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

approved, and which will deserve to be considered by those who in time to come may have in other countries to frame federal or quasi-federal constitutions. They were studied, and to a large extent, though in no slavish spirit, adopted by the founders of the present constitution of the Swiss Confederation, a constitution whose success bears further witness to the soundness of the American doctrines.

The working relations of the National government to the States may be considered under two heads, viz. its relations to the States as communities, and its relations to the citizens of the States as individuals, they being also citizens of the Union.

The National government touches the States as corporate commonwealths in three points. One is their function in helping to form the National government; another is the control exercised over them by the Federal Constitution through the Federal courts; the third is the control exercised over them by the Federal Legislature and Executive in the discharge of the governing functions which these latter authorities possess.

I. The States serve to form the National government by choosing presidential electors, by choosing senators, and by fixing the franchise which qualifies citizens to vote for members of the House of Representatives.[1] No difficulty has ever arisen (except during the Civil War) from any unwillingness of the States to discharge these duties, for each State is eager to exercise as much influence as it can on the national executive and Congress. But note how much latitude has been left to the States. A State may appoint its presidential electors in any way it pleases. All States now do appoint them by popular vote. But during the first thirty years of the Union many States left the choice of electors to their respective legislatures. So a State may, by its power of prescribing the franchise for its State elections, prescribe whatever franchise it pleases for the election of its members of the Federal House of Representatives, and may thus admit persons who would in other States be excluded from the suffrage, or exclude persons

[1] Congress may regulate by statute the times, places, and manner of holding elections for representatives (Const., Art. i. § 4), and has done so to some extent.

who would in other States be admitted. For instance, fifteen States now allow aliens (*i.e.* foreigners not yet naturalized) to vote; and any State which should admit women to vote at its own State elections (as Wyoming now does) would thereby admit them also to vote at congressional elections.[1] The only restriction imposed on State discretion in this respect is that of the fifteenth amendment, which forbids any person to be deprived of suffrage, on "account of race, colour, or previous condition of servitude."[2]

II. The Federal Constitution deprives the States of certain powers they would otherwise enjoy. Some of these, such as that of making treaties, are obviously unpermissible, and such as the State need not regret.[3] Others, however, seriously restrain their daily action. They are liable to be sued in the Federal courts by another State or by a foreign Power. They cannot, except with the consent of Congress, tax exports or imports, or in any case pass a law impairing the obligation of a contract. They must surrender fugitives from the justice of any other State. Whether they have transgressed any of these restrictions is a question for the courts of law, and, if not in the first instance, yet always in the last resort a question for the Federal Supreme court. If it is decided that they have transgressed, their act, be it legislative or executive, is null and void.[4]

[1] So in some States tribal Indians are permitted to vote. It is odd that the votes of persons who are not citizens of the United States might, in a State where parties are nearly equal, turn the choice of presidential electors in that State, and thereby perhaps turn the presidential election in the Union.

[2] The Constitutions of some States retain the old exclusion of negroes from the suffrage, and three exclude natives of China; but these provisions are overridden by the fifteenth constitutional amendment.

[3] As the States had not been accustomed to act as sovereign commonwealths in international affairs, they yielded this right to the National government without demur; whereas Swiss history shows the larger cantons to have been unwilling to drop the practice of sending their own envoys to foreign powers and making bargains on their own behalf.

[4] Mr. Justice Miller observes (*Centennial Address at Philadelphia*) that "at no time since the formation of the Union has there been a period when there were not to be found on the statute books of some of the States acts passed in violation of the provisions of the Constitution regarding commerce, acts imposing taxes and other burdens upon the free interchange of commodities, discriminating against the productions of other States, and attempting to establish regulations of commerce, which the Constitution says shall only be done by Congress." All such acts are of course held invalid by the courts when questioned before them.

