THE INTERNAL AND EXTERNAL POWERS OF THE NATIONAL GOVERNMENT.

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FROM the formation of the Union to the present day differences of opinion, more or less serious, and more or less acrimonious, have existed concerning the character and authority of the government of the United States, and although a century and a quarter has elapsed since the adoption of the Constitution, and hundreds of decisions have been rendered, and hundreds of books and articles have been written in the effort to elucidate the matter, we are still far from any common agreement respecting many important phases of the subject. That this government is one of *limited* powers, and that absolute power resides nowhere except in the people, no one whose judgment is of any value has ever seriously denied, but as to the nature and extent of the limitation there has always prevailed and there still prevails much diversity of opinion. At one extreme of the controversy have been those who asserted that the government possessed only such powers as were *expressly* conferred by the Constitution strictly construed, and at the other, those who have insisted that the "general welfare" clause, instead of being a limitation upon the taxing power—which it plainly is—constitutes a substantive grant of practically unlimited power. Between those who, upon the one extreme, would put the government of the United States in a constitutional strait-jacket, and those who, on the other hand, would turn it adrift upon a boundless sea of unrestricted power, all varieties and shades of opinion are to be found.

I.

Much of the confusion has resulted from a failure to distinguish

between our *internal* and our *external* relations—a failure to recognize the difference which, from the structure and character of the American dual political system, must of necessity exist between the Federal powers of the general government, which are exerted in its dealings with the several states and their people, and the national powers which are exerted in its dealings with the outside world. Among ourselves we are many governments and many peoples—to others we are one government and one people. "Toward foreign powers the country has no seam in its garment; it exists in absolute unity as a Nation, and with full and undisputed national resources" (Bancroft—"History of the Constitution").

This difference is apparent not only with reference to the powers which apply exclusively to our foreign relations, but also to certain powers which may be brought into operation both externally and internally. For example, the Constitution confers upon Congress the authority "to regulate commerce with foreign nations, and among the several states," etc. The same *language,* therefore, confers the power to regulate commerce with foreign nations and among the several states, but the *objects* upon which the language operates are different; hence, while the power in the two cases is identical in *terms,* it may be quite different in *scope* and *degree.* The general government in dealing with foreign nations, in its national capacity may entirely prohibit the importation of all commodities, but in dealing with the several states in its Federal capacity it can exercise no such degree of power over transportation from one state to another. This distinction is overlooked or ignored by those advocates of the child labor law (which seeks to deny transportation to goods manufactured in whole or in part by child labor) when they assert that because Congress has prohibited the importation of convict-made goods from foreign countries, it may likewise prohibit the transportation of goods among the several states whenever it disapproves of the way in which such goods originate.

By the Tenth Amendment to the Constitution all powers not delegated to the United States nor prohibited to the States are reserved to the several States or to the people. But the operations of the State governments are confined to their own boundaries, hence, so far as they are concerned, this reservation can have no reference to any power to be exercised externally. The

result is that as to all domestic matters, certain specified powers are vested in the general government and all others in the various State governments, unless prohibited, in which case they are reserved to the people; while as to foreign matters (with which the States are not competent to deal) all powers must be vested in the general government or reserved to the people. There is, therefore, a very radical difference, in the consequential effect, between withholding from the general government a particular power to deal with internal matters, and withholding authority in a given case over external affairs. In the former, the result of denying a particular power to the general government is not to wholly inhibit its exercise, but, unless affirmatively forbidden, to permit it to be exercised by the States severally. Hence, as the powers of the general government are diminished those of the several State governments are extended. Such powers are not lost, they are only distributed. But the consequence of denying to the general government any specified power over *external* affairs is to preclude its exercise by governmental agency altogether. However beneficial, however necessary, however imperative for the common defence or the general welfare the exercise of such a power may be, *if the general government is prevented from acting, no action can be taken at all.*

