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OUR CONTINUOUS CONFLICT*

CLARENCE E. MARTIN**

Writing from Paris in September, 1787, to his friend, Monsieur Dumas, one of the French soldiers of our Revolution, Thomas Jefferson, then our representative at the Court of Versailles, said: "Our Federal Convention is likely to sit till October; there is a general disposition through the States to adopt what they shall propose and we may be assured their propositions will be wise, as a more capable assembly never sat in America."

And Jefferson's estimate is history's award. For nearly a century and a half we have lived in the light of their wisdom. The Constitution has become a living organism. President Lowell, of Harvard, one time observed that we had found or rather developed a substitute for a king, and that this substitute was the Constitution of the United States. Admit, if we will, that it was, to a very large extent, a codification of British law and government, coupled with colonial experience for the 150 years preceding, as one writer puts it; yet the contrast is too vivid, the departmental coordination but independence too prominent, to suggest the existence of any desire to copy the British system. The technique of the instrument is strictly American in origin. That it was the result of a series of compromises, is so; for no jury ever tried harder to agree for the good of the commonwealth.

The tendency of the public mind, which produced it was a federalist one, it is true; but that tendency was curbed in the convention by the adherents of the rights of the States. The States proposed to surrender only such essential power as was necessary to accomplish the union desired. The thought was born of the fear of the larger by the smaller States. We owe to the dramatic retirement from the Convention of Luther Martin, of Maryland, and the effect that his withdrawal had upon his fellows, more than to any other happening, the change of the then intended plan, which, if submitted and adopted, would have completely destroyed the

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sovereignty of the States. His strenuous insistence upon the rights of the weaker States caused the revision of the instrument and saved the work of the Convention to posterity. Jefferson's Anas, his political diary, recites that even Washington, stated to him, after its adoption, that he was out of sympathy with the final plan. As submitted, however, it received the support, if it did not meet the complete approval, of the majority of the several schools of political thought then existing. It is fortunate for the future of the country that the opinions of neither the advocates of a complete centralized government, nor those of a weak, confederated one prevailed. The former would not have been accepted by the States; the latter would have been ineffective.

The rights of the States! No new problem confronted the makers of the Constitution. The Continental Congresses were composed of State units. The insistence upon State allegiance had prevented the use of the militia as a dependable unit of the Continental army. With peace, States' rights became a powerful barrier to a material development. State control of finances made the Confederation impossible. Indeed, it is exact to say that the Constitution was born of necessity, not of choice, and that the exercise of State sovereignty, and powers, created a political upheaval, which finally drove the States to form a more perfect union.

The compromise which produced the Constitution, it was hoped, would silence forever the extreme advocates of both schools of political thought. Hardly had the new government been inducted into office than the fight reopened. The conflict began in Washington's cabinet. It has continued ever since. Federal taxation; the Virginia and Kentucky resolutions; the effort of the chieftains of a dying Federalist party to gain control of the State governments of New England as a prerequisite to withdrawal from the Union, known as the New England movement, which reached its climax in the Hartford Convention; the United States Bank; nullification; the war upon the Supreme Court under Marshall:—each was a contest of major historical importance in this continuous conflict, and each for the time held the fate of the nation trembling in the balance. Lastly came the decades of disturbance over slavery, culminating in the Civil
War, when the South dared to do what the Northern leaders had often threatened, but feared to venture—attempt to withdraw from the Union. And until the Civil War, no one section nor any one party for long championed or defended the rights of the States. It was a theory advanced to fit the occasion. New England insisted upon it, when its commerce was affected, during the War of 1812; South Carolina, in the fight over the tariff, eagerly embraced it in 1833; Massachusetts proclaimed that the admission of Texas, in 1848, had no binding force upon it and was an assault upon its rights as a sovereign State; Wisconsin, enraged over the enforcement of the Fugitive Slave Act, by the conviction of its citizens, known as the Booth case, solemnly resolved, in 1859, through its Legislature, that it was a sovereign State and had the right to determine its status in the Union.