It has very recently been held that a State cannot forbid a common carrier

The President as national executive, and Congress as national legislature, have also received from the Constitution the right of interfering in certain specified matters with the governments of the States. Congress of course does this by way of legislation, and when an Act of Congress, made within the powers conferred by the Constitution, conflicts with a State statute, the former prevails against the latter. It prevails by making the latter null and void, so that if a State statute has been duly passed upon a matter not forbidden to a State by the Constitution, and subsequently Congress passes an act on the same matter, being one whereon Congress has received the right to legislate, the State statute, which was previously valid, now becomes invalid to the extent to which it conflicts with the Act of Congress. For instance, Congress has power to establish a uniform law of bankruptcy over the whole Union. It has formerly, in the exercise of this power, passed bankruptcy laws; but these have been repealed, and at present the subject is left to the State laws, which are accordingly in full force in the several States.[1] Were Congress again to legislate on the subject, these State laws would lose their force;[2] and if the law passed by Congress were again repealed, they would again spring into life. The field of this so-called concurrent legislation is large, for Congress has not yet exercised all the powers vested in it of superseding State action.

It was remarked in the last chapter that in determining the powers of Congress on the one hand and of a State government on the other, opposite methods have to be followed. The presumption is always in favour of the State; and in order to show that it cannot legislate on a subject, there must be pointed out within the four corners of the Constitution some express prohibition of the right which it *prima facie* possesses, or some implied prohibition arising from the fact that legislation by it would conflict with legitimate federal authority.[3]

to bring into its jurisdiction intoxicating liquors from another State (*Bowman* v. *C. & N. W. Rly.* 125 U. S., p. 465); cf. *Leisy* v. *Hardin*, 135 U. S., p. 100; *Minnesota* v. *Barber*, 136 U. S., p. 313.

[1] See the interesting case of *Sturges* v. *Crowninshield*, 4 Wheat. 196.

[2] And in this instance they would lose their force altogether, because the power of Congress being to establish a "uniform" law, the continued existence of statutes differing in the different States would prevent the law of bankruptcy from being uniform over the Union.

[3] Otherwise in the Federal Constitution of Canada. See Note to Chapter XXX.

On the other hand, the presumption is always against Congress, and to show that it can legislate, some positive grant of power to Congress in the Constitution must be pointed out.[1] When the grant is shown, then the Act of Congress has, so long as it remains on the statute book, all the force of the Constitution itself. In some instances the grant of power to Congress to legislate is auxiliary to a prohibition imposed on the States. This is notably the case as regards the amendments to the Constitution, passed for the protection of the lately liberated negroes. They interdict the States from either recognizing slavery, or discriminating in any way against any class of citizens; they go even beyond citizens in their care, and declare that "no State shall deny to any person within its jurisdiction the equal protection of the laws." Now, by each of these amendments, Congress is also empowered, which practically means enjoined, to "enforce by appropriate legislation" the prohibitions laid upon the States. Congress has done so, but some of its efforts have been held to go beyond the directions of the amendments, and to be therefore void.[2] The grant of power has not covered them.

Where the President interferes with a State, he does so either under his duty to give effect to the legislation of Congress, or under the discretionary executive functions which the Constitution has entrusted to him. So if any State were to depart from a republican form of government, it would be his duty to bring the fact to the notice of Congress in order that the guarantee of that form contained in the Constitution might be made effective. If an insurrection broke out against the authority of the Union, he would (as in 1861) send Federal troops to suppress it. If there should be rival State governments, each claiming to be legitimate, the President might, especially if Congress were not sitting, recognize and support the one which he deemed regular and constitutional.[3]

[1] The grant need not, however, be express, for it has frequently been held that a power incidental or instrumental to a power expressly given may be conferred upon Congress by necessary implication. See *M'Culloch* v. *Maryland*, 4 Wheat. p. 316, and *post*, Chapter XXXIII.

[2] See the Appendix to the last edition of Story's *Commentaries*, and Desty's *Constitution of the United States Annotated*.

