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AMERICAN POLITICS.

THE most significant and important contribution to the literature of American politics in recent times is the address delivered by Mr. Elihu Root, the able and distinguished Secretary of State, before the Pennsylvania Society in New York City, a few weeks ago. In that address, it will be remembered, Mr. Root emphasized the growth of federalism in this republic, and indulged in much thoughtful speculation as to the future of the States under our dual system of constitutional government. So forcefully were his ideas expressed, so plainly did he picture the tendency of the times, so rudely did he awaken the public mind into a consciousness of a menacing situation, that the echo of his address has by no means died away.

At semi-public functions, in the halls of Congress, and in the editorial columns of nearly every newspaper in the land, Mr. Root's words have formed the text for comment and discussion. Indeed, he may be said to have created a political issue; for the Democrats, following in the footsteps of Jefferson, are still ardent advocates of States' rights, and their leaders have openly welcomed a contest over the question of whether the federal power shall be still further enlarged. It is appropriate, therefore, to discuss in this issue of THE FORUM, even at some length, the development and growth of federalism in the United States, and to consider what problems the future has in store. The subject is one of intense interest to every student of American politics.

It is impossible, of course, to present Secretary Root's speech in all its interesting detail. We must content ourselves, therefore, with a mere exposition. He asserted, first of all, that the conditions under

which the clauses of the Constitution, distributing powers to the National and State governments, are now and henceforth to be applied are widely different from the conditions which were or could have been within the contemplation of the framers of the Constitution, and widely different from those which obtained during the early years of the republic. He emphasized the sparseness of the population at that time, the difficulties and hardships of long and laborious journeys, and, above all, the very natural fear that as the States grew more and more self-sufficient they would fall apart, and that the Union would resolve itself into a number of separate confederacies. Owing to the marvelous progress of our civilization, the point of view has entirely changed.

"Our whole life," said Mr. Root, "has swung away from the old State centres and is crystallizing about national centres"; and he added that "in the wide range of daily life and activity and interest the old lines between the States and the old barriers which kept the States as separate communities are completely lost from sight." The political changes have been responsive to these altered material conditions. According to Mr. Root, the people of the country are realizing that laws which were adequate enough for the due and just regulation and control of the business which was transacted and the activity which began and ended within the limits of the several States are inadequate for the due and just control of the business and activities which extend throughout all the States, and that the power of regulation and control is gradually passing into the hands of the national government.

In other words, from Mr. Root's point of view, the national government is simply undertaking the performance of duties which the States are no longer adequately capable of performing. At the same time, he insists, many of the States are totally ignoring even the duties which were within their province. This has led to a curious anomaly, which, although not emphasized by Secretary Root, actually exists. In States where there has been a failure to enact desirable legislation, a feeling of discontent against State control has been engendered; while the very fact that other States display a progress not universally enjoyed stimulates the tendency toward the beneficent exercise of the federal power.

I shall quote only one portion of Mr. Root's speech, namely, the concluding paragraphs, which read as follows:

> It is useless for the advocates of State rights to inveigh against the supremacy of the constitutional laws of the United States or against the extension of national authority in the fields of necessary control where the States themselves fail in the performance of their duty. The instinct for self-government among the people of the United States is too strong to permit them long to respect any one's right to exercise a power which he fails to exercise. The governmental control which they deem just and necessary they will have.

It may be that such control could better be exercised in particular instances by the governments of the States; but the people will have the control they need either from the States or from the national Government, and if the States fail to furnish it in due measure, sooner or later constructions of the Constitution will be found to vest the power where it will be exercised—in the national Government.

The true and only way to preserve State authority is to be found in the awakened conscience of the States, their broadened views and higher standard of responsibility to the general public, in effective legislation by the States in conformity to the general moral sense of the country, and in the vigorous exercise for the general public good of that State authority which is to be preserved

Secretary Root's forceful presentation of the present supremacy of federalism, or centralization, as the exercise of enlarged powers by the general Government is sometimes designated, might easily be dismissed without consideration were it not for the fact that it presents a picture that is absolutely accurate. Every one who has watched the trend of national legislation during the past ten or fifteen years, as the writer has done, has noticed the encroachment of federal authority, sometimes by gradual steps and sometimes by leaps and bounds, along lines which, to say the least, were of dubious constitutionality, especially if the Constitution be construed with any degree of literal interpretation.

It is true that this enlarged power has been always exercised for the public good and was invariably demanded by conditions which could not, apparently, be otherwise remedied. None the less, the tendency toward congressional jurisdiction over matters which, half a century ago, would have been considered as wholly within the jurisdiction of the States has been steadily increasing, and, as will be shown later, is more rampant to-day than ever before.

A thorough discussion of the situation carries us, therefore, beyond the point reached in Mr. Root's address. He contented himself with asserting that if the States failed in their duty national control would, indeed, become supreme. It is easy enough to go a step further and consider whether it is possible for the States to grant the relief from existing evils which is so imperatively demanded; and if it shall be shown that reliance upon State legislation will be hope deferred, we must consider how far we are destined to drift away from our old moorings. We realize now that we accept complacently a condition of federal control beyond the wildest imaginings of Alexander Hamilton. Into what situation shall we be led ere the end comes?

