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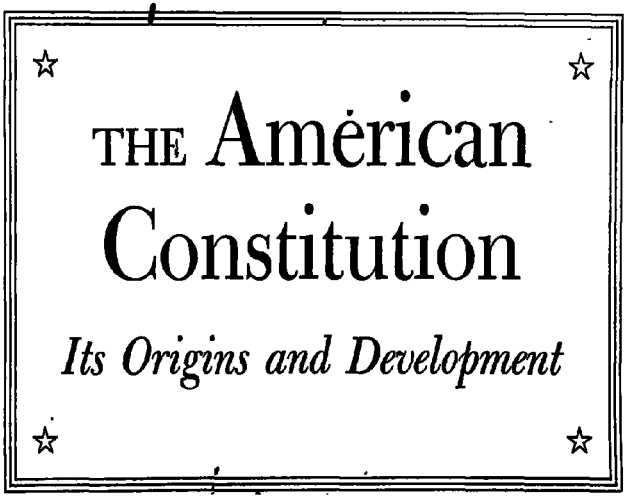

THE American Constitution

Its Origins and Development

By

Alfred H. Kelly & Winfred A. Harbison

WAYNE UNIVERSITY

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Preface

IN THIS BOOK we have attempted to present the reader with a general picture of the growth and development of the American constitutional system. It is an introductory work, in the sense that it presupposes no extensive technical knowledge of constitutional law or political theory on the part of prospective readers. The intellectual problems encountered in constitutional history are often complex, and the book makes no attempt at false oversimplification. At the same time there has been every effort at proper emphasis and clarity of presentation, so that the average undergraduate student or general reader should be able to follow the narrative successfully.

The work emphasizes strongly those aspects of constitutional growth which relate closely to the fundamental structure of the American government and social order. For example, it deals at length with the emergence of limited government or "constitutionalism," with the growth of federalism and its concomitant problems of sovereignty and state-federal relations, with the rise of judicial review, and with the constitutional aspects of civil liberties. Of necessity, it ignores or discusses briefly many aspects of constitutional law and history which have not seemed essential or important to an understanding of the fundamental nature of American government and society.

The book devotes about equal attention to the periods before

and after 1860. The "traditional" epoch of American constitutional history (1760–1876) is obviously of immense importance, but it is equally true that a whole new era of constitutional development has occurred since the close of Reconstruction, and it no longer appears to be desirable or intelligent to write American constitutional history as though nothing of consequence had occurred since 1885. Accordingly, the book treats in considerable detail the emergence of modern due process of law, the constitutional aspects of modern commerce power and taxation, the development of the modern executive, and the great constitutional crisis of the New Deal.

Several persons have been of assistance in the preparation of the work. Professor Benjamin F. Wright of Harvard University read the entire manuscript with care and attention, and his scholarly criticisms and suggestions have been of great value. In addition, he generously allowed us to use certain statistics on judicial review from his *Growth of American Constitutional Law*. Dr. Charles Burton Marshall of Arlington, Virginia, also read the manuscript in its early stages, and advanced numerous useful suggestions as to both content and style. Mr. Addison Burnham of W. W. Norton & Company has lent constant assistance and co-operation at every stage of the book's preparation. Much of the typing was done by our wives, while Mrs. Sylvia Goodman typed most of the final manuscript. Our thanks are due to all these people for their encouragement and assistance. The book is a better one for their attention; its shortcomings are ours.

Alfred H. Kelly
Winfred A. Harbison

Introduction

WILLIAM GLADSTONE, the great British statesman and prime minister, once described the American Constitution as "the most wonderful work ever struck off at a given time by the brain and purpose of man." Americans cannot but be pleased by this tribute, and a historian may well accept it as having a large measure of truth. The Philadelphia Convention of 1787 was one of the great creative assemblages of the modern world. It did not, of course, depend upon pure inspiration, for it had several centuries of English and colonial constitutional growth to draw upon, and many of the main principles of American government were already fairly well established. Yet the creative role of the convention is undeniable. It fashioned a frame of government embodying the most adequate mechanism for a federal state ever achieved by man, and it produced at the same time a brilliant compromise between the requirements of adequate governmental authority and effective controls upon the exercise of political power.

Certainly the American Constitution has withstood the most decisive of all tests—that of time. The Charter drafted at Philadelphia in 1787 is now the oldest written constitution in the world. It has survived the trials of practical politics, the holocaust of civil war, and the immense and relentless tide of social and economic change induced by the industrial revolution. Drafted for an eighteenth-century agrarian republic of less than four million people, the Con-

stitution now functions adequately as the fundamental law of a great urban industrial democracy of some one hundred and forty million souls.

The American Constitution would not have survived 160 years had it not been an extraordinarily flexible instrument of government. Flexibility is commonly achieved most readily in those governments which function without the limitations of a supreme written charter. But it has been the peculiar genius of the American Constitution that while its provisions are sufficiently specific and detailed to provide a necessary element of stability to government, it has nonetheless proved to be broad and general enough in its institutional arrangements and grants of power to allow for steady growth of the "living constitution" to meet the altered requirements of a changing social order.

This implies that the American Constitution is something more than a mere written document. And indeed, in all but the narrowest sense this is true. A constitution might well be defined as the fundamental supreme law by which the state is organized and governed. But a written document, however important, can never contain more than a very small proportion of the whole body of custom, tradition, governmental practice, and statutory and judicial interpretation that functions at any one time as the fundamental law. Indeed, in the past most states managed to get along well enough without a formal written charter, although since 1787 nation after nation has adopted the American idea of committing at least the bare outlines of its constitutional system to paper. Written charters still occupy a position of peculiar sanctity and supremacy in our constitutional system, but the United States is no exception to the general rule that most of a "living constitution" at any one time is to be found in contemporary governmental practice.

This fact sets the limits of inquiry and analysis for the study of American constitutional history. Constitutional history necessarily concerns itself with tracing the origin and development of all the principal institutions, practices, customs, traditions, and fundamental legal ideas that go to make up the whole body of the "living constitution" today.

What are the forces in American history upon which the student of constitutional history must turn his particular attention? In one sense, of course, constitutional history is inextricably bound up with

the entire fabric of American social and economic development. It is therefore frequently necessary to examine various important phases of the nation's economic life or a political conflict which may have altered the nation's entire destiny and the constitutional system along with it.

In a more immediate sense, actual governmental practice has probably been the greatest single force in shaping the evolution of the American constitutional system. The first settlers along the Atlantic seaboard brought with them a certain English political heritage, but they began at once to evolve the unique institutions and ideas of American constitutional government. Before the close of the colonial era, governmental practice had produced the bicameral system, a mass of legislative practices relating to procedure and prerogative, the theory of the separation of powers, and the idea of a supreme written constitution.

Since 1787 day-to-day governmental practice has been of no less importance. The first Congress, for example, created the principal executive departments of government, and turned the barren language of Article I, Section 8, of the Constitution into the actual assertion of national authority through the creation of a national bank, an army and navy, and a nationalistic judicial system. President Washington found it necessary to make several important decisions about the nature of the executive office, decisions which have had a permanent influence upon the scope and character of presidential authority. The presidential cabinet made its appearance in his administration, and executive ascendancy in the control of foreign policy also began at this time. Needless to say, constitutional growth through actual governmental practice is still going on. Several of the major federal statutes adopted by Congress in the "New Deal" era, for example, have apparently worked a more or less permanent alteration in the scope of national power.

In the seven decades between 1790 and the Civil War, congressional debate was a major source of constitutional doctrine. Supreme Court dictum, although already important, was not then universally accepted as the final word upon constitutional questions. Instead, prevailing ideas about the constitutional system were in the main derived from congressional politics. Henry Clay, John C. Calhoun, Daniel Webster, Robert Y. Hayne, Thomas H. Benton, and the other great sectional leaders of the day frequently engaged one an-

other in great debates upon the nature of the Union and the powers of the states and of the national government. After Webster's brilliant oration, "Reply to Hayne," delivered in January 1830, during the course of an epoch-making Senate debate on the nature of the Union, most Northerners regarded Webster's forensic effort as the most authoritative statement upon the sovereign character of the national government. Southerners, on the other hand, usually relied upon the constitutional arguments of Calhoun, Hayne, or Robert Barnwell Rhett. Even today, congressional debate upon constitutional matters is frequently significant, although it is rarely decisive in deciding major constitutional issues, most of which are referred to the courts.

In the last eighty years the Constitution has become more and more, as Charles Evans Hughes put it in 1926, "what the Supreme Court says it is." The Court has become the final arbiter of the American constitutional system. Its opinions on the nature and scope of federal and state power, on the functions of the various departments of government, and on the meaning of the written language of the Constitution have built up a great body of living and growing constitutional law. Supreme Court opinions are almost universally accepted as the final word on constitutional questions, so that in a practical, everyday sense it is this body of constitutional law rather than the document of 1787 which comprises the "living constitution" today.

In spite of judicial supremacy, however, it is public opinion and not the Court that has the last word on constitutional matters. Although the justices hold office during good behavior and so are protected against popular political resentment of a momentary or sporadic nature, they cannot maintain a constitutional doctrine against long-range, deep-seated majority popular conviction. Judges are mortal and perforce must eventually die or resign. A constitutional philosophy dominant for any great length of time in the nation at large will eventually find expression through Congress and the President. This in turn means the nomination and confirmation of judges who accept the verdict of the election returns.

The greatest constitutional issue in all American history, however, was not settled by the Court or in the halls of Congress but on the battlefield. The whole nature and destiny of the American Union was at stake in the Civil War. Lee's surrender to Grant at Appomat-

tox Court House settled once and for all that the United States was a sovereign nation and not a mere loose confederation of sovereign states. Until 1865 that question had been undecided; since that time no one has questioned either national sovereignty or the permanent nature of the Union.

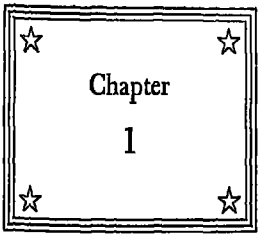
American constitutional history falls into three fairly well-defined periods. The first, from 1607 to 1789, covers the whole colonial era, the break with Britain, and the achievement of national unity under the Articles of Confederation and the Constitution. Most of the principal institutions and ideas of the American constitutional system made their appearance in this period of almost two centuries, among them the idea of a supreme written constitution, the doctrine of limited government, the concept of a federal state, the separation of powers, bicameralism, and the main principles of American legislative practice. The era closed with the ratification of the Constitution, a document embodying the political experience of the preceding two centuries.

The second period, from 1789 to 1865, began with the establishment of the national government under the Constitution and ended with the collapse and failure of the Confederacy's attempt to break up the Union. The great constitutional issue of this entire period was that of the ultimate nature of the Union. Had the Constitution created a supreme sovereign central government or had it merely brought into being a loose confederation or league of sovereign states? Closely correlated with this issue was the question of who had the final power to interpret the Constitution. Secession finally transferred both questions from the political arena to the battlefield, where the "locus of sovereignty" was settled decisively in favor of the national government.

The third great period in American constitutional history began in 1865, and has extended to our own time. The era has been one of large-scale industrialization and urbanization of American life, and most of its constitutional problems have arisen from successive attempts to adjust the constitutional system to the requirements of modern urban industrial society. The powers delegated to the national government in 1789 contemplated but little assertion of federal authority beyond the general areas of defense, finance, foreign policy, and commerce. No one in the Convention had any knowledge of modern means of communication, railroads, holding

companies, labor unions, hydroelectric power, mass production, or mechanized agriculture. Modern government has to deal with social and economic problems arising from all these developments and many more. The result is a body of modern constitutional law which the delegates to Philadelphia would no doubt have some difficulty in recognizing as their handiwork.

One grand theme runs through all three centuries of American constitutional history. It is the idea of limited government, or what Professor C. H. McIlwain has called "constitutionalism." The doctrine of limited government holds that government should proceed within the authority of established institutions and laws, that governmental authority should be limited and defined by law, and that governmental officials should be responsible to law. A government of this kind is often, somewhat loosely, described as one of laws and not of men. Without doubt the evolution of limited government constitutes one of the most significant chapters in the history of human freedom. In the twentieth century, when free political institutions are once again under powerful attack in the Western world, the central thesis of American constitutionalism is that free men can solve the problems of modern society under processes of law and without resort to tyranny.



English and Colonial Origins

THE FIRST English colonies in America were the work of private enterprise, not of the British government itself. The role of the Crown in colonial ventures was passive rather than active; it granted charters, conveyed lands, conferred monopoly rights in trade, and permitted migration, but its officials were not at all aware that they were giving encouragement to men laying the foundations of a great colonial empire. Early colonial government, in short, bore the marks of private enterprise, of the men and institutions that first participated in colonial activity.

Speaking generally, early colonial adventurers were of three types: merchant capitalists seeking new markets, raw materials, and trade; English Calvinists seeking to found religious Zions in the wilderness; and Stuart courtiers hoping to establish feudal proprieties in the New World. Merchant-capitalists, already accustomed to the joint-stock company as a method of organization, quite naturally founded governments in their colonies closely modeled upon joint-stock corporate structure. Separatists, accustomed to founding church government by compact, or mutual consent, formed political bodies in that fashion. Stuart courtiers, holding a feudal grant from the Crown, attempted to organize colonial government as a feudal

barony. Thus the three early types of colony—joint-stock, compact, and proprietary—all resulted from some form of private initiative.

THE JOINT-STOCK COMPANY: VIRGINIA AND MASSACHUSETTS BAY

The joint-stock company was an important instrument in the great English commercial expansion of the sixteenth and seventeenth centuries. The origins of the institution are to be found in the Middle Ages. The merchants and industrialists of fifteenth-century Italy developed the business technique of pooling capital resources to expand operations and distribute risk, and later English merchants no doubt borrowed somewhat from the Italian idea.

The English joint-stock companies, however, also evolved directly out of the medieval guild-merchant. Since the twelfth century it had been customary for the merchants of a community to organize guilds-merchant for the purpose of carrying on trade. The guild often became a kind of closed corporation—that is, one to which admission was necessary if a merchant wished to trade within the area over which the guild had control. Very often it sought and obtained from the Crown a charter giving legal recognition to the trade rights it claimed, a step particularly important to the guild when it had secured a monopoly over some segment of foreign trade.

Organizations of "merchant-adventurers," as this type of guild was sometimes called, were fairly common in fifteenth-century England. They were not joint-stock companies in the later sense of the term, for they seldom undertook any common group venture. The membership simply carried on individual operations under the protection of the privileges assured by membership in the guild.

In the great commercial development of the sixteenth century, the principle of the "company of merchant-adventurers," a corporate entity licensed by the crown and having certain trade privileges, was combined with the continental device of pooling the capital of investors to share both risk and profits in a common enterprise. The result was the emergence of the great English trading companies of the late sixteenth and early seventeenth centuries as the principal media of English commercial and colonial expansion.

In the case of at least one company, the Merchant-Adventurers of London, it is possible to trace the transition from a mere company of merchant-adventurers into an actual joint-stock enterprise.

This organization had originally been one of the trading guilds of the kind discussed above. Later, having acquired a virtual monopoly of the Netherlands trade, it sought and obtained incorporation in 1564, as the Merchant-Adventurers of London.

About the same time that the Merchant-Adventurers of London were incorporating, various groups of traders approached the Crown and sought and received charters affording commercial favors, prescribing their form of organization, and granting the right to raise money by selling stock. One of the earliest of such enterprises was the Muscovy Company, chartered in 1555 to carry on trade with Russia and central Asia. It enjoyed a profitable career until the early seventeenth century, when the growth of Dutch influence in Russia intervened. The Eastland Company, chartered in 1579, received a monopoly of English trade with the Baltic and for some years carried on a prosperous trade in naval stores and cloth. The Levant Company, chartered in 1592 to trade with the eastern Mediterranean, counted Queen Elizabeth herself among its investors. Most famous of all was the East India Company, chartered in 1600, on the eve of Elizabeth's death. This concern eventually became not only the medium through which English commercial interests penetrated India and wrested control of that great subcontinent from the Portuguese, the Dutch, and the French, but also a virtual state-within-a-state, through which British control of India was gradually effected.

