

bers of the Union did, indeed, have an intense historical individuality which made them easily distinguishable and rendered it impossible, had any one dreamed of it, to treat them as anything but what they were, actual communities, quick with a character and purpose of their own. Throughout the earlier process of our national expansion States formed themselves, for the most part, upon geographical lines marked out by nature, within the limiting flood of great rivers or the lifted masses of great mountain chains; with here and there a parallel of latitude for frontier, but generally within plots of natural limit where those who had set up homes felt some natural and obvious tie of political union draw them together. In later years, when States were to be created upon the great plains which stretched their fertile breadths upon the broad mid-surfaces of the continent, the lines chosen for boundaries were those which had been run by the theodolite of the public surveyor, and States began to be disposed upon the map like squares upon a great chess board, where the human pieces of the future game of politics might come to be moved very much at will, and no distinct economic, though many social, varieties were to be noted among neighbor commonwealths.

But, while division by survey instead of by life and historical circumstance no doubt created some artificial political divisions with regard to which the old theories of separate political sovereignty seemed inapplicable enough, the contrasts between region and region were in no way affected, resemblances were rendered no more striking than the differences which remained. We have been familiar from the first with groups of States united in interest and character; we have been familiar from the first also with groups of States contrasted by obvious differences of occupation and of development. These differences are almost as marked now as they ever were, and the vital growth of the nation depends upon our

recognizing and providing for them. It will be checked and permanently embarrassed by ignoring them.

We are too apt to think that our American political system is distinguished by its central structure, by its President and Congress and courts, which the Constitution of the Union set up. As a matter of fact, it is distinguished by its local structure, by the extreme vitality of its parts. It would be an impossibility without its division of powers. From the first it has been a nation in the making. It has come to maturity by the stimulation of no central force or guidance, but by the abounding self-helping, self-sufficing energy of its parts, which severally brought themselves into existence and added themselves to the Union, pleasing first of all themselves in the framing of their laws and constitutions, not asking leave to exist, but existing first and asking leave afterwards, self-originated, self-constituted, self-confident, self-sustaining, veritable communities, demanding only recognition. Communities develop, not by external, but by internal forces. Else they do not live at all. Our commonwealths have not come into existence by invitation, like plants in a tended garden; they have sprung up of themselves, irrepressible, a sturdy, spontaneous product of the nature of men nurtured in a free air.

It is this spontaneity and variety, this independent and irrepressible life of its communities, that has given our system its extraordinary elasticity, which has preserved it from the paralysis which has sooner or later fallen upon every people who have looked to their central government to patronize and nurture them. It is this, also, which has made our political system so admirable an instrumentality of vital constitutional understandings. Throughout these lectures I have described constitutional government as that which is maintained upon the basis of an intimate understanding between those who conduct government and those who obey it. Nowhere has it been possible to maintain such under-

standings more intimately or with a nicer adjustment to every variety of circumstance than in the United States. The distribution of the chief powers of government among the States is the localization and specialization of constitutional understandings; and this elastic adaptation of constitutional processes to the various and changing conditions of a new country and a vast area has been the real cause of our political success.

The division of powers between the States and the Federal Government effected by our Federal Constitution was the normal and natural division for this purpose. Under it the States possess all the ordinary legal choices that shape a people's life. Theirs is the whole of the ordinary field of law: the regulation of domestic relations and of the relations between employer and employee, the determination of property rights and of the validity and enforcement of contracts, the definition of crimes and their punishments, the definition of the many and subtle rights and obligations which lie outside the fields of property and contract, the establishment of the laws of incorporation and of the rules governing the conduct of every kind of business. The presumption insisted upon by the Courts in every argument with regard to the Federal Government is that it has no power not explicitly granted it by the Federal Constitution or resonably to be inferred as the natural or necessary accompaniment of the powers there conveyed to it; but the presumption with regard to the powers of the States they have always held to be of exactly the opposite kind. It is that the States of course possess every power that government has ever anywhere exercised, except only those powers which their own constitutions or the Constitution of the United States explicitly or by plain inference withhold. They are the ordinary governments of the country; the Federal Government is its instrument only for particular purposes.