No adequate appreciation of the difficulties attending our national situation can be obtained until we realize the fact that, even while we talk of the present tendency toward federalism and discuss Secretary Root's address as though it related to some new and menacing feature, we

have been steadily advancing in our federalism for more than two hundred and fifty years. Our nation has passed through three stages. The first was the union of the colonies, an alliance temporary in its nature and formed for the purpose of accomplishing a specified result. Confederation, which meant a surrendering of some of the local rights of the sovereignties in order that the entire people might be benefited, was the second stage; but even in this we find that the States jealously retained and guarded their individual supremacy. Finally came federalism, wherein the largest measure of power was surrendered by the States to the general government, while the latter, instead of being the creature of the sovereignties, became the creature of the mass of people that compose the sovereignties.

In this distinction between confederation and federalism lies the whole germ of the development of the United States. Viewed in this light, the opening sentence of the Constitution presents a significance not otherwise perceived. "We the people of the United States," declares the Constitution. Some of the men who framed the Constitution appreciated the full purport of this phrase. Patrick Henry, returning to Virginia and presenting the immortal document to his State for ratification, pointed out that it should have declared that "we, the States of the United States," etc. He was a States' Rights advocate, and he saw plainly that in the phrase, "We the people of the United States," there was an elimination of State boundaries. If the phrase meant anything at all, it signified that the Constitution was framed for the benefit and guidance of the entire people of the nation, a homogeneous mass who dwelt together under one flag, even though their respective habitats might be separated by arbitrary lines.

It is hardly necessary to point out that a step so advanced as this could not have been taken unless the public mind had long been prepared for such action. There had been, in fact, a century and a half of evolution. The very first step toward federalism on American soil was taken in the year 1643, when certain colonies of New England combined to protect themselves from the Indians or any hostile invasion. There were four parties to this union, Massachusetts, New Plymouth, Connecticut, and New Haven. The articles of agreement upon which the consolidation was based form the germ of the American Constitution, because even then, in the initial union which existed in this country, the provinces agreed not to make war without the permission of the other parties to the union unless suddenly invaded, and that no two of them should combine into one jurisdiction without the consent of the others. Herein was a surrender of certain rights hitherto enjoyed independently. It was the first step timidly taken and apparently with

much mental reservation. Indeed, lest there should be too large an exercise of the powers thus granted to the union, it was expressly stipulated in one of the articles that the confederation as a whole could not intermeddle with the government of any other jurisdictions. Even this stipulation could not wholly disguise the fact, however, that where a union was necessary, the whole became stronger than any of the integral parts, and that the latter suffered in consequence. It may have been the very fact that these four provinces were attached by such attenuated bonds that led to the dissolution of the union in less than twenty-five years.

As the years progressed, the necessity for a larger degree of union between the colonies became more and more apparent. Concerted policy was essential in the treatment of the Indians, while only by mutual agreement could the citizens of one colony entering the domain of another colony receive equitable consideration. The regulation of commerce between the colonies also became a most important question, while it was equally desirable that criminals should not find undisturbed refuge outside of the province in which their offences had been committed.

In 1696 came Penn's plan for an American Congress — the first use, by the way, of the name which now attaches to our national legislature — and under this plan a further step in the direction of federalism was suggested. It is not necessary to present in detail the numerous other plans for union which were from time to time proposed. It is worth while to refer, however, to the plan which Franklin offered in 1754, because it shows the advanced position of the public mind even at that time, in the matter of federalism. Franklin proposed that the representative body of the colonies should have the "power to lay and levy general duties, imposts, or taxes" on the colonies, "considering the ability and other circumstances of the inhabitants in the several colonies, and such as may be collected with the least inconvenience to the people."

The significance of this declaration lies in the fact that three decades before the adoption of the Constitution it was seriously proposed that the colonies, which had hitherto sacredly preserved to themselves the right of taxation, should authorize a general government to collect the money of their citizens to be used for the general welfare. It is true that Franklin's plan did not receive immediate endorsement; but the fact remains that it paved the way for the articles of confederation which were finally adopted in 1778, and which, in turn, were superseded by the American Constitution.

The Declaration of Independence forced upon the colonies a larger degree of federalism than had hitherto even been contemplated. They

were dependent upon themselves; and union, more or less complete in its nature, was absolutely essential to their continued existence. The point to be emphasized, however, is that this union was along federal lines, a recognition of the rights of the people rather than the rights of the States. In the articles of Confederation, although an advancement had been made along these lines, there was still a great lack of federal power — a lack which resulted in a government so weak and inefficient as to threaten the stability of the new republic and compel the adoption of a Constitution wherein federalism was the basic principle.