Remarkable, too, it is to present day readers, that this latter decision was announced by Chief Justice Roger Brooke Taney, an appointee of Andrew Jackson, who declared, in an opinion said to have been never excelled by Marshall in loftiness of tone, that the Supreme Court was the final arbiter under the Constitution, deciding “the angry and irritating controversies between sovereignties, which in other countries have been determined by the arbitrament of force.”

Interesting, also, as an anti-climax is it, that an Ohio congressman, interpreting public sentiment in his own State, relative to that case, declared:

“The spectacle of a gowned conclave, gravely setting aside statutes and constitutions of States; enforcing powers not granted in the compact, and against the express reservations of the States; with eager zeal reversing the whole current of authority and law, to make universal a local and exceptional despotism; prompting its ministers to mayhem and murder, sure of their illegal shield, never darkened our fathers’ vision. Had a little of what we stupidly suffer been anticipated by them, the Federation would have been an impossibility.”

The war between the States settled for all time but one political question—that the compact made was perpetual. The rights and powers of the States were not surrendered
at Appomatox. But there the dominancy of States' rights was crushed. Legislation during succeeding years has strengthened the position of the Federal government and correspondingly weakened that of the States, until now the position of the States, in our governmental structure, it is contended, is rapidly approaching the status of the departments of France and the counties of England. So-called dual sovereignty is fast becoming a thing of the past, and present day legal writers are beginning to assert that the States have been reduced to administrative districts. If the States are annihilated and the local powers usurped by a general government, our republican form under which this nation has grown great and mighty, will gradually give way to a pure democracy. If that time comes, and we pray it never will, the days of our greatness as a nation will be numbered, and the pen of posterity will place us among the great nations and peoples known only to history.

Proud of the ability of our National Government, with knowledge of its wealth and its capacity to deal effectively, we have heaped upon it tasks to undertake, work to accomplish, unthought of in the days when the nation was young. Hamilton never conceived the present strength of the National Government, under the most liberal construction given the fundamental instrument. The tenth amendment has been abandoned in practice, and State legislation is fast becoming a mere ratification of Federal interference. To such an extent has this practice of Federal intermeddling in matters of local concern become—as one Congressman put it, from the advancement and control of education to that of hunting and fishing—that the system of government being formulated as a result is making the Federal establishment more imperial than the German system we so heartily condemned and materially aided in destroying.

The change has been too apparent, too real, to escape the notice of the most casual observer of political affairs. Some legislators suggest that the change, if not complete, is too far on its way to be checked. Others see the present as the mere beginning of the transitory stage. The average citizen now looks to the National Government to encourage all good; to curb, correct or stop all evil. To many of us, unconsciously, our National Government is becoming patriarchal in fact, if
not in form.

The functions of the National Government are no longer exclusively or primarily negative; they are constructive. Through the tariff and other similar legislation, business interjected itself into government in past decades to such an extent that government has interjected itself into business, and business has become so interwoven with government that there are few branches of either, in the actions of which the other is not concerned.

A Federal police power has been born as a result of this union; it now affects our every day life. It is towering in its plan and purpose. It permits no intrusions into its realm, although it seeks and welcomes the assistance of local powers to make it strong and effective. And Commerce is its name.

_Gibbons v. Ogden,_¹ settled the exclusive right of Congress to regulate interstate commerce. Indeed, it has been urged,² that had Congress followed this decision to its fullest extent, slavery could have been abolished by prohibiting the slave trade and excluding slaves from the domain of interstate commerce. Exceptional as this proposal may seem today, the reasoning is sound, for the Court upheld the Webb-Kenyon Act, which prohibited the transportation of liquor into a dry State,³ and the Read Amendment, which prohibited the transportation of liquor into a dry State, even though the State—West Virginia—permitted a quart to be transported for personal use.⁴

Prior to 1887, when the Interstate Commerce Act was passed, the Supreme Court was determining what the States could not do under the commerce clause; since it has been affirmatively deciding what Congress may do thereunder. Under this clause the activities of monopolistic corporations are restricted, lotteries have been prohibited, food and drugs are examined and branded, meat is inspected, quarantines are enforced, standard packages for fruit have been established, trade is regulated, grain exchanges are directed, the hours and conditions of interstate labor are determined,

