CHAPTER XXVII

THE FEDERAL SYSTEM

Having examined the several branches of the National government and the manner in which they work together, we may now proceed to examine the American Commonwealth as a Federation of States. The present chapter is intended to state concisely the main features which distinguish the Federal system, and from which it derives its peculiar character. Three other chapters will describe its practical working, and summarize the criticisms that may be passed upon it.

The contests in the Convention of 1787 over the framing of the Constitution, and in the country over its adoption, turned upon two points: the extent to which the several States should be recognized as independent and separate factors in the construction of the National government, and the quantity and nature of the powers which should be withdrawn from the States to be vested in that government. It has been well remarked that "the first of these, the definition of the structural powers, gave more trouble at the time than the second, because the line of partition between the powers of the States and the Federal government had been already fixed by the whole experience of the country."[1] But since 1791 there has been practically no dispute as to the former point, and little as to the propriety of the provisions which define the latter. On the interpretation of these provisions there has, however, been endless debate, some deeming the Constitution to have taken more from the States, some less; while still warmer controversies have raged as to the matters which the instrument does not expressly deal with, and particularly whether the States retain their sovereignty, and with it the right of nullifying or refusing to be bound by certain acts of the national government, and in the last resort of withdrawing from the Union. As these latter questions (nullification and secession) have now been settled by the Civil War, we may say that in the America of to-day there exists a general agreement —

That every State on entering the Union finally renounced its sovereignty, and is now for ever subject to the Federal authority as defined by the Constitution.

That the functions of the States as factors of the national government are satisfactory, *i.e.* sufficiently secure its strength and the dignity of these communities.

That the delimitation of powers between the national government and the States, contained in the Constitution, is convenient, and needs no fundamental alteration.[1]

The ground which we have to tread during the remainder of this chapter is therefore no longer controversial ground, but that of well-established law and practice.

I. The distribution of powers between the National and the State governments is effected in two ways — Positively, by conferring certain powers on the National government; Negatively, by imposing certain restrictions on the States. It would have been superfluous to confer any powers on the States, because they retain all powers not actually taken from them. A lawyer may think that it was equally unnecessary and, so to speak, inartistic, to lay any prohibitions on the National government, because it could *ex hypothesi* exercise no powers not expressly granted. However, the anxiety of the States to fetter the master they were giving themselves caused the introduction of provisions qualifying the grant of express powers, and interdicting the National government from various kinds of action on which it might otherwise have been tempted to enter.[2]

[1] I quote from an acute and concise essay on this subject by Mr. Richard M. Venable of Baltimore, entitled "The Partition of Powers between the Federal and State Governments."

[1] The view that the power of Congress to legislate might properly be extended, by a constitutional amendment, to such a subject as marriage and divorce, is of course compatible with an acquiescence in the general scheme of delimitation of powers.

[2] Judge Cooley observes to me, "The prohibitions imposed by the Federal Constitution on the exercise of power by the general government were not, for the most part, to prevent its encroaching on the powers left with the States, but to preclude tyrannical exercise of powers which were unquestionably given to the Federal government. Thus Congress was forbidden to pass any bill of attainder; this was to prevent its dealing with Federal offences by legislative conviction and sentence. It was forbidden to pass *ex post facto* laws, and this

The matter is further complicated by the fact that the grant of power to the National government is not in all cases an exclusive grant: *i.e.* there are matters which both, or either, the States and the National government may deal with. "The mere grant of a power to Congress does not of itself, in most cases, imply a prohibition upon the States to exercise the like power. . . . It is not the mere existence of the National power, but its exercise, which is incompatible with the exercise of the same power by the States."[1] Thus we may distinguish the following classes of governmental powers: —

Powers vested in the National government alone.

Powers vested in the States alone.

Powers exercisable by either the National government or the States.

Powers forbidden to the National government.

Powers forbidden to the State governments.

It might be thought that the two latter classes are superfluous, because whatever is forbidden to the National government must be permitted to the States, and conversely, whatever is forbidden to the States must be permitted to the National government. But this is not so. For instance, Congress can grant no title of nobility (Art. i. § 9). But neither can a State do so (Art. i. § 10). The National government cannot take private property for public use without just compensation (Amendment v.). Apparently neither can any State do so (Amendment xiv. as interpreted in several cases). So no State can pass any law impairing the obligation of a contract (Art. i. § 10). But the National government, although not subject to a similar direct prohibition, has received no general power to legislate as regards ordinary contracts, and might therefore in some cases find itself equally unable to pass a law which a State legislature, though for a different reason, could not pass.[2] So no State can pass any *ex post facto* law. Neither can Congress.

undoubtedly is a limitation upon power granted; for with the same complete power in respect to offences against the general government which a sovereignty possesses, it might have passed such laws if not prohibited."