A typical joint-stock charter of this time gave the company a name and a formally recognized legal position, and specified the terms of organization. The charter usually vested control in a council, the original members of which were customarily named in the document. Generally, the membership of this body varied from six to more than twenty, and the direction of the affairs of the company was in its hands. Sometimes the charter provided for a governor as the head of the company, in which case he was chosen by the council, usually from its own membership. Membership in the company was secured through stock ownership. The smaller stockholders had little to say about general policy; however, they met periodically in a general court to elect members to vacancies in the council and occasionally to express their opinion upon some major question of policy.

The typical charter also granted a number of privileges thought

to be of some financial advantage. These might include a grant of land, the right to convey title to any portion of its domains, and the title to all precious metals discovered within the specified region. A monopoly of trade within the area was an almost invariable provision.

Finally, the charter sometimes conferred upon the company extensive governing powers. This was necessary either because the contemplated region to be exploited was unsettled wilderness, as in America, or because the company was to be the actual instrument of English conquest in an already civilized region, as in India. In either case the company needed authority to establish law and order within its domains, and therefore the charter commonly bestowed the right to set up some local governing body, to maintain defense, to coin money, to establish courts, and to enact ordinances for local government. Thus certain of the companies took on a quasi-sovereign character, becoming virtual states within the British Empire. In this respect those companies trading to America were not at all unique; the East India Company, for example, long exercised an almost unlimited authority over much of India.

Virginia, the earliest successful English colony, was founded by a joint-stock company. In 1606, two influential groups of English merchants, one at London and one at Plymouth, obtained two separate grants from the crown under a single charter. The London group was organized as The Virginia Company of London, while the Plymouth adventurers were incorporated as the Virginia Company of Plymouth. The London Company was given the right to found a colony anywhere between the thirty-fourth and forty-first parallels on the North American continent, and the Plymouth group was granted the corresponding right between the thirty-eighth and forty-fifth parallels. Neither company might colonize within one hundred miles of the other. The two companies were technically "semi-joint-stock" organizations, separate stock subscriptions being anticipated for each successive voyage.

The London Company's charter provided for a governor, who with an advisory council of thirteen was empowered to direct the general affairs of the company. The stockholders were also instructed to assemble from time to time in a general court. A novel provision was one establishing a Royal Council in London, quite apart from the company's council, with power to supervise all

activities in so far as they concerned the interests of the English Crown. Under this charter, the Virginia Company of London founded the settlement at Jamestown in 1607.

There was at first little local self-government in Virginia; rather, as in any joint-stock enterprise, the governor and council directed operations from London. Local matters within the colony were in the hands of a governor and local council, all appointed from London, and ordinary settlers were given no share in the government. Political quarrels between governor and council, together with recurrent economic crises, inspired Governor John Smith in 1608 to resort to stern measures to check the colony's disintegration.

In 1609, the London Company secured a new charter designed to end mismanagement and to encourage new stock subscriptions. This charter severed the company's connection with the Virginia Company of Plymouth after the latter had already failed in its attempt to establish the Sagadahoc Colony in Maine. The London Company now became a regular joint-stock concern, with some seven hundred permanent stockholders. The separate royal council in London was abolished, control now being vested in the company's treasurer and the London council. The Crown also extended the company's lands to include all the lands from sea to sea for two hundred miles on either side of its settlement. A supplementary charter of 1612 strengthened the stockholders' control of company affairs by providing for four "great courts" or stockholders' meetings each year to dispose of matters of great importance. The 1612 charter also extended the company's boundaries three hundred leagues seaward to include Bermuda.

In 1610 the reorganized company resorted to outright despotism in Virginia. The treasurer and council revoked the authority of the local governor and council and vested absolute authority in a "lord-governor and captain-general" who was given full military, executive, and lawmaking power. By this experiment in autocracy the company hoped to end the indolence and petty wrangling which had so far crippled the colony's life.

The enterprise nonetheless did not prosper, mainly because it lacked an adequate economic base. The settlers had attempted more or less unsuccessfully to raise corn, produce wine and silk, and mine gold. Although the cultivation of tobacco, begun in 1612, brought some prosperity, the significance of the new crop was not appre-

ciated, and the company still failed to pay dividends. Furthermore, the despotic local government gave the settlement a bad name and discouraged immigration.

In 1618 the company, in an effort to encourage immigration and to promote a better spirit among the colonists, attempted a general reorganization of local government in Virginia. The governor's instructions for 1619 contained an order for the establishment of a local representative assembly. This body, patterned after the company's general court or stockholders' meeting in London, was the beginning of the Virginia colonial legislature. The local council, which at first sat with the assembly to compose one chamber, was a counterpart of the company's council in London.

Thus, through the establishment of a local governor, a council, and a representative assembly, the Virginia Company of London had finally evolved a colonial government for Virginia modeled upon its own charter provisions. Substantially the same pattern of government eventually appeared in all the English colonies.

The Virginia Company of London, beset by financial failure and internal dissension, lost its charter in 1624. The King now named a royal governor and, the following year, formally incorporated Virginia in the royal domain. Virginia thereby became the first royal colony in America. The assembly, a mere creature of the company, might well have expired at this time, and in fact no regular assemblies met in Virginia from 1623 to 1628. Thereafter the legislature met annually, although it was not until 1639 that the king recognized the right of the assembly to permanent existence. By that time the future of Virginia as a royal colony was assured, but the frame of government of the Old Dominion, both as colony and as state, continued to be that imposed by the joint-stock company.

Like Virginia, Massachusetts Bay was founded by a trading company, but in its case the company's charter became the actual constitution of the colony. The company's founders were for the most part middle-class Puritans who desired to found a Calvinist religious refuge in the wilderness. Many of the stockholders had mercantile backgrounds, however, and some were interested primarily in the venture's commercial possibilities. Hence it was not unnatural for the interested parties to organize as a joint-stock company.

The charter of the Massachusetts Bay Company, secured in 1629, provided for a governor, a deputy governor, and eighteen assistants,

who together were to constitute the council. Provision was made for four "great and general courts" each year, to be attended by the freemen of the company. The power to make laws and ordinances not contrary to the laws of England was bestowed in a somewhat ambiguous fashion upon the governor, the deputy governor, the assistants, and the general court. The charter granted also the right to establish all necessary offices and to appoint appropriate magistrates. Included also was a grant of all the land lying between a point three miles south of the Charles River and three miles north of the Merrimac River, extending to the "Westerne Sea."

While the foregoing provisions were not unusual, the charter in one important respect differed vitally from others of the period in that it failed to specify where the seat of government was to be located. The omission may have been an inadvertent one, for it was only reasonable to assume that the governor and assistants would normally reside in London; or it may have been intentional, at least on the part of some of the grantees. In either case, the absence of any such stipulation opened the way for the eventual transfer, in 1630, of the seat of government of the colony from London to Massachusetts.

At this time most of the influential members of the Massachusetts Bay Company belonged to the faction interested in a religious colony rather than a commercial enterprise. Many of them preferred to migrate to Massachusetts along with other religious dissidents and direct company affairs on the scene rather than stay in England. The mercantile group still had some influence, however, and they would not concur in a move which might foreclose the possibility of future profits from the venture. The result was a compromise, arrived at in the famous Cambridge Agreement of 1630. The mercantile group assented to the removal of the company to Massachusetts Bay, and in return the merchants were given certain exclusive trading concessions with the colony. This made formal the transfer of the seat of government to Massachusetts Bay, a move which had actually been effected in October 1629, some months before the Cambridge Agreement was signed. The company's connection with any superior governing body in England within the corporation forthwith ceased.

The council, once it became located in Massachusetts, attempted to run the colony as a closed corporation in the hands of the select

without the assistance of the General Court. However, this oligarchical conception, fitting precisely with the aristocratic Calvinism of Governor John Winthrop and his associates, was not at all to the liking of the stockholders, or, as they now became, freeholders, in the colony. In 1634, certain of the freeholders, of whom there were then about two hundred in Massachusetts, demanded to see the charter. With some reluctance, the governor and his assistants produced it, and by it, the freeholders were able to demonstrate that the lawmaking powers of the corporation were vested in the General Court. The governor and assistants were forced to consent to the calling of the General Court at regular intervals to function as a legislature, and from that time on, the supremacy of the General Court was never questioned.

The metamorphosis of a trading company charter into the constitution of an English colony thus determined the outlines of the government of Massachusetts. The governor, the deputy governor, and the eighteen assistants, who together had constituted the board of directors of the trading corporation, functioned almost from the start as the executive council which handled day-to-day affairs of the colony. The "Great and General Court," formerly the quarterly meeting of the stockholders, now became the legislature. The only important subsequent modification in the structure of the General Court was the introduction of bicameralism in 1644.[1] The rights of self-government which the charter granted the company proved sufficient to give Massachusetts almost complete internal autonomy during most of the seventeenth century. Though the original charter was annulled in 1684, subsequent grants did not seriously alter the colony's form of government. Meantime the general pattern of Massachusetts' government had spread among the other New England colonies.

GOVERNMENT BY COMPACT: PLYMOUTH, PROVIDENCE, CONNECTICUT, AND NEW HAVEN

Several of the smaller New England colonies, notably Plymouth, The Providence Plantations, the Connecticut River towns, and New Haven, owed their early governments to compacts among the settlers, an idea borrowed directly from Puritan church theory.

The Puritans were English Calvinists, who began to win a fol-

[1] The development of bicameralism in the colonies is discussed in Chapter 2.

lowing among English Protestants about the beginning of Elizabeth's reign (1558–1603). They derived their name from a desire to purify the English church of its remaining taint of "Popery," or Catholicism. Most of them wished also to restore the Bible as the principal source of religious authority, and emphatically rejected all doctrine and ceremonial not justified by the Scriptures.

A principal subject of Puritan concern was church organization. Puritans were nearly unanimous in rejecting episcopacy, but they were far from united in their belief as to what should be substituted. Before 1600, the Presbyterians seem to have been the most numerous Puritan group. They wished to organize the church into regional synods controlled by boards of presbyters or church magistrates, each synod having full charge of the churches within its district. Prior to 1600, most of the Presbyterians were conformists —that is, they were content to seek reform from within the Church of England.

In the 1570's there appeared in England a Calvinist sect, the Separatists or Brownists, who advocated separation from the Church of England and the formation of churches by compact or covenant among the church members. Church organization by compact was even then not new to Calvinist thought. In Protestant theory, every man was ultimately his own source of authority in religious matters, and it followed logically from this that mere agreement among individuals was all that was necessary for church organization. Calvin himself had asserted in his *Institutes* that the church came into existence by "common consent," while Richard Hooker, author of a famous Elizabethan theological work, *The Laws of Ecclesiastical Polity*, had supported the same theory.

Robert Browne, an early Separatist divine, whose contentiousness in matters theological earned him the title of "Trouble-Church Browne," contended that any two believers could come together and form a church, which needed no other source of authority than the compact that brought it into existence. Following Browne's advice, the Separatists proceeded to form their churches by common compact among the members and refused to acknowledge any connection with the Church of England.

Separatist theory and practice very soon brought the adherents of the faith into direct conflict with established Anglican authorities and with the English government itself. In England, as in other

Protestant and Catholic nations of the time, the church was still regarded as an arm of the state. To deny the authority of the episcopacy was hence to attack the authority of the state itself. This was particularly the case in England, where the king was himself the personal head of the church. Anglican theologians therefore condemned Separatist compact theories as both heretical and seditious. Even under the tolerant Elizabeth, the Separatists were subjected to some mild persecution, while under James I (1603–1625) the condition of the Separatists as well as that of other Puritan groups became decidedly uncomfortable.

Various Separatist groups in search of greater religious freedom therefore migrated shortly after 1600 to the Netherlands, a country already practicing almost complete religious toleration. Possessed with the desire to form a wilderness Zion, a number of Separatist families resident in Holland decided to migrate to America, and after some negotiation they secured consent from the Virginia Company of London to settle within its domain. There followed the voyage on the *Mayflower* and the founding of Plymouth colony in November 1620.

The Plymouth colonists thus found themselves presented with a unique opportunity to apply the compact doctrine, hitherto used by the Separatists only for church organization, to the organization of a new body politic. In theory, the idea was not an original one, for various medieval political writers had held that the Holy Roman Emperor's authority flowed from a compact to which the people assented; also Calvin had argued for common consent or covenant as the origin of lawful government. However, Calvin's aristocratic theory of election was in conflict with this notion, for it implied that the magistrates, presumably chosen from among the elect, held office by the superior authority of God's grace.

In the Mayflower Compact, the Plymouth settlers translated abstract theory into practice. Their grant from the Virginia Company of London was meaningless, since the portion of the New England coast upon which they were to settle lay entirely outside the company's domains, and hence they were without any recognized political authority. Before landing, therefore, the adult males of the little body of Separatists gathered in the cabin of the *Mayflower*, and there set their hands to a covenant intended to provide the basis for civil government:

> We whose names are underwritten . . . Do by these Presents, solemnly and mutually in the Presence of God and one another, covenant and combine ourselves together into a civil Body Politick . . .

Here for the first time the compact theory of the state found expression in America. Plymouth Colony, in fact, had no other formal basis for its political order throughout its seventy-one years of existence.

The Mayflower Compact was only the first of many such covenants by which civil authority was established within the various New England settlements. When Roger Williams and his followers fled from Massachusetts to Rhode Island in the winter of 1636 and founded the town of Providence, they also found themselves outside all organized government. They solved their problem as the settlers at Plymouth had, binding themselves by a compact very similar to that executed aboard the *Mayflower*. The other principal Rhode Island towns founded within the next few years, notably Newport and Portsmouth, established governments in the same fashion.

The most famous of all early covenants after the Mayflower Compact was the Fundamental Orders of Connecticut, executed in 1639 among the settlers in the Connecticut River towns of Hartford, Windsor, and Wethersfield. The covenant created a government patterned after the joint-stock company organization, probably in direct imitation of the Massachusetts Bay charter.

Once a year all freemen in the colony were to assemble in a "Courte of Election" to choose a governor and a board of magistrates. In addition, each of the three towns elected four deputies to meet with the governor and magistrates in a General Court or legislature. The General Court possessed all law-making authority for the colony, including the power to raise taxes, admit freemen, make grants of undisposed lands, and call the magistrates to account for misconduct. The General Court was more powerful than the governor; it could meet and adjourn without the consent of the governor and magistrates, while the governor possessed no veto but only a casting vote in case of a tie.

The Fundamental Orders of Connecticut were for all practical purposes the first of modern written constitutions. Like modern American constitutions, they were a written compact of the people

by which a fundamental frame of government was erected. They differed from modern constitutions in one important respect: they could be modified or abolished by a vote of the General Court. Thus they did not make the distinction, as does modern American constitutional law, between organic supreme law and ordinary enactments of the legislature. This distinction was late in making its appearance in American political theory; indeed, it was not clearly stated in most of the early state constitutions adopted after 1776.

The Puritan followers of John Davenport and Theophilus Eaton, who founded New Haven Colony, likewise organized their body politic through compact. They first met at New Haven in 1639, and with the declaration that the Bible offered perfect guidance for establishing government, they covenanted together in a body politic to enforce the laws of God. Seven men, known as the "seven Pillars," were chosen to constitute the government; and to them was granted virtual dictatorial power to make laws, administer affairs, and admit new freemen to the colony.

Eventually a number of towns grew up around New Haven, and in 1643 they united to form the colony of New Haven. Under this compact the freemen of the colony elected a governor, deputy governor, and magistrates, while the several towns each sent two delegates to a General Court. The governor, deputy governor, and magistrates sat with the delegates to compose a one-house legislature with general lawmaking and taxing powers and supreme judicial authority.