It is clear from a consideration of the events leading up to and surrounding the adoption of the Constitution that the primary purpose of the specific enumeration of the powers of the general government over internal matters was to preclude any encroachment of that government upon those powers which it was deemed the State governments should exclusively possess. It was recognized that every power exercised by the general government—which the States were severally competent to exercise—reduced the aggregate of the normal State powers. The effect of the enumeration is, therefore, quite as much to *affirm* the possession of these unenumerated powers to the several States, as it is to *deny* them to the general government. Over its internal affairs the State government possesses every power not delegated to the general government, or prohibited by the Constitution of the United States or the State Constitution. It will, therefore, be seen that, in this way, every power which any government in the world possesses over *its internal* affairs, is vested either in the *United* States or in the *several* States, unless affirmatively pro-

hibited. Thus every necessary governmental power of this class may be exercised by one agency or the other, and none is lost or held in abeyance by the mere failure, either by oversight or lack of foresight, to grant it affirmatively. Is it not reasonable to conclude that it was likewise within the contemplation of the framers of the Constitution that every necessary and proper power possessed by foreign governments over their *external* affairs should be exercised by the Government of the United States over our external affairs? The fear which was voiced by those who were anxious to limit the powers of the general government was based on their anxiety to preserve the powers of the several States. They were anxious to keep for the people of each State in the fullest measure their right of local self-government, but there was not shown anywhere a disposition to curtail the power of the National government in its external relations. On the contrary, there was clearly manifested a desire to make such power, in the words of the Annapolis recommendation, "adequate to the exigencies of the Union." The Declaration of Independence asserted it when that great instrument declared that the *United* Colonies as free and independent States (that is, as *United* States, not as *separate* States) "have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and *to do all other Acts and Things which Independent States may of right do.*"

And so national sovereignity inhered in the United States from the beginning. Neither the Colonies nor the States which succeeded them ever separately exercised authority over foreign affairs. Prior to the Revolution the Colonies were independent of each other, but all owed common allegiance to the Crown of Great Britain. They were invested with and exercised in subordination to the Crown certain governmental functions of a purely local and internal character, but so far as foreign relations were concerned the Imperial Government exercised plenary authority. When they severed their connection with Great Britain they did not do so as *separate* Colonies, but as the *United* States of America, and they declared not the *several* Colonies, but the *United* Colonies to be free and independent States—not New York, or Georgia, or South Carolina severally—but all the Colonies in their *united and collective capacity.* This declaration was an assertion of, and constituted the first step toward, nationality. Unitedly they fought the War of the Revolution, and

when success made their declaration an accomplished fact they became in the family of nations not *thirteen* independent sovereignties, but *one sovereign Nation* under the name of the United States of America; and it was this Nation, not the States severally, which was recognized by the governments of the world, and it was to this Nation that all the powers of external sovereignity passed from the Kingdom of Great Britain. These powers were never delegated by the States; they were never possessed by the States, and the States could not delegate something which they did not have. During the period of the Confederation this cardinal fact was to a certain extent obscured, but deductions drawn from the history of that period are of doubtful utility. It was a time of confusion and uncertainty, when the Nation was partially submerged in the dim struggle of the people toward a realization of their own political status. This realization came with the Constitution. But even under the Confederation there were great men, who, seeing through and beyond the mists of local feeling and State prejudice proclaimed the sovereignity of the Nation. Among them was James Wilson, a signer of the Declaration of Independence, one of the framers of the Constitution, a Justice of the Supreme Court of the United States, and who, speaking of the power of Congress under the Articles of the Confederation to incorporate the Bank of North America, said:

"The United States have general rights, general powers, and general obligations, not derived from any particular states, nor from all the particular states, taken separately; but resulting from the union of the whole. . . ."

"To many purposes, the United States are to be considered as one undivided, independent nation; and as possessed of all the rights, and powers, and properties, by the law of nations incident to such."

"Whenever an object occurs, to the direction of which no particular state is competent, the management of it must, of necessity, belong to the United States in Congress assembled. There are many objects of this extended nature. . . ."

"The act of independence was made before the articles of confederation. This act declares that 'these *United Colonies*' (not enumerating them separately) 'are free and independent states; and that, as free and independent states *they* have full power to

do *all* acts and things which independent states may, of right, do.'"

