Federal Control over Industry. Legal history teaches two doctrines, which seem at first glance diametrically opposed to each other, with reference to the current agitation concerning the dangers of federal encroachment. First, that the agitation, in so far as it is called out by a temporary accidental state of affairs due to the war, is ephemeral. On the other hand, the essential facts involved are of a type that are always with us. In other words, federal encroachment, when stripped of the mask and guise that temporarily makes it seem dreadful, is a perfectly natural phenomenon quite familiar to students of Anglo-American law, and, for that matter, of other legal systems.

As a bogie it appears periodically to frighten us. The last time it wandered on earth was thirteen or fourteen years ago. A flood of periodical literature, at least two books, the major part of a session of the American Political Science Association, and two of the leading addresses before the American Bar Association, all in 1908, make up the bulk of the recent, though not of the current, bibliography of the subject.[1] The state of mind of the country at that time was humorously illustrated at the Gridiron Club dinner of 1907. There one who was supposed to impersonate the President of the United States of ten years later erased the chalk lines which divided the states on a map of the United States. What prompted such feelings at that time was, of course, the aggressiveness of the administration of Theodore Roosevelt which not only made the average citizen feel the presence of the national government as a factor in his daily life, but which had the further merit or demerit of being well advertised. The big stick

[1] *Proceedings* of the American Political Science Association, 1908: Leacock, "The Limitation of Federal Government;" Ford, "The Influence of State Politics in Expanding Federal Power;" Moore, "The Increased Control of State Activities by Federal Courts;" Anderson, "Increase of Federal Power under the Commerce Clause of the Federal Constitution." Papers before the American Bar Association, 1908: Hanford, "National Progression and the Increasing Responsibilities of our National Judiciary;" Farrar, "The Extension of the Admiralty Jurisdiction by Judicial Interpretation." Books: Pierce, *Federal Usurpation* (New York, 1908); Moseley, *Federal Supremacy: A Study of the Power of Congress Over Railroads* (Privately printed, 1907).

of the cartoonist was perhaps as effective as the list of new statutes, or the prosecutions under old statutes attributable to this administration, in awakening any sticklers for states rights who still remained in the South and even in winning converts in the North to an appreciation of our country's peril. The words of Theodore Roosevelt uttered in 1907 were still fresh in the mind of the country:

"State rights should be preserved when they mean the people's rights, but not when they mean the people's wrongs; not, for instance, when they are invoked to prevent the abolition of child labor, or to break the force of laws which prohibit the importation of contract labor to this country; in short, not when they stand for wrong or oppression of any kind or for national weakness or impotence at home or abroad. . . . . The states have shown that they have not the ability to curb the power of syndicated wealth, and therefore in the interests of the people it must be done by national action."[2]

A federal child labor bill had been introduced and was being met by serious opposition from the South. Furthermore, as one of the speakers before the American Political Science Association said, "The attention of the country has been recently sharply called to the matter of state activities by the federal courts in several cases decided before the Supreme Court."[3] The text makes clear that he refers particularly to the cases of *Ex parte Young*[4] and *Hunter v. Wood*,[5] with reference to state attempts to regulate railway rates.

During the administration of President Taft, the national government continued most of the activities of the preceding administration, but with much less noise. And it so happened that the failure of the child labor bill and the holding of the Supreme Court that the Federal Employers' Liability Act was unconstitutional, allayed the fears of federal usurpation for the time being.[6]

[2] Quoted in Pierce, *op. cit.*, p. 270.

[3] Moore, *op. cit.*, p. 69.

[4] 1908, 209 U. S. 123–204.

[5] 1908, 209 U. S. 205, 211.