Congress is, indeed, the immediate government of the people. It does not govern the States, but acts

directly upon individuals, as directly as the governments of the States themselves. It does not stand at a distance and look on,—to be ready for an occasional interference; —but is the immediate and familiar instrument of the people in everything that it undertakes, as if there were no States. The States do not stand between it and the people. But the field of its action is distinct, restricted, definite.

We are not concerned in our present discussion with its powers as representative of the people in regulating the foreign affairs of the country. The discussion of the relation of the States to the Federal Government does not touch that field. About it there has never been doubt or debate. Neither is the power of the Federal Government to tax, or to regulate the military establishments of the country, any longer in dispute, even though the Federal Government use its power to tax to accomplish many an indirect object of economic stimulation or control which touches the independent industrial choices of the States very nearly. The one source from which all debatable Federal powers of domestic regulation now spring is the power to regulate commerce between the States.

The chief object of the Union and of the revision of the Articles of Confederation was undoubtedly commercial regulation. It was not political, but economic, warfare between the States which threatened the existence of the new Union and made every prospect of national growth and independence doubtful—the warfare of selfish commercial regulation. It was intended, accordingly, that the chief, one might almost say the only, domestic power of Congress in respect of the daily life of the people should be the power to regulate commerce.

It seemed a power susceptible of very simple definition at the first. Only in our own day of extraordinary variation from the older and simpler types of industry has it assumed aspects both new and without limit of

variety. It is now no longer possible to frame any simple or comprehensive definition of "commerce." Above all is it difficult to distinguish the "commerce" which is confined within the boundaries of a single State and subject to its domestic regulation from that which passes from State to State and lies within the jurisdiction of Congress. The actual interchange of goods, which, strictly speaking, is commerce, within the narrow and specific meaning of the term, is now so married to their production under our great modern industrial combinations, organization and community of interest have so obscured the differences between the several parts of business which once it was easy to discriminate, that the power to regulate commerce subtly extends its borders every year into new fields of enterprise and prys into every matter of economic effort.

Added to this doubt and difficulty of analysis which makes it a constant matter of debate what the powers of Congress are is the growing dissatisfaction with the part the States are playing in the economic life of the day. They either let the pressing problems of the time alone and attempt no regulation at all, however loudly opinion and circumstance itself may call for it, or they try every half-considered remedy, embark upon a thousand experiments, and bring utter confusion upon the industry of the country by contradicting and offsetting each other's measures. No two States act alike. Manufacturers and carriers who serve commerce in many States find it impossible to obey the laws of all, and the enforcement of the laws of the States in all their variety threatens the country with a new war of conflicting regulations as serious as that which made the Philadelphia convention of 1787 necessary and gave us a new Federal Constitution. This conflict of laws in matters which vitally interest the whole country and in which no State or region can wisely stand apart to serve any particular interest of its own constitutes the greatest political danger of our day. It is more apt and powerful than

any other cause to bring upon us radical and ill-considered changes. It confuses our thinking upon essential matters and makes us hasty reformers out of mere impatience. We are in danger of acting before we clearly know what we want or comprehend the consequences of what we do,—in danger of altering the character of the government in order to escape a temporary inconvenience.

We are an industrial people. The development of the resources of the country, the command of the markets of the world, is for the time being more important in our eyes than any political theory or lawyer's discrimination of functions. We are intensely "practical," moreover, and insist that every obstacle, whether of law or fact, be swept out of the way. It is not the right temper for constitutional understandings. Too "practical" a purpose may give us a government such as we never should have chosen had we made the choice more thoughtfully and deliberately. We cannot afford to belie our reputation for political sagacity and self-possession by any such hasty processes as those into which such a temper of mere impatience seems likely to hurry us.

The remedy for ill-considered legislation by the States, the remedy alike for neglect and mistake on their part, lies, not outside the States, but within them. The mistakes which they themselves correct will sink deeper into the consciousness of their people than the mistakes which Congress may rush in to correct for them, thrusting upon them what they have not learned to desire. They will either themselves learn their mistakes, by such intimate and domestic processes as will penetrate very deep and abide with them in convincing force, or else they will prove that what might have been a mistake for other States or regions of the country was no mistake for them, and the country will have been saved its wholesome variety. In no case will their failure to correct

their own measures prove that the Federal Government might have forced wisdom upon them.