In brief, therefore, from the time of the New England union in 1643 to the adoption of the federal Constitution in 1787, the development of federal power had not only been persistent and well-defined, but it was evident that the people realized more and more that, in order to secure permanent, effective, and harmonious government, the rights of the colonies and the States would have to be continually abridged and the federal authority correspondingly increased. This fact, so plainly demonstrated then, is interesting now because it corresponds with the situation which presents itself to the nation to-day. Our forefathers yielded to federalism because their separate communities were powerless to conquer the problems which confronted them. We are face to face to-day with the necessity for the largest exercise of federal power for the same reason; nor is the force of the parallel weakened by the fact that the difficulties which confronted them were not the same as those with which we are now called upon to contend.

I have thus presented, in a necessarily brief and imperfect manner, the conditions which led the colonies and then the States to surrender a larger proportion of their powers to the federal Government. It was inevitable, however, that the language of the Constitution should contain some ambiguities, some phrases capable of double construction. For the first ten years of our national life there was much uncertainty, disputes were numerous, and, except in a few courageous minds, a doubt existed as to the outcome of the new experiment.

It is difficult to tell what might have been the ultimate outcome if it had not been for the appointment of John Marshall as chief justice of the United States by President Adams. He went upon the bench in the critical and formative period of our existence, and with great ability and courage uttered forth his federalistic views. For a quarter of a century he read into the Constitution every possible enlargement of the federal powers. No wonder that Jefferson denounced and hated him; no wonder that one of his colleagues on the bench was forced to exclaim that "the American people can no longer enjoy the blessings of

a free Government whenever the State sovereignties shall be prostrated at the feet of the general Government."

Throughout all the adverse criticism which his decisions created, Marshall pursued his undaunted way. Larger and larger were the powers and authority which he gave not only to the Supreme Court of the United States, but to the President and the Congress, all of them the agents of the federal Government. There were strict constructionists in those days, as there are to-day, but Marshall brushed them aside with little consideration. He scorned their reasoning, under which, to use his own words, the Constitution would still be a magnificent structure to look at but totally unfit for use.

Nothing could better illustrate the growth of the spirit of federalism in this country than to note the character of the questions which the Supreme Court under Chief Justice Marshall was called upon to decide. So accustomed have we become to the atrophy of States' Rights that the problems which confronted the nation-builders in those early days seem hardly worth a moment's consideration, much less the exhaustive industry and research which Marshall devoted to his lengthy opinions. We must remember, however, that in those days the States were still very much alive to their freedom and independence, and the national character of our government was not so fully accepted as it is to-day.

Take, for instance, the privilege conferred by legislative enactment by the State of New York to Livingston and Fulton exclusively to operate their steamboats upon the navigable waters in that State. Over in the port of Elizabeth, New Jersey, was a steamboat owner, whose vessel was licensed under a federal statute. He persisted in trespassing upon the New York waters. All the courts in the State, from the lowest to the highest, enjoined him; and not until he successfully appealed to the Supreme Court of the United States did the State of New York learn how insignificant and futile were its enactments when they conflicted with the expression of federal will. The merest schoolboy would to-day decide off-hand an analogous question. In the first twenty-five years of our national life, however, the federal instinct was not so firmly implanted as it is now.

It is impossible to overestimate the importance of Marshall's opinions in developing this federal instinct. He taught the doctrine of "the subordination of the parts to the whole, rather than the complete independence of any one of them." He believed in the people more than he did in the States. "The people of the United States," he declared, "have been taught by experience that this government would be a mere shadow that must disappoint their hopes unless invested with large portions of that sovereignty which belongs to independent States."

He insisted always that it was the people and not the States that had framed and adopted the Constitution. To his mind, the "supreme and irresistible power" resided in the whole body of the people, not in any subdivision of them. "The American people," he declared in another opinion, "did not design to make their government dependent upon the States." His decision denying the power of a State to tax an institution which flourished under Congressional sanction is well known. In fact, he persistently and forcefully asserted the supremacy of the federal Constitution over the constitutions and laws of the States, and established federal authority upon a foundation which remains not only unshaken but actually undisturbed after a lapse of nearly one hundred years.

Marshall may have been building better than he knew, but certainly he was not building ignorantly. He appreciated with the mind of a seer the far-reaching effect of his emphatic and eloquent declarations of federal supremacy. In beginning one of his decisions, he said:

> The Constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed, and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the supreme court of the United States has the Constitution of our country devolved this important duty.

In this reverential and solemn spirit, which is the spirit which must actuate the Supreme Court to-day, he approached and decided the questions which were to determine whether the United States were to be a league of independent republics or a nation bound together from the Atlantic to the Pacific and from Canada to the Gulf and with State lines almost entirely obliterated. No wonder that he gave to the federal instinct a tremendous impetus.

Still more important is the fact that his mantle has ever since rested upon the court. The latter has invariably stood upon the side of the federal Government, and it is interesting to note that in one of the latest cases decided by the court — the case affecting the legality of the merging of certain railroads in the Northwest — the words of Marshall in more than one opinion were repeated with hearty endorsement and satisfaction. In analyzing the development and growth of federalism in the United States it would be impossible to ignore the important factorship of the Supreme Court of the United States. It has been and is a federalist body — dealing equitably with the States, to be sure, but always upholding what Marshall called the strong arm of the federal Government. The

significance of this position is all the more impressive, because, as will be shown later, we are entering upon an era when the Supreme Court will be as important a factor in the settlement of grave constitutional questions as it was in the days of John Marshall.