[6] A child labor act was advocated at that time by Senator Beveridge and one was passed for the District of Columbia (May 28, 1908, 25 Stat. at L. 420). For a contemporary discussion of the federal Child Labor Bill then pending, and the litigation over the Employers' Liability Act for Carriers (Act of June 11, 1906, 34 Stat. at L. 232), see Pierce, *op. cit.*, 284–291. The Employers' Liability Act was held unconstitutional for failing properly to exclude intrastate commerce from its scope, on January 6, 1908, in Howard v. Illinois Central R. R. Co. (207 U. S. 463, 52 L. ed. 297). It was superseded by a more carefully drawn act, that of

Early in the course of the next administration, it was held that the Migratory Bird Act could not be upheld either as an exercise by Congress of the power to regulate commerce or as an attempt to protect the property of the United States.[7] It was beginning to look as if Hamilton had been right after all when he said, "It will always be more easy for the state governments to encroach upon the national authorities than for the national government to encroach upon state authorities."[8] One may surmise—if one is permitted to wander into the realm of hypothetics—that the subject would hardly have been revived today had it not been for the demonstration of the latent powers of the national government which the war afforded. While it was on, there was a widespread feeling that it was unpatriotic to question the power of the national government in any respect. Under the impetus

April 22, 1908 (35 Stat. at L. 65), amended April 5, 1910 (36 Stat. at L. 291), and upheld in Mondou v. N. Y., etc. R. R. Co. (1908, 223 U. S. 1, 56 L. ed. 327). Cf. also Pederson v. R. R. Co. (1913, 229 U. S. 146, 57 L. ed. 1125). A Child Labor Act was passed September 1, 1916 (39 Stat. at L. 675), the constitutionality of which was denied in Hammer v. Dagenbart (1918, 247 U. S. 251, 62 L. ed. 1101). Cf. Gordon, "The Child Labor Law Case," 32 *Harvard Law Review*, 45. See also note 59.

[7] The Migratory Bird Act (March 4, 1913, 37 Stat. at L. 847) was held unconstitutional in the following cases in the state and federal courts: United States v. Schauver (1914, 214 Fed. 154); United States v. McCullagh (1915, 221 Fed. 288); State v. McCullagh (1915, 96 Kans. 786, 153 Pac. 557); State v. Sawyer (1915, 113 Me. 458, 94 Atl. 886). In this instance, the resources of the national government were not exhausted by resort to the theory of interstate commerce or the protection of property of the United States or implied powers of the national government. The treaty-making power was invoked in order to bring about directly what could not be done by legislation. On August 16, 1916, a treaty between the United States and Great Britain on behalf of Canada was made with reference to the subject, and on July 3, 1918 (40 Stat. at L. 755), it was put into effect by a reënactment of the provisions previously held unconstitutional. Under the second act prosecutions were commenced in several states to raise the question whether the President and Senate could thus make possible by treaty what Congress could not otherwise do by legislation. All of the district courts seemed to have agreed that they could. In State of Missouri v. Holland (1920, 252 U. S. 415, 64 L. ed. 64), the second act was held constitutional. See the learned note, antedating this decision, in 33 *Harvard Law Review*, 281.

[8] *The Federalist*, No. 17, quoted by Leacock, *op. cit.* The devious ways in which the state may encroach on federal authority are nowhere better illustrated than in Professor Powell's studies on "Indirect Encroachment on Federal Authority by the Taxing Powers of the States," 31 *Harvard Law Review*, 321, 572, 721, 932, and 32 *ibid.*, 234, 374, 634, 902. This study, however, shows also that in the last ten years there has been not only a tendency to check such encroachment by judicial decisions but also a move in the opposite direction.

of that feeling, such a book as Commissioner Henry Lichfield West's *Federal Power, its Growth and Necessity* (1918) is to be explained. The author not only admits the fact of federal usurpation—he glories in it.

The acute stage of national control brought about by war conditions has passed. And yet if a chart could be drawn with a curve in which the accidents of personality and temporary necessity could be averaged, there is no doubt that it would show a great increase of the relative importance in our lives of national control as compared with state control. What is not so apparent is the method by which the national government has proceeded. Most of the discussions have been partisan, to the extent at least that they have either accused the courts of surreptitiously amending the Constitution or else have defended and even praised the courts for their readiness to adapt the Constitution to new conditions.