[3] In 1874–75 a contest having arisen in Louisiana between two governments each claiming to be the legal government of the State, Federal military aid was supplied to one of them by the President, and his action was afterwards

Are these, it may be asked, the only cases in which Federal authority can interfere within the limits of a State to maintain order? Are law and order, *i.e.* the punishment of crimes and the enforcement of civil rights, left entirely to State authorities? The answer is: —

Offences against Federal statutes are justiciable in Federal courts, and punishable under Federal authority. There is no Federal common law of crimes.

Resistance offered to the enforcement of a Federal statute may be suppressed by Federal authority.

Attacks on the property of the Federal government may be repelled, and disturbances thence arising may be quelled by Federal authority.

The judgments pronounced in civil causes by Federal courts are executed by the officers of these courts.

All other offences and disorders whatsoever are left to be dealt with by the duly constituted authorities of the State, who are, however, entitled in one case to summon the power of the Union to their aid.

This case is that of the breaking out in a State of serious disturbances. The President is bound on the application of the State legislature or executive to quell such disturbances by the armed forces of the Union, or by directing the militia of another State to enter. Thus in 1794 Washington suppressed the so-called Whisky Insurrection in Pennsylvania by the militia of Pennsylvania, New Jersey, Virginia, and Maryland.[1] President Grant was obliged to use military force during the troubles which disturbed several of the Southern States after the Civil War; as was President Hayes, during the tumults in Pennsylvania caused by the great railway strikes of 1877. There have, however, been cases, such as the Dorr rebellion in Rhode Island in 1842,[2] in which a State has

approved by Congress. It has been doubted, however, whether the case could properly be deemed one of "domestic violence" within the meaning of Art. iv § 4 of the Constitution.

[1] This was the first assertion by arms of the supreme authority of the Union, and produced an enormous effect upon opinion.

[2] President Tyler ordered the militia of Connecticut and Massachusetts to be prepared (in case a requisition came from the R. I. executive) to guard the frontier of Rhode Island against insurgents attempting to enter, and himself took steps for sending in (in case of need) U. S. regular troops, but the Rhode Island militia proved equal to the occasion and succeeded in suppressing Dorr.

itself suppressed an insurrection against its legitimate government. It is the duty of a State to do so if it can, and to seek Federal aid only in extreme cases, when resistance is formidable.

So far we have been considering the relations of the National government to the States as political communities. Let us now see what are its relations to the individual citizens of these States. They are citizens of the Union as well as of these States, and owe allegiance to both powers. Each power has a right to command their obedience. To which then, in case of conflict, is obedience due?

The right of the State to obedience is wider in the area of matters which it covers. *Prima facie*, every State law, every order of a competent State authority, binds the citizen, whereas the National government has but a limited power: it can legislate or command only for certain purposes or on certain subjects. But within the limits of its power, its authority is higher than that of the State, and must be obeyed even at the risk of disobeying the State. A recent instance in which a State official suffered for obeying his State where its directions clashed with a provision of the Federal Constitution may set the point in a clear light. A statute of California had committed to the city and county authority of San Francisco the power of making regulations for the management of gaols. This authority had in 1876 passed an ordinance directing that every male imprisoned in the county gaol should "immediately on his arrival have his hair clipped to a uniform length of one inch from the scalp." The sheriff having, under this ordinance, cut off the queue of a Chinese prisoner, Ho Ah Kow, was sued for damages by the prisoner, and the court, holding that the ordinance had been passed with a special view to the injury of the Chinese, who consider the preservation of their queue a matter of religion as well as of honour, and that it operated unequally and oppressively upon them, in contravention of the fourteenth amendment to the Constitution of the United States, declared the ordinance invalid, and gave judgment against the sheriff.[1] Similar subsequent attempts against

[1] Case of *Ho Ah Kow* v. *Matthew Nunan* (July 1879), 5 Sawyer, *Circuit Court Reports*, p. 552. A similar ordinance had been some years before courageously vetoed by Mr. Alvord, then mayor of San Francisco.