There is, however, something else that comes to the surface, and that explains not a little of our present dissatisfaction with State legislation upon matters of vital national importance. Their failure to correct their own processes may prove that there is something radically wrong with the structure and operation of their governments,—that they have ceased to be sensitive and efficient instruments for the creation and realization of opinion,—the real function of constitutional governments.

It is better to learn the true political lesson than merely to improve business. There is something involved which is deeper than the mere question of the distribution of legislative powers within our Federal system. We have come to the test of the intimate and detailed processes of self-government to which it was supposed that our principles and our experience had committed us. There are many evidences that we are losing confidence in our State Legislatures, and yet it is evident that it is through them that we attempt all the more intimate measures of self-government. To lose faith in them is to lose faith in our very system of government, and that is a very serious matter. It is this loss of confidence in our local legislatures that has led our people to give so much heed to the radical suggestions of change made by those who advocate the use of the initiative and the referendum in our processes of legislation, the virtual abandonment of the representative principle and the attempt to put into the hands of the voters themselves the power to initiate and negative laws,—in order to enable them to do for themselves what they have not been able to get satisfactorily done through the representatives they have hitherto chosen to act for them.

Such doubts and such consequent proposals of reform should make us look deeper into this question than we have hitherto looked. It may turn out, upon examina-

tion, that what we are really dissatisfied with is not the present distribution of powers between the State and Federal authorities, but the character of our State governments. If they were really governments by the people we should not be dissatisfied with them. We are impatient of State Legislatures because they seem to us less representative of the thoughtful opinion of the country than Congress is. We know that our Legislatures do not think alike, but we are not sure that our people do not think alike. If there is a real variety of opinion among our people in the several regions of the country, we would be poor lovers of democratic self-government were we to wish to see those differences overridden by the majorities of a central Legislature. It is to be hoped that we still sufficiently understand the real processes of political life to know that a growing country must grow, that opinion such as government can be based upon develops by experience, not by authority, that a region forced is a region dissatisfied, and that spontaneous is better, more geniune, more permanent than forced agreement.

The truth is that our State governments are many of them no longer truly representative governments. We are not, in fact, dissatisfied with local representative assemblies and the government which they impose; we are dissatisfied, rather, with regulations imposed by commissions and assemblies which are no longer representative. It is a large subject, of many debatable parts, and I can only touch upon it here, but the fact is that we have imposed an impossible task upon our voters, and that because it is impossible they do not perform it. It is impossible for the voters of any busy community actually to pick out or in any real sense choose the very large number of persons we call upon them under our present State Constitutions to elect. They have neither the time nor the quick and easy means of co-operation which would enable them to make up the long lists of candidates for offices local and national upon

which they are expected to act. They must of necessity leave the selection to a few persons who, from one motive or another, volunteer to make a business of it. These are the political bosses and managers whom the people obey and affect to despise. It is unjust to despise them. Under a system of innumerable nominations they are indispensable. A system of so-called popular elections like ours could not be operated successfully without them. But it is true that by their constant and professional attention to the business of nomination a real popular choice of candidates is done away with entirely, and that our State officers and legislators are in effect appointed, not elected. The question at an election is only which set of appointees shall be put into office, those appointed by the managers and bosses of this party or of that. It is this, whether our people are distinctly conscious of it or not, which has so seriously impaired their confidence in the State Legislatures and which has made them look about for new means by which to obtain a real choice in affairs.

Members of Congress are themselves voted for on the lists which the local managers prepare, are themselves appointed to their candidacy as the candidates for local functions are, but because they are relatively few in number and their office national, attention is more or less concentrated upon them. There is a more general interest in their selection, by which party managers are sure to be somewhat checked and guided. After their election, moreover, they become members of an assembly highly organized and disciplined and act under a very strict party responsibility in which the personal force and character of the Speaker of the House plays a greater part than their own. The man by whom they are led is scarcely less conspicuous as a national figure than the President himself and they are but wheels in a great piece of machinery which is made sensitive to opinion in ways which local managers in no sort control. The opinion of the whole country beats upon

them. The country feels, therefore, that, however selected, they are in some sense more representative, more to be depended on to register its thoughtful judgments, then the members of State Legislatures are.