What has actually been done, however, is by no means the work of the courts alone. The part of the executive in the Roosevelt and Wilson administrations was far more conscipuous than that of the courts. The legislative contribution to its development will be apparent from a mere enumeration of the principal statutes involved: the beginning of the authorization by Congress in 1866 of transcontinental railways,[9] the Interstate Commerce Act of 1887[10] and its amendments,[11] and a host of smaller acts such as the Sherman Anti-Trust Act of 1890,[12] the Lottery Act of 1895,[13] the Safety Appliance Acts of 1893, 1903, and 1910,[14] inspections of grasses, etc., 1904[15] the Employers' Liability Acts

[9] Act of June 15, 1866 (14 Stat. at L. 66). The act was "to facilitate commercial, postal and military communication among the several states." This act, which represents the first attempt of the government to grant charters for railroads in states without their consent was upheld even as to roads within a state, in *California* v. *Pacific* R. R. Co. (1888, 127 U. S. 1, 32 L. ed. 150).

[10] Act of February 4, 1887 (24 Stat. at L. 379).

[11] Act of March 2, 1889 (25 Stat. at L. 855); act of February 10, 1891 (26 Stat. at L. 743); act of February 19, 1903 (32 Stat. at L. 847); June 29, 1906 (34 Stat. at L. 584); June 18, 1910 (36 Stat. at L. 539); May 29, 1917 (40 Stat. at L. 101); August 10, 1917 (40 Stat. at L. 272); February 28, 1920 (41 Stat. at L. 456, 474).

[12] Act of July 2, 1890 (26 Stat. at L. 209).

[13] Act of March 2, 1895 (28 Stat. at L. 963). See also notes 45 and 46 below.

[14] Acts of March 2, 1893 (27 Stat. at L. 531); March 2, 1903 (32 Stat. at L. 943); April 14, 1910 (36 Stat. at L. 298).

[15] Act of April 28, 1904 (33 Stat. at L. 283).

of 1906, 1908 and 1910,[16] the Hallmark Act of 1905 and 1906,[17] the Commodities Clause[18] and the Pure Food and Drugs Act[19] of the same year, standards for grades of cotton, inspection of seed grains, etc., 1908,[20] the Meat Inspection Act of 1907,[21] the White Slavery Act of 1910,[22] the act as to arbitration of carriers labor disputes of 1913,[23] the Migratory Bird Acts of 1913[24] and 1918, the various package marking acts,[25] the Federal Reserve Act[26] and the Webb-Kenyon Liquor Act[27] of the same year, the Federal Trade Act[28] and Anti-trust Act of 1914,[29] the Farm Loan Act of 1916,[30] the Child Labor Act of 1916,[31] the Eight-hour Railroad Act of 1916.[32]

By no means every attempt of Congress has been upheld by the Supreme Court. Nor has that court acted uniformly in the direction of extending national power. It declared, for example, in 1869 that insurance was not commerce,[33] and having sworn to its hurt, it changed not.[34] Its definition of commerce, while very comprehensive in some respects, is after all surprisingly limited. The famous sentence in

[16] Act of June 11, 1906 (34 Stat. at L. 232); April 22, 1908 (35 Stat. at L. 65); April 5, 1910 (36 Stat. at L. 291). Cf. note 6, above.

[17] Act of February 21, 1905 (33 Stat. at L. 732); June 13, 1906 (34 Stat. at L. 260).

[18] Act of June 29, 1906 (34 Stat. at L. 584).

[19] Act of June 30, 1906 (34 Stat. at L. 768).

[20] Act of May 23, 1908 (35 Stat. at L. 256).

[21] Act of March 4, 1907 (34 Stat. at L. 1256). Earlier acts touching on the subject had been passed in 1890, 1891, 1903, 1905, and 1906.

[22] Acts of March 26, 1910 (36 Stat. at L. 263); June 25, 1910 (36 Stat. at L. 825).

[23] Act of July 15, 1913 (38 Stat. at L. 103).

[24] See note 7, above.

[25] Acts of August 3, 1912 (37 Stat. at L. 251), as to branding of apple barrels; March 4, 1904 (35 Stat. at L. 1137), as to intoxicating liquor; August 23, 1916 (39 Stat. at L. 530), as to barrels of lime; August 20, 1912 (37 Stat. at L. 316); as to conspicuous branding of horse meat, Act of July 24, 1919 (41 Stat. at L. 234, 241).

[26] Act of December 23, 1913 (38 Stat. at L. 251).

[27] Act of March 1, 1913 (37 Stat. at L. 699).

[28] Act of September 26, 1914 (38 Stat. at L. 717).

[29] Act of October 15, 1914 (38 Stat. at L. 730).