For a long time the covenant colonies were concerned with their lack of formal recognition from the English government, a condition that might well have resulted in their dissolution through a royal grant of their lands to a joint-stock company or proprietor. Actually there was comparatively little danger of such a development during the Puritan Revolution in England, since for some years after 1642 the mother country was thoroughly preoccupied with civil war, the trial and execution of the king, and the establishment of the Puritan Protectorate. In any event, the Puritan leaders in England were friendly to the Calvinist colonies in America, although Rhode Island in 1644 took the precaution of obtaining a charter from the Long Parliament.

With the restoration in 1660 of Charles II, who certainly had no

cause to love Puritans either in England or in America, the covenant colonies feared greatly that the new sovereign might refuse to recognize their existing governments. Accordingly they all hastened to make their submission to royal authority and to obtain formal recognition of their right to existence. John Winthrop, Jr., son of the renowned governor of Massachusetts, acting as agent for Connecticut, secured a charter from the Crown for that colony in 1662. This document, with some minor modifications, confirmed the constitutional system already functioning in Connecticut under the Fundamental Orders. The colony was obliged, however, to submit to royal customs control and to the limitation that its laws could not be contrary to those of England. The colony's eastern boundary was fixed at Narragansett Bay, a provision which by implication brought New Haven under Connecticut's jurisdiction. While London officialdom probably had not intended thus to destroy Davenport's colony, Connecticut nevertheless insisted upon interpreting the charter literally, and in 1664 the weak and uninfluential New Haven settlement ended its separate existence by accepting Connecticut's jurisdiction.

Like Connecticut, Rhode Island recognized Charles II, and the colony was rewarded with a royal charter granted in 1663. This document also substantially confirmed the existing governmental pattern. There is reason to believe that Plymouth also made an attempt to obtain a royal charter at this time but was unsuccessful, and the colony continued to have no other legal basis than its own covenant until it was formally merged with Massachusetts Bay in 1691.

These charters of 1662 and 1663 gave Rhode Island and Connecticut a constitutional base substantially like that of Massachusetts under the charter of 1629. In erecting government by compact, the various covenant settlements had already imitated closely the Bay Company's corporate structure, and the new charters therefore merely confirmed the joint-stock frame of government in the two colonies. In a technical sense, also, Rhode Island and Connecticut were after 1663 little less than joint-stock companies—legal entities owing their existence to the Crown's prerogative.

Rhode Island and Connecticut eventually came to occupy a unique position among the English colonies, for after granting their

charters the Crown recognized no more corporate colonies, and in 1684 Massachusetts lost its corporate charter.[2] The two former covenant settlements, however, continued to enjoy an extraordinary autonomy and freedom from outside interference. Although under the terms of their charters their laws were supposed to conform to those of England, they were never required to send them to England for review. Alone of all the colonies in the eighteenth century, their assemblies elected their own governors. The two colonies had to recognize appeals from their courts to the Privy Council, and they were also subject to the Navigation Acts and customs system. Otherwise they were nearly autonomous states whose self-government was interrupted only by the short-lived attempt at a single royal government for New England between 1686 and 1689.[3]

Rhode Island and Connecticut never forgot that they had created their governments by covenant and compact. Indeed, they merely transferred the original Separatist doctrine to the later royal charters, which they came to regard as binding compacts between themselves and the English Crown. Thus the Separatist compact theory remained alive in colonial New England and contributed substantially to the later American constitutional idea: the compact theory of the state. New Englanders never ceased to regard government as an instrument created by general agreement and resting therefore upon a contract binding the sovereign as well as the people.

THE PROPRIETARY COLONIES

Several colonial ventures, notably Maryland, New York, New Jersey, Pennsylvania, Delaware, the Carolinas, and Georgia grew out of feudal grants made by Stuart sovereigns to court favorites. As such, they reflected the persistence of feudal institutions in seventeenth-century England and the attempt to transfer those institutions to America.

The first proprietary grant on the mainland, that for Maryland, came very close to erecting an autonomous feudal principality in America. In the warrant issued in 1632, Charles I as overlord granted Lord Baltimore all the rights, privileges, and immunities possessed

[2] Abrogation of the Massachusetts charter is discussed on p. 60.
[3] See pp. 59–60.

then or in the past by the Bishop of Durham. Between the years 1300 and 1500 the Palatinate of Durham in England had been little less than an independent feudal state, and thus by implication reference to Durham's past status made Baltimore a virtually independent feudal lord, with but very slight obligation to the Crown.

The Maryland charter also gave the proprietor complete control over local administration, lawmaking, and military matters in his province. He could establish an assembly, but was not required to do so. All writs ran in his name, and no appeals could be taken to England from his courts. He possessed the right of sub-infeudation, and the charter provided further that grantees owed allegiance only to Baltimore and not directly to the king. In short, Baltimore enjoyed a status not unlike that of a king except that he had no crown.

The proprietary grant for the Carolinas was in origin and character substantially similar to that for Maryland. In 1662, Charles II granted Carolina to eight court favorites, including the Earl of Clarendon and the Duke of Albemarle, who were thus rewarded for faithful service during the king's exile or for their influence in effecting his restoration. As in the case of Lord Baltimore, the proprietors received all the rights and privileges of the Bishop of Durham, and full ordinance-making power, subject only to the restriction that local legislation must conform as far as possible to the laws of England. No restrictions of consequence were imposed upon proprietary autonomy.

The warrant of 1664 granting New York to the Duke of York was in some respects even more extreme in its recognition of proprietary sovereignty, although it also contained certain new limitations. The Duke received full control of lawmaking, appointive and judicial powers, customs duties, land grants, and military matters. The charter made no mention of the Durham Palatinate, however, and the king specifically reserved the right to hear appeals from the colony's courts.

Perhaps because the Duke of York was the king's brother, he was able to exercise extraordinary freedom in disposing of his grant. Three months after receiving his patent he handed over the Jerseys as an independent proprietary to John Berkeley and George Carteret. York's action in parting with his own sovereignty over the region was illegal, but nonetheless the grant brought New Jersey into existence as a proprietary colony.

The charter issued to William Penn in 1681 reflected the growing belief among the more responsible English statesmen that proprietary colonies were undesirable, and that England ought to assert a more positive authority over her growing colonial empire. The king's advisers were unable to block the grant to Penn, but they did succeed in imposing certain unprecedented limitations upon his powers as proprietor. Within the colony, Penn's sovereignty was limited by the requirement that all laws be promulgated with the assent of an assembly of freemen. The Lords of Trade, the new body charged with administering English commercial policy, insisted also upon seven additional charter provisions intended to secure the colony's submission to English authority: First, the colony must obey the Navigation Acts. Second, the proprietor must keep an agent resident in London to answer in court for any violations of the Navigation Acts. Third, the proprietor must admit royal customs officers to his province. Fourth, he must forward all provincial laws within five years of their passage, to the Privy Council for acceptance or disallowance, the crown thus reserving a kind of veto over all the colony's legislation. Fifth, the Crown reserved the right to hear appeals from the colony's courts. Sixth, the proprietor assented to the erection of Anglican churches in the colony, should any twenty persons ask for one. And seventh, the king reserved the right to levy taxes on the colony, subject to consent of the provincial assembly, the proprietor, or Parliament.

These provisions anticipated many of the main elements of eighteenth-century British colonial policy. Submission to the Navigation Acts and customs control, maintenance of a London agent, disallowance, and judicial appeals—all shortly became requirements imposed upon most of the American colonies. The clause reserving Britain's right to tax the colonies is of special interest in the light of the American claim advanced in the Revolutionary period that Britain had no lawful authority to tax the colonies, and that no colony had ever acknowledged such a right. In fact, however, Britain never resorted to the authority established by the provision to impose taxes upon Pennsylvania. The considered and sustained assertion by Britain of a right to tax the American colonies did not develop until after 1763.

In all of the proprietary colonies, the proprietor specified the details of local government. In Maryland, Lord Baltimore at first

merely provided for a governor and advisory council and put complete control of the colony's government in their hands. In 1637, however, he instructed his governor to call an assembly of the freemen. Although for some years after this the proprietor insisted upon his unlimited lawmaking powers, by 1650 the assembly had forced recognition of its right to initiate legislation. The council and assembly were by that date sitting separately to compose a bicameral body.

Likewise in New York the Duke of York at first attempted to rule through a local governor and advisory council vested with complete sovereign authority. In 1665, for example, the first governor, Richard Nicolls, with the consent of a temporary assembly, promulgated a legal code known as the "Duke's laws." Not until 1681 did York yield to popular pressure and instruct Governor Thomas Dongan to call a popular assembly with full legislative powers.

In the Carolinas, the proprietors promulgated a comprehensive constitutional system for their colony soon after its formation. The Fundamental Constitutions of Carolina, drawn up by John Locke, the famous English political philosopher,[4] and issued in 1669, reflected the proprietors' intention of establishing a comprehensive feudal society in their grant. Carolina was to be divided into several counties, within each of which there were to be eight seigniories of twelve thousand acres each, one for each proprietor. Each county was also to contain eight baronies of equal size, to be granted to one "landgrave" and two "caciques." These highly artificial titles were borrowed from the German nobility and the Indians because the charter prohibited resort to English titles of nobility.[5] The remaining lands in each county were to be divided into twenty-four "colonies," to be apportioned among the resident freemen. The eight proprietors sitting in England were to constitute a palatinate court, which was in turn to appoint the colonial governor. There was to be an assembly, composed of the governor, a deputy for each proprietor, landgraves, caciques, and elected deputies representing the freeholders. The scheme, an attempt to reproduce in the colony the social and political structure of medieval Europe, was destined

[4] Locke's contribution to American political theory is discussed on pp. 39–40.

[5] A landgrave was a kind of German count; a cacique originally was a West Indian native chief.

never to function as the proprietors intended. There was too much good land readily available in America to enable a feudal system based upon land scarcity to survive.

In Pennsylvania, William Penn between 1682 and 1701 made a series of constitutional grants for his colony. In 1682, he issued a "frame of government," providing for a council of seventy-two members, and an assembly of two hundred, both elected by the landholders. The Council alone could propose bills; the assembly alone could enact them. The proprietor was to appoint the governor, who was given three votes in the council, but no veto. A so-called "second frame" which Penn issued in 1683 reduced the size of the assembly to thirty-six and the council to eighteen, and authorized the assembly to amend legislation proposed by the council. It also granted the franchise to all who owned a fifty-acre freehold or £50 worth of other property.

These provisions were liberal for the time, but Penn's colonists did not appreciate the restrictions imposed upon the assembly's powers, and they agitated to give the chamber full legislative authority. Penn's absence from the colony for some years after 1683 led to a series of brawls between Penn's deputy governors, the council, and the assembly, and greatly strengthened the assembly's sense of independence. Furthermore, Penn fell out of favor in England after the fall of James II in the Glorious Revolution, and in 1692 the Crown suspended his proprietorship, appointing a royal governor for Pennsylvania. When in 1694 Penn's proprietary rights were restored, he found his control over the assembly still further weakened. As a result, the assembly in 1696 was itself emboldened to enact a new frame of government, which it forced Governor Markham to accept. The Markham Frame reduced the size of both council and assembly by one-third, gave both houses the right to propose and consider legislation, and deprived the governor of the right to perform any public act without the council's consent.

Penn returned to his colony in 1699, and after some negotiation with the assembly he promulgated the famous "Charter of Liberties" of 1701, in which he surrendered all control over Pennsylvania's government except the right to appoint the governor. The charter also put all legislative power in the assembly's hands, that body thereby becoming a unicameral legislature, the only one in colonial

America. Under the Charter of Liberties, which remained in effect until the Revolution, Pennsylvania presented a curious anomaly: a proprietary colony virtually free from proprietary control.

A by-product of the Charter of Liberties was the eventual emergence of Delaware as a distinct propriety. Penn had earlier acquired the three "lower counties" from the Duke of York, who had a dubious title to them through conquest from the Dutch. The charter of 1701 provided that Delaware in three years might organize a separate assembly, a step actually taken in 1704. Penn remained the Delaware proprietor and continued to appoint a common governor for the two colonies.

The last proprietary colony in America was that established by the Georgia grant to James Oglethorpe in 1732, made with the understanding that the proprietor's control would expire in 1752. British officials had reached the conclusion, following Penn's grant, that the establishment of additional autonomous colonies would be unwise and that existing settlements of whatever form ought to be brought under more effective royal control.

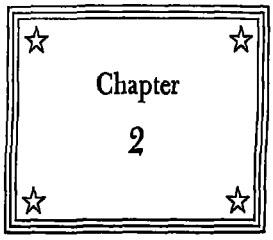
By the end of the seventeenth century, the proprietary colony was rapidly becoming an anachronism. Manorial feudalism was a dying institution in England, and the system did not thrive on American soil. It was difficult to erect a social and political system based upon land scarcity in a country where there was a surplus of unoccupied land. Moreover, most of the small landholders in the proprietary colonies were of lower middle-class rather than peasant origins, and they did not take kindly to manorial and feudal restrictions. Had the British government supported the attempt to introduce feudalism in the American colonies with the same strong hand the Spanish and French used to protect similar institutions in their settlements, it is conceivable that the proprietary colonies might have survived for a longer period. Instead the English government permitted the colonists in the proprietaries to engage their overlords in protracted conflicts eventually ending in the destruction of both the legal and the social elements of manorial feudalism.

The proprietary colonies nonetheless made a distinct contribution to colonial government in that they promoted the transfer of English parliamentary institutions to America. Since the average proprietor found himself in his relations to his colonists in a position analogous to that of the king in England, he tended to establish

a local administrative and parliamentary system strongly resembling that in London. The proprietary colonists recognized the parallel, and in their dealings with the proprietor they insisted upon the rights and privileges which the English House of Commons had lately wrested from the Crown. After 1688, in particular, the proprietary colonies tended to re-enact to a degree the Glorious Revolution; as a result the whole body of English parliamentary institutions and attitudes appeared in the proprietaries somewhat earlier than in the other colonies.

By the end of the seventeenth century, the private agencies which had founded the early colonies and thus established the first colonial governments were of declining importance in America. The impulse to covenant settlements had passed with the Puritan Revolution. Joint-stock enterprise in America was not financially successful, and after the Virginia Company of London and the Massachusetts Bay Company had in turn disappointed their investors, the experiment was not repeated. Likewise the proprietary ventures, except that in Maryland, proved for the most part unprofitable. Moreover, the Crown after 1681 discouraged applications for proprietary favors.

While the earlier forms of colonial enterprise passed from the scene, they left behind them a residue of political institutions of permanent importance in the American constitutional system. The joint-stock company contributed the basic framework of colonial and later state government. The Separatist church contributed the doctrine of government by compact. The feudal proprietaries contributed little of themselves, but they hastened the transfer of English parliamentary institutions to America. The influence of seventeenth-century colonial government is still noticeable in the twentieth-century American constitutional system.



A Century of Colonial Government

DESPITE ITS heterogeneous origins, colonial government in America progressed rapidly toward a common constitutional pattern, which became clearly discernible by the early eighteenth century. Most British settlements tended eventually to become royal colonies. A royal colony was in theory a part of the king's domains, and was administered by a governor appointed by the Crown. Virginia became a royal colony virtually by default in 1625. For a time no others appeared, since the Stuarts long deliberately favored the establishment of proprietary colonies. After 1681, however, most of the colonies were converted to the royal type, either by accident or because London officials after that time deliberately sought to establish direct royal government. Massachusetts, for example, lost its original charter in 1684, when the Crown acted to end the colony's high-handed autonomy. New York became a royal colony in 1685, when its proprietor, the Duke of York, became King of England, while the Carolinas became royal colonies in 1729 following the virtual collapse of proprietary government. By 1752, there remained but three proprietary colonies—Maryland, Pennsylvania,

and Delaware—and two charter colonies, Rhode Island and Connecticut. Royal government obtained in the remaining eight.