Having thus reviewed the period wherein the colonies or States voluntarily surrendered portions of their rights in order to achieve a mutual benefit, and having hastily sketched the second period wherein the authority of the States was further restricted by judicial decisions from which there was no appeal, we come now to the consideration of the most important period wherein the people, through their duly elected representatives in the national legislature, undertook to disregard State rights and do for themselves what the States either negligently ignored or were incapable of accomplishing.

There is neither necessity nor desire to avoid full consideration to the part which the Civil War played in stimulating the national spirit and in accustoming the people to acquiescence in the exercise of federal power. I do not believe, however, that it is an exaggeration to assert that the commercialism or materialism which has developed in this country so remarkably during the past two or three decades has done more to stimulate the federalistic spirit than did the Civil War. More than this, it is important to realize that the manifestation of this spirit has been in the direction of affording greater protection to the great mass of the people. There has not been, with possibly rare exceptions, any effort toward official aggrandizement. Power has been thrust upon, not involuntarily sought by, federal executives.

A review of the legislation which has been enacted since the close of the Civil War affords a most conclusive demonstration of the fact that the growth of the federal power in this nation is in response to popular demand. Take, for instance, the federal law which taxed State banks out of existence and substituted therefor the national banking system — a law made inevitable by the uncertainty and danger in financial circles for which the old State institutions were responsible. A banking system, organized under and controlled by federal authority, offered the only relief from an aggravating and unendurable situation.

In later years the people realized that the existence of the Louisiana Lottery Company was a menace to public morals. It was a State institution, pure and simple, but it was quite evident that the Louisiana legislature would not molest it. Even if it had been driven from Louisiana, however, there is no reason why it could not have found an asylum in some neighboring State. The federal Government undertook to exterminate it by prohibiting the transportation of lottery tickets by either

mail or express. The memory of the bitter legal controversy which ensued is still fresh in the public mind; and the decision of the United States Supreme Court upholding the legislation was in thorough harmony with the almost invariable position of that tribunal.

When the federal Government sought to stop the circulation of obscene literature through similar legislation, there was another contest, which, as might have been expected, resulted in another victory for federal power. Still more striking is the instance of the national quarantine law, a measure made necessary by the fact that the quarantine regulations of the States were conflicting and ineffective, causing endless annoyance and failing to accomplish desired results. No one has yet attempted to contest the constitutionality of this law, simply because its necessity is self-evident; and yet no law affords so striking an example of the invasion of States' rights or undertakes to regulate by federal control a matter which comes so totally within the province of State legislatures.

The oleomargarine law is still another instance of the exercise of federal authority in a matter which might well be regarded as within the competency of State enactment; and yet the people accepted it and the Supreme Court sustained it because it was manifestly for the public good. The pure-food law comes within the same category. Not only have we reached the point where there is federal control through federal legislation of our meat and drink, but thousands of advertisements, announcing that certain establishments are operating under federal permit, are doing their effective work in influencing the public mind toward accepting and even being grateful for federal supervision.

The fact is that the very conditions of our civilization stimulate the onward march of federalism. Corporations have waxed so powerful and monopolies have become so aggressive and exacting that the State, to say nothing of the individual, cannot successfully cope with them. The people instinctively look to the omnipotent federal authority for protection. It is this situation which has led Congress to enact laws which stretch to the utmost the constitutional limits of federal power. Nearly twenty years have elapsed since the first federal anti-trust law was enacted; and although Mr. Bryan insists that the control of corporations is wholly within the province of the State, the Supreme Court differs with him and the people do not seem inclined to wait for the slow and dubious process of State legislation.

The latest and most conspicuous example of this character of legislation is the railroad-rate bill. Made necessary by enormous combinations of capital which control an essential public utility, this railroad-rate law is a measure which, constitutional or unconstitutional, had to be enacted.

Conditions forced it upon the country; and as long as these conditions continue, the federal authority will continue to be exercised in larger and larger measure. The employers'-liability bill and the bill shortening hours of labor on the railroads are additional examples.

It is useless, as Secretary Root suggests, for the advocates of States' Rights to inveigh against this situation. The demand of the people upon the national Government for the relief which the States are powerless to afford makes the growth of federalism inevitable. With all these object lessons before it, is it any wonder that the public turns again to the federal Government for the regulation of insurance and of marriage and divorce? How is it possible to check the growth of federalism when the people witness the accomplishment of great and desirable results through the operation of federal authority?

This question might especially apply to the river and harbor bill, a measure similar to which was vetoed by Madison on constitutional grounds in 1817, and which President Pierce as late as 1852 declined to approve because he also believed it to be unconstitutional. The fact that the river and harbor bill enacted during the last session of Congress carried with it a direct appropriation of over $37,000,000, with authorization for contracts aggregating $50,000,000 additional, indicates that there is no disinclination on the part of the people in the States to receive largess from the federal treasury.