[1] Cooley, *Principles*, p. 35; cf. *Sturges* v. *Crowninshield*, 4 Wheat. 122.

[2] Of course Congress can legislate regarding some contracts, and can impair their obligation. It has power to regulate commerce, it can pass bankrupt laws, it can make paper money legal tender.

What the Constitution has done is not to cut in half the totality of governmental functions and powers, giving part to the national government and leaving all the rest to the States, but to divide up this totality of authority into a number of parts which do not exhaust the whole, but leave a residuum of powers neither granted to the Union nor continued to the States but reserved to the people, who, however, can put them in force only by the difficult process of amending the Constitution. In other words, there are things in America which there exists no organized and permanent authority capable of legally doing, not a State, because it is expressly forbidden, not the national government, because it either has not received the competence or has been expressly forbidden. Suppose, for instance, that there should arise a wish to pass for California such a measure as the Irish Land Act passed by the British Parliament in 1881. Neither the State legislature of California, nor the people of California assembled in a constitutional convention, could pass such a measure, because it would violate the obligation of contracts, and thereby transgress Art. i § 10 of the Federal Constitution. Whether the Federal Congress could pass such a measure is at least extremely doubtful, because the Constitution, though it has imposed no prohibition such as that which restricts a State, does not seem to have conferred on Congress the right of legislating on such a matter at all.[1] If, therefore, an absolute and overwhelming necessity for the enactment of such a measure should arise, the safer if not the only course would be to amend the Federal Constitution, either by striking out the prohibition on the States or by conferring the requisite power on Congress, a process which would probably occupy more than a year, and which requires the concurrence of two-thirds of both Houses of Congress and of three-fourths of the forty-four States.

II. The powers vested in the National government alone are such as relate to the conduct of the foreign relations of the country and to such common national purposes as the army and navy, internal commerce, currency, weights and measures, and

[1] It may of course be suggested that in case of urgent public necessity, such as the existence of war or insurrection, Congress might extinguish debts either generally or in a particular district. No such legislative power seems, however, to have been exerted or declared by the courts to exist, unless the principles of the last Legal Tender decision can be thought to reach so far.

the post-office, with provisions for the management of the machinery, legislative, executive, and judicial, charged with these purposes.[1]

The powers which remain vested in the States alone are all the other ordinary powers of internal government, such as legislation on private law, civil and criminal, the maintenance of law and order, the creation of local institutions, the provision for education and the relief of the poor, together with taxation for the above purposes.

III. The powers which are exercisable concurrently by the National government and by the States are —

Powers of legislation on some specified subjects, such as bankruptcy and certain commercial matters (*e.g.* pilot laws and harbour regulations), but so that State legislation shall take effect only in the absence of Federal legislation.

Powers of taxation, direct or indirect, but so that neither Congress nor a State shall tax exports from any State, and so that neither any State shall, except with the consent of Congress, tax any corporation or other agency created for Federal purposes or any act done under Federal authority, nor the National government tax any State or its agencies or property.

Judicial powers in certain classes of cases where Congress might have legislated, but has not, or where a party to a suit has a choice to proceed either in a Federal or a State court.

Powers of determining matters relating to the election of representatives and senators (but if Congress determines, the State law gives way).

IV. The prohibitions imposed on the National government are set forth in Art. i. § 9, and in the first ten amendments. The most important are —

Writ of habeas corpus may not be suspended, nor bill of attainder or *ex post facto* law passed.[2]

No commercial preference shall be given to one State over another.

[1] See Art. i. § 8, Art. ii. § 2, Art. iii. § 2, Art. iv. §§ 3 and 4; Amendments xiii. xiv. xv. of the Constitution.

[2] Limitations of a nature generally similar to these are now pretty frequent in recent European Constitutions, *e.g.* in that of Belgium.

The term *ex post facto* law is deemed to refer to criminal laws only.

No title of nobility shall be granted.

No law shall be passed establishing or prohibiting any religion, or abridging the freedom of speech or of the press, or of public meeting or of bearing arms.

No religious test shall be required as a qualification for any office under the United States.

No person shall be tried for a capital or otherwise infamous crime unless on the presentment of a grand jury, or be subjected to a second trial for the same offence, or be compelled to be a witness against himself, or be tried otherwise than by a jury of his State and district.

No common law action shall be decided except by a jury where the value in dispute exceeds $20, and no fact determined by a jury shall be re-examined otherwise than by the rules of the common law.[1]

V. The prohibitions imposed on the States are contained in Art. i. § 10, and in the three latest amendments. They are intended to secure the National government against attempts by the States to trespass on its domain, and to protect individuals against oppressive legislation.