The differences between the governments of royal, proprietary, and charter colonies were slight in actual practice. All had governments established by written charter, either proprietary or royal. All had approximately the same legislative, executive, and judicial systems; all had about the same degree of internal autonomy, and all maintained about the same relations with the English government. It is therefore possible to subject all colonial government to common analysis.

THE COLONIAL LEGISLATURE

All but one of the eighteenth-century colonial legislatures were bicameral bodies. The upper house, usually known as a council, consisted of from twelve to eighteen members who were appointed by the Crown or proprietor upon the governor's recommendation. The council ordinarily had three fairly distinct functions: it acted as a legislative chamber, as an advisory cabinet for the governor, and as a court of last resort in certain types of judicial cases. Its members were usually drawn from the ranks of the great landed gentry or merchant class and thus represented the dominant social groups in the colony.

The lower house was an elective body, usually chosen from the colony's smaller-propertied classes. It varied considerably in size; in Massachusetts, for example, the house consisted of about one hundred members; the Virginia House of Burgesses seated about seventy-five; and the Maryland House of Delegates had about fifty members. There were invariably substantial property qualifications for membership, the common requirements being possession of a forty-shilling freehold (the traditional English suffrage prerequisite of a piece of land returning an income of at least forty shillings a year), or possession of fifty acres of land or other property valued at fifty to three hundred pounds. The privilege of voting for members of the lower house was also restricted.[1] The lower house thus

[1] All the colonies imposed a variety of restrictions upon the franchise. A majority recognized in some fashion the forty-shilling freehold requirement, although this condition was often altered to meet American conditions. Massachusetts and Connecticut, for example, both observed the forty-shilling freehold requirement in the eighteenth century, but New York merely stipulated ownership of a piece of land worth forty pounds. The colonies south of New York fixed the requirement in

represented the more prosperous middle-class farmers and smaller merchants. The squatter, tenant, artisan, indentured servant, laborer, and Negro had little or no voice in political affairs.

In several of the very early colonial legislatures, the council and the assembly sat together to compose one representative body. This practice failed to give full recognition to the superior economic and social prestige of the council members, who eventually insisted upon sitting separately in order to exercise a veto over the assembly's enactments. In Massachusetts, for example, the assistants and deputies at first sat together in the General Court. From the first, however, the assistants insisted upon a separate veto, and in 1644, after a serious crisis precipitated over the amusing matter of a lost pig, the assistants withdrew and thereafter met as a separate chamber. In Maryland, where the council represented the proprietary interest and great landlords, and the assembly represented the middle-class farmers, constant quarreling over the council's right to a negative vote led to permanent separation by 1650. In the Carolinas, Locke's Fundamental Orders nominally established a one-house legislature consisting of the governor and four estates: proprietary deputies, landgraves, caciques, and elected deputies. From the beginning, however, the various orders of nobility coalesced as a council, while the elected deputies sat separately as an assembly. In a few colonies, notably in Virginia and New York, the council antedated the assembly, and the lower house when created sat apart from the council from the beginning.

American bicameralism was thus largely an outgrowth of colonial social and economic distinctions, with the council and assembly drawing apart because they represented different economic interests. No doubt the fact that British parliamentary structure already

acres rather than in income or value, thus New Jersey stipulated one hundred acres, while Pennsylvania, Delaware, Maryland, the Carolinas, and Georgia all required fifty acres. After 1736, Virginia fixed the franchise prerequisite at one hundred acres of unimproved land, or twenty-five acres with a house Most of the colonies at one time or another imposed various religious qualifications for the franchise Until 1664, Massachusetts required all freemen to be Congregational church members, after that date and until 1691 a certificate of religious orthodoxy was a franchise prerequisite. Several of the colonies disfranchised Catholics and Jews at various times. Virginia excluded all non-Protestants from voting after 1699, and Maryland, New York, and Rhode Island all disfranchised Catholics in the eighteenth century, as did South Carolina after 1759. Pennsylvania, New York, Rhode Island, South Carolina, and Virginia all disfranchised Jews in the later colonial period. The Southern colonies all barred Negroes and mulattoes from voting, while nearly all the colonies at all times barred Indians and indentured servants.

recognized bicameralism based upon class differences made the development an altogether natural one in America.

Eighteenth-century colonial legislatures commonly thought of themselves as small-scale models of the English parliament, and they tend to assume both the practice and prerogatives of the Lords and Commons. The committee system and parliamentary rules of debate and order were adopted with little change; so also, were many parliamentary ceremonies so dear to English tradition. The governor's address imitated the speech from the throne, and the speaker was presented to the governor in the same fashion as the House of Commons presented its speaker to the king.

More important were the privileges and prerogatives claimed by the assemblies in imitation of the rights lately won by Parliament in its struggle with the Stuarts. These included the full right of local legislation, control over taxes and expenditures, the right to fix the qualifications and judge of the eligibility of house members, the power to apportion legislative districts, freedom of debate and immunity from arrest, and the right of the assemblies to choose their own speakers. In Britain, these privileges had been fully vindicated by the Glorious Revolution, and in insisting upon them the colonial assemblies believed that they were assuming the normal prerogatives of all sovereign legislative bodies.

English officials, however, held that the colonies were technically mere subordinate corporations without inherent sovereignty, and they were unwilling to recognize colonial legislative prerogative as identical with that of Parliament. Colonial legislatures, they said, existed only upon sufferance and could exercise only such privileges as the king chose to grant them. Legally, they said, the colonial assemblies had a right of legislation analogous to that of any other private corporate body—the power to make by-laws. London officials also insisted that the benefits gained by Parliament in the Glorious Revolution did not automatically extend to the colonial assemblies, and that the royal prerogative was therefore much more extensive over the American assemblies than over Parliament.

This difference of opinion upon colonial legislative prerogative resulted in a long series of disputes between governor and assembly in most of the colonies. In some matters the assemblies were successful in asserting their rights. In all of the colonies they soon won full internal legislative power, and the early attempts in New York and

Maryland to rule without an assembly ended in failure, as did Penn's attempt to give the lower house mere veto power. Also the assemblies eventually established the right to judge the eligibility of their own members and to fix the qualifications for membership in the lower house.

On the other hand, British officials consistently refused to allow the assemblies to create new legislative districts or to pass "triennial acts" providing for automatic meetings of the assembly at regular intervals. Further, they refused requests of the assemblies for the automatic acceptance of their speakers by the governor. In Massachusetts, for example, a dispute between the General Court and Governor Samuel Shute over automatic acceptance of the speaker led to the issuance in 1725 of an "explanatory charter" confirming the governor's right to disapprove the speaker at his discretion.

In the sphere of finance, the assemblies won a great and decisive victory. From the first they were able to resist the insistent demands of royal governors acting on instructions from London that they pass permanent revenue acts making annual appropriations unnecessary. In New York, for example, the assembly by 1740 customarily limited its appropriations to one year, stipulated in great detail how the money was to be spent, and refused to accept amendments to revenue bills. When, in 1748, Governor George Clinton attempted to regain some authority over fiscal matters by use of his veto power, the assembly blocked all legislation and eventually forced him to capitulate. Similar incidents occurred in Massachusetts, Pennsylvania, and the Carolinas.

This victory over the purse strings, recapitulating as it did a like victory by the House of Commons over the Crown, was of tremendous importance in the growth of colonial internal autonomy. Governors could hardly support royal or proprietary prerogative against assemblies that could specify the expenditure of every penny and withhold money from any governmental function, however vital. This situation contributed substantially to a gradual depletion of internal British authority in America.

If colonial legislative prerogative was substantially modeled upon that of Parliament, the theory of representation which prevailed in eighteenth-century America was vitally different from that in England. In England, members of Parliament were held to represent the nation at large rather than the particular district which elected them,

and never considered themselves bound to obey local interests at the expense of national policy. In America, however, the representative was regarded primarily as a deputy, sent to the assembly by the people of his district simply because they were too numerous and too preoccupied to go themselves. This concept arose very early in Virginia and Massachusetts. When instructions were prepared for summoning the Virginia assembly of 1619, Governor George Yeardley suggested that distances were too great and that there were too many freemen to permit the attendance of all. Hence the instructions called upon the freemen in each of eleven districts to choose two deputies to attend the assembly for them. In Massachusetts Bay, Governor John Winthrop made a similar suggestion in 1634, proposing that the freemen in the various towns choose deputies to meet with the assistants as the General Court. The idea of the representative as a deputy soon spread to the other colonies. This American concept of representation was to prove a potent factor in colonial unwillingness to submit to Parliamentary taxation after 1763 and was thus of some consequence in promoting the Revolution itself.

THE COLONIAL GOVERNOR

The principal executive officer in the colonies was the governor. In the royal colonies he was an appointee of the Crown, named usually upon the recommendation of the Board of Trade, although on occasion the opinion of influential colonials was consulted. In the proprietary colonies, the governor owed his office to the proprietor, while Rhode Island and Connecticut chose their own governors.

As the representative of the Crown in the colony, the governor exercised virtually all the traditional prerogatives of the executive. Thus he summoned and prorogued the assembly; he possessed an absolute veto over legislation; by his commission from the Board of Trade he exercised nominal control over appropriations and expenditures; he had full appointive power for subordinate colonial offices; he was commander in chief of the colony's military forces and was vice-admiral of the province; he was the head of the Established Church in the colony; and, with the council, he frequently constituted a court of last resort. In short, he was the principal symbol of royal or proprietary authority and as such carried high

prestige. The office was certainly sufficiently important to call for the appointment of men of position and character, and in general the Crown so regarded it. The colonists' recurring charge that the English government placed inferior men in the governorships was on the whole not true.

Colonial governors were of three types: Englishmen who owed their offices to political influence with London officialdom, English military and naval officers, and provincials. The first group was the most numerous and the most distinguished. In eighteenth-century England, most offices were obtained by political favoritism, or even by bribery. Yet this was not thought to be immoral, and many distinguished men entered colonial service in this fashion. Fully a fourth of the English civil appointees were drawn from the ranks of the nobility or the lower English gentry, and others had long been influential in English public life.

Occasionally a rogue secured the office. The classic example cited by historians is that of Lord Cornbury, cousin of Queen Anne and governor of New York and New Jersey for a time at the opening of the eighteenth century. Cornbury was apparently a profligate scoundrel, devoid of any sense of public or private morality.[2] On the other hand, the list of distinguished men whom England sent to the colonies was long and impressive. The able and upright Thomas Pownall, governor of Massachusetts from 1767 to 1770, is an excellent example of this type of official. The provincial appointees were also often of high caliber. Thomas Hutchinson, who governed Massachusetts on the eve of the Revolution, has a bad name in American history because he supported the king in the break with England. Yet he was a man of integrity, a historian of estimable scholarship, and a talented official. Cadwallader Colden, who governed New York at intervals after 1760, was, with the possible exception of Benjamin Franklin, perhaps the most learned man of his time in America.

Notwithstanding the prestige of the office, however, the colonial governor's lot generally was not a happy one. As the king's representative, he was expected to defend the interests of Britain and to maintain the prestige of the Crown unimpaired. A governor who

[2] A few of Cornbury's deficiencies: he was chronically drunk in public, embezzled large sums from the New York treasury, cruelly oppressed the Quakers, and displayed tendencies toward abnormal sexual behavior.

disregarded instructions from London to curry favor with provincial interests courted loss of favor in London and eventual removal. On the other hand, a governor who attempted honestly to execute instructions from London was in danger of involving himself in a long and bitter struggle with the assembly, a struggle from which he was only too likely to come off second best. The British government thought in terms of imperial interests and British authority; the colonials thought in terms of provincial interests and the prestige of their own governments. The two points of view were incompatible. The whole conflict of interests between a colony and England thus centered upon the person of the governor, who nearly always incurred colonial wrath in the defense of imperial interest.

In spite of the governor's legal powers, in the many struggles between governor and assembly in eighteenth-century America it was generally the governor who was defeated. The real authority in colonial government was in the hands of those who controlled taxes and expenditures, and the assembly knew it. Time after time, the governor's failure to control expenditures defeated his attempts to carry out his instructions from London.

Sometimes the method used to defeat the governor was a simple and direct threat to withhold his salary. In certain colonies, notably in Massachusetts and New York, the governor's stipend was dependent upon annual appropriations by the assembly. If the governor was un-co-operative, it was easy to withhold this appropriation. In 1721, for example, the Massachusetts General Court informed Governor Shute that it would approve the annual salary grant only after he had signed all the bills passed by the legislature. The same thing happened occasionally in New York, New Jersey, and Pennsylvania. While the exercise of direct pressure of this sort was not common, the governor was almost invariably the victim of the control which the assembly exercised over the purse strings. The failure of the Board of Trade to obtain a permanent civil list for any colony confirmed the financial ascendancy of the legislatures.

The long conflicts between the assembly and the governor in the American colonies had at least two important consequences for American constitutional development. First, the colonists became extremely suspicious of executive power. They came to look upon executive authority as almost inherently evil and corrupt, and

suspect on every occasion. In the Revolution this attitude was strengthened by the popular hatred for monarchy symbolized by the person of George III. As a result, when the new states wrote their first constitutions, they tried to reduce their governors to virtual nonentities. It took a century of practical experience in state and national government to convince Americans that a comparatively strong executive authority was imperative to sound statesmanship.

Second, the colonists became accustomed to regard the executive and legislative departments of government as being entirely separate, as fundamentally opposed in interest and policy. It is sometimes said that the American states borrowed the doctrine of the separation of powers from Montesquieu, whose great work, *The Spirit of the Laws*, was known and read in America before the Revolution. It seems more fitting, however, to regard Montesquieu's doctrines as a confirmation of something in which Americans had been conditioned for a century or more. Long before Montesquieu they had become convinced of the desirability of a legislature removed from and independent of executive controls.

COLONIAL JUDICIAL AND LEGAL INSTITUTIONS

In the course of the century and a half before the Revolution, the colonies developed a judicial and legal structure largely adapted from its English counterpart. The growth was a slow one. The requirements of justice in America before 1700 were few and simple. Lawyers and judges trained in the common law were unknown; and in some places, Massachusetts for example, they were forbidden to practice. Only with the growth of population and the emergence of a more complex culture did a fully developed legal and judicial system make its appearance.

In most of the colonies of the early period, judicial authority was in the hands of the governor and council. Whenever an extension of judicial functions became necessary, local courts of original jurisdiction were established, usually by executive fiat, with the governor and council continuing to exercise appellate jurisdiction. In Massachusetts, for example, the Board of Assistants at first acted as a court of first resort; but in 1636 quarterly courts were formed at Ipswich, Salem, Newton, and Boston, and in 1639 four counties were formed, one around each of these jurisdictions.

Similar development occurred in the other colonies. In New York, the assembly of 1683 put the judiciary on a statutory base with the establishment of a court of sessions in each county. These were county courts with original jurisdiction over a variety of types of small criminal and civil cases. A like statute was enacted in Pennsylvania, where the county courts were given original jurisdiction over nearly all cases except capital crimes, which were tried by the provincial court.

With the emergence of local courts, the council in most cases ceased to serve as a court of original jurisdiction and retained merely its appellate functions. In nearly all the colonies, the governor and council constituted for a time a kind of supreme court. In Massachusetts, New York, and Virginia, the upper chamber functioned as a supreme court to the end of the colonial period. In the other colonies, however, the appellate jurisdiction of the council was either limited or taken away by the establishment of a provincial court of appeals. In South Carolina, a peculiar situation existed. There the Court of Berkeley County, erected in 1685, was given power to try all criminal and civil cases for the entire colony. For a long time, it was not merely the sole court of original jurisdiction, except for justices of the peace, but it also functioned as the supreme court of the colony.