[30] Act of July 17, 1916 (39 Stat. at L. 360).

[31] Act of September 1, 1916 (39 Stat. at L. 675). Cf. note 6, above.

[32] Act of September 3, 5, 1916 (39 Stat. at L. 721).

[33] Paul v. Virginia (1869, 8 Wall. 168, 19 L. ed. 357).

[34] N. Y. Life Insurance Co. v. Cravens (1900, 178 U. S. 389, 44 L. ed. 1116); N. Y. Life Insurance Co. v. Deer Lodge Co. (1913, 231 U. S. 495, 58 L. ed. 232). Cf. Cooke, *The Commerce Clause of the Federal Constitution*, secs. 7–9.

Gibbons v. Ogden,[35] "Commerce undoubtedly is traffic, but it is something more: it is intercourse," was big enough to include the railroad,[36] the telegraph,[37] and the telephone[38] in their turn. But it has somehow or other carried with it the suggestion that commerce does not include anything but intercourse. It has been denied, for example, that a grain elevator engaged in the business of storing grain in the course of interstate transportation is engaged in interstate commerce,[39] and manufacturing and commerce have been emphatically distinguished. In Kidd v. Peterson,[40] Mr. Justice Lamar says that manufacturing is the transformation or the fashioning of raw materials into a changed form for use. In the case of the United States v. Knight, it was said:

"If it be held that the term [commerce] includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it will also include all productive industries that contemplate the same thing. The result would be that Congress would be invested to the exclusion of the states with the power to regulate not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries and mining;

[35] 1824, 9 Wheat 1, 229, 6 L. ed. 23.

[36] Consistently since the legislation of 1866, mentioned in note 9, above.

[37] The Ohio supreme court once held that the sending of telegraph messages was not commerce, Western Union Tel. Co. v. Mayer (1876, 28 Ohio St. 521). This decision has been completely overwhelmed, however, by the almost uniform holding of almost every other jurisdiction. Cf. W. U. Tel. Co. v. State Board of Assessment (1889, 132 U. S. 472, 33 L. ed. 409).

[38] Act of June 29, 1906 (34 Stat. at L. 584), added to the jurisdiction of the Interstate Commerce Commission telegraph, telephone and cable companies (whether wire or wireless) engaged in sending messages from one state, territory, or district to another.

[39] Cargill Co. v. Minnesota (1901, 180 U. S. 452, 45 L. ed. 619). The production of plays has been held not to be commerce under the New York penal code, People v. Klaw (1907, 106 N. Y. Sup. Ct. Rep. 341, 350, 55 Misc. Rep. 72). The baseball industry is not interstate commerce. Cf. 34 *Harvard Law Review*, 559; 16 *Michigan Law Review*, 867; The National League et al. v. The Federal Baseball Club of Baltimore, Inc. (48 Wash. L. Rep. 819); American Baseball Club of Chicago v. Chase (86 Misc. Rep. 441, 149 N. Y. Sup. Ct. Rep. 6). Nor is the presentation of grand opera by a company on tour interstate commerce, Metropolitan Opera Co. v. Hammerstein (1914, 162 App. Div. 691, 147 N. Y. Sup. Ct. Rep. 542). Nor is a personal service contract between citizens of different states interstate commerce, Williams v. Fears (1900, 179 U. S. 270, 45 L. ed. 186). Service rendered by a mercantile agency is not commerce, State v. Morgan (1891, 2 S. D. 32, 48 N. W. 314, [writ of error dismissed, 1894], 159 U. S. 261, 40 L. ed. 145).

[40] 1888, 128 U. S. 1.

in short, every branch of human industry. The business of refining sugar is a manufacture, and not an operation of commerce, and therefore not within the commerce clause of the Federal Constitution."[41]

The theory is simple enough. Yet when the Supreme Court was faced with the practical question of determining which initiatory processes connected with selling and transporting were commercial in their nature and which of a manufacturing type, their inaccurate economic definitions of these economic terms caused them endless trouble. The solicitation of a drummer was held to be commerce.[42] The business of conducting a correspondence school is interstate commerce,[43] as is that of selling natural gas after its severance from the ground,[44] and the transmission of lottery tickets.[45] Indeed it would seem that not only the transmission but also the issuing of lottery tickets was within national control.[46] This leads to the narrow question—not entirely unrelated to the control of patents and copyrights—whether the misbranding of goods within a state may be made a national offense? It was so held, in United States v. Chas. L. Heinle Specialty Co.,[47] and the Marking of Packages Act of March 3, 1913, carries this theory further. The commodities clause of 1906 as construed in United States v. D. & H. Railway Co.[48] goes far towards establishing the doctrine that the conditions under which a thing is produced may be controlled by means of the national power to exclude articles produced in the prohibited manner from interstate transportation.