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¹ _1 Wheat. 1_ (1824).
² _2 Warren's Sup. Ct. 71 et seq._
³ _Clark Distilling Co. v. Western Maryland R. Co_, 242 U. S. 311, 61 L. ed. 325 (1917).
liability for injury to employees is ascertained, unfair methods of competition in commerce is investigated, and personal morals are supervised. All of these subjects were formerly within the supposed exclusive scope of the police powers of the States. Few subjects of legislation affecting State rights have been attempted that Congress has not assumed the right to act under the commerce clause.

And the Federal Courts have been busy in consequence. Challenge of Congressional action has had judicial approval. And judicial approval has been the basis of further legislative action.

The Supreme Court has opened the way for additional legislation under the commerce clause, which, if exercised, will curb the rights of the States to regulate effectively public utilities. It has been decided that the direct transmission of natural gas from the source of supply outside the State to local consumers in municipalities within the State is interstate commerce; but that until Congress acts under its superior authority by regulating the subject matter, the States may do so without offending against the commerce clause. The purchase at the State line does not rob it of its interstate character. The transmission of electric current from one State to another is interstate commerce, although the custody and title are transferred from vendor to purchaser at the State boundary. And because of State decisions interpreting State compensation statutes relative to interstate employees, these utilities will be driven to seek Federal protection in interstate business. But no other logical interpretations could have been made by the Supreme Court, nor can criticism be directed to the State tribunals, when acting in accord with binding authority.

Bus transportation has not escaped. While a State may rightfully prescribe uniform regulations for public safety and order, and may exercise control over its highways, although the user is exclusively engaged in interstate commerce, and require the user to pay the taxes levied of others making like use; yet it cannot prohibit the use of the roads by common carriers for hire, over regular routes,

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when engaged in interstate transportation, when even though existing lines of transportation will be prejudiced.

As a result of these decisions there has passed the Senate, and there is now pending before a committee of the House, a regulatory measure, which constitutes the public service commissions of the respective States the tribunal to apply the contemplated statute, so far as traffic between adjoining States is concerned. It is admitted that this is a delegation of Federal power to a State commission, but the author says that this is a test case statute. While the proposed legislation is a temporary measure, if passed and tested, the judicial determination will be awaited with interest. Upon it may depend the future legislative development of the commerce clause. It may also form the precedent for further Federal invasion, not only of States' rights, but of State administrative agencies, as well.

Under the commerce clause, the Federal Power Commission is functioning. By its right to control the waters of non-navigable streams, the damming of which the Commission determines may effect navigable waters into which the non-navigable stream flows, the States have lost complete control over all the useful waters within their boundaries. This means that eighty-five per cent of all of the waters within the domains of the United States are under the jurisdiction of the Commission, whether navigable or not. And the rights of Congress to control the waters of non-navigable streams was decided by the Supreme Court long before the Federal Power Commission Act was in contemplation.

Yesterday the aeroplane was an experiment; today it is yet a novelty. Tomorrow, it is confidently believed, it will be an instrument of commerce. So anticipating, Congress passed the Air Commerce Act of 1926, under which the transportation of passengers or freight, for hire, between States, is declared to be interstate commerce. Crude, though its authors admit it must be at this time, it assumes broad regulatory powers over State air space. Lawyers are discussing and will watch with interest the development of this new necessary function assumed, particularly in view

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of the vested right of the landowner to the air above him, held by actual grant from or guaranteed under the laws of the several States, which makes every passage of an air machine a trespass, until the State has taken the air by the proper exercise of the right of eminent domain. Or shall the Courts be compelled to announce a new principle and decide that although Congress, under the Act, has assumed jurisdiction, as against foreign nations, to all the air above our territory, that the air to the citizens of the several States, at least like the sea, is free, subject only to essential regulations as to flying and landing? If so, shall the destruction of or injury to property caused by a falling plane, render nugatory the laws of the States, and transform an act which would be a tort, if committed on the ground, into a happening *damnum absque injuria*, if done from the air? Minute discussion has no place here. The right exercised, however, you will admit, offers opportunities for invasion not only of State powers, but destruction of State constitutional guarantees to citizens, as well.