DEVELOPMENT OF COLONIAL POLITICAL THEORY

Of great importance for the future of American constitutional theory was the body of political ideas developed in colonial times. Colonial political theory had two principal sources: seventeenth- and eighteenth-century writers on natural law, and certain ideas derived from English legalists.

The theory of a law of nature or natural law first arose in the ancient world. Its basic concept was that certain eternal principles of law were inherent in the very nature of the universe itself, man-made law being a mere affirmation of natural law. In the *Republic*, Plato advanced the conception of an absolute justice which existed whether or not it found expression in any human enactment. The Stoic philosophers, who emphasized the necessity of harmonizing man's institutions with those of nature, spread the same idea throughout the Hellenistic and Roman world. Cicero, the great Roman essayist, orator, and statesman, expressed the essential notion

in his *De Legibus,* where he stated that the binding quality of civil law rose out of its harmony with the eternal principles of right and justice. He contended that man-made law was valid only when it did not transgress the principles of right and justice, and that it would be impossible to make "robbery, adultery, or the falsification of wills" true law by mere enactment.

In the medieval period the idea of natural law continued to receive recognition. The Roman law as codified by the Emperor Justinian was thought to be largely a reflection of natural law; the *Decretum,* Gratian's great canonical code of the twelfth century, also paid homage to natural law. In England, John of Salisbury, a great theologian of the twelfth century, wrote that "there are certain principles of law which have perpetual necessity, having the force of law among all nations, and which absolutely cannot be broken." Henry de Bracton, the thirteenth-century English legal theorist, made much the same observation, as did Sir John Fortescue, who wrote two centuries later.[3]

Modern natural-law theory, however, arose in the late sixteenth century. The great problem confronting political theorists of the day was the rise of the modern national state, which had freed itself of ecclesiastical controls, feudal decentralization, and theoretical allegiance to the Holy Roman Empire. The essential political quality of the new national state was its sovereign irresponsibility, that is, its refusal to acknowledge superior controls exercised by any political or religious body. Jean Bodin, a sixteenth-century French theorist, first adequately defined the new sovereignty when he said that it was "supreme power over citizens and subjects unrestrained by the laws."

The sovereign secular state created a new problem in political theory. The state and its sovereign attributes could not be explained or justified by any notion of a divinely ordained political order as

[3] John of Salisbury (d. 1180) was a great English scholar, cleric, and early humanist, who did much to revive medieval interest in the ancient classics. Henry de Bracton (d. 1268) was England's greatest legal authority of the Middle Ages. His *De Legibus Consuetudinibus Angliae* combined English with Continental Roman legal practice, and had a pronounced influence on seventeenth- and eighteenth-century British writers. Sir John Fortescue (d. 1476) was a noted English jurist, justice of the King's Bench, and political theorist. His *De Natura Legis Naturae* is a leading early treatise on natural law, which he carefully distinguished from divine law. He argued that natural law was the fountainhead of the English constitutional system.

had medieval government, for the new nations had renounced theocratic controls. The national state and the theory of irresponsible sovereignty upon which it operated therefore required a new theoretical justification, and political theorists set to work to supply it.

The problem was solved in the seventeenth century by combining the ancient Stoic idea of natural law with the Calvinist-Separatist doctrine of the social compact. Political theorists turned the more readily to the idea of natural law as a sanction for social theory because the new science, particularly in astronomy and physics, seemed to demonstrate that all nature operated by immutable and eternal laws inherent in the nature of the universe itself. It was an easy step to transfer this idea from science to the foundations of social theory. The idea that a society or body politic might be based on a covenant or compact among the people had been seized upon by Calvin as the theoretical foundation for all church organization. The little Separatist communities in England and America had used the covenant principle to organize their churches, and it was but a short step for them to move from the creation of a church by covenant to the founding of the social order and the state itself by the same process. This the Fundamental Orders of Connecticut and the other Puritan covenants were to demonstrate.

A Dutch writer, Johannes Althusius (d. 1638), was perhaps the first to associate a modernized conception of natural law with the Calvinist compact theory. Althusius was himself a pronounced Calvinist, and he thus supplied a definite link between Calvinist theory and the secular philosophers. Althusius also was well known to the early Separatists, a fact which may explain the well-developed ideas on natural law present in the New England of Roger Williams and Thomas Hooker. Hugo Grotius, the great Dutch authority on international law, shortly presented the natural law–compact theory of the state anew in his immortal treatise, *De Jure Belli ac Pacis*, published in 1625. Thereafter the same general body of ideas, with some important variations in detail, was explored by a host of brilliant seventeenth- and eighteenth-century figures, among them the Englishmen John Milton,[4] James Harrington,[5] Algernon Sid-

[4] John Milton (1608–1674), the great Puritan poet, was also a political theorist of some consequence. His *Areopagitica* (1644) was a classic defense of the right of free speech. In later essays he used the natural-law theory to champion the doctrine of limited government and the right of revolution against a tyrannous king.

[5] James Harrington (1611–1677) was an aristocratic political philosopher whose

ney,[6] and John Locke,[7] and the continental writers Samuel Pufendorf, Emmerich Vattel, and Jean Jacques Burlamaqui.[8]

Seventeenth-century natural-law theorists took their departure not from divine sanctions for the state or from an Aristotelian conception of society as inherently political, but from the idea of an original state of nature, the presumed condition of man prior to the creation of all government. There being no man-made law in the state of nature, man's relations were then governed by natural law and by the long familiar principles of right and justice inherent in the nature of things. All theorists agreed that for the better protection of natural law and natural right men had covenanted together to create the state and erect a sovereign who was thereby endowed with the responsibility for protecting and enforcing natural law, a function originally inherent in separate individuals. Most philosophers held that the sovereign was a party to the compact and was bound by its terms, an idea pointing directly toward the doctrine of limited government, the theory of ultimate popular sovereignty, and the right of revolution.

An important derivation of certain seventeenth-century theorists was the distinct formulation of the idea of natural rights, hitherto not given clear and decisive expression. The doctrine was first expounded emphatically by John Milton and was later reiterated by the great John Locke, who was to exercise an immeasurable influence on colonial political thought. These writers conceived of a detailed body of inalienable rights and privileges possessed by every individual in the state of nature and reserved by him even in organized society. It was the state's duty to protect these rights, which were virtually immune to infringement, even by government in the name of the general welfare.

Utopian essay, *The Commonwealth of Oceana,* advocated equitable distribution of land, written constitutions, free elections, and the separation of powers. *Oceana* had considerable influence in America.

[6] Algernon Sidney (1622–1683), Puritan political philosopher and opponent of Charles I, wrote a *Discourse Concerning Government* advocating limited republican government and resistance to tyranny. He had much influence upon the revolutionary era in America.

[7] John Locke (1632–1704), a Whig politician and secretary to the Earl of Shaftesbury, was both political theorist and abstract philosopher. His best-known political works are his *Two Treatises of Government* (1690), the second of which is discussed on p. 40.

[8] Jean Jacques Burlamaqui (1694–1748) was a Swiss jurist and political theorist. His *Principes du droit naturel* derived natural law from the divine order and from man's reason and moral sense. Pufendorf and Vattel are discussed below.

Locke, who published his *Second Treatise of Government* in 1690 as a justification for the Glorious Revolution, commonly spoke of natural rights as those of "life, liberty and estate," the latter term apparently being a general one for property. The right to property, he said, was created by the union of a man's labor with the fruits of nature, and was therefore absolutely inalienable; even governmental restrictions upon usage in the light of the general welfare must be narrowly circumscribed. Locke's attitude toward the sanctity of private property and its virtual immunity from governmental regulation was largely a rationalization of the economic interests of England's new mercantile and industrialist groups, who were disgusted with outworn governmental restrictions upon economic enterprise. The doctrine of inalienable natural rights was later to enter American constitutional law, eventually becoming identified with the due process clause of the Fifth and Fourteenth amendments.

Locke associated his doctrine of natural rights with the concept of limited legislative power, also of great significance in American constitutional development. The legislature, he contended, could not lawfully enact "arbitrary" or unjust measures violating natural right, and it must rule through promulgated standing laws, not through capricious decrees. It could take no man's property without his consent, and it could not delegate its legislative authority to any other person or body. Locke also drew a sharp distinction between executive and legislative functions, and thus contributed to the growth of the doctrine of separation of powers in later colonial and national political theory. All these ideas substantially affected later American constitutional thought, both before and after the American Revolution.

Locke went further in defense of the right of revolution than had earlier theorists. He drew a distinction between the occasional violations of natural law and right inevitable under any government, and chronic habitual violations constituting a "long train of abuses, prevarications, and artifices" marking a government's degeneration into a tyranny. The former circumstance did not justify rebellion, but in the latter instance, the sovereign broke the compact by which the people's obedience was commanded, and rebellion became a right, even a duty.

Natural-law and compact theory early made their way into the

oligarchical semitheocratic societies of seventeenth-century New England. John Winthrop, governor of Massachusetts Bay and head of the oligarchical clique of ministers and aristocrats who ruled the colony, could assert that both churches and government properly originated by compact among regenerate men. He could assert also that the people ought to elect their own magistrates, and that the latter are responsible to the covenant and to God. John Cotton, the colony's leading churchman, could demand that "all power that is on earth be limited." Natural law also had a place in the pattern; it was identified with the law of God as revealed in the Bible through Christ and the prophets.

A belief in modern conceptions of liberal democratic government was not inherent in these ideas. If John Winthrop believed that government came into existence by compact, he nonetheless considered that it had divine as well as secular sanction. The magistrates, once in office, exercised their authority by the fiat of God as well as the authority of man. Government was limited, but this did not mean that the magistrates were subject to the whims of popular control. The magistrates were presumably chosen from the saved or "elect." They expected to operate government and church according to God's will; as for the common folk, it was their duty to submit to authority. Early Massachusetts society was not individualistic, but hierarchical and authoritarian. Compact theory and government originating from popular consent meant little or nothing in actual practice.

Yet compact social theory had in it the seeds of a modern secular constitutional system, and occasionally there were hints of the contemporary concepts of democracy even in early New England. Thomas Hooker, one of the founders of Connecticut, has on occasion been described as a believer in limited constitutional government based upon popular democratic controls. This point of view is undoubtedly exaggerated; Hooker's ideas on government, church, and society were for the most part good orthodox Calvinism, and he never quarreled seriously with the Bay Colony oligarchy. Nonetheless his writings do contain somewhat more emphasis upon the popular foundations and limited character of government than was common among early Calvinist divines. He early accepted the ideas of fundamental supreme law and the limitation of magistrates by an organic constitution. In a notable sermon of 1638 Hooker em-

phasized three points: (1) The choice of public magistrates belongs to the people by God's own allowance; (2) the privilege of election which belongs to the people must therefore be exercised according to the law of God; (3) since the people choose the magistrates, it is within their power also to set bounds and limitations upon the magistrates' office.

His *Survey of the Summe of Church Discipline*, published in 1648, was mainly orthodox Calvinist doctrine; yet he emphasized not so much the sovereignty of magistrates or the duty of submission, but rather the continued responsibility of officials to the people, who remained the ultimate source of sovereignty even after the compact. It is perhaps no accident that the Fundamental Orders of Connecticut, for which Hooker was in part responsible, placed no limitations upon the franchise, and subjected the magistrates to the control of the General Court. If Hooker was not a modern liberal democrat, he at least revealed something of the implications of Calvinist compact theory for later constitutional government.

Roger Williams, founder of Rhode Island and rebel against the Massachusetts oligarchy, was a political and religious radical who went much farther than Hooker along the path toward later American constitutional theory. His writings, sermons, and political activities all display strong evidence of a thinker who anticipated many of the basic tenets of nineteenth- and twentieth-century liberal democracy. He maintained in theory and practice (1) a highly democratic theory of the social compact; (2) a belief in limited government based upon popular sovereignty, in which government originates with the people, has only such authority as the people shall entrust to it, and is subject to termination by the people at will; (3) a conception of natural law as derived originally from God but nonetheless rational and secular in nature so that it can be discovered and analyzed by rational men, and of natural rights derived from natural law, which can properly serve as a barrier against encroachment by the state; (4) a belief in a sharp separation between church and state, in which the state has no authority over church or religious matters, and in which the church, as a mere private corporation, can exert no authority over either state or individual.

Williams' theory of the social compact was far more democratic than that of most seventeenth-century philosophers, and it enabled

him to emphasize sharply the limited and popular character of government. The state, he held, originated not in a rigid formal contract, but in an inherent community consciousness of common social purpose. Government later came into existence by formal contract in the community. Williams thus drew a sharp distinction between the state, or the ultimate sovereign community, and government, the latter being merely the agent of the state and the servant of the community. Government must be both immediately and ultimately subject to popular controls. It is evident, he said, that governments "have no more power nor for a longer time than the civil power of a people consenting and agreeing shall betrust them with." There is an inherent right in the people to change their government, even by rebellion if necessary, when it no longer serves their purposes.

Williams believed firmly in complete separation of church and state. His two principal essays, *The Bloody Tenent of Persecution* (1643) and *The Bloody Tenent Yet More Bloody* (1652) were both attacks upon the theocratic conception of government as maintained by John Cotton of the Bay Colony's oligarchy. Civil magistrates, said Williams, had no lawful authority over the church or over matters of individual conscience. Persecution for heresy violated natural law, natural rights, and the law of Christ. Moreover, the church had properly no public status. It was a mere private corporation, not unlike a trading company, and in a free society men might form one or another church or no church as they liked. Here was an extraordinary affirmation of the modern conception of religious liberty.

Williams believed in a variety of natural rights, derived rationally from the character of natural law. Religious liberty was one of these, but other rights were also sacred. Government must guarantee liberty of persons, by which he meant freedom from arbitrary punishment or restraint, and liberty of "estates," by which he meant right of property. He held that these rights were guaranteed in Magna Charta, and he was thus among the first of many colonists to assume that the great English charters incorporated certain natural rights fundamental to liberty. All these notions add up to a remarkable anticipation of later American political ideas on natural rights, compact theory, popular sovereignty, and the separation of church and state.

Williams was an extreme radical for his time, and he stood almost alone in New England, denounced by most magistrates and divines as a dangerous firebrand. At the end of the seventeenth century, however, New England society began to lose its oligarchical, theocratic character. As the eighteenth century progressed it assumed more and more a secular democratic cast. Religious and political theory reflected these changes, so that after 1700 declarations of belief in natural rights, compact theory, limited government, popular sovereignty, and the right of revolution became more and more common.

One of the earliest writers to reflect the growth of a secular democratic social order was John Wise, pastor of the church at Ipswich, Massachusetts, and lifelong champion of popular causes. In 1717 Wise published his *Vindication of the Government of New England Churches,* a defense of the Congregational system of church organization against certain Boston ministers who had agitated for a close-knit hierarchical church system. Wise was concerned in the first instance entirely with church government, but he made as well an interesting inquiry into the foundations of the secular state in order to support his argument. He openly borrowed his political ideas from Samuel Pufendorf, the noted German writer on international law whose *De Jure Naturae et Gentium* had appeared in 1672. John Locke's *Second Treatise of Government* would have served his purposes better, but apparently Wise was not acquainted with this work.

As Roger Williams had done, Wise turned natural-law theory into a powerful defense of individualism, liberty, and even democracy. Natural law, Wise said, emanated ultimately from God himself. In the state of nature men had possessed inherent rational capacity to discover natural law. They also possessed an inherent political equality and a body of natural rights of which no man could rightfully be deprived. Because some men violated natural law, men were driven into combination for their common safety. The state, Wise emphasized, was a mere instrument of human convenience, not any divinely sanctioned agent of God's will. Therefore in covenanting together the people had a right to determine their own form of government and to alter it at will. Of the three forms of government, democracy, aristocracy, and monarchy, Wise thought democracy to be the best, since it gave recognition to man's natural equality

and was best calculated to protect society against tyranny and despotism.[9]

In the course of the eighteenth century natural-law and compact theory assumed a position of increasing importance in the minds of colonial statesmen, lawyers, and clergymen. Educated colonials in New England, and the other colonies as well, read and adopted as their own the ideas of Locke, Harrington, Milton, Sidney, Pufendorf, and the other notable political theorists of the day. Locke, hardly known in America before 1740, became familiar to the generation of Americans before the Revolution. The New England clergy in particular filled their sermons with references to the law of nature, government by compact, natural rights, and the right of revolution.