Finally, the Anti-Trust Act of 1914 affects industry directly as well as indirectly in that it speaks of the unlawfulness of the condition that the purchaser or hirer of one's goods or wares shall not use the goods of a competitor.[49] Such industries as the boot and shoe manufacturing

[41] 1895, 156 U. S. 1.

[42] Brennan v. City of Titusville (1893, 153 U. S. 289, 38 L. ed. 119).

[43] International Textbook Co. v. Pigg (1902, 217 U. S. 91, 54 L. ed. 678).

[44] Haskell v. Gas Co. (1911, 224 U. S. 217, 56 L. ed. 738).

[45] Champion v. Ames (1903, 188 U. S. 321, 47 L. ed. 492).

[46] In the lottery case, cited above, Mr. Justice Harlan says: "May not Congress, for the protection of the people of all the states, and under the power to regulate interstate commerce, devise such means, within the scope of the Constitution, and not prohibited by it as to drive that traffic out of commerce among the states?"

[47] 1910, 175 Fed. 299.

[48] 1908, 213 U. S. 366, 53 L. ed. 836.

[49] Section 3 makes it unlawful for any person engaged in commerce, in the course of such commerce to lease or make and sell, or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities whether patented

business which have heretofore been supplied with machinery on exactly that basis are particularly affected. And the Federal Trade Commission Act of the same year gives such broad powers to the commission, that it is not easy to say where the line will be drawn between what the Supreme Court calls commerce and what it prefers to call manufacture.[50]

These illustrations of national control over industry are limited to the operation of statutes under the interstate commerce clause. The power of making or unmaking a business under the postal authority through fraud orders,[51] the power of fostering or even creating new industries or of destroying old ones through the imposition of tariffs, the extension of the jurisdiction of United States courts by keeping the Bankruptcy Act alive,[52] and the chance of abusing national powers are beyond the scope of this study. An extreme example may, however, be mentioned. When Congress (in 1913), had determined to interfere in the Paint Creek disturbances in West Virginia, it sent a committee to investigate whether there had been any violation of the immigration laws or other national laws involved in the causes of the disturbance. The same method was resorted to in connection with purely local disturbances in the mines of Michigan and Colorado. The presumption, apparently, is that any community would rather make

or unpatented. . . . on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, etc. of a competitor.

[50] In section 4 the word "commerce" as used in the act is defined as follows: "Commerce means commerce among the several states or with foreign nations or in any territory of the United States." In section 5, "unfair methods of competition in commerce are hereby declared unlawful. The commission is hereby empowered and directed to prevent persons, partnerships or corporations, except banks and common carriers subject to the acts to regulate commerce, from using unfair methods of competition in commerce." In other words, commerce is distinctly understood as embracing something more than the transportation that had hitherto been emphasized as the chief, if not the only, element of interstate commerce.

[51] Based on Revised Statutes 3929 as amended, Act of September 19, 1890, ch. 908, sec. 2, and Revised Statutes 4041 as amended, Act of September 19, 1890, ch. 908, sec. 3.

[52] The earlier bankruptcy acts were all ostensibly passed for emergencies, and accordingly repealed within a few years after their passage. This was undoubtedly the feeling of most people with reference to the Bankruptcy Act of July 1, 1898. Instead of being repealed, however, it is still on the books (amended February 5, 1903, June 15, 1906, June 25, 1910, March 2, 1917), and from present indications is likely to remain a permanent part of the jurisdiction of federal courts.

peace at any price than submit to the visitation of a congressional committee, or possibly there lurks behind this method the notion that if necessary an army can be sent into the state where the investigation is being carried on in order to protect the congressional committee in its function of investigating.