No State shall — Make any treaty or alliance: coin money: make anything but gold and silver coin a legal tender: pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts: grant any titles of nobility.

No State shall without the consent of Congress — Lay duties on exports or imports (the produce of such, if laid, going to the national treasury): keep troops or ships of war in peace time: enter into an agreement with another State or with any foreign power: engage in war, unless actually invaded or in imminent danger.

Every State must — Give credit to the records and judicial proceedings of every other State: extend the privileges and immunities of citizens to the citizens of other States: deliver up fugitives from justice to the State entitled to claim them.

No State shall have any but a republican form of government.

No State shall — Maintain slavery: abridge the privileges of any citizen of the United States, or deny to him the right

[1] Chiefly intended to prevent the methods of courts of equity from being applied in the Federal courts as against the findings of a jury.

of voting, in respect of race, colour, or previous servitude: deprive any person of life, liberty, or property without due process of law: deny to any person the equal protection of the laws.

Note that this list contains no prohibition to a State to do any of the following things: — Establish a particular form of religion: endow a particular form of religion, or educational or charitable establishments connected therewith: abolish trial by jury in criminal or civil cases: suppress the freedom of speaking, writing, and meeting (provided that this be done equally as between different classes of citizens, and provided also that it be not done to such an extent as to amount to a deprivation of liberty without due process of law): limit the electoral franchise to any extent: extend the electoral franchise to women, minors, aliens.

These omissions are significant. They show that the framers of the Constitution had no wish to produce uniformity among the States in government or institutions, and little care to protect the citizens against abuses of State power.[1] They were content to trust for this to the provisions of the State constitutions. Their chief aim was to secure the National government against encroachments on the part of the States, and to prevent causes of quarrel both between the central and State authorities and between the several States. The result has, on the whole, justified their action. So far from abusing their power of making themselves unlike one another, the States have tended to be too uniform, and have made fewer experiments in institutions than one could wish.

VI. The powers vested in each State are all of them original and inherent powers, which belonged to the State before it entered the Union. Hence they are *prima facie* unlimited, and if a question arises as to any particular power, it is presumed to be enjoyed by the State, unless it can be shown to have been taken away by the Federal Constitution; or, in other words, a State is not deemed to be subject to any restriction which the Constitution has not distinctly imposed.

The powers granted to the National government are delegated powers, enumerated in and defined by the instrument

[1] The fourteenth and fifteenth amendments are in this respect a novelty. The only restrictions of this kind to be found in the instrument of 1789 are those relating to contracts and *ex post facto* laws.

which has created the Union. Hence the rule that when a question arises whether the National government possesses a particular power, proof must be given that the power was positively granted. If not granted, it is not possessed, because the Union is an artificial creation, whose government can have nothing but what the people have by the Constitution conferred. The presumption is therefore against the National government in such a case, just as it is for the State in a like case.[1]

VII. The authority of the National government over the citizens of every State is direct and immediate, not exerted through the State organization, and not requiring the co-operation of the State government. For most purposes the National government ignores the States; and it treats the citizens of different States as being simply its own citizens, equally bound by its laws. The Federal courts, revenue officers, and post-office draw no help from any State officials, but depend directly on Washington. Hence, too, of course, there is no local self-government in Federal matters. No Federal official is elected by the people of any local area. Local government is purely a State affair.

On the other hand, the State in no wise depends on the National government for its organization or its effective working. It is the creation of its own inhabitants. They have given it its constitution. They administer its government. It goes on its own way, touching the National government at but few points. That the two should touch at the fewest possible points was the intent of those who framed the Federal Constitution, for they saw that the less contact, the less danger of collision. Their aim was to keep the two mechanisms as distinct and independent of each other as was compatible with the still higher need of subordinating, for national purposes, the State to the Central government.[2]

[1] Congress must not attempt to interfere with the so-called "police power" of the States within their own limits. So when a statute of Congress had made it punishable to sell certain illuminating fluids inflammable at less than a certain specified temperature, it was held that this statute could not operate within a State, but only in the District of Columbia and the Territories, and a person convicted under it in Detroit was discharged (*United States* v. *De Witt*, 9 Wall. 41).

[2] For a comparison of the Federal system of the United States with the Federal system of the two ancient English Universities, see note to this chapter printed at the end of the volume.