I fear to carry that thought into the law pertaining to transmission by radio. Verily we have entered a new field of jurisprudence.

The power of Congress to fix rates for oil and gas transported in pipe lines, telephone and telegraph messages and electric power transmitted from one State to the other, and interstate commerce carried on by bus lines, is unquestioned. Couple this right, when and if completely exercised, with the powers of the Federal Courts under the Fourteenth Amendment, and the influence upon intrastate rates will be tremendous. Public service commissions will become largely a rubber stamp, so far as rates are concerned. This statement has peculiar application to West Virginia and to Maryland. State control, then, over the larger activities of public utilities will be a thing of the past.

While it has been held that the intent to supersede the State police power will not be implied unless the Act of Congress, fairly interpreted, is in actual conflict with the laws of the State, and that until Congress acts, the power of the States is paramount; yet, once exercised, the right

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of Congress is exclusive, and its treatment of the subject, supreme, even though the rights of the States are invaded.

The makers of the Constitution believed that the commerce clause should receive strict construction. Washington, while President, told Jefferson,\(^\text{13}\) that he was in favor of a two-thirds vote by Congress on all matters pertaining to navigation, which today means commerce. Madison, in the Federalist, said of this clause that "no apprehensions are entertained." Its insertion, however, was a then present compelling one. States were adopting local protective commercial and tariff laws. Unless commerce could move free and untrammelled, there could be no real union.

Properly applied, it has been the unremitting enemy of special favor, the comforter of the small trader, the friend of the energetic, the stabilizer of business.

Under a liberal construction, given it repeatedly by Congress, it has encroached upon the police powers of the States and has produced, in some instances, actual conflicts of authority.

It may be suggested that the Supreme Court has repeatedly upheld this legislative encroachment. Undoubtedly so; but although Congress has been within the letter, its intrusions have been without the spirit of the Constitution. Because it was given right to exercise certain powers, it was never presumed that Congress had the duty to use them to an extent beyond the essential necessity to carry out the general scheme of National Government. To urge otherwise would be to assume that we should always be at war, because Congress has the right to declare war.

We are now being treated to another awakening. The Constitution contains what is known as a "general welfare" clause. The words appear first in the preamble, but there they are not "the source of any substantive power conferred on the Government of the United States or on any of its departments."\(^\text{14}\) They again appear in Section 8 of Article 1, when Congress is given power "to pay the debts and provide for the common defense and general welfare of the United States."

One school of political thought contends that taxes may

\(^{13}\) Jefferson's Anas, September 30th, 1792.

\(^{14}\) Harlan, J., in Jackson v. Massachusetts, 197 U. S. 11, 22, 49 L. ed. 643, 649
be levied only for the enumerated purposes which follow in Section 8. It is the contention of the other class that, under this clause, Congress is the judge of what is general welfare, and, having gathered the money in the shape of taxes, may appropriate as it deems best for that general welfare.

The historical setting of this phrase is interesting. Several taxation clauses were introduced and referred. This clause originated in committee. (See Elliott's Debates). It was supposed to be the taxation clause of the Constitution. Madison in the Federalist,\(^\text{15}\) says that the clause is intended only to grant power for the raising of money to carry out the succeeding enumerated powers. "But what would have been the thought of the assembly," says he, "If, attaching themselves to these general expressions and disregarding the specifications, which ascertain and limit their purport, they had exercised an unlimited power of providing for our defense and general welfare?"

When the internal improvement bill was first passed in 1817, it was urged that Congress had the power to legislate under the general welfare clause. Declaring that such interpretation would have the effect of subjecting both the Constitution and the laws of the several States to the legislative whim of Congress, Madison vetoed and returned the bill. In his veto message, among other things, he said:

"Such a view of the Constitution would have the effect of excluding the judicial authority of the United States from its participating in guarding the boundary between the legislative powers of the general and the State governments, inasmuch as questions relating to the general welfare, being questions of policy and expediency are unsusceptible of judicial cognizance and decision."