It is not surprising that this question of the extension of the federal powers should have been the most important topic discussed during the session of Congress just closed. It was a very vital and important question in connection with the exclusion of Japanese children from the schools of San Francisco, an exclusion insisted upon by the State of California, and combated on the ground that it was in contravention of the rights possessed by Japan under a treaty with the United States. The whole subject was made the text of earnest discussion, a compromise being finally agreed upon whereby the Japanese children were to be afforded an education at the expense of the State, but in separate institutions.

In this connection, it is interesting to state that the Californians secured an important concession in a law designed to restrict the importation of Japanese coolie labor. The wording of this law, however, marks a distinct advance in the delegation of power to the federal executive, for it declares that "when the President shall be satisfied that passports issued by any foreign government to its citizens to go to any country other than the United States, or to any insular possession of the United States, or to the Canal Zone, are being used for the

purpose of enabling the holders to come to the continental territory of the United States, to the detriment of labor conditions therein," the President may refuse to permit such citizens to enter this country.

This unique legislation was not adopted without a protest. In the opinion of Representative McCall, a republican member from Massachusetts, it was equivalent to placing in the hands of the President a discretion whereby he could at any time restrict immigration altogether; while Representative Williams, of Mississippi, the minority leader, opposed it because it shifted the entire responsibility from the legislative body of the nation and placed it upon the shoulders of the executive. The fact that the legislation was enacted shows how the largest delegation of power to the federal executive is now accepted as a matter of course.

The advocates of States' Rights in Congress took their stand upon a resolution offered by Senator Whyte, of Maryland, which read as follows:

1. *Resolved*, That the people of the several States, acting in their highest sovereign capacity as free and independent States, adopted the Federal Constitution and established a form of government in the nature of a confederated republic, and for the purpose of carrying into effect the objects for which it was formed delegated to that Government certain rights enumerated in said Constitution, but reserved to the States, respectively, or to the people thereof, all the residuary powers not delegated to the United States by the Constitution nor prohibited by it to the States.

2. *Resolved Further*, That the extension of the Federal powers beyond those enumerated in the Constitution can only be rightfully accomplished in the manner provided by that instrument, and not by a strained construction of the Constitution, which shall obliterate all State rights and vest the coveted, but not granted, power where it will be exercised by the general Government.

It will be observed that in these resolutions Senator Whyte announces a proposition distinctly opposite to that enunciated by Chief Justice Marshall and by the eminent federalists who had preceded him; for Mr. Whyte's resolution declares that the Constitution was adopted by the people of the several States "acting in their highest sovereign capacity as free and independent States." This view was elaborated by him in an able address, the first part of his argument being devoted entirely to proving that the federal character of the United States was not in the minds of those who proposed the union of the colonies.

It would be interesting if space permitted to present in detail Senator Whyte's argument upon this subject. Suffice it to say that he endorsed the principle laid down by Madison, who explained that the words in the preamble of the Constitution, "We the people of the United States," referred not to the people as composing one great society, but the people composing thirteen sovereignties. Senator Whyte would not concede that the opposition to the federal usurpation, as he terms it, has abated

one jot or tittle from the intensity felt in the days of our fathers. He emphatically challenged Secretary Root's assertion that "we are urging forward in a development of business and social life, which tends more and more to the obliteration of State lines and the decrease of State power," and added that "no proposition is more hostile to the wishes of the great masses of the people than that of extension of the powers of the general Government and for consolidation or accumulation in the federal Government of the powers properly belonging to the States."

The question of federal control and States' Rights also came before Congress in connection with the bill of Senator Beveridge, of Indiana, to prohibit interstate commerce in the products of factories and mines where children under the age of fourteen years are employed. Mr. Beveridge argued for his bill on the ground that a widespread evil existed which should be remedied; and, inasmuch as the States could not, or would not, enact the necessary legislation, it was incumbent upon the federal Government to exercise its supreme authority. He asserted, as another reason for federal interference, that even where States had passed child-labor laws, they had failed properly to enforce them.

His views were, of course, combated by those who insisted that the regulation of child labor was entirely a State affair. Senator Overman, of North Carolina, for instance, pointed out that if the principle embodied in Mr. Beveridge's proposition were a sound one, Congress could regulate the ages of the laborers in the wheat fields of the Northwest, because a very large portion of the wheat grown and harvested is shipped out of the State and frequently into foreign countries. He asserted that several of the States had already enacted laws regulating child labor, and this, in his opinion, was the only method whereby such labor could be regulated. He admitted the existence of many evils, explaining that he would like to see uniformity in the divorce laws and in the insurance laws, but claimed that uniformity could be obtained without Congressional action and without usurpation of the reserved powers of the States.