"The confederation was not intended to weaken or abridge the powers and rights to which the United States were previously entitled. It was not intended to transfer any of those powers or rights to the particular states, or any of them. If, therefore, the power now in question was vested in the United States before the confederation, it continues vested in them still. The confederation clothed the United States with many, though, perhaps, not with sufficient powers; but of none did it disrobe them."

In recognition of the fact that territory belonging to certain of the Colonies had been wrested from Great Britain by the combined efforts of all, this territory was ceded to the United States. This, except as to North Carolina and Georgia, was under the Articles of Confederation and before the Constitution. The Articles of Confederation nowhere recognize the right of the United States to either acquire or govern territory, yet the United States acquired and governed this territory. It could only have been upon the theory that such power resulted from the very fact of nationality.

That all necessary power over external affairs should be vested in the National Government was clearly within the contemplation of the framers of the Constitution. The first paragraph of Mr. Randolph's proposed plan was to the effect that the Articles of Confederation ought to be enlarged so as to accomplish the objects of their institution, namely: "the common defence, security of liberty, and general welfare," and the sixth paragraph declared that the National Legislature "ought to be empowered to enjoy the legislative rights vested in Congress by the Confederation, and, moreover, to legislate in *all* cases to which the *separate* States are *incompetent,* or in which the harmony of the United States will be interrupted by the exercise of individual legislation" (Madison Papers, 5 Elliott's Debates, p. 127). After some discussion this latter paragraph was adopted,* and in this form it was reported to the Convention from the Committee of the Whole.† In the Convention Mr. Sherman proposed to amend it by substituting the words "to make laws binding on the people of the United States in all

* *Ibid.* 139.

† *Ibid.* 190.

cases which may concern the common interests of the Union; but not to interfere with the government of the individual states in matters of internal police which respect the government of such States only, and wherein the general welfare of the United States is not concerned." But this was rejected. Finally, on motion of Mr. Bedford, it was amended so as to read, "and moreover to legislate in all cases for the general interests of the Union, and also in those to which the states are severally incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation," and in this form it was referred to the Committee of Detail (the word "separately" being substituted for the word "severally") as one of the resolutions *to govern them in the preparation of the Constitution* to be finally submitted to the Convention. It will be seen, therefore, that it was the unanimous opinion of the framers' convention that power should be conferred by the Constitution upon Congress to legislate in *all cases to which the States were severally incompetent.* It does not appear that the members of this convention at any time changed their opinions, and it, therefore, must be assumed that in the judgment of these men who framed the Constitution such power was conferred by that instrument. The declared purpose of the Constitution as stated in the Preamble is "to form a more perfect Union, establish Justice, insure domestic Tranquillity, *provide for the common defence, promote the general welfare,* and secure the Blessings of Liberty to ourselves and our posterity." While it is true that the Preamble cannot be construed as a substantive grant of power, it is valuable as reflecting light upon the powers granted, and the meaning and intent of those who framed and adopted the Constitution. In other words, the Preamble states the ultimate objects to be attained by the establishment of the Constitution, and, among them, to "provide for the common defence and promote the general welfare." These are the *ends* to be attained, the powers conferred upon the government are the *means;* but always the end is more important than the means. With regard to *domestic* matters, if the power is denied to the National Government, the *end* can generally still be attained through the State governments, but with regard to *external* matters, the *end* is wholly denied when the power of realizing it is withheld from the National government. The