To this body of ideas the colonists added one of their own—the notion of a written constitution. Since the days of the Mayflower Compact and the Fundamental Orders of Connecticut they had been accustomed to form governments upon written compacts. The idea of a written instrument of government was strengthened by the later charter grants to Rhode Island, Connecticut, and Massachusetts, and by the various written proprietary charters, notably Penn's Charter of Liberties of 1701.

The colonists thus became accustomed to viewing the charter as a visible embodiment of the compact setting up government, which specified and guaranteed certain natural rights, presumably derived ultimately from natural law and reserved to the people. The frame of government and the rights specified in the written constitution could not lawfully be altered by the government. The constitution, in other words, was supreme, and government was fixed and limited by its terms.

On the eve of the Revolution Emmerich de Vattel's *Law of Nations*, published in London in 1758, became known in the colonies and attracted much interest.[10] Significantly, Vattel emphasized

[9] Because the *Vindication* was republished in 1772 and had some circulation at that time, Wise has sometimes been described as the father of the Revolution. It is doubtful whether his influence upon the revolutionary era was large in any direct sense, for the *Vindication* in certain passages attacks the right of revolution as contrary to natural law. The passages on rebellion and revolution appear to be confused and contradictory.

[10] Emmerich de Vattel (1714–1767) was a Swiss diplomat, jurist, and writer on international law. He emphasized the customary practice of states as well as natural law as the origin of international law.

the importance of a fixed written constitution which could not be altered by the legislature. He also drew a sharp distinction between the fundamental constitution, which he regarded as supreme, and mere legislative enactments, which must conform to the written constitution.

Colonial theories of natural law and natural rights, compact, written constitutions, and the right of revolution bore fruit in the Revolutionary era, when they formed the legal basis of the colonial argument against England. Patrick Henry's Resolves, John Dickinson's essays, and Jefferson's ideas as set forth in the Declaration of Independence all were applications of well-matured colonial ideas upon natural law and natural rights.

THE INFLUENCE OF SIR EDWARD COKE

Sir Edward Coke, the great seventeenth-century authority on the common law of England, also contributed substantially to colonial ideas on limited government. In his *Institutes*, Coke contended that the Magna Charta had embodied certain fundamental principles of right and justice, and that the common law contained a further expression of the same principles. Magna Charta and the common law, he argued, were therefore supreme law, having such force that they controlled both the king and acts of Parliament.

Coke's opinion in Dr. Bonham's Case, delivered in 1610, when Coke was Chief Justice of the King's Bench, contained a notable expression of this viewpoint. An act of Parliament had authorized the London College of Physicians to license the practice of medicine in the City and empowered the college to punish physicians practicing without the required license. When one Dr. Bonham appeared before Coke on appeal on a charge of having violated the statute, the Chief Justice held Dr. Bonham innocent upon the grounds that the law in question was void. He went on to observe: "And it appears in our books, that in many cases, the common law will control acts of Parliament, and sometimes adjudge them to be utterly void; for when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void."

This case upon casual examination appears to be a seventeenth-century application of the doctrine of judicial review. Actually, it may not be so regarded. The modern American concept of ju-

dicial review has to do with the power of a court to hold an act of a coequal legislative body invalid as repugnant to the Constitution. In Coke's day, however, no clear-cut idea of Parliament as being strictly a legislative body had yet emerged, nor had the later notion of the separation of powers any hold upon political thought at the time. Coke was thus upholding the validity of one set of courts, those of the common law, as against another, the High Court of Parliament. Notwithstanding this, the case certainly contains the idea that the common law embodies the principles of natural law and natural right, and that it therefore can control the acts of an important agency of the government.

Coke became the principal legal authority in colonial America in the eighteenth century, in part because his *Institutes* and *Commentaries on the Common Law* were among the very few legal works accessible to colonial lawyers, in part because many colonists studied law at the Inns of Court in London, where Coke's ideas were still given wide currency, even though many of them were no longer generally recognized in English practice. Coke's notion that the common law and Magna Charta reflected natural law and could therefore control acts of Parliament thus gained wide acceptance in America, even though the doctrine was generally rejected in England after 1700.

The best evidence for this statement is the Writs of Assistance Case, which occurred in Massachusetts in 1761, on the very eve of the Revolution. A writ of assistance was simply a "John Doe" search warrant; that is, it permitted the bearer to search virtually any premises at virtually any time. The English government often issued them to customs officers to facilitate search of warehouses, ships, and private dwellings, their use having been authorized by an Act of Parliament of 1662.

Writs of assistance, like other writs, were issued in the name of the king. Hence, when George II died in 1760, the writs of colonial customs officials had to be renewed, so as to bear the name of the new sovereign, George III. At this time, the British government was already tightening the enforcement of commmercial regulations, much to the resentment of colonial merchants. When the Massachusetts customs officials applied to the Superior Court of the colony for new writs, certain Boston merchants determined to resist their issuance, and they retained James Otis, a young Boston lawyer of

the day, to represent them. The case came before the Superior Court in 1761, and Thomas Hutchinson, recently appointed Chief Justice, heard the case.

Otis advanced the argument that writs of assistance were illegal, since they violated a fundamental principle of the common law —that every man should be secure in his own home. As the writs were authorized by an act of Parliament, the statute was also illegal, for it contravened the common law, which was supreme. Otis' actual words to the court as reported by John Adams were:

> Thus reason and the constitution are both against this writ. . . . No Acts of Parliament can establish such a writ; though it should be made in the very words of the petition, it would be void. An act against the Constitution is void.

As authority, Otis cited Dr. Bonham's Case and Coke's works. Thus on the eve of the Revolution an American lawyer, citing Coke, had contended that the common law constituted a kind of supreme law for England, and that acts of Parliament violating its principles were void, a clear defense of the doctrine that legislative power is limited by higher law. Otis lost his case, but the important thing is that he made the argument. Three years later, he used the same reasoning in the attack on the Sugar Act, at the opening of the Revolutionary crisis.

THE COLONIES IN THE EMPIRE

Although the colonies were in most respects internally autonomous, they were but small units in a vast and complicated imperial system, which by 1763 was the greatest the world had seen since the day of the Roman Empire. The British government, however, awoke only gradually to the fact that its subjects had created a far-flung network of colonies requiring some control and administration. The main outlines of commercial policy first appeared in the so-called Navigation Acts, enacted between 1660 and 1696, while the administrative machinery of the empire was not complete until after 1700.

The policy and attitude evolved by Britain toward her new empire was commercial rather than imperial in the modern sense. That is, London officialdom was not interested in political control of the colonies for its own sake, or for taxes or military power.

Rather, Britain viewed the colonies as a great commercial reservoir, to be exploited for the benefit of English traders and the material prosperity of the mother country. Mercantilism, the body of economic theories about trade and empire which gained currency in the latter seventeenth century, emphasized the importance of a favorable balance of trade and the importance of colonies as markets and as sources of raw materials.

The Navigation Acts, anticipated by Cromwell and enacted formally between 1660 and 1696, reflected the prevailing mercantilist trend of thought. They embodied three main principles: First, all trade with the "plantations" must be in English or colonial ships manned by English crews or colonial crews. Second, certain colonial products, the so-called enumerated commodities, must be shipped to England alone; these included tobacco, sugar, indigo, rice, cotton, and naval stores. Third, the plantations must, with certain exceptions, take their imports only from Britain, this rule being intended to give English merchants the benefits of the middleman's position in continental exports to the colonies. The Molasses Act of 1733 placed an additional restriction on colonial trade; it required all sugar and molasses imported into the colonies from other than British plantations to pay a duty of sixpence per gallon. This statute, passed at the instance of absentee West Indies plantation owners, was intended to give the British sugar islands a monopoly in sugar production for the colonial rum industry.

Largely because England's interest in the colonies was commercial rather than political, the development of colonial administrative agencies proceeded in a comparatively unplanned and haphazard fashion, no single agency ever being charged with the primary function of colonial government and administration until the very eve of the Revolution. By the early eighteenth century, however, six principal agencies of the British government in London shared the responsibility for administering the colonies: the Secretary of State for the Southern Department, the Privy Council, the Board of Trade, the Treasury and Customs Office, the Admiralty, and Parliament.

The cabinet officer immediately charged with the administration of colonial affairs was the Secretary of State for the Southern Department. This official was one of two secretaries for foreign affairs whose duties were theoretically interchangeable, but by cus-

tom and convenience the Secretary of State for the Northern Department confined his activities to the north of Europe, while the Secretary of State for the Southern Department was concerned mainly with the region south of a line drawn roughly from Paris to Constantinople. After 1704, American affairs were also placed in the Southern Department.

The power of the Secretary over colonial affairs rested mainly upon his appointment of colonial governors. In practice he gave little attention to their duties, once they had taken office. The Secretary's interest in the colonies was confined to military affairs, foreign policy, and piracy, while matters relating to commerce and trade were turned over to the Board of Trade for study and recommendation. Between the Board and the Secretary there was a constant exchange of papers and information, and a fairly well recognized division of interest obtained.

Since the Secretary of State enjoyed the right of approach to the king, his office functioned as a clearing house between the king and other parts of the English government. This increased his importance in colonial administration, for all petitions, suggestions, and requests for the royal favor passed through his hands. All matters relating to colonial affairs were also relayed by him to the proper official. Thus if Parliament sought information from the Board of Trade, the request was presented through the office of the Secretary.

Although the Secretaries of State were usually competent men, it was unfortunate that they were so little informed about colonial matters. The Duke of Newcastle, for example, who occupied the office from 1724 to 1748, was interested mainly in English party politics and cared little about America. The other duties of the Secretaries were so burdensome that they had little time for administrative detail and policies. It was administration of this kind which accounted for the fact that English officials eventually fell completely out of touch with American problems.

The Board of Trade was in theory a mere advisory body; actually, however, it was more directly and exclusively concerned with American matters than any other agency. The Board's immediate predecessor was the Lords of Trade, a committee of the Privy Council erected in 1675, when Crown officials were just becoming aware of the desirability of a more positive and coherent colonial

policy. The Lords were placed in direct charge of American affairs, and for some years administered their duties with efficiency. They strengthened the customs service, placed the proprietaries under more direct control, and took steps toward the unification and centralization of the entire colonial system. After the Glorious Revolution, however, the Lords ceased to function effectively, and in 1696 King William replaced it with the "Lords Commissioners of Trade and Plantation," a sixteen-man body better known as the Board of Trade.

The Board had a great variety of duties, the most important being the instruction of colonial governors, control of colonial patronage, the review and disallowance of colonial legislation, assistance to the Privy Council in appeals from the colonial courts, and advice to the Crown and Parliament upon matters of colonial policy.

Although the Board did not appoint colonial governors, it nonetheless was charged with instructing them in virtually all questions of policy except foreign affairs, military matters, and piracy. In practice, it carried on a constant correspondence with the governors, advising, admonishing, and seeking information to be forwarded to other governmental departments in need of it. While the Board's supervision over the governors was in theory purely advisory, its prestige was usually great enough for it to command respect for its policies. It had no removal power, but it sometimes could and did force the removal of governors who violated its instructions too flagrantly.

The Board also had some control over royal patronage within the colonies. By established custom, its nominations for members of the governors' councils were accepted by the Crown, and it sometimes was able to control the appointments of royal governors, although here its wishes were very often ignored by the Secretary of State.

The power to review and disallow colonial legislation was nominally lodged in the Privy Council; actually, however, the Council invariably referred colonial legislation to the Board for investigation, and then abode by the Board's recommendations as a matter of course. Colonial legislation went into effect immediately upon being signed by the governor, but the king reserved the right to "disallow" statutes within a prescribed time. In Pennsylvania the charter required that all laws be submitted within five years to the

Crown, which might then nullify them within six months after they were received; in Massachusetts the time allowed was three years; and in the royal colonies a statute could be disallowed at any time after passage. Disallowance differed from the modern veto in that its effect was to repeal a law already in operation rather than to block the proposed enactment of a law.

The Board's decisions on disallowance were in general guided by well-defined principles. It was quick to disallow encroachments upon the royal prerogative, such as the colonial triennial acts providing for automatic meetings of the assembly. It also disallowed laws which were considered to be inconsistent with fundamental principles of English law and justice. In this category were the various acts which attempted to classify slaves as personal property. It usually disallowed laws regarded as detrimental to British commercial policy, and those which it felt endangered the welfare of the colonies enacting them. Thus, the Board refused its assent to the Virginia Land Act of 1707, which permitted the patenting of two hundred acres of land per taxable servant imported. It also frowned upon badly drawn, obscure, and absurd laws.

Some four hundred acts of colonial legislatures were recommended for disallowance by the Board between 1696 and the outbreak of the American Revolution. The Board was sometimes exceedingly dilatory in the performance of its duties; laws were often disallowed after they had been in effect for years and had already accomplished their intended purpose. Yet with all its weaknesses disallowance constituted one of the few genuine checks which the British government exercised upon the internal life of the colonies. In general, the Board was attentive to its review of legislation, and arrived at its judgments only after grave consideration.

The function of disallowance was in some degree anticipatory of the role which the Supreme Court of the United States was to play with respect to state legislation at a later date. An agency of the central government reviewed legislation passed by local legislatures and decided whether or not it was in accordance with the fundamental law of the central government. It is true that the Supreme Court is a judicial body, reviewing the decisions of inferior courts rather than legislative enactments as such, and that it passes upon state legislation in the light of a written constitution. Yet the

essential idea of harmonizing local legislation with central supreme law obtains in both instances.

The Board also played an important role in advising the Privy Council on appeals from the colonial courts. It was usually given the task of investigating disputed facts or questions of policy behind cases on appeal, and as a rule its recommendations were accepted by the Council.

Upon occasion, the Board furnished both factual information and advice to the various ministries and to Parliament, a function of some consequence, particularly at those periods when the Board possessed sufficient prestige to make its recommendations effective. Board members often had seats in the Lords or Commons, a fact making relations with Parliament fairly intimate. The Board frequently submitted information to Parliament on request, and it sometimes even successfully recommended the passage of specific pieces of legislation for the colonies.

Since the Board possessed only advisory powers, its importance in the last analysis was dependent upon the quality of the men who served on it, their prestige, and their relations with other branches of the government. The original Board included John Locke, the famous statesman-philosopher, and William Blathwayt, a man endowed with an extraordinary knowledge of colonial affairs, as well as two members of the House of Commons and two members of the Privy Council. Its prestige was therefore very high. After 1714, however, few men of distinction served on the Board, and its importance entered upon a long decline. Appointment in 1748 of the Earl of Halifax as President of the Board gave the body renewed significance. After 1751 Halifax was a member of the Board and of the Cabinet at the same time. After 1763 the Board again became unimportant, and it was abolished in 1782.

Nominally, at least, the Privy Council had two important functions with respect to the colonies. These were the review of colonial court decisions and the disallowance of colonial laws. The Privy Council had once been an important executive body, but by 1700 the full committee had ceased to be anything more than a ceremonial body. Its theoretical functions were actually performed by a series of committees, whose acts the Council ratified as a matter of course.

The Committee on Appeals of the Privy Council was a court of last resort for the American colonies. If one party to a colonial action was dissatisfied with the decision of the court of highest resort in the colony, he could petition the governor to grant an appeal to the Council. Ordinarily, the governor's instructions limited such appeals to civil cases involving £200 or more, although appeals were occasionally granted in criminal cases. The Council as a matter of course transferred such cases to the Committee on Appeals, which in turn usually referred the facts to the Board of Trade. As a rule, the Committee embodied the Board's finding in its decision, although occasionally it exercised some independent judgment. The Committee's decisions were then promulgated as the decisions of the king-in-council.