The real basis for the extension of national power over industry is the simple fact that the greatly increased facility of communication has made a business unit of the country. It is indeed open to question whether nationalization of power has gone or can go under our present Constitution as far as the actual nationalization of industry has gone. There are physical facts which the law *haud passibus aequis* attempts to follow. It is not so surprising to see chalk marks erased as it is to learn that the lines are mere chalk.

This consideration brings us to the second lesson of legal history. To what extent are the efforts of the national legislature, courts and executive authorities capable of being illuminated by reference to comparative legal history? The closest analogy seems to be furnished by the period when the Norman and Angevin kings of England were developing a national law and national courts to take the place of the innumerable local jurisdictions into which England had theretofore been divided. The entering wedge for this national jurisdiction was in those days the power of the king over the highway, as it is with us the power of the nation over the railway. The whole history of those times remains obscure until we realize that the king was not the fountain-head of justice, but that the local jurisdictions were to all intents and purposes states as independent of the central jurisdiction of the king's courts as our state courts are in theory independent of our national jurisdictions today.

Of the efficiency of these royal courts in arrogating to themselves all jurisdictions there can be little doubt. The local jurisdictions gradually sank into oblivion, and one after the other they disappeared. The subject matter that they had handled was dealt with by the king's courts or church courts or entirely neglected. It was many years before the expression "no wrong without a remedy" had even a presumptive force in the king's court, for there was always the possibility that a remedy existed in some other court.

What were the methods by which the king took the jurisdiction of the local courts? Many of the discussions of this part of English legal history are hazed over and obscured by the completeness of the victory of the king's courts. They suggest that the powerful Norman

kings deliberately and openly introduced substitute actions of their own to take the place of causes of action normally entertained by local courts. As a matter of fact, the Norman kings were too cautious, their advisers too wise, and their position too insecure to permit of any such procedure. Besides, it must be remembered that legislation in the modern sense was unknown. That the Norman kings did not purport to introduce new laws is illustrated time and again by the use of the pious fraud of reintroducing the laws of King Edward the Confessor.[53] The most high-handed act of the Conqueror himself consisted of his tabulation of the rights which he in theory possessed as the legitimate successor of Edward on the throne.[54] And all of these rights he tabulated on the theory that land-holding was to continue and revenues to go on in accordance with the laws of the Saxons. When his right-hand man, Lanfranc, clashed with his half-brother Odo over the possession of certain lands, they had to call in old Bishop Athelric, an Englishman, to determine their claims in accordance with the laws of the land.[55] This old man whom, the chronicler tells us, they brought in on a wagon, is the very embodiment of the continuity of Anglo-Saxon laws under the conquerors. The very forgeries of this period are a tribute to the theory that the old law continued.[56] Otherwise, why speak in the name of Edward the Confessor?

[53] Thus in his charter to the Portgerefa and the citizens of London, William the Conqueror wills "that ye be worthy of all the laws that ye were worthy of in King Edward's day." (Liber Custumarum, pt. 1, pp. 25, 26. Text and translation in Stubbs' *Select Charters*.) The charter of liberties of Henry I, of the year 1100, recites: "The law of King Edward I give to you again with those changes with which my father changed it by the counsel of his barons." (Text in Stubbs' *Select Charters*.) Stephen's charter of 1135 recites: "All the good laws and good customs which they had in the time of King Edward I concede to them." (Translated in 1 *Translations and Reprints* 6, p. 5, from 1 *Statutes of the Realm* 4.)

[54] "So very narrowly," the Anglo-Saxon Chronicle tells us, "did he cause the survey to be made that there was not a single hide nor a rood of land nor—it is shameful to relate that which he thought no shame to do—was there an ox, or a cow, or a pig passed by, that was not set down on the accounts, and then all these writings were brought to him."

[55] The case of Lanfranc v. Odo is translated in *Essays in Anglo-Saxon Law*, p. 369.