VIII. It is a further consequence of this principle that the National government has but little to do with the States as States. Its relations are with their citizens, who are also its citizens, rather than with them as ruling commonwealths. In the following points, however, the Constitution does require certain services of the States: —

It requires each State government to direct the choice of, and accredit to the seat of the National government, two senators and so many representatives as the State is entitled to send.

It requires similarly that presidential electors be chosen, meet, and vote in the States, and that their votes be transmitted to the national capital.

It requires each State to organize and arm its militia, which, when duly summoned for active service, are placed under the command of the President.

It requires each State to maintain a republican form of government. (Conversely, a State may require the National government to protect it against invasion or domestic violence.)

Note in particular that the National government does not as in some other federations —

Call upon the States, as commonwealths, to contribute funds to its support:

Issue (save in so far as may be needed in order to secure a republican form of government) administrative orders to the States, directing their authorities to carry out its laws or commands:

Require the States to submit their laws to it, and veto such as it disapproves.

The first two things it is not necessary for the National government to do, because it levies its taxes directly by its own collectors, and enforces its laws, commands, and judicial decrees by the hands of its own servants. The last can be dispensed with because the State laws are *ipso jure* invalid, if they conflict with the Constitution or any treaty or law duly made under it (Art. vi. § 2), while if they do not so conflict they are valid, any act of the National government notwithstanding.

Neither does the National government allow its structure to

be dependent on the action of the States. "To make it impossible for a State or group of States to jeopard by inaction or hostile action the existence of the central government," was a prime object with the men of 1787, and has greatly contributed to the solidity of the fabric they reared. The *de facto* secession of eleven States in 1860–61 interfered with the regular legal conduct neither of the presidential election of 1864 nor of the congressional elections from 1861 to 1865. Those States were not represented in Congress; but Congress itself went on diminished in numbers yet with its full legal powers, as the British Parliament would go on though all the peers and representatives from Scotland might be absent.

IX. A State is, within its proper sphere, just as legally supreme, just as well entitled to give effect to its own will, as is the National government within its sphere; and for the same reason. All authority flows from the people. The people have given part of their supreme authority to the National, part to the State governments. Both hold by the same title, and therefore the National government, although superior wherever there is a concurrence of powers, has no more right to trespass upon the domain of a State than a State has upon the domain of Federal action. That the course which a State is following is pernicious, that its motives are bad and its sentiments disloyal to the Union, makes no difference until or unless it infringes on the sphere of Federal authority. It may be thought that however distinctly this may have been laid down as a matter of theory, in practice the State will not obtain the same justice as the National government, because the court which decides points of law in dispute between the two is in the last resort a Federal court, and therefore biassed in favour of the Federal government. In fact, however, little or no unfairness has arisen from this cause.[1] The Supreme court may, as happened for twenty years before the War of Secession, be chiefly composed of States' Rights men. In any case

[1] "Whatever fluctuations may be seen in the history of public opinion during the period of our national existence, we think it will be found that the Supreme court, so far as its functions required, has always held with a steady and even hand the balance between State and Federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution." — Judgment of the Supreme court in *The Slaughter House Cases*, 16 Wall. 82.

the court cannot stray far from the path which previous decisions have marked out.

X. There are several remarkable omissions in the constitution of the American federation.

One is that there is no grant of power to the National government to coerce a recalcitrant or rebellious State. Another is that nothing is said as to the right of secession. Any one can understand why this right should not have been granted. But neither is it mentioned to be negatived.

The Constitution was an instrument of compromises; and these were questions which it would have been unwise to raise.

There is no abstract or theoretic declaration regarding the nature of the federation and its government, nothing as to the ultimate supremacy of the central authority outside the particular sphere allotted to it, nothing as to the so-called sovereign rights of the States. As if with a prescience of the dangers to follow, the wise men of 1787 resolved to give no opening for abstract inquiry and metaphysical dialectic. But in vain. The human mind is not to be so restrained. If the New Testament had consisted of no other writings than the Gospel of St. Matthew and the Epistle of St. James, there would have been scarcely the less a crop of speculative theology. The drily legal and practical character of the Constitution did not prevent the growth of a mass of subtle and, so to speak, scholastic metaphysics regarding the nature of the government it created. The inextricable knots which American lawyers and publicists went on tying, down till 1861, were cut by the sword of the North in the Civil War, and need concern us no longer. It is now admitted that the Union is not a mere compact between commonwealths, dissoluble at pleasure, but an instrument of perpetual efficacy,[1] emanating from the whole people,

[1] This view received judicial sanction in the famous case of *Texas* v. *White* (7 Wall. 700), decided by the Supreme court after the war. It is there said by Chief-Justice Chase, "The Union of the States never was a purely artificial and arbitrary relation. . . . It received definite form and character and sanction by the Articles of Confederation. By these the Union was solemnly declared to be 'perpetual.' And when these articles were found to be inadequate to the exigencies of the country, the Constitution was ordained 'to form a more perfect Union.' It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual union, made more perfect, is not? But the perpetuity and indissolubility of the Union

and alterable by them only in the manner which its own terms prescribe. It is "an indestructible Union of indestructible States."