powers of government must be commensurate with the *objects* of government, else only a semi-government has been created. It is clear that the powers of government over all internal matters under the Constitution, which in effect distributes these powers between the Nation and the States, are completely commensurate. Did the founders intend that governmental power over *internal* affairs should be *adequate* and over *external* affairs *inadequate?* Did the framers of the Constitution intend that *complete* governmental authority should exist somewhere for the "common defence" and "general welfare" of the people in their internal relations, but that *complete* governmental power should exist *nowhere* if the menace to these ultimate objects of the Constitution was from external sources? Is it conceivable that a government should be established for the purpose of attaining certain great ends and that any necessary and proper means for realizing them should be withheld? To say that the power is not destroyed but is reserved to the people does not meet the difficulty. Such a reserved power is in effect no power. The people *en masse* cannot make laws—they cannot interpet laws—they cannot execute laws. This is a *representative* government. The people can act only through the Government. A power reserved to the people is not come-at-able; it cannot be translated into action. A power denied to the government is, therefore, a power which is practically non-existent, and must remain non-existent until granted to the government by the tedious and well-nigh impossible process of a constitutional amendment. Such a situation is a good deal like commanding a fire department to put out a conflagration, but forbidding the use of the fire-engine until the populace can be gathered into the town hall and a resolution passed after full debate. The people do not and cannot govern immediately by their own direct action. They can only govern mediately through the representatives whom they designate for the purpose. "The whole people cannot operate the Government any more than the whole of twenty people in an omnibus can drive the horses. Some one must drive, as some one must govern." The framers of the Constitution understood this, and undertook to provide a thoroughgoing scheme of government in which should be vested every necessary and proper power to accomplish the great ends which they declared was their purpose. The Constitution must be construed, if possible, so

that their expression shall not fall short of their meaning. As to internal matters this is accomplished through the combined powers of the State and National governments. As to external matters, it must be realized, if at all, through the instrumentality of the National government alone. We must assume that no necessary or beneficial power was intentionally withheld in either case, but that the powers reserved to the people were only such as they were capable or desirous of themselves exercising or were unnecessary to the operations of government, or such that their exercise would be of no benefit to the people. The Constitution was made not only for those who adopted it, but for us who live under it, and those who will live under it, please God, for all time to come; not only for the comparatively small affairs of that day, but for the vast affairs of this day, and for the vaster affairs of a future whose greatness and complexity no man can foresee. Like the living garment which clothes the living body, it must continue to clothe the Nation whose living garment it is, or the Nation must become naked and defenceless at some vulnerable point.

The men who made it were deeply versed in the science of government. They distributed *all* necessary authority over domestic affairs, as already pointed out, either to the Nation by enumeration or to the States by non-enumeration. They did not intend to provide less completely for external affairs. They established not only Federal authority, but National authority. They were familiar with the great principles which governed the various nations as political entities, and knew that in the eye of international law every sovereign nation was *ipso facto* equal to every other sovereign nation, and that the highest law of every nation was that of self-preservation. Vattel had written in 1758, and this they read: "Whatever is lawful for one nation is equally lawful for another; and whatever is unjustifiable in the one is equally so in the other." With this knowledge they introduced the United States of America into the family of nations, to be governed by the law of nations. Thus one of the consequences which followed from the fact of nationality was that of national equality, and one of the rights which followed was that of self-preservation, and they could not have intended, with this understanding, to have conferred upon the government less power than was necessary to render this equality and this right of self-pres-

ervation effectual. The government they instituted and contemplated was that of a fully sovereign nation, possessing and capable of exercising in the *family* of nations every sovereign power which any sovereign government possessed or was capable of exercising under the *law* of nations; unless prohibited or contrary to the fundamental principles upon which the Constitution itself was established. And why should it be otherwise? Why should any citizen of the great Republic, proud of its strength and glory, desire that *his* government should be inferior in power to any government or less potential in ability to act for the benefit of the people or in the upbuilding of their country and institutions? Such governmental authority is less to be feared under our institutions than under those of the great monarchies across the sea, because there the government dictates and the people obey, but here the people command and the government obeys, and in the last analysis it is the people who exercise the power through the government which is the servant and agent of the people. It is time we realized, not in phrases alone, but in fact, that the Government of the United States is perfect in all its limbs, and not a cripple among the full-grown governments of the world.