Certain principles were observed regularly by the Committee and the Board in arriving at decisions. As far as possible, opinions were rendered in accordance with the local law of the colony in question, unless some fundamental rule of English procedure or justice were involved. The Committee sought to protect English subjects against grave miscarriages of natural justice, and it also attempted to use appeals as a method of controlling the administration of justice in the colonies. Certain common colonial legal practices were definitely frowned upon—for example, evidence by affidavit, general verdicts, improper jury procedure, and the like.

Although the Committee attempted to function efficiently as a supreme court for the empire, its jurisdiction was subject to serious weaknesses. The expense of appeals was great. Numerous documents and records and occasionally even witnesses had to be sent to England. English solicitors must be retained to argue the case before the Committee and the Board of Trade. The cost of an appeal often amounted to several hundred or even several thousand pounds.

Appeals sometimes took years to carry through to a final judgment. For instance, the Stanton Case, which arose in Rhode Island, required ten years from petition to verdict. Moreover, the colonial courts, like other departments of the colonial governments, often resented outside interference with their jurisdiction, and in extreme instances, sometimes actually refused to give effect to the orders of the Council. For example, in *Frost v. Leighton,* taken on appeal from the Massachusetts Courts in 1735, the Council reversed a two-

hundred-pound judgment which had been assessed against Leighton for cutting timber upon the public lands in Maine, although Leighton had a license to do so. The Privy Council ordered a refund and a new trial. After three years of dallying, however, the Superior Court of Massachusetts refused either to give the necessary order for a new trial or to restore Leighton his £200. When Governor Belcher and the Council failed to give him any relief, Leighton obtained a second order from the Privy Council directing Frost to pay the disputed sum immediately and ordering the governor and council to "support the royal authority."

The treasury and customs commissioners in London controlled the colonial customs service, which was not separated from that of Great Britain until 1767. A body of customs officials confusing in variety appointed by the Crown and responsible to the treasury—collectors, surveyors, naval officers, controllers, and the like—gradually grew up in the colonies, these officials being charged with the enforcement of the Navigation Acts and the collection of the duties imposed therein. Heading the American customs was a surveyor-general, who exercised a general supervisory authority over all colonial customs houses. In 1709, the continental colonies were divided into a northern and a southern department, a separate surveyor-general being appointed for each. Each customs house was in charge of a collector, whose principal function was the enforcement of the navigation laws and the collection of the duties incidental thereto. The resident naval officer performed much of the work of clearing vessels entering or leaving the port, this official being responsible not to the customs office but to the Crown.

In 1696 the High Court of Admiralty in England, acting on instructions from the Privy Council, created eleven vice-admiralty courts in the American colonies. The colonial vice-admiralty courts, which were subject to the High Court of Admiralty and the Admiralty Board in England, were given control of the usual marine, prize, and salvage causes, as well as certain cases arising out of violation of the various acts of trade. They remained an important agency of British control in America until the Revolution and succeeded in building up a substantial body of American admiralty law, most of which was later adopted by the federal courts under the Constitution.

Finally, Parliament exercised an uncertain degree of authority

over the colonies. The theoretical extent of Parliamentary authority in America hardly concerned British officials at all before 1763, although colonial writers occasionally discussed the matter. Some colonists held that the colonies were not part of the realm of England but merely part of the king's domain and were therefore not subject to acts of Parliament at all. Others contended that an act of Parliament might be recognized in a colony in the absence of any specific colonial legislation on the point. Still others believed that a colony was subject only to those parliamentary acts which were in force when the colony was founded.

Such theories had little relation to reality. In practice, many acts of Parliament had effect in the colonies. Thus, the colonies were subject to the various Navigation Acts passed by Parliament from Cromwell's time onward and to the acts erecting a colonial customs service and the Admiralty Courts. Several important statutes were directly concerned with the internal affairs of the colonies. Among these were the three statutes prohibiting certain classes of colonial manufactures: the Woolens Act (1699), the Hat Act (1733), and the Iron Act (1750); the act fixing the value of foreign coins in the colonies (1708); the act establishing an intercolonial post office (1710); the act making colonial realty and slaves chargeable with debts (1732); the colonial Naturalization Act (1740); the act extending the Bubble Act to the colonies (1741); and the act forbidding the issuance of paper money by the New England colonies (1751).

These parliamentary statutes were for the most part concerned with major considerations of imperial policy. Parliament legislated only on the major affairs of the empire at large; it was not interested in the purely domestic internal affairs of any one colony.

When the vast complex mechanism of the British Empire in the eighteenth century is examined, it appears that the empire had become something very like a modern federal state. The government at London controlled matters of general imperial importance, while local affairs were left to the care of the provincial governments. Thus, London was concerned with the commerce and trade of the empire, and with defense, Indian affairs, the post office, and money. These functions upon examination appear to be remarkably like those later delegated to Congress by the Constitution of the United States. Only one important power accorded Congress

was not exercised by the British government. That was the right of taxation, the very right which caused such an uproar in the Revolutionary era.

No political theorist before 1765 recognized the empire for the federal state it had become. English legalists still thought of the colonies as subordinate political corporations and held that Parliament and the Crown were supreme over them. The theory of divided sovereignty, upon which American federalism was later to rest, had not as yet been formulated. The empire was a federal state in practice but not in theory.

EARLY ATTEMPTS AT IMPERIAL REORGANIZATION

Though on the whole the empire's governmental mechanism worked smoothly enough, it was subject to certain difficulties. A very important one was the general absence of unity and coherence in colonial administration, a situation arising mainly because no single agency in Britain was in control of American affairs. While the Board of Trade was largely concerned with colonial matters, it had only advisory authority and hence could enforce no unity in administration or policy. Other officials, the Secretary of State, for example, regarded colonial matters as of incidental importance in relation to their other duties; as a result they were usually badly informed on colonial affairs and gave them but little attention. Division of authority among many officials resulted in a general absence of any sense of responsibility for colonial policy and a disinclination to undertake the reform of colonial administration. This situation explains in part why colonial affairs were allowed to drift along for three-quarters of a century after 1689 with little attention given the development of a more logical, unified, and rational colonial system.

A second difficulty arose out of the conflict between local provincial interests and the larger interests of the empire. Each of the various colonies tended quite naturally to adopt a narrow and provincial view of its relations with the mother country, considering questions of war, trade, land, and Indian relations strictly in the light of its own interests. This attitude exasperated London officials, who looked upon these problems in the light of the larger welfare of the empire and the prosperity of the mother country. This conflict of interest focused in the interminable quarrels between gov-

ernors and assemblies upon money matters, defense, Indian affairs, and the like. Since, for reasons already explained, the assemblies usually more than held their own in these differences, provincial interests more often than not triumphed over what London officials conceived to be the larger imperial welfare.

There were in general two possible remedies for this situation. One solution, some form of imperial absolutism, repeatedly suggested itself to exasperated British officialdom. Under this plan, the existing colonies might well be combined into a small number of larger royal colonies. Were the existing colonies permitted to continue, then, at the very least, proprietary and charter governments would be abolished and a uniform pattern of royal government imposed on all colonies alike. In any event, colonial autonomy would be virtually ended, local administration being placed in the hands of royal officials paid and directed from London. The assemblies would either disappear or be greatly reduced in importance.

The other solution would nowadays be termed "dominion government." It would involve the erection of an intercolonial federal government in America to handle common problems. This government would maintain an army and a navy, treat with the Indians, handle western lands, operate a post office, and possibly coin money. It would support itself either by direct taxation or by levies upon the various component governments. The administrative duties of London would be reduced to a minimum, although English officials would exercise a general supervision, retaining enough control to protect British interests.

There were great difficulties in the way of either royal absolutism or colonial dominion government. London officials were interested only sporadically in the problem of colonial administration, while the prevailing divided responsibility for the colonies made it difficult for any single agency to propose and carry through a comprehensive plan of reform. The almost total absence of any sense of cultural or political unity among the American colonies, before 1763, was a fatal stumbling block to the development of dominion government, for the colonies lacked any desire for sustained co-operation in the handling of their common problems. In spite of these difficulties, however, two attempts at voluntary colonial federalism and one attempt at royal absolutism were made before 1763.

The earliest attempt at voluntary colonial co-operation occurred

in 1643, when Massachusetts Bay, Plymouth, Connecticut, and New Haven formed the Confederation of New England. While the various New England colonies were fearful and jealous of one another, they were nonetheless drawn together by the Indian menace, fear of the Dutch and French, certain boundary problems, and common religious interests. Rhode Island and the New Hampshire towns were not permitted to join the Confederation, for Massachusetts still hoped at this time to enforce her title to these settlements.

The Confederation's articles of union called the Confederation a "firm and perpetual league of friendship for offense and defense." Each colony was to send two commissioners to meet with the delegates from the other colonies once a year and in emergencies. The commissioners were to elect one of their own number as a presiding officer. They could declare war, make peace, and settle boundary disputes with the consent of any six of the eight delegates. The articles also guaranteed the mutual return of fugitive servants and the extradition of criminals, two provisions later incorporated in the Constitution of the United States.

Though the Confederation was of some importance for a time, it was sabotaged from the start by Massachusetts Bay, which felt itself stronger and more important than the other colonies. The Bay Colony negotiated independently with the French in Arcadia, handled its own Indian problems, and in 1652 refused to co-operate in a projected war against the Dutch voted by seven commissioners. The Restoration of 1660 in England, which re-established some measure of direct English control over the colonies, also dealt a severe blow to the Confederation's vitality, and Connecticut's annexation of New Haven further weakened the league. The commissioners continued to meet occasionally, however, until Massachusetts lost its charter in 1684, when the Confederation was formally dissolved.

The one important attempt to establish unified royal absolutism, extending from 1675 to 1689, culminated in the erection of the Dominion of New England in 1686. When the Lords of Trade were established in 1675 they at once began working toward closer royal control over the colonies. They discouraged the establishment of any additional proprietary colonies and sought means for converting existing proprietaries and charter colonies to the royal type.

They were forced to make an exception in the proprietary grant to William Penn in 1681, but as already observed, they hedged the grant about with several restrictions intended to bring the new colony under certain royal controls. Meantime, in 1679, New Hampshire was converted to a royal colony, and in 1682 the Lords blocked a proprietary grant for Florida. Two years later, after lengthy judicial proceedings, the lords secured the annulment of the Massachusetts charter of 1629, in order to reduce the semi-autonomous Puritan republic to some degree of royal authority.

This policy of royal centralization came to a head in 1686, when the Crown established the Dominion of New England. Apparently modeled on absolutist French Canada, the Dominion dissolved all existing governments in the New England colonies, New York, and New Jersey, and united the colonies involved under a single royal government. A governor and council, both appointed by the Crown, were the sole governing bodies; there was no provision for a legislature. The governor and council were given power to promulgate laws in the name of the king, to tax, and to provide for the administration of justice. Sir Edmund Andros was named governor of the Dominion.

The Dominion of New England failed mainly because the tradition of colonial self-government was already too well established to be destroyed in such summary fashion. New Englanders remained in a state of silent animosity to the new regime and seized the first opportunity to destroy it. That opportunity came in 1689, when news of the Glorious Revolution reached America. The former colonies of the Dominion immediately rose in rebellion, and in the name of King William imprisoned Andros and his subordinates as agents of the deposed James II. The Dominion disappeared overnight.

William III wisely allowed the colonies to reassume their old identity and autonomy. Only in Massachusetts were matters somewhat changed. The Crown refused to restore the trading company charter, and instead issued a new charter in 1691. While most features of the old government were retained, the governor was now appointed from England and the colony was obliged to send its laws to England for review. Under the new charter Plymouth and Maine were incorporated in Massachusetts.

NEED FOR IMPERIAL REORGANIZATION AFTER 1750

After the Dominion's failure, no further concerted attempt at colonial reform was projected by British officials until the close of the Seven Years' War in 1763. England in the early eighteenth century was preoccupied with her protracted struggle with France for control of North America, and could pay little attention to colonial government. Meanwhile the old habits of colonial self-government, limited only by the imperfect controls of the British federal system, were left undisturbed.

In 1754, Benjamin Franklin, aware of the need for greater colonial co-operation in certain common problems, proposed the erection of what was in effect a self-governing confederation for the colonies. The occasion was the Albany Conference, composed of delegates from the northern colonies called together by the Board of Trade to negotiate with representatives of the Iroquois Indians, in order to cement the very valuable military alliance with that tribe. Franklin, a delegate from Pennsylvania, obtained the adoption of a resolution that some union of the colonies "was absolutely necessary for their preservation." He then presented a plan of union, which the congress adopted and recommended to the various colonial assemblies.

The Albany Plan was essentially a scheme for a federal government for all the continental colonies. There was to be a "grand council," composed of delegates elected by the various provincial assemblies. Very cleverly, Franklin provided that the number of delegates from any one colony was to be dependent upon the size of the monetary contribution which that colony made. There was to be a "president-general" appointed by the Crown as executive officer. To this government the respective colonies were to delegate the powers to raise military and naval forces, to make war and peace with the Indians, to regulate trade with the tribes, to control the purchase of Indian lands, and—significantly—to levy taxes and collect customs duties.

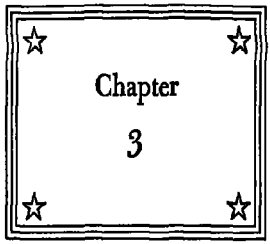
Franklin's plan of union was foredoomed to failure. Not a single assembly accepted the plan. It appealed neither to the colonies nor to the Crown. To the colonists it seemed to involve too much a surrender of local prerogative to the central government, and they

wanted none of it. On the other hand, British officials probably would have rejected the plan for the opposite reason: to them it seemed to concentrate too much power in colonial hands and strengthen colonial autonomy too far. Franklin reported that in England it was "thought to have too much of the democratic" in it.

Though the Albany Plan thus failed of adoption, Franklin's proposal was nonetheless significant, for it is the first clear evidence that the colonists were groping their way toward the conception of federalism later embodied in the American constitutional system. The Articles of Confederation and the Constitution later delegated to a central government substantially the same group of powers as Franklin's plan had proposed be delegated in 1754.

It is also possible that the adoption of Franklin's proposal would have averted the revolutionary crisis which shortly arose out of Britain's attempt to reorganize her colonial system. The Albany Plan was essentially an anticipation of the scheme of dominion government evolved in the British Empire in the twentieth century. Successful operation of the dominion system would have solved the problem of imperial organization for an indefinite period, and would have averted the strains which became so apparent in the Seven Years' War and which led directly to the attempt at imperial reorganization.

Some attempt to reform the imperial structure was virtually inevitable, and if the colonies would not initiate the movement, sooner or later the attempt was certain to be made from London. It was the inefficient operation of the imperial system during the Seven Years' War which finally crystallized the determination of British officials to impose certain reforms on the empire. During the war, the prevailing scheme of defense, which allowed each colony almost complete discretion in raising and supplying armed forces, broke down completely, and the Navigation Acts were also flagrantly violated. Such a state of affairs was intolerable to Britain. At the same time, the Peace of 1763 paved the way for an attempt at reform, for it cleared the French from North America and allowed Britain to pay some attention to colonial policy, undistracted by the French conflict. In 1763, therefore, London, deeply dissatisfied with the existing colonial system, launched a far-reaching plan of imperial reorganization. The attempted reform led directly into the American Revolution.



The American Revolution

THE FORCES producing the American Revolution were exceedingly complex, and even today historians are not in general agreement upon them. The immediate cause was the attempted British reform program inaugurated at the close of the Seven Years' War, in which Britain sought to bring the colonies under more direct control. The attempt at reform was inspired by British disgust with colonial defense measures and American evasions of the Empire's commercial restrictions.