Monroe vetoed a similar act in 1822, for the same reason. Before he did so, it might be interesting to note that he secured from the justices of the Supreme Court an unofficial view of the constitutionality of the measure.\(^\text{16}\) They suggested to him that the post road provision gave Congress requisite power.

Hamilton, however, was of opinion that "the only quali-
fication of the generality of the phrase in question which seems to be admissible is this: that the object to which an appropriation of money is to be made must be general not local."

Mr. Justice Story, in his great work on the Constitution, seems to agree with Madison’s interpretation. As late as 1898, a learned Federal Judge, relying upon Story’s construction, concluded that the general welfare clause contains no grant of power in itself.

But he overlooked two cases, both decided in 1896. In one of the cases, the constitutionality of a statute passed by Congress, having for its purpose the condemnation of the land on the Gettysburg battlefield, for a public park, was questioned. The case was argued for the United States by Solicitor General Conrad, one of the most brilliant later day lawyers of the Virginia Bar. It was urged that if the proposed taking of land by and for the Government alone could have or be fairly thought by Congress to have, any possible direct and immediate relation to any of the subjects of governmental action which are committed to Congress, it was not open to the Courts to question the necessity or propriety of the appropriation. In other words, contrary to the universal rule, because Congress is acting, that body and not the Courts is the judge of the public use or purpose to which the land is to be put, because Congress is presumably acting for the general welfare. Announcing the opinion, Mr. Justice Peckman, said in part:

"Congress has power to declare war and to create and equip armies and navies. It has the great power of taxation to be exercised for the common defense and general welfare. Having such powers, it has such other and implied ones as are necessary and appropriate for the purpose of carrying the powers expressly given into effect. Any act of Congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country and to quicken and strengthen his motives to defend them, and which is germane to and ultimately connected with and appropriate to the exercise of one or all of the powers granted by Congress must be valid. The proposed use comes within such description."

17 §§ 462, 497, 906.  
"No narrow view of the character of the proposed use should be taken. Its national character and importance we think, are plain. The power to condemn for this purpose need not be plainly and unmistakably deduced from any one of the particularly specified powers. Any number of those powers may be grouped together, and an inference from them all may be drawn that the power claimed has been conferred."

No unbiased mind may study this opinion without coming to one conclusion—that it was because Congress was acting under the several powers grouped together—under the general welfare clause—that it had the requisite power.

This decision in January, 1896, was followed in April, by United States v. Realty Company. 2 Here the Government was objecting to the appropriation, because, it contended, Congress could only appropriate public money to pay debts, and the appropriation covered by the act attacked was not to pay a debt or for purposes of general welfare. Saying that it was unnecessary to pass upon this question as to whether Congress may appropriate money for what it may choose for purposes of general welfare, Mr. Justice Peckman, however, said:

"Having power to raise money for that purpose" (to pay debts) "it of course follows that it has power when the money is raised to appropriate it to the same object. What are the debts of the United States within the meaning of this constitutional provision? * * * The term 'debts' includes those debts or claims which rest upon a merely equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual. * * * Their recognition depends solely upon Congress, and whether it will recognize claims thus founded must be left to the discretion of that body."

Hamilton's view has prevailed. The power claimed by him for the Federal Government, under this clause, has been secured by favorable judicial interpretation. The general welfare clause has a meaning all its own, not confined to the particular powers which follow, but, inclusive of them, it goes beyond and takes in those subjects of legislation which Congress in its wisdom may determine is for the welfare of all of the people generally.

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It is apparent, in the language of United States v. Gettysburg,21 "no narrow view of the character of the proposed use" has been taken. The fathers have been clearly reversed. Congress has taken advantage of its opportunities. So-called debts are being contracted in the interest of general welfare and the tax gathering clause is responsible. And Congress has used this right to pay debts (?) in the interests of general welfare by invading the powers of the States.

