

CHAPTER XXIX

CRITICISM OF THE FEDERAL SYSTEM

ALL Americans have long been agreed that the only possible form of government for their country is a Federal one. All have perceived that a centralized system would be inexpedient, if not unworkable, over so large an area, and have still more strongly felt that to cut up the continent into absolutely independent States would not only involve risks of war but injure commerce and retard in a thousand ways the material development of every part of the country. But regarding the nature of the Federal tie that ought to exist there have been keen and frequent controversies, dormant at present, but which might break out afresh should there arise a new question of social or economic change capable of bringing the powers of Congress into collision with the wishes of any State or group of States. The general suitability to the country of a Federal system is therefore accepted, and need not be discussed. I pass to consider the strong and weak points of that which exists.

The faults generally charged on federations as compared with unified governments are the following:—

- I. Weakness in the conduct of foreign affairs.
- II. Weakness in home government, that is to say, deficient authority over the component States and the individual citizens.
- III. Liability to dissolution by the secession or rebellion of States.
- IV. Liability to division into groups and factions by the formation of separate combinations of the component States.
- V. Want of uniformity among the States in legislation and administration.
- VI. Trouble, expense, and delay due to the complexity of a double system of legislation and administration.

The first four of these are all due to the same cause, viz. the existence within one government, which ought to be able to speak and act in the name and with the united strength of the nation, of distinct centres of force, organized political bodies into which part of the nation's strength has flowed, and whose resistance to the will of the majority of the whole nation is likely to be more effective than could be the resistance of individuals, because such bodies have each of them a government, a revenue, a militia, a local patriotism to unite them, whereas individual recalcitrants, however numerous, would be unorganized, and less likely to find a legal standing ground for opposition. The gravity of the first two of the four alleged faults has been exaggerated by most writers, who have assumed, on insufficient grounds, that Federal governments are necessarily weak. Let us, however, see how far America has experienced such troubles from these features of a Federal system.

I. In its early years, the Union was not successful in the management of its foreign relations. Few popular governments are, because a successful foreign policy needs in a world such as ours conditions which popular governments seldom enjoy. In the days of Adams, Jefferson, and Madison, the Union put up with a great deal of ill-treatment from France as well as from England. It drifted rather than steered into the war of 1812. The conduct of that war was hampered by the opposition of the New England States. The Mexican war of 1846 was due to the slaveholders; but as the combination among the Southern leaders which entrapped the nation into that conflict might have been equally successful in a unified country, the blame need not be laid at the door of Federalism. Of late years the principle of abstention from Old World complications has been so heartily and consistently adhered to that the capacities of the Federal system for the conduct of foreign affairs have been little tried; and the likelihood of any danger from abroad is so slender that it may be practically ignored. But when a question of external policy arises which interests only one part of the Union, the existence of States feeling themselves specially affected is apt to have a strong and probably an unfortunate influence. Only in this way can the American government be deemed likely to suffer in its foreign relations from its Federal character.

II. For the purposes of domestic government the Federal authority is now, in ordinary times, sufficiently strong. However, as was remarked in last chapter, there have been occasions when the resistance of even a single State disclosed its weakness. Had a man less vigorous than Jackson occupied the presidential chair in 1832, South Carolina would probably have prevailed against the Union. In the Kansas troubles of 1855-56 the national executive played a sorry part; and even in the resolute hands of President Grant it was hampered in the re-establishment of order in the reconquered southern States by the rights which the Federal Constitution secured to those States. The only general conclusion on this point which can be drawn from history is that while the central government is likely to find less and less difficulty in enforcing its will against a State or disobedient subjects, because the prestige of its success in the Civil War has strengthened it, and the facilities of communication make the raising and moving of troops more easy, nevertheless recalcitrant States, or groups of States, still enjoy certain advantages for resistance, advantages due partly to their legal position, partly to their local sentiment, which rebels might not have in unified countries like England, France, or Italy.

III. Everybody knows that it was the Federal system and the doctrine of State sovereignty grounded thereon, and not expressly excluded, though certainly not recognized, by the Constitution, which led to the secession of 1861, and gave European powers a plausible ground for recognizing the insurgent minority as belligerents. Nothing seems now less probable than another secession, not merely because the supposed legal basis for it has been abandoned, and because the advantages of continued union are more obvious than ever before, but because the precedent of the victory won by the North will discourage like attempts in the future.¹ This is so strongly felt that it has not even been thought worth while to add to the Constitution an amendment negating the right to secede. The doctrine of the legal indestructibility of the Union is now

¹The Roman Catholic cantons of Switzerland (or rather the majority of them) formed a separate league (the so-called *Sonderbund*) which it needed the war of 1847 to put down. And the effect of that war was, as in the parallel case of America, to tighten the Federal bond for the future.

well established. To establish it, however, cost thousands of millions of dollars and the lives of a million of men.