"Where the evils exist," he said, "the States can and will correct them"; and with almost passionate eloquence he asserted that the integrity and autonomy of the States should be upheld, inasmuch as centralization would be a constant menace to the representatives of the people, breeding corruption and oppression. Then, after elaboration of the argument against the Constitutional power of Congress to enact the proposed legislation, he said:

> And again, Mr. President, the law which will suit one State might not prove satisfactory to the people of another State, where conditions are entirely different, and the regulation should be left to each State, which knows its own conditions best. The power to pass such a law is exclusively in the State. The State never

surrendered to the general Government the power or its rights to legislate upon questions affecting the life and liberty of its citizens. It never surrendered its right to legislate upon the rights of person or property or upon questions affecting the good order of society, the public health, or upon any of its internal, industrial, or domestic concerns. It never surrendered its police power, and it never will. These rights they not only did not surrender, but the people have always jealously guarded them and reserved them. This was clearly understood when the Constitution was adopted, and to properly safeguard them was the reason for the adoption of the ten amendments.

There is basis for much felicitation in the fact that a similar view is expressed, but in even stronger terms, in the report of the House Committee on the Judiciary, upon the question whether Congress had any jurisdiction or authority over the subject of women and child labor. The report is emphatically in the negative. It declares that the question is not even debatable and says:--

> The jurisdiction and authority over the subject of women and child labor certainly falls under the police power of the States, and not under the commercial power of Congress. The suggestion contained in the resolution shows how rapidly we are drifting in thought from our constitutional moorings. Undoubtedly it is the earnest wish of all who desire the prosperity of the nation that the proper line should always be drawn between the power of the States and the power of the nation. Certainly there is no warrant in the Constitution for the thought or suggestion that Congress can exercise jurisdiction and authority over the subject of women and child labor. If those performing such labor are abused, and conditions are such that the same should be improved, it rests for the States to act. The failure of the States to act will not justify unconstitutional action by Congress.
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> Unquestionably Congress has the power to investigate conditions, ascertain facts, and report upon any subject. In the opinion of your committee, there is no question as to the entire want of power on the part of Congress to exercise jurisdiction and authority over the subject of women and child labor.

The uncertainty which is thus shown to exist as to the constitutionality of measures designed to improve social conditions through federal control might be removed by the adoption of a new constitution. A proposition to this effect has emanated seriously from Representative DeArmond, of Missouri, whose suggestions deserve consideration because he is an able and conservative Democrat, whose judgment is respected and who is a candidate for the minority leadership in the next Congress. A convention to amend the Constitution can be called by Congress whenever application therefor shall be made by legislatures of two-thirds of the States.

As previously pointed out in THE FORUM, the legislatures of nearly two-thirds of the States have already petitioned for the assembling of a constitutional convention for the purpose of adopting a provision which shall result in the election of United States Senators by popular

vote. Mr. DeArmond, however, would not stop at this one subject, but would invite consideration of all the topics which, in the past, have been considered as proper amendments to the Constitution. The great fear hitherto has been that a constitutional convention, even if called to consider only one topic, might undertake to revolutionize the document and thus open the door to endless ills. Mr. DeArmond does not share this pessimistic view. "I believe there is enough of wisdom and patriotism and justice in the American people," he says, "enough pride in their past, interest in the present, and hope of the future, to protect us against any possible danger that the Constitution might be impaired by the adoption of an unwise amendment."

Even admitting that this view is correct, although it seems to be based more upon sentiment than upon reason, there is still to be considered the question whether, if the Constitution should be amended, the changes would be in the direction of according larger authority to the federal Government, or whether the rights of the States would be declared with greater latitude and clearness. In the consideration of this question, it will be instructive to glance at the efforts which have been made to secure amendments to the Constitution and, from the subjects which they include, to note the tendency of the popular mind.

Of the fifteen amendments to the Constitution, twelve were adpoted in the formative period of the government, while the thirteenth, fourteenth, and fifteenth were forged in the heat of the reconstruction. The tenth amendment, which especially safeguards the rights of the States, was added in order to appease the element which regarded federal control with great jealousy. The failure to amend the Constitution to any greater extent has not been due to lack of suggestion. More than two thousand amendments have been proposed since the Constitution was ratified, some being unquestionably the product of only individual minds, while others indicated a general trend of popular sentiment.

It is significant to note the fact that not one of the amendments which had anything like popular support has suggested enlarging the reserved powers of the States. All of them have, in some form or other, indicated a desire for a greater degree of federalism. In addition to this, it is also noteworthy that nearly every proposition for this enlargement of federal power has been based upon an effort to secure a betterment of social conditions. This is especially true of recent years. Take for instance the amendment which would give Congress the power to adopt a uniform marriage and divorce law for the entire United States; the amendment authorizing Congress to establish uniform hours of labor in manufactories throughout the United States; and the amendment giving Congress the authority to regulate the traffic in intoxicating liquors.

It is most significant, however, that the amendment which has received the largest degree of popular support is one that strikes directly at the principle of States' rights and is, in other words, an expression of popular sovereignty as against State sovereignty. I refer to the endeavor to secure the election of United States Senators by popular vote. It is hardly necessary to recall the fact that the Senate was designed to be the representative body of the States, wherein each State should have equal representation and therefore equal authority and power. The Senators, it is provided, shall be elected by State Legislatures, an arrangement which, in the minds of the framers of the Constitution, was designed to secure freedom from the possibility of error in the expression of popular will during times of great excitement or clamor.