So longer need we discuss the right of appropriation for internal improvements under the post road and other clauses. This discussion has long since grown moot, abstract and obsolete. We are interested now in grant-in-aid statutes.

With all due respect, Congress frequently offended against the reserved powers in the interests of agriculture, schools, roads and canals. It was done, however, by the sale of public lands and not by direct appropriation. The Morrill Act, first passed in 1862, for the encouragement of agricultural colleges, by amendment, developed into our first real grant-in-aid law.

The scheme is simple. Congress first passes an act with sufficient appropriation to encourage the object. Then, when and if a State passes an act containing stated provisions prescribed by Congress in its Act and makes an appropriation required by Congress to be made, a certain, usually the same, amount of Federal money becomes available. While the State is not compelled to accept the aid and may give to the people of other States its share of the appropriated money gathered from all, the State is in fact coerced, surrenders its sovereign power to legislate as to the subject, the draft proposed by Congress is adopted, responsibility of State legislatures to the people for law enactment is removed, control of State legislation is secured, regulation of the manner of distribution is obtained, State agencies become Federal agencies, and the Federal Government is supreme. Each of these laws appears to leave enforcement to the States without doing so.

It is said that these enactments are due to an expansion of the social functions of government; that State perform-

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21 Supra, n. 20.
ance would be incompetent or incomplete; that untold effort must be expended to secure the passage of similar legislation by forty-eight different States, besides the delay and want of uniformity; that the National Government might not be able to perform the object directly, and un-supervised efforts would result in abuses; that the aid is really to projects under local supervision, and that, if attempted alone, the very act might be duplicated by the States. It is urged, too, that the method divides the burden too heavy for the States to bear; insures a certain national minimum standard and relatively economical expenditure; affords a clearing house for information upon the subject treated; solves the constitutional objections; serves to integrate the units affected within the State and strengthens State control. Beginning with the protection of forests in 1911, several of these laws have been passed and others are pending. They extend aid to extension work in agriculture, good roads, militia, vocation, social diseases and mother welfare. The Maternity Act was recently repealed to take effect on June 30, 1929. Under no stretch of the imagination can the last three statutes come under the implied powers of Congress. At the present time, the appropriations made by Congress under them amount to nearly $200,000,000 yearly.

Against these arguments made in favor of this character of statutes, it is contended, in addition to the invasion of the reserved powers of the States, the laws, in practice, lead to plundering of the National Treasury, are an incentive to wasteful and increased local appropriations, and result in increased taxation, both Federal and local, under the baseless theory that the local governing body is getting something for nothing. Because of this fallacy, it is possible to organize a local public sentiment in their favor, with resulting Congressional pressure, against which resistance is almost impossible.

In enforcing them, we have the anomalous feature of State officers on Federal pay-rolls and Federal officers on State pay-rolls. The Federal and State governments are entering into contractual relations with each other—the whole theory of our scheme of government is set at naught. These and other like laws are responsible for so-called bur-
eau government in Washington. Under a fair interpretation of the Constitution, it is insisted, were the question other than political, most of the bureaus in the Departments of Interior, Agriculture, Commerce and Labor would be abolished. Of these bureaus, fifty-six regulate or control police powers formerly within the exclusive jurisdiction of the States. The border line has been plainly crossed. The Federal treasury dole is the bribe accepted. Congress and the State governments are jointly responsible.

And the Supreme Court has held that it is powerless to prevent this invasion, even in a suit brought by a State, because the question involved is political, not judicial, in character. Madison, with prophetic vision, urged, you will recall, that if statutes could be passed under the general welfare clause of the Constitution that the judiciary would be unable to guard the boundary between the legislative powers of the General and State governments, "inasmuch as questions of policy and expediency are unsusceptible of judicial cognizance and decision." Madison was right. No State may interfere. The judicial arm, for once, is paralyzed. Congress, alone, is supreme.