It is for this reason as much as for any other that the balance of powers between the States and the Federal Government now trembles at an unstable equilibrium and we hesitate into which scale to throw the weight of our purpose and preference with regard to the legislation by which we shall attempt to thread the maze of our present economic needs and perplexities. It may turn out that what our State governments need is not to be sapped of their powers and subordinated to Congress, but to be reorganized along simpler lines which will make them real organs of popular opinion. A government must have organs; it cannot act inorganically, by masses. It must have a lawmaking body; it can no more make laws through its voters than it can make them through its newspapers.

It would be fatal to our political vitality really to strip the States of their powers and transfer them to the Federal Government. It cannot be too often repeated that it has been the privilege of separate development secured to the several regions of the country by the Constitution, and not the privilege of separate development only, but also that other more fundamental privilege that lies back of it, the privilege of independent local opinion and individual conviction, which has given speed, facility, vigor, and certainty to the processes of our economic and political growth. To buy temporary ease and convenience for the performance of a few great tasks of the hour at the expense of that would be to pay too great a price and to cheat all generations for the sake of one.

Undoubtedly the powers of the Federal Government have grown enormously since the creation of the Government; and they have grown for the most part without amendment of the Constitution. But they have

grown in almost every instance by a process which must be regarded as perfectly normal and legitimate. The Constitution cannot be regarded as a mere legal document, to be read as a will or a contract would be. It must of the necessity of the case be a vehicle of life. As the life of the nation changes so must the interpretation of the document which contains it change, by a nice adjustment determined, not by the original intention of those who drew the paper, but by the exigencies and the new aspects of life itself. Changes of fact and alterations of opinion bring in their train actual extensions of community of interest, actual additions to the catalogue of things which must be included under the general terms of the law. The commerce of great systems of railway is of course not the commerce of wagon roads, the only land commerce known in the days when the Constitution was drafted. The common interests of a nation bound together in thought and interest and action by the telegraph and the telephone, as well as by the rushing mails which every express train carries, have a scope and variety, an infinite multiplication and intricate interlacing of which a simpler day can have had no conception. Every general term of the Constitution has come to have a meaning as varied as the actual variety of the things which the country now shares in common.

The character of the process of constitutional adaptation depends first of all upon the wise or unwise choice of statesmen, but ultimately and chiefly upon the opinion and purpose of the courts. The chief instrumentality by which the law of the Constitution has been extended to cover the facts of national development has been judicial interpretation, the decisions of the courts. The process of formal amendment of the Constitution was made so difficult by the provisions of the Constitution itself that it has seldom been feasible to use it; and the difficulty of formal amendment has undoubtedly made the courts more liberal, not to say more

lax, in their interpretation than they would otherwise have been. The whole business of adaptation was theirs, and they have undertaken it with open minds, sometimes even with boldness and a touch of audacity. But, though they have sometimes been lax, though they have sometimes yielded, it may be, to the pressure of popular agitation and of party interest, they have not often overstepped the bounds of legitimate extension. By legitimate extension I mean extension which does not change the character of the Federal power but only its items,—which does not make new kinds, but only new particulars of power.

The members of courts are necessarily men of their own generation: we would not wish to have them men of another. Constitutional law, as well as statesmanship, must look forward, not backward, and, while we should wish the courts to be conservative, we should certainly be deeply uneasy were they to hold affairs back from their natural alteration. Change as well as stability may be conservative. Conservative change is conservative, not of prejudices, but of principles, of established purposes and conceptions, the only things which in government or in any other field of action can abide. Conservative progress is a process, not of revolution, but of modification. In our own case and in the matter now under discussion it consists in a slowly progressive modification and transfer of functions as between the States and the Federal Government along the lines of actual development, along the lines of actual and substantial alterations of interest and of that national consciousness which is the breath of all true amendment,—and not along lines of party or individual purpose, nor by way of desperate search for remedies for existing evils.