It follows from the recognition of the indestructibility of the Union that there must somewhere exist a force capable of preserving it. The National government is now admitted to be such a force. "It can exercise all powers essential to preserve and protect its own existence and that of the States, and the constitutional relation of the States to itself, and to one another."[1]

"May it not," some one will ask, "abuse these powers, abuse them so as to extinguish the States themselves, and turn the

by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. . . . It may be not unreasonably said that the preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government. The Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States. When, therefore, Texas became one of the United States she entered into an indissoluble relation. . . . There was no place for reconsideration or revocation except through revolution or through consent of the States. Considered therefore as transactions under the Constitution, the ordinance of secession adopted by the Convention, and ratified by a majority of the citizens of Texas, was absolutely null and utterly without operation in law. The obligations of the State as a member of the Union, and of every citizen of the State as a citizen of the United States, remained perfect and unimpaired." The State did not cease to be a State, nor her citizens to be citizens of the Union. See also the cases of *White* v. *Hart* (13 Wall. 646) and *Keith* v. *Clark* (97 U. S. 451).

As respects the argument that the Union established by the Constitution of 1789 must be perpetual, because it is declared to have been designed to make a previous perpetual Union more perfect, it may be remarked, as matter of history, that this previous Union (that resting on the Articles of Confederation) had not proved perpetual, but was in fact put an end to by the acceptance in 1788 of the new Constitution by the nine States who first ratified that instrument. After that ratification the Confederation was dead, and the States of North Carolina and Rhode Island, which for some months refused to come into the new Union, were clearly out of the old one, and, *de jure* if not *de facto*, stood alone in the world. May it not then be said that those who destroyed a Union purporting to be perpetual were thereafter estopped from holding it to have been perpetual, and from founding on the word "perpetual" an argument against those who tried to upset the new Union in 1861, as the old one had been upset in 1788? The answer to this way of putting the point seems to be to admit that the proceedings of 1788 were in fact revolutionary. In ratifying their new Constitution in that year, the nine States broke through and flung away their previous compact which purported to have been made for ever. But they did so for the sake of forming a better and more enduring compact, and their extra-legal action was amply justified by the necessities of the case.

[1] Venable, *ut supra*.

federation into a unified government? What is there but the Federal judiciary to prevent this catastrophe? and the Federal judiciary has only moral and not also physical force at its command."

No doubt it may, but not until public opinion supports it in so doing — that is to say, not until the mass of the nation which now maintains, because it values, the Federal system, is possessed by a desire to overthrow that system. Such a desire may express itself in proper legal form by carrying amendments to the Constitution which will entirely change the nature of the government. Or if the minority be numerous enough to prevent the passing of such amendments, and if the desire of the majority be sufficiently vehement, the majority which sways the National government may disregard legal sanctions and effect its object by a revolution. In either event — and both are improbable — the change which will have passed upon the sentiments of the American people will be a sign that Federalism has done its work, and that the time has arrived for new forms of political life.

CHAPTER XXVIII

WORKING RELATIONS OF THE NATIONAL AND THE STATE GOVERNMENTS

THE characteristic feature and special interest of the American Union is that it shows us two governments covering the same ground, yet distinct and separate in their action. It is like a great factory wherein two sets of machinery are at work, their revolving wheels apparently intermixed, their bands crossing one another, yet each set doing its own work without touching or hampering the other. To keep the National government and the State governments each in the allotted sphere, preventing collision and friction between them, was the primary aim of those who formed the Constitution, a task the more needful and the more delicate because the States had been until then almost independent and therefore jealous of their privileges, and because, if friction should arise, the National government could not remove it by correcting defects in the machinery. For the National government, being itself the creature of the Constitution, was not permitted to amend the Constitution, but could only refer it back for amendment to the people of the States or to their legislatures. Hence the men of 1787, feeling the cardinal importance of anticipating and avoiding occasions of collision, sought to accomplish their object by the concurrent application of two devices. One was to restrict the functions of the National government to the irreducible minimum of functions absolutely needed for the national welfare, so that everything else should be left to the States. The other was to give that government, so far as those functions extended, a direct and immediate relation to the citizens, so that it should act on them not through the States but of its own authority and by its own officers. These are fundamental principles whose soundness experience has