Nothing is more indicative of the growth of the federal spirit in this country, and the consequent diminution of interest in the sovereignty of the State, than the fact that nearly two-thirds of the State legislatures in the Union have, in response to popular demand, adopted resolutions asking for the calling of a convention to amend the Constitution so as to authorize the election of United States Senators by popular vote. This proposition, if adopted, would strike at one of the fundamental principles upon which this government is founded.

Now, as a matter of fact, there is no immediate danger of a constitutional convention, and no likelihood that any amendment will soon be adopted. The American people have shown themselves particularly averse to tinkering with their sacred charter. But, reasoning from analogy, and appreciating the federalistic trend of the public mind, it is a fair presumption, should a constitutional convention be held, that a document would be evolved which would be more federalistic than the one under which we are now governed. Federal control would be sought and probably obtained in almost innumerable directions. There certainly would be a clause providing for the levying of a federal income tax, while the question of controlling and restricting trusts would be placed beyond the question of unconstitutionality by a definite provision applying to this important subject. The distinctive character now enjoyed by the United States Senate as a body representing the States in their sovereign capacity would disappear; and we would have federal jurisdiction authorized over many subjects which now come solely within the province of the States.

It is barely possible that the tidal wave of federalism might frighten the people into a stricter construction of States' Rights. There is no evidence, however, upon which to base this assumption, nor is it logical to believe that the growth of the federal idea would receive a summary check after flourishing for two centuries and a half.

If we are not to amend the Constitution, and it be unconstitutional and dangerous for the federal authority to be exercised in opposition to the rights of the States, then we must look to the States for a remedy for the evils which admittedly exist. But, are the State legislatures inclined to afford the remedy, and have they the power to do so? It is happily true that since Secretary Root uttered his warning many of the governors, in their messages to their respective legislatures, have indicated that they were awake to the need of upholding the federal Government in certain well-defined directions, particularly in social and charitable reforms.

It is noticeable, also, that Governor Cummins, of Iowa, in his inaugural speech, stated his belief that the failure of the States to bring their legislation into harmony with existing conditions would lead to government usurpation of the States' functions. We find, therefore, that in New York, Massachusetts, and Missouri, the enactment of laws prohibiting the employment of child labor were expressly recommended, while the regulation of State municipal railway affairs is urged by the executives of Wisconsin, Nebraska, Illinois, Michigan, and Massachusetts. The governors of Oregon, Idaho, and Indiana are also among those who asked their legislatures to create new railroad commissions or to increase the powers of those already existing. Governor Pennypacker, of Pennsylvania, advocated uniform divorce laws to be adopted by the various States, a subject also taken up at length by the governors of New Jersey, Massachusetts, Connecticut, and Delaware. Governor Woodruff, of Connecticut, urges a committee to report on a practical employers' liability act, a subject which has already engaged the attention of Congress.

The list of recommendations made by State governors, along the line of subjects suggested to Congress, as proper for federal control, might be almost indefinitely extended. We are still brought face to face, however, with the fact that there is a long and tedious road to travel before unity of legislation can be secured through the legislatures of forty-five States. What impresses me, as it unquestionably impresses the people of the United States, is that a result can be attained almost immediately and effectively by a single enactment by the Congress of the United States; and, realizing this, there is a prevalent feeling that in order to accomplish results it is perfectly justifiable to strain the federal Constitution to the utmost degree. In other words, if federal control is not accepted, the existence of evils, which even the advocates of States' Rights do not deny, may be continued indefinitely.

It is true that there is a difference of opinion on this point. Personally, the writer is and always has been an advocate of the exercise

of the largest degree of rights by the States as against federal control. At the same time, any observer of events and any student of the tendencies of the American people must be wilfully blind not to recognize the fact that the great mass of the people are becoming more and more federalistic in their spirit. We are living to-day in a civilization which is not only complex, but which has brought us face to face with conditions beyond the imagination of the men who framed the Constitution. The fact that Congress promptly responded to a demand for legislation to restrain conspiracy and monopolistic combinations in trade, when the constitutionality of such legislation was by no means determined, indicates its willingness to respond to a popular belief that nothing less than the strong arm of the federal Government, to quote again the words of Chief Justice Marshall, is able to cope successfully with great monopolistic corporations.

Mr. Bryan may be right when he declares that "no assault upon the authority or contraction of the sphere of the State can be justified on the ground that it is necessary for the overthrow of monopolies," and when he asserts that federal remedies should supplement State remedies and should not be substituted for State remedies; but the trouble will be to bring the people to the same point of view. They want action and results; and in the effort to improve social conditions and break down monopolies, they are not likely to split hairs over fine constitutional points concerning the reserved powers of the States.

The situation would seem to be more accurately presented by President Roosevelt, when he says:

> I would rather have the State authorities work out such reforms when possible; but if the State authorities do not do as they should in matters of vital importance to the whole nation . . . then there will be no choice but for the national Government to interfere.