No doubt courts must "make" law for their own day, must have the insight which adapts law to its uses rather than its uses to it, must sometimes venture upon decisions which have a certain touch of states-

manlike initiative in them. We shall often find ourselves looking to them for strong and fearless opinions. But there are two kinds of "strong" opinions, as a distinguished English jurist long ago pointed out. There are those which are strong with the strength of insight and intelligence and those which are strong with the mere strength of will. The latter sort all judges who act with conscience, mindful of their oaths of office, should eschew as they would eschew the actual breaking of law. That the Federal courts should have such a conscience is essential to the integrity of our whole national action. Actual alterations of interest in the makeup of our national life, actual, unmistakable changes in our national consciousness, actual modifications in our national activities such as give a new aspect and significance to the well-known purposes of our fundamental law, should of course be taken up into decisions which add to the number of things of which the national Government must take cognizance and regulative control. That is a function of insight and intelligence. The courage it calls for on the part of the courts is the courage of conviction. But they are, on the other hand, called on to display the more noble courage which defends ancient conviction and established principle against the clamor, the class interests and the changeful moods of parties. They should never permit themselves wilfully to seek to find in the phrases of the Constitution remedies for evils which the Federal Government was never intended to deal with.

Moral and social questions originally left to the several States for settlement can be drawn into the field of Federal authority only at the expense of the self-dependence and efficiency of the several communities of which our complex body politic is made up. Paternal morals, morals enforced by the judgment and choices of the central authority at Washington, do not and cannot create vital habits or methods of life unless sustained by local opinion and purpose, local prejudices and con-

venience,—unless supported by local convenience and interest; and only communities capable of taking care of themselves will, taken together, constitute a nation capable of vital action and control. You cannot atrophy the parts without atrophying the whole. Deliberate adding to the powers of the Federal Government by sheer judicial authority, because the Supreme Court can no longer be withstood or contradicted in the States, both saps the legal morality upon which a sound constitutional system must rest and deprives the Federal structure as a whole of the vitality which has given the Supreme Court itself its increase of power. It is the alchemy of decay.

It would certainly mean that we had acquired a new political temper, never hitherto characteristic of us, that we had utterly lost confidence in what we set out to do, were we now to substitute abolition for reform,—were we by degrees to do away with our boasted system of self-government out of mere impatience and disgust, like those who got rid of an instrument they no longer knew how to use. There are some hopeful signs that we may be about to return to the better way of a time when we knew how to restrict government and adapt it to our uses in accordance with principles we did not doubt, but adhered to with an ardent fervor which was the best evidence of youth and virility. We have long been painfully conscious that we have failed in the matter of city government. It is an age of cities, and if we cannot govern our cities we cannot govern at all. For a little while we acted as if in despair. We began to strip our city governments of their powers and to transfer them to State commissions or back to the Legislatures of the States, very much as we are now stripping the States of their powers and putting them in the hands of Federal commissions. The attempt was made to put the police departments of some of our cities, for example, in the hands of State officers, and to put the granting of city franchises back into the hands of the central Legislature of the State, in the hope, apparently,

that a uniform regulation of such things by the opinion of the whole State might take the place of corrupt control by city politicians. But it did not take us long, fortunately, to see that we were moving in the wrong direction. We have now turned to the better way of reconsidering the whole question of the organization of city governments, and are likely within a generation to purify them by simplifying them, to moralize them by placing their government in the hands of a few persons who can really be selected by popular preference instead of by the private processes of nomination by party managers, and who, because few and conspicuous, can really be watched and held to a responsibility which they will honor because they cannot escape.

It is to be hoped that we shall presently have the same light dawn upon us with regard to our State governments, and, instead of upsetting an ancient system, hallowed by long use and deep devotion, revitalize it by reorganization. And that, not only because it is an old system long beloved, but also because we are certified by all political history of the fact that centralization is not vitalization. Moralization is by life, not by statute, by the interior impulse and experience of communities, not by fostering legislation which is merely the abstraction of an experience which may belong to a nation as a whole or to many parts of it without having yet touched the thought of the rest anywhere to the quick. The object of our Federal system is to bring the understandings of constitutional government home to the people of every part of the nation, to make them part of their consciousness as they go about their daily tasks. If we cannot successfully effect its adjustments by the nice local adaptations of our older practice, we have failed as constitutional statesmen.