The construction of the Constitution has undergone a process of progressive evolution. The earlier decisions of the Supreme Court, notably those written by Chief Justice Marshall, laid down the doctrine of the implied powers, and it was held that Congress possessed not only those powers which were expressly conferred, but implied power to pass all legislation necessary to carry them into effect. But from time to time Congress passed laws not referable to or capable of being implied from any one particular express power, and the legislation was upheld if the authority could be deduced from a number of express powers grouped together, or from the sum total of all of them combined. But Congress has from time to time gone beyond even this and passed laws that by no reasoning can be justified under any or all of the express powers, or by virtue of any implication to be drawn therefrom. Some of these acts have been passed upon by the Supreme Court, while others have never been considered by that tribunal. Members of the Court have from time to time broadly announced the doctrine that the general government is one of enumerated powers, and can exercise no authority

not expressed or implied in the written words of the Constitution, yet some of the decisions can be logically justified only upon the theory that the government possesses certain powers which result from the fact that it is a *National* government and the only government capable of exercising the powers in question. The doctrine is foreshadowed if not stated by Hamilton, when he says: "There are express and implied powers, and the latter are as effectually delegated as the former. There is also another class of powers which may be called *resulting* powers—resulting from the whole mass of the power of government and from the *nature of political society,* rather than as a consequence of any especially enumerated power." There is, for example, no express language in the Constitution conferring upon the Government of the United States the power to acquire additional territory. The question first arose in connection with the Louisiana purchase. Mr Jefferson thought the acquisition unconstitutional. Albert Gallatin, then Secretary of the Treasury, and a statesman and lawyer of great ability, gave it as his opinion that the acquisition was valid, either as an *inherent right* of the United States *as a Nation* to acquire territory, or as a constitutional right under the treaty-making power. It seems to have finally been determined that this acquisition, as well as some others, was justified under the treaty-making power. The United States has acquired other territory as the result of a successful war, and these acquisitions have been justified under the war power of the Constitution. For many years the Supreme Court of the United States contented itself with deciding that the United States might acquire additional territory under one or the other of these powers; but we have acquired additional territory by discovery and occupation. The greater part of Oregon came to us in this way. Some years ago Congress passed an act providing in substance for the acquisition of certain islands valuable for their deposits of guano by virtue of discovery by our citizens and the proclamation of the President. Upon one of these islands some years ago a homicide was committed, and the perpetrators were brought to the United States charged with the offence of murder (Jones *vs.* United States, 137, U. S., 202). The Supreme Court of the United States unanimously held that the Act of Congress was valid, saying:

"By the law of nations, recognized by all civilized States, do-

minion of new territory may be acquired by discovery and occupation, as well as by cession or conquest; and when citizens or subjects of one nation, in its name, and by its authority or with its assent, take and hold actual, continuous and useful possession (although only for the purpose of carrying on a particular business, such as catching and curing fish, or working mines) of territory unoccupied by any other government or its citizens, the nation to which they belong may exercise such jurisdiction and for such period as it sees fit over territory so acquired. This principle affords ample warrant for the legislation of Congress concerning guano islands."

Then follows a list of references to various authorities on international law, no reference whatever being made to any provision of the Constitution or to any constitutional authority. Here then is at least one case where the Supreme Court has sustained Congress in exercising a power not expressly granted by the Constitution, nor capable of being inferred from any one of the express powers, nor from any group of them, nor from all combined. Manifestly the Act of Congress was a naked usurpation unless it could be justified upon the ground that the government of the United States possesses certain sovereign powers resulting from the *National* status. In other words, the act was *extra*-constitutional. Was it on that account necessarily *un*-constitutional? The Court said not. The law was upheld, as the above quotation from the opinion delivered by Mr. Justice Gray shows, not upon the ground that it was warranted by any *constitutional* provision or implication, but solely upon the ground that it was a power recognized by the principles of *international* law as belonging inherently to every sovereign nation. From this opinion no Justice of the Supreme Court dissented, and no member of that Court has ever dissented, though in subsequent cases some of the Justices have apparently repudiated the doctrine it establishes, and have vigorously denied the possession by the general government of any inherent power, although the assumption of such power constitutes the sole and ultimate justification for the opinion. At the same time, the Court has repeatedly affirmed the authority of the government to acquire additional territory by discovery and occupation, saying that the power was established by the prior decisions of the Court, and that any discussion of its source was unnecessary. Those who

deny any inherent sovereign power to the general government are, therefore, confronted with this alternative: Either they must deny the correctness of the unanimous decision of the Supreme Court, repeatedly announced—they must deny the power of the government to acquire additional territory by discovery and occupation alone—they must declare that Oregon and all the guano islands are held without right or title, or they must concede an exception to the rule for which they contend; and this exception is not one which proves the rule, but one which destroys it, inasmuch as the rule which they assert is that the general government possesses *no* inherent power whatsoever.