IV. The combination of States into groups was a familiar feature of politics before the war. South Carolina and the Gulf States constituted one such, and the most energetic, group; the New England States frequently acted as another, especially during the war of 1812. At present, though there are several sets of States whose common interests lead their representatives in Congress to act together, it is no longer the fashion for States to combine in an official way through their State organizations, and their doing so would excite reprehension. It is easier, safer, and more effective to act through the great national parties. Any considerable State interest (such as that of the silver-miners or cattle-men, or Protectionist manufacturers) can generally compel a party to conciliate it by threatening to forsake the party if neglected. Political action runs less in State channels than it did formerly, and the only really threatening form which the combined action of States could take, that of using for a common disloyal purpose State revenues and the machinery of State governments, has become, since the failure of secession, most improbable.

It has been a singular piece of good fortune that lines of religious difference have never happened to coincide with State lines; nor has any particular creed ever dominated any group of States. The religious forces which in some countries and times have given rise to grave civil discord, have in America never weakened the Federal fabric.

V. The want of uniformity in private law and methods of administration is an evil which different minds will judge by different standards. Some may think it a positive benefit to secure a variety which is interesting in itself and makes possible the trying of experiments from which the whole country may profit. Is variety within a country more a gain or a loss? Diversity in coinage, in weights and measures, in the rules regarding bills and cheques and banking and commerce generally, is obviously inconvenient. Diversity in dress, in food, in the habits and usages of society, is almost as obviously a thing to rejoice over, because it diminishes the terrible monotony of life. Diversity in religious opinion and worship excited horror in the Middle Ages, but now passes unnoticed, except where

governments are intolerant. In the United States the possible diversity of laws is immense. Subject to a few prohibitions contained in the Constitution, each State can play whatever tricks it pleases with the law of family relations, of inheritance, of contracts, of torts, of crimes. But the actual diversity is not great, for all the States, save Louisiana, have taken the English common and statute law of 1776 as their point of departure, and have adhered to its main principles. A more complete uniformity as regards marriage and divorce might be desirable, for it is particularly awkward not to know whether you are married or not, nor whether you have been or can be divorced or not; and several States have tried bold experiments in divorce laws.¹ But, on the whole, far less inconvenience than could have been expected seems to be caused by the varying laws of different States, partly because commercial law is the department in which the diversity is smallest, partly because American practitioners and judges have become expert in applying the rules for determining which law, where those of different States are in question, ought to be deemed to govern a given case.² However, eight States have very recently taken steps to reduce this diversity by appointing Commissions, instructed to meet and confer as to the best means of securing uniform State legislation on some important subjects.

VI. He who is conducted over an iron-clad warship, and sees the infinite intricacy of the machinery and mechanical appliances which it contains and by which its engines, its guns, its turrets, its torpedoes, its apparatus for anchoring and making sail, are worked, is apt to think that it must break down in the rough practice of war. He is told, however, that the more is done by machinery, the more safely and easily does everything go on, because the machinery can be relied on to work accurately, and the performance by it of the heavier work leaves the crew

¹ There is, however, little substantial diversity in the laws of marriage in different States, the rule everywhere prevailing that no special ceremony is requisite, and the statutory forms not being deemed imperative. Even as regards divorce more trouble arises from frauds practised on the laws than from divergent provisions in the laws themselves.

² Although the law of Scotland still differs in many material points from that of England and Ireland, having had a different origin, British subjects and courts do not find the practical inconveniences arising from the diversities to be serious except as respects marriage and the succession to property. The mercantile law of the two countries tends to become practically the same.

free to attend to the general management of the vessel and her armament. So in studying the elaborate devices with which the Federal system of the United States has been equipped, one fancies that with so many authorities and bodies whose functions are intricately interlaced, and some of which may collide with others, there must be a great risk of break-downs and deadlocks, not to speak of an expense much exceeding that which is incident to a simple centralized government. In America, however, smoothness of working is secured by elaboration of device; and complex as the mechanism of the government may appear, the citizens have grown so familiar with it that its play is smooth and easy, attended with less trouble, and certainly with less suspicion on the part of the people, than would belong to a scheme which vested all powers in one administration and one legislature. The expense is admitted, but is considered no grave defect when compared with the waste which arises from untrustworthy officials and legislators whose depredations would, it is thought, be greater were their sphere of action wider, and the checks upon them fewer. He who examines a system of government from without is generally disposed to overrate the difficulties in working which its complexity causes. Few things, for instance, are harder than to explain to a person who has not been a student in one of the two ancient English universities the nature of their highly complex constitution and the relation of the colleges to the university. If he does apprehend it he pronounces it too intricate for the purposes it has to serve. To those who have grown up under it, nothing is simpler and more obvious.