In the nature of things we cannot stand still. We must either progress or retrograde. It is no exaggeration to assert that, in the present condition of the public mind, there will be no retrogression if the backward step lands us in conditions out of which we have evolved ourselves. Who, for instance, would return to the old State banking institutions, with all their uncertainty and danger, which were taxed out of existence by federal enactments, and in the place of which there stands to-day the national banking system which places federal control over the financial operations of the entire country? Who for a moment would favor the effort to break up conspiracy in trade by such feeble enactments as State legislatures might place upon the statute books; and who would consider it possible to regulate the vast railroad interests of the country for the benefit of the people if such regulation were restricted to State authority?

Who will plead for the autonomy of the States if that autonomy is powerless to cope with national evils like the lottery and inadequate quarantine and impure food? Is there a single alleged usurpation of federal power which we, as a nation, would willingly overthrow? Who is willing to rely upon the indifference or incompetency of State legislatures or who believes that these legislatures will act promptly and with uniformity upon necessary measures?

These are the questions which present themselves to those who, like myself, would like to see a curb placed upon federal control, but which, unfortunately, the advocates of States' Rights somehow fail to answer. We must remember, too, that, in the days of Hamilton, federalism was founded on a distrust of the people, while to-day it is an expression of the people against conditions which they and the States are impotent to rectify. Then federalism was not democratic; to-day it is democratic, in the genuine sense of the word.

It is due, also, to the cosmopolitan character of the people. The millions who travel from one end of the land to the other pay no heed to State lines. They are apt, indeed, to regard with a sense of humor the conflict of State laws which makes it illegal at one moment to purchase intoxicating liquors, while a few miles further on the same action is not forbidden. The very protest against this incongruity is a manifestation of the federalistic spirit; and the fact that this spirit is so universally imbued in the popular mind makes the problem all the more difficult of solution.

It being evident that we are not to amend the Constitution or yield to the States any portion of the power obtained and exercised by the federal Government, we may naturally anticipate more laws in the future which, like those already enumerated, will strain the Constitution and will be contested in the Supreme Court of the United States. That body occupies a position in our political economy to-day as important as in the early period of our government. We must rely upon it to steer us safely between Scylla and Charybdis. It will undoubtedly follow the footsteps of Marshall and read into the Constitution much that is not specifically written therein, but which, let us hope, will still be in harmony with the spirit of that immortal document.

With the momentum of federalism which has been evolving for 250 years; with the object lessons which have been presented to the people in the shape of beneficent federal control; and with a popular belief that nothing less than the strong arm of the Government can successfully cope with the problems of our complex civilization, there will be more and more a tendency to obliterate State lines and emphasize the federal character of the Government. Upon the Supreme Court, therefore, a

tremendous responsibility rests; and even though that great tribunal has always enunciated the largest powers for the federal Government, we must rely upon it for proper conservation of the right of the States. Let us indulge the hope that this reliance will not be in vain.

There was little of general political interest in the session of Congress outside of the important question already fully discussed. What is known as the Brownsville incident — the summary discharge of three companies of colored soldiers by the President for alleged participation in a fatal riot — excited some discussion and led to an inquiry into the facts which is still in progress. Among the new enactments was a law to prohibit corporations from making money contributions in connection with political elections, and punishing a violation by a fine of $5,000 or imprisonment. This legislation is the outcome of the revelations as to the amounts paid by corporations to political parties in the past, and will, no doubt, have some effect upon future campaigns.

HENRY LITCHFIELD WEST.

To make or mend the House of Lords has long been the ambition of a certain school of British politicians. The advanced Liberal has regarded the upper chamber as an archaic institution entirely out of keeping with modern requirements and opposed to the best interests of the people, antagonistic to genuine democracy and tending to keep alive class distinctions and hereditary privileges. Ever since England became a genuine democracy, roughly speaking since the passage of Lord John Russell's first reform bill, which marked the beginning of authority centred in the people and deprived the aristocracy of their great power to control Parliament, there has always been an agitation in favor of depriving the hereditary legislators of their few remaining privileges and making the House of Lords a chamber merely to register the will of the Commons. This agitation always gains increased force after a Conservative government has been long in power and is succeeded by a Liberal ministry of advanced views. When in opposition, the Liberals countenance measures which they are not always prepared to enact when given power; but having made them issues, they are forced upon them when they are clothed with responsibility. In England, similar to the United States, men and parties play politics, the result being that Tories swallow a measure proposed by a Tory government; but let a Liberal government propose a similar measure and the Tories will resist it, partly on political grounds and partly because they believe it is an insidious attempt made by "republicans" to deprive them of the rights of their order.

Illustrative of this was the folly of the Irish members in opposing Mr. Wyndham's limited measure of home rule when he was Chief Secretary for Ireland in the last government. The Irish bill could have been put through Parliament at that time; and while it did not give Ireland all that she believed she was entitled to, it would have been at least a step, a long step, in the right direction. But the same measure now proposed by the Liberal government meets with strenuous opposition on the part of the Tories because they fear the Liberals will eventually go much further in the direction of complete home rule and the independence of Ireland than would have been countenanced by their own party. Irish independence, that is the government of Ireland by Irishmen in Dublin,