To undertake a comprehensive review of the decisions of the Supreme Court bearing upon the question is impossible within the reasonable limits of a magazine article, and a brief reference to one or two must suffice. The Alien Law (which provoked the so-called Virginia and Kentucky resolutions) was never considered by the Supreme Court, though it was upheld in principle by the decisions sustaining the Chinese exclusion and expulsion acts as being within the "essentisal attributes of sovereignty." The earlier cases upheld the right of *exclusion* under the "accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe" (142 U. S. 651, 659).

The later cases affirm the right of *expulsion* as well as *exclusion* upon the same high authority—"the right to exclude or expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, being an *inherent* and *inalienable* right of every sovereign and independent nation, essential to its safety, its independence, and its welfare" (149 U. S., 698).

Mr. Justice Miller, in United States *vs.* Kagama, 118 U. S. 375, speaking of the power of Congress to govern the Territories, said that it arose not so much from the clause authorizing Congress to dispose of and make rules and regulations for the territory and other property of the United States, as "from the ownership of the country in which the Territories are, and the right of exclusive sovereignty which must exist in the National government, and can be found nowhere else."

In the Legal Tender cases, 12 Wall., 457, Mr. Justice Strong

said that the adoption of the first ten amendments shows that in the judgment of those who adopted the Constitution there were powers created by it neither expressly specified nor reducible from any one specified power, "but which grew out of the aggregate of powers conferred upon the government *or out of the sovereignty instituted.*" And Mr. Justice Bradley, in the same case, after characterizing the United States as a national government and the only government in this country having the character of nationality, said: "Such being the character of the general government, it seems to be a self-evident proposition that it is invested with all those inherent and implied powers which, at the time of adopting the Constitution, were generally considered to belong to every government as such, and as being essential to the exercise of its functions."

Judge Campbell, for many years a member of the Supreme Court of Michigan, whose historical and legal learning has been seldom excelled in this country, in the case of Van Husen *vs.* Kanouse, 13 Mich., 313, uses the following language: "Under the Constitution of the United States all possible powers must be found in the Union or the States, or else they remain among those reserved rights which the people have retained *as not essential to be vested in any government.* That which is forbidden to the States is not necessarily in the Union, because it may be among the reserved powers. *But if that which is essential to government is prohibited to one it must of necessity be found in the other, and the prohibition in such case on the one side is equivalent to a grant on the other.*"

II.

While maintaining the power of the general government to adequately meet and deal with every *external* situation which affects the general welfare of the *United* States, it is no less essential to maintain the supreme power of the State governments to deal with every question which affects only the *domestic* welfare of the *several* States. As happily expressed by Chief Justice Marshall in Gibbons *vs.* Ogden, 9 Wheat., 195: "The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which

do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government." There is a growing tendency on the part of many of our people to insist that because an evil has become great or wide-spread, and the several States do not deal with it as it should be dealt with—either from lack of desire or lack of ability—the general government as a sort of overlord, should assume the responsibility of correcting it. Reduced to the last analysis, this is the argument of the advocates of the Federal child-labor law. That the employment of immature children is a monstrous evil no properly constituted mind can for a moment doubt, but, when existing in a State, it is an evil the supervision, regulation or suppression of which belongs wholly and exclusively to the State, and not to the general government. It is purely a domestic matter. The general government has been given no authority to legislate respecting the domestic evils which exist within the limits of a State simply because they are monstrous evils, any more than if they existed in France or England. To do so would constitute a clear invasion of the reserved powers of the States, and in its ultimate effect would prove more harmful than the failure of the State to cure its own evils. Once break over the line which separates the State and Federal powers, because the exigency is great, or thought to be great, and the way has been opened for the gradual and insidious, though certain, breaking down of the barrier of separation altogether. If we begin to legislate in such matters upon the ground of exigency we shall end by legislating upon the ground of expediency. If we enter the domain of State control to abolish evils because the States do not act at all we shall remain to regulate and correct because the States do not act as we think they should. Of course no one who has considered the matter insists that Congress has authority to legislate directly to forbid the employment of child labor in the domestic industries of a State, but it is sought to do so indirectly by declaring that any article manufactured in whole or in part by child labor shall be denied the right of interstate transportation. In other words, if a manufacturer of woollen goods in Massachusetts employs a thousand operatives, one of whom is a child of tender years, the employment of that one child (whether sanctioned by the law of the State or not) taints the entire output of the factory, and none of it can be