There is a blemish characteristic of the American federation which Americans seldom notice because it seems to them unavoidable. This is the practice in selecting candidates for Federal office of regarding not so much the merits of the candidate as the effect which his nomination will have upon the vote of the State to which he belongs. Second-rate men are run for first-rate posts, not because the party which runs them overrates their capacity, but because it expects to carry their State either by their local influence or through the pleasure which the State feels in the prospect of seeing one of its own citizens in high office. This of course works in favour of the politicians who come from a large State. No doubt the leading men of a

large State are *prima facie* more likely to be men of high ability than those of a small State, because the field of choice is wider, the competition probably keener. One is reminded of the story of the leading citizen in the isle of Seriphus who observed to Themistocles, "You would not have been famous had you been born in Seriphus," to which Themistocles replied, "Neither would you had you been born in Athens." The two great States of Virginia and Massachusetts reared one half of the men who won distinction in the first fifty years of the history of the Republic. Nevertheless it often happens that a small State produces a first-rate man, whom the country ought to have in one of its highest places, but who is passed over because the Federal system gives great weight to the voice of a State, and because State sentiment is so strong that the voters of a State which has a large and perhaps a doubtful vote to cast in national elections, prefer an inferior man in whom they are directly interested to a superior one who is a stranger.

I have left to the last the gravest reproach which Europeans have been wont to bring against Federalism in America. They attributed to it the origin, or at least the virulence, of the great struggle over slavery which tried the Constitution so severely. That struggle created parties which, though they had adherents everywhere, no doubt tended more and more to become identified with States, controlling the State organizations and bending the State governments to their service. It gave tremendous importance to legal questions arising out of the differences between the law of the Slave States and the Free States, questions which the Constitution had either evaded or not foreseen. It shook the credit of the Supreme court by making the judicial decision of those questions appear due to partiality to the Slave States. It disposed the extreme men on both sides to hate the Federal Union which bound them in the same body with their antagonists. It laid hold of the doctrine of State rights and State sovereignty as entitling a commonwealth which deemed itself aggrieved to shake off allegiance to the national government. Thus at last it brought about secession and the great civil war. Even when the war was over, the dregs of the poison continued to haunt and vex the system, and bred fresh disorders in it. The constitutional duty of re-

establishing the State governments of the conquered States on the one hand, and on the other hand the practical danger of doing so while their people remained disaffected, produced the military governments, the "carpet bag" governments, the Ku Klux Klan outrages, the gift of suffrage to a negro population unfit for such a privilege, yet apparently capable of being protected in no other way. All these mischiefs, it has often been argued, are the results of the Federal structure of the government, which carried in its bosom the seeds of its own destruction, seeds sure to ripen so soon as there arose a question that stirred men deeply.

It may be answered not merely that the National government has survived this struggle and emerged from it stronger than before, but also that Federalism did not produce the struggle, but only gave to it the particular form of a series of legal controversies over the Federal pact followed by a war of States against the Union. Where such vast economic interests were involved, and such hot passions roused, there must anyhow have been a conflict, and it may well be that a conflict raging within the vitals of a centralized government would have proved no less terrible and would have left as many noxious *sequelae* behind.

In blaming either the conduct of a person or the plan and scheme of a government for evils which have actually followed, men are apt to overlook those other evils, perhaps as great, which might have flowed from different conduct or some other plan. All that can fairly be concluded from the history of the American Union is that Federalism is obliged by the law of its nature to leave in the hands of States powers whose exercise may give to political controversy a peculiarly dangerous form, may impede the assertion of national authority, may even, when long-continued exasperation has suspended or destroyed the feeling of a common patriotism, threaten national unity itself. Against this danger is to be set the fact that the looser structure of a Federal government and the scope it gives for diversities of legislation in different parts of a country may avert sources of discord, or prevent local discord from growing into a contest of national magnitude.