When the power desired is plainly without the scope of the National grants, or if Congressional action is taken and judicial concurrence is wanting, constitutional amendment is resorted to. A study of these amendments offered at various times is a history of American politics. Nearly thirty-five hundred resolutions offering amendments have been introduced. Most all of them reflect some problem then presently urgent.

For instance, the late Senator Hoar, as a member of the House, among many others, offered an amendment in the early nineties requiring postmasters to be elected. During the 67th Congress, when the price of coal was high and labor troubles existent, Mr. Volstead introduced a resolution to submit an amendment regulating the production of and commerce in coal, oil and gas. Amendments have been suggested covering every conceivable thought, from one granting Congress the power to buy and sell agricultural land, and thus become a real estate broker, to one changing the name of the country!

It was once thought to be an Herculean effort to amend the Constitution. Yet in recent years amending the National Constitution has become an easier task than changing the local organic law. In quick succession, the States have granted to the National Government the right to levy direct income taxes; agreed that senators should be elected by direct vote; agreed to abolish the liquor traffic and gave to Congress concurrent power with the State to enforce prohibition; and agreed that women should have the right to vote. In this discussion we are interested in referring to them as evidence of this growing national tendency. Legislation passed in pursuance to the provisions of some of them, however, has brought strongly to mind the convincing thought that local control of police powers is certainly the best governmental policy.

It is a serious proposal, one would imagine, to suggest a change in our fundamental law. Nevertheless during the 68th Congress, one hundred and six joint resolutions suggesting amendments were introduced. Many of them were intended to limit the right of or take from the Supreme Court the power to pass upon Acts of Congress. Two required Congress to provide for equal rights of men and women; six gave the National Government the right to levy taxes on State securities; seven gave Congress the power to provide uniform laws on marriage and divorce; twenty-eight related to child labor—all aimed at destruction of States’ rights. Several provided for the election of President and Vice-President by popular vote of all the people, thus destroying the last vestige of State sovereignty. Only the so-called Child Labor Amendment was submitted and its defeat followed.

Probably because of the defeat of the last named amendment, only fifty-two amendments were proposed in the 69th Congress, or less than half the number offered during the preceding Congress. Twelve of these related to the election and representation of members of Congress; two provided for equal rights of men and women; two gave Congress the right to tax securities of States; four provided for Congressional supervision of marriage and divorce; one only for direct election of President and Vice-President; and one covered child labor.
However, the number was large enough to offer overwhelming, positive proof that some movement toward destruction of State governmental powers is under way. It is interesting to note, though, that four of the amendments offered provided plans making it far more difficult to amend the Constitution, and six of them suggested either amendment or repeal of the Eighteenth Amendment.

Observance of the subjects covered is evidence that in some instances sentimental emotionalism is being substituted for the realm of reason. For instance, if the General Government is given jurisdiction of marriage and divorce, there must of necessity follow the settlement of the personal and property rights of the persons concerned—another incidental power, making for Federal invasion. For it is a fundamental principle of Constitutional construction, as we all know, that what is implied is as much a part of the instrument as what is expressed. If given jurisdiction of one, why not the other domestic relations? Where then the dividing line?

The power to tax securities of States and their subdivisions is earnestly urged, because the holders of these securities escape payment of taxes, and, if imposed, taxes would discourage their issue. The power to tax does carry the power to prevent their issue. If this right were granted, the increased interest charged will demand that the National Government be called upon to finance the necessary State governmental projects. It is then the plan of the latter, or, by complete regulation, will be made so.

So with the other suggested amendments. The adoption of any of them granting additional power disarranges and tends to change our system of government. Each of them brings incidental powers in its train: And the exercise of incidental powers creates further Federal invasion and State submission.

The Constitution builders erected a simple structure. They feared for it, when built; they prayed for its preservation, as we do today. They knew, as we do, that it would be the constant object of attack, as well as the cloak for designing and unpatriotic people. They knew, too, that the Constitution must expand with the country; for they

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recognized that when it ceased to meet the demand for which it was created, then the government erected by it must perish. They builded for an agricultural people; not an industrial one, for even farming has become an industry. They submitted the Constitution in an age when the stage coach was developing; not one of mechanics. They lived by candle; not by electricity. Yet so simply constructed is it, so flexible to changing conditions of people and territory, so admirably fitted for national government, so careful of the reserved powers of the States, that a nation of three millions of people has developed, under its protecting influence, to one of over one hundred millions, scattered over a vast expanse of territory—prosperous, strong, happy!