[56] The great forgery which professes to be the laws of Edward the Confessor begins as follows: "Here begins the law of the glorious king of the English, Edward. Four years after the conquest of this country, England, by King William, with the counsel of his barons, he caused to be summoned throughout all the counties of the land the English nobles, the wise and those learned in their own law, to hear their customs from their own lips. Thereupon from each and

Under these conditions there was theoretically but little for the king's court to do beyond the protection of the king's peace and the settlement of disputes in which the king was personally interested. Now the king's peace, it must be remembered, was not the only peace to be protected in England. There was the church peace, the house peace, the folk peace. To violate any of these was not necessarily to bring one under the jurisdiction of the king's court. The story has often been told of how the king's peace, beginning with the protection of the king's person and the prevention of disturbance in the king's presence or in his house, came to be extended to the king's servants in all places and eventually to persons specially taken under the king's protection and made his servants *pro tanto*.[57] Whole classes of persons came to be included. Before long great roads, the king's highways, and eventually all highways, came to be looked upon as directly involving the king's peace, and so gradually its force was felt throughout the country. It remained only for the king on his coronation as an act of grace to take all persons in England into his care, and thus establish the foundation of public prosecution for crimes in the king's courts for various private prosecutions in various courts. But the value of the king's peace as an entering wedge was not limited to criminal procedure. By alleging that the most ordinary trespass had been committed *contra pacem regis, vi et armis*, it became possible to bring any case before the king's justices. Other fictions, notably that of the king's debtor, by which the king's exchequer became a court for the trial of claims between man and man, gradually made possible the transfer of innumerable cases to the centralized courts.

With centralized courts there came a centralized law. In the days of Henry II there were various customs in England. In the days of Henry III it was possible to speak of the general custom of England, subject to slight local deviations.[58] To imagine that this transfer was

every county in the land twelve chosen men promised under oath that to the best of their ability they would set forth their laws and customs, omitting nothing, adding nothing, changing nothing."

[57] *Cf.* Inderwick, *The King's Peace*, Pollock, *Oxford Lectures*, "The King's Peace;" Howard, *On the Development of the King's Peace and the English Local Peace Magistracy*.

[58] *Cf.* 1 Pollock and Maitland, p. 163, on the decline of local customs in England. Gradually there develops a presumption that there is no local custom contrary to the general custom of England unless it is specially approved. The discussion ends with this significant statement: "No English county ever rebels for the maintenance of its customary law."

accomplished without vigorous controversies of the nature of states rights claims is to misread the entire history of the thirteenth century. The controversies between the barons and the king are very largely controversies as to jurisdiction. So long as feudalism remained a factor in the lives of the people, the royal courts had rivals. It was not that the victory of the royal courts destroyed the feudal units. On the contrary, the feudal jurisdictions outlasted feudalism at least on paper. But as life in England became national, national jurisdiction had to expand to take care of it. It was not a question of the rights of localities, but of the duties of the nation.

And so it is with us. State lines are not so clear in life as they used to be. I do not prophesy their disappearance. But so far as they fail to correspond to actualities, we may depend upon the "law in action" to deviate from the law of the books so as to meet the practical needs of business. If eventually the law books come to record what has happened in life, it is misleading to brand the resulting federalization as federal usurpation. If anything is to be criticized or regretted in this connection, is it law or is it life?[59]

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Federal Aid to the States. When a central authority orders a local subordinate government to take a certain course of action under penalty, it is more than likely that the enforcement of the order will lead to difficulties, and it may even result in open defiance on the part of the local government. The effect is very different, however, when the central authority merely establishes a standard and promises to turn over cold cash to the local units which meet the standard. With governmental units as with individuals, rewards for work properly done are more likely to produce desirable results than punishment for failure to obey orders. It is in recognition of this principle that so many of the states have adopted the subsidy or state aid system in education

[59] Since this paper was read at the meeting of the American Political Science Association in December, 1921, several important decisions have been handed down by the Supreme Court of the United States: two illustrate the firmness of the hold of the national power on railroads as the result of a long tradition [Railroad Commission of Wisconsin v. C. B. and Q. Ry. (1922) 42 Sup. Ct. 232 and State of New York v. U. S. (1922) 42 Sup. Ct. 239]; and the other the comparative weakness of the national power in connection with new fields of social legislation [Bailey v. Drexel Furniture Co. (1922) U. S. Sup. Ct. Oct. Term, 1921, No. 657 on the unconstitutionality of regulating child labor through federal taxation.]