transported into another State. The authority for such legislation is supposed to be found in the commerce clause of the Constitution giving Congress power to regulate commerce among the several States. No power is given Congress to regulate the relation of master and servant, or to say who shall or who shall not be employed, to prescribe the hours of labor, or to regulate in any way the manufacture of commodities within the limits of a State. The power is to regulate *commerce,* and if under this power, which seems precise and clear, Congress may control the employment of child labor in a State, there would seem to be no phase of the business of domestic manufacture which it could not in the same way control. It could with equal authority forbid the interstate shipment of goods where the manufacturer employs his servants more than eight hours; where he employs non-union labor or where he does not employ non-union labor; where he employs any Chinese labor or where he declines to employ such labor; or indeed, where he does anything which Congress does not approve or fails to do anything which Congress does approve. Thus a power to regulate *interstate commerce* would be transformed into a power to regulate *domestic manufacture;* and a power to *regulate* commerce into a power to *prohibit* commerce altogether.

It is far better to leave to the people of each State their constitutional right and their constitutional *duty* to deal with their own problems in their own way. To the extent that the general government would assume the responsibility of correcting the evils in a State, the State government would quite likely shirk its own responsibility. With the gradual abridgment of local action would come the gradual loss of local ability. The people of the State would lean more and more upon the National government which is remote from the *locus* of the evil, instead of relying upon themselves who are in close touch with it. Their power would become atrophied from disuse as the muscles of the body become atrophied from lack of exercise. Such a process would inevitably, to a great extent, sap the feeling of local responsibility, and in time the nation itself would become unable to bear up under the multiplicity of duties which it would be compelled to assume. The States are *politically* as well as *geographically* parts of one great governmental organism. To destroy or reduce the vitality of one of these parts would in the end

reduce the strength of the whole, as the vigor of the human body is lessened by the loss or weakening of one of its limbs. By leaving local evils to the State and National evils to the Nation we shall preserve the harmonious balance contemplated by the Constitution, and in the end solve the problems of society much more effectually than we can ever do by devolving upon one the responsibilities clearly intended for the other.

III.

To epitomize and conclude: The American people, in whom all sovereign authority ultimately resides, have provided as the instrument for the practical expression of this authority a complete governmental system, consisting of the General government and the State governments, and in this system have vested every power necessary to accomplish the constitutionally declared ends of government. Because of the dual character of the agency which exercises the *domestic* sovereignty of the people the line between the State and Federal powers has been carefully drawn and must be rigidly observed, but either upon one side of the line or the other plenary governmental power adequate to every exigency will be found. Over *external* matters, however, no residuary powers do or can exist in the several States, and from the necessity of the case all necessary authority must be found in the National government, such authority being expressly conferred or implied from one or more of the express powers, or from all of them combined, or resulting from the very fact of nationality as inherently inseparable therefrom. Thus nothing is added to the general government at the expense of the State, while we are saved the humiliating paradox of an agency constituted to achieve certain complete ends, but vested with incomplete power to do so. If we are to preserve the great governmental system conceived by the Declaration of Independence and perfected by the Constitution, we must realize in feeling and in fact that the rights of the States and the rights of the Nation are not antagonistic, but complementary; and that the usurpation *by* the general government of any State power over local affairs, and the denial *to* the general government of any necessary power over national affairs are equally unfortunate and equally subversive of the spirit of the Constitution, which is the paramount law of State and Nation alike. GEORGE SUTHERLAND.