But the man on the street, deeply and intensely imbued with a spirit of loyalty to his State and to the Republic, who seeks social betterment and political reform, knows little of the niceties of our Constitution and of the respective rights that each sovereignty may exercise. He seeks a remedy, even if he must first create the right. In this search for relief he becomes the legitimate prey sometimes of men of good intentions, but, more frequently, scheming and ambitious reformers. Over five hundred different organizations, many whose purposes are entirely opposed to our governmental scheme, offering solution of some problem and seeking requisite Congressional action, now center their activities in Washington. A greater or less number of these organizations are at his command.

And here lies the present day cause for this conflict. The States are what we make them. The State governments will be just as strong as the men behind them. If one cannot buy an article needed at one place nearby and is compelled to go to another, where courteous treatment is accorded, he is quite likely to do his business there in the future. Criticize it as you like, if one cannot secure the necessary action or protection from the local government, he will appeal elsewhere.

This trend away from the original American ideal of local self government is not without a reason, shocking to our republican sensibilities though that admission may be. Lack of knowledge of government, lack of interest in its activities, inaction upon the part of some local officials to
correct existing evils and maintain inviolate guaranteed personal and property rights, inability of others to ade-
quately and properly perform the duties of high offices to
which they have been elected, maladministration of the
criminal law, legislative neglect in many States—any of
these, coupled with the encouragement from other quar-
ters to seek help from an ever-willing and more effective
central government, have found reflection in misguided
Congressional action.

This movement toward centralization by exterminating
the reserved powers of the States is crystalizing into a
National policy and is resulting in the development of an
unwritten Constitution or basis of government entirely at
variance with the spirit of the written one. Begun just
after the Civil War, this centralizing tendency evolved into
a so-called progressive movement less than two decades
ago, and it has grown to such proportions that the advoca-
cy of any theory to correct public ills must bear its stamp.
Politicians have been quick to take advantage of it, so-
called big business uses it when convenient, social welfare
workers thrive upon it, legislative combines have been
formed under its protection; until to question the efficacy,
appropriateness or purpose of any measure proposed in its
name, is to become a reactionary and the enemy of matters
substantial in the body politic. Commenced in the proper
spirit, and used frequently for righteous ends, nevertheless,
it has grown to be the refuge of the radical, the citadel of
the socialist, the hope of the communist.

Hand in hand with this malignant tendency walks gov-
ernmental extravagance, while corruption stalks in the
rear. When the reserved powers of the States are gone,
this will be a government administered from the top down,
whatever its form. Undoubtedly this gradual demolition of
our dual form of government and its direful consequences
has not become thoroughly manifest in the American peo-
ple.

Amid the vicissitudes and fortunes of our political life for
a century and a half, members of the bar have been the
leaders of constructive thought and action in the nation.
There should be, then, an individual sense of responsibility
and a stern determination to stem this tide of destruction.
A recognition of compelling duty urges us to sound the note of warning. Again must come at least benevolent admiration for that system of government, so long responsible for our tranquility at home and greatness abroad. Again must come that respect for local government that caused Charles Carroll of Carrollton to leave the United States Senate to assume what to him was the higher honor of representing his county in the Senate of Maryland; and the same feeling that prompted John Jay, the first occupant of the high and exalted position of Chief Justice of the Supreme Court of the United States to resign that office and accept the Governorship of the State of New York. Again must come a recognition of that primary principle, so essential to the success of stable, substantial government: that the performance of authority be placed where it belongs, and that the dependable agency be held responsible for its proper exercise.

When that time comes, the centralizing tendency will cease, the commerce clause will assume its proper function, and “general welfare” will be relegated to the storeroom of ancient heirlooms.