Behind this disgust there lay a changing conception of empire. British officials were abandoning the older ideal of mercantilism for a new conception—that of imperialism. Mercantilism had sought colonies as markets and sources of raw materials, and was interested in political control only as incidental to these ends. Imperialism, the newer policy, sought colonies primarily as a means to greater political, financial, and military power, ends to be achieved through sharper and more efficient political and military control of the colonies and a program of direct taxation.

The British reform program affected adversely the economic interests of nearly all classes of colonists. Merchants, lawyers, and

land speculators were particularly affected, however, and they led the attack on the earlier Parliamentary measures.

The underlying basis of the American objection to the British program was undoubtedly a conviction that the new measures would prove economically ruinous, but in accordance with Anglo-Saxon tradition the colonists couched their objections very largely in constitutional and legal terms. This led to a protracted debate between England and America as to the fundamental nature of the empire's constitutional system. The developing crisis thus had somewhat the appearance of a lawyers' quarrel, though it is scarcely conceivable that the colonists would have pursued the argument so vigorously had they not felt the immediate severity of the new tax laws and the commercial menace of tighter trade regulations.

Colonial resistance to Britain was intensified by a growing American sense of independence, and an awareness of cultural and economic divergence between America and England. The destruction of French control in Canada removed much of the old sense of military insecurity and dependence on Britain, while their growing population and economic power gave the colonists an additional sense of self-sufficiency. Many Americans were also coming to realize how profoundly Britain's culture and economic interests differed from those of the colonists; they saw that their economic, social, and political institutions were in many respects entirely unlike England's. This realization contributed substantially toward a breakdown in sympathy, respect, and understanding between the colonists and the mother country. Thus, one underlying cause of the Revolution was the growth of a distinct and independent American culture and a growing American awareness of that cultural difference.

The quarrel with Britain brought to a climax long-standing social and class conflicts within the colonies, between the wealthy planter and merchant classes on the one hand and the small farmer, laborer, and artisan groups on the other. These conflicts involved differences over land systems and quitrent, defense of the frontier, the support of established religion, the franchise, and the like. Eventually the middle and lower classes came to identify their animosities toward the ruling groups with hatred for Britain, and after 1774 they formed the core of the revolutionary Patriot Party. The great merchants and landed gentry, though at first they had led

the attack on British tax and commercial measures, eventually drew back from the abyss of social revolution, and with some very important exceptions, notably in Virginia, the colonial elite became Tories and supported Britain in the Revolutionary War. The Revolution was therefore an internal social upheaval as well as a political break with Britain.

However, while the Revolution was a conflict based on economic and social as well as political grounds, the constitutional crisis was of great significance in American history. It brought colonial political ideas on natural rights, compact theory, legislative limitation, and federalism to maturity and fixed them firmly in the American mind. Immediately following the Revolution the political concepts developed and expressed during the crisis found application in the creation of state governments, the Articles of Confederation, and the federal Constitution of 1787.

GRENVILLE'S REFORMS: THE SUGAR AND STAMP ACTS

Whatever the more remote causes of the Revolution, the immediate crisis was precipitated by the attempt of the ministry of George Grenville to impose certain reforms upon the administration of the colonies. Colonial military co-operation with Britain, based upon voluntary appropriations by the colonial assemblies, had all but collapsed in the Seven Years' War. Grenville and his associates therefore concluded, with much justice, that since the colonies would not voluntarily defend either themselves or the Empire, regular British troops must be sent to the colonies. As Britain had already incurred a heavy indebtedness in defense of the Empire, and since her tax burden was considered already too heavy, the ministry determined to levy taxes on the colonies to pay for the new army. In addition, Grenville decided to tighten enforcement of the custom laws, a step which might be made to yield still further revenue.

The ministry was also concerned with the problem of the trans-Allegheny West. Extensive colonial migration into this region appeared to be imminent, and such a development might injure British speculative landholdings on the seaboard, prejudice imperial relations with the Indian tribes controlling the valuable fur trade, and ultimately build a new colonial world too remote for effective British control. Grenville therefore determined to check western settlement for the moment.

The ministry resorted to three principal measures to accomplish these ends: The Proclamation of 1763, the Sugar Act of 1764, and the Stamp Act of 1765. The Proclamation of 1763 closed the frontier west of the Alleghenies to further settlement and forbade further land purchases or patents in the region. Although the decree was of slight constitutional significance, it greatly annoyed colonial land speculators and western settlers.

The Sugar Act, however, provoked powerful constitutional objections in the colonies. The statute levied a duty of threepence per gallon on molasses imported into the colonies, and it also levied small duties on a variety of other imports, among them sugar, indigo, coffee, wines, calicoes, and linens. On the surface there was nothing revolutionary in the character of these duties, for England had long imposed small tariffs upon the colonies for the regulation of trade, and under the Molasses Act of 1733 Britain had levied a duty of sixpence per gallon on molasses imported into the colonies from other than the British West Indies.

What was revolutionary in the Sugar Act was the statement in the preamble of the statute that the proceeds were to be applied toward "defraying the expenses of defending, protecting, and securing the colonies." In other words, the Sugar Act was a revenue measure, not a regulation of trade, and thus it raised the whole question of the power of Britain to tax the colonies.

The ensuing uproar against the law was inspired not only by nice legal theories, but also by the conviction that the law would prove ruinous to colonial commerce and industry. Although the law lowered the duty on molasses, this was done to facilitate enforcement by reducing the incentive to smuggling. Strict enforcement of the duty, the colonists believed, would destroy the molasses trade and the manufacture of rum, thus bringing ruin to the whole structure of colonial commerce.

The colonial constitutional argument against the Sugar Act found cogent statement in a famous pamphlet by James Otis, a young Boston lawyer who had first attracted attention with his argument in the Writs of Assistance case in 1761. His pamphlet *The Rights of the Colonists Asserted and Proved* began with an inquiry into the origins of government. He mentioned with approval Harrington's assertion in *Oceana* [1] that government is "evidently founded

[1] See Note 5, p. 38.

on the necessities of our nature," but warned that "the natural liberty of man is to be free from any supreme power on earth . . . but only to have the law of nature for his rule. . . ." It followed that power, even the power of Parliament, was not arbitrary but was merely a declaration of natural law, which Otis identified closely with the divine law of God. "Should an Act of Parliament be against any of His natural laws, which are immutably true, their declaration would be contrary to eternal truth, equity, and justice, and consequently void." Recapitulating his argument in the Writs of Assistance case, he asserted that where an act of Parliament was obviously against natural right and equity, "the judges of the executive courts have declared the Act 'of a whole Parliament void,'" an evident reference to Dr. Bonham's Case. And he concluded, "That acts of Parliament against natural equity are void. That acts against the fundamental principles of the British constitution are void." These words embodied ideas long familiar to New England minds: the supremacy of natural law, the idea of a supreme constitution, the doctrine of natural rights, and the limited power of human government.

It would be an error to insist that Otis saw clearly the whole theory of judicial review, as later exercised in the American courts. He was interested in the idea of limited government, the doctrine that the legislature was controlled by natural law and the constitution, and his reference to the courts was evidently incidental. Yet the fact of that reference illustrates clearly that the doctrine of judicial review sprang directly out of the political philosophy of the American Revolution.

Otis then asserted that since the Americans had no representation in Parliament, that body had no power to tax the colonies. Thus he assumed the deputy theory of representation and rejected the English conception that Parliament virtually represents the entire Empire. A difference in the respective theories of representation in America and Britain, traceable to the action of early seventeenth-century Virginia and Massachusetts in substituting elected deputies for the actual presence of all electors in the legislature, was at last coming into the open.[2] The American and English conceptions of representation were to be dramatically revealed as irreconcilable.

Otis also saw clearly a point not yet discerned by many Ameri-

[2] On the early development of the deputy system of representation, see pp. 31–32.

cans—that there was no essential constitutional difference between external and internal taxation. The alleged distinction Otis declared to be entirely specious. The Sugar Act was taxation—and as such was as obnoxious in principle as any internal excise.

While the colonies were resounding to the attack on the Sugar Act, Parliament in February 1765 passed the Stamp Act, the second revenue measure in Grenville's series of imperial reforms. This law provided for excise duties, to be paid by affixing revenue stamps upon a variety of legal documents, bills of sale, liquor licenses, playing cards, newspapers, and so on. The duties ranged from one halfpenny to six pounds and were required to be paid in specie. Here was no abstract question of constitutional right. The duties were direct and heavy. They touched nearly every aspect of commercial and industrial life in the colonies, and the power of Parliament to lay them immediately became of vital concern. The indignation which swept the seaboard produced a flood of pamphlets, tracts, and resolutions, nearly all of them setting forth essentially the same arguments as Otis had advanced the previous year.

At the suggestion of Massachusetts, a colonial conference known as the Stamp Act Congress, to which nine colonies sent delegates, was held in New York in October to protest against the law. This marked the first time that so many of the colonies had resorted to voluntary concerted action for a political purpose. In a sense, the meeting was a forerunner of the Continental Congress.

The Stamp Act Congress adopted a series of resolutions, the work of John Dickinson of Philadelphia, conservative in phraseology and full of polite protestations of loyalty to the Crown. However, their polite phraseology was a mere façade for a number of sharp and ominous political observations. The British government was reminded that the king's subjects in America were "intitled to all the inherent rights and liberties of his natural born subjects within the kingdom of Great Britain," and that it was "the undoubted right of Englishmen, that no taxes be imposed on them but with their own consent, given personally or by their representatives." The people of the colonies, said the resolutions, "are not, and from their local circumstances cannot be, represented in the House of Commons," and hence "no taxes ever have been, or can be constitutionally imposed on them, but by their respective legislatures."

The Stamp Act, the resolutions concluded, had "a manifest tendency to subvert the rights and liberties of the colonists."

More sweeping and more ominous were the resolves submitted in May 1765 to the Virginia House of Burgesses by a fiery young backwoods radical, Patrick Henry. It was on this occasion that Henry reputedly cried that "Caesar had his Brutus, Charles I had his Cromwell, and George III . . . ," at which point he was interrupted by cries of "Treason! treason!" from outraged conservatives. His Resolves were a powerful statement of the whole colonial argument. They claimed for Virginians all the rights, privileges, and immunities of Englishmen by virtue of the charters granted by James I, and asserted that "taxation of the people by themselves" is "the distinguishing characteristick of British freedom, without which the ancient constitution cannot exist." They stated that "the General Assembly of this Colony have the only and sole exclusive right and power to lay taxes and impositions upon the inhabitants of this Colony." In short, Henry identified resistance to British authority as loyalty to the Crown and a defense of British authority as treason to the colony—a claim destined to be heard from the lips of many a revolutionary patriot within the next ten years.

Several of the most important colonial arguments appeared in pamphlet form. Pamphlets then functioned as a public forum, much as the newspaper and radio do today, and they attracted a wide audience. The flood of pamphlets that poured from the pens of colonial writers expressed substantially the ideas of the Stamp Act Congress and the Virginia Resolves.

One of the most brilliant and influential pamphlets was that of Governor Stephen Hopkins of Rhode Island. Like other American writers, he observed that the British government was founded on compact and that the colonial charters guaranteed "all the rights and privileges of free-born Englishmen." One of those rights was immunity from taxation except by consent of lawfully elected representatives. Those "whose Property may be taken from them by taxes, or otherwise, without their own consent," he said, "are in the miserable condition of slaves."

Hopkins then presented the British Empire as a great federal state in which "each of the colonies hath a legislature within itself, to take care of its Interests . . . yet there are things of a more general

nature, quite out of reach of these particular legislatures, which it is necessary should be regulated, ordered and governed." These things, among them commerce, money, and credit, were properly in the keeping of Parliament. This notion of a division of authority was a realistic appraisal of the actual state of affairs within the empire; yet few men of 1765 had the vision to see reality so clearly. Not until John Dickinson popularized the notion of a federal state two years later did the federal idea gain wide acceptance in America.

Other colonial writers rested their case upon the supposed distinction between external and internal taxation which Otis and Hopkins had already attacked as specious but which still had much currency. Daniel Dulany, distinguished Maryland lawyer, legislator, and plantation aristocrat, accepted the distinction but at the same time attacked the theory that the colonies were virtually represented in Parliament as "a mere cobweb, spread to catch the unwary, and intangle the weak." Richard Bland, a leader of the Popular faction in the Virginia House of Burgesses, who also confined his attack to internal taxation, declared: "I cannot comprehend how Men who are excluded from voting at the Election of Members of Parliament can be represented in that Assembly . . ." He conceded that the colonies were subordinate to the authority of Parliament, but "subordinate I mean in Degree, but not absolutely so." He even implied cautiously the possibility of rebellion against injustice.

The points in the argument advanced against the Stamp Act may be summed up somewhat as follows:

Most of the resolutions and pamphlets attempted to return to first principles of government. Nearly all colonial thinkers accepted the idea of a state of nature in which men were naturally free, and they accepted the compact theory of the state as the beginning of free government.

They also assumed the existence of a supreme British constitution, to be found in a variety of documents from Magna Charta to the Bill of Rights. Their own charters they regarded as contractual, embodying the principles of natural law and natural right and granting them all the rights of freeborn Englishmen.

They upheld the doctrine of limited government. While they admitted that Parliament was the supreme legislature of the empire, they insisted that Parliament had no power to violate natural law or natural right, which they identified with the great principles of

English liberty, the English constitution, and the colonial charters.

In attacking the power of Parliament to tax the colonies they accepted the American doctrine of deputy representation and repudiated the idea that the colonists were "virtually represented" in Parliament.

A few colonial writers, notably Stephen Hopkins, presented a federal conception of the empire, the power of Parliament being represented as properly confined to matters of broad imperial interest, while local internal affairs were dealt with by the colonies' own governments. Most colonists, however, were as yet confused about the extent of parliamentary authority. In this they could doubtless sympathize with the position of the Massachusetts General Court, which in October 1765 stated that "it by no means appertains to us to presume to adjust the boundaries of the Power of Parliament, but boundaries there undoubtedly are. . . ."

On the whole, it will be seen that these ideas were exceedingly conservative in the literal sense. Unlike the ideas put forward in many revolutionary movements, they made no attack upon the existing body of symbols and ideas commanding loyalty to the state, nor did they attempt to formulate a new body of political philosophy. The colonists merely took the theories laid down by Hooker, Milton, Harrington, Locke, and Vattel, propagated among them by their own clergy and lawyers, and applied them to the current controversy. To Americans the statesmen in London, and not themselves, were the revolutionaries. Westminster, not Boston, New York, or Philadelphia, had launched an attack upon the precedents of a century and a half of colonial growth.

REPEAL OF THE STAMP ACT; THE DECLARATORY ACT

Not all of the colonial reaction to the Stamp Act took the form of high-flown appeals to constitutional theory. There was rioting and street fighting, intimidation of tax collectors, and the beginnings of a merchants' and consumers' boycott directed against English products. London merchants, their trade badly injured, clamored for repeal. All this had its effect upon the government in London. The ministry of the Marquis of Rockingham, which succeeded that of Grenville in 1766, was not averse to discrediting the work of men now out of power, and it therefore determined upon repeal of the law.

Before the act was repealed, however, an extensive debate in both houses of Parliament revealed how greatly the thinking of British statesmen was at odds with that of their American cousins. Almost without exception, the lords and gentlemen of Parliament were unable to understand either the American conception of direct representation or the idea that there were limits to the authority of Parliament over the colonies. Lord Mansfield, for example, held that the British legislature "represents the whole British Empire, and has authority to bind every part and every subject without the least distinction." Lord Lyttleton stated the case for the unlimited authority of Parliament very brilliantly with the remark that "in all states . . . the government must rest somewhere, and that must be fixed, or otherwise there is an end of all government. . . . The only question before your lordships is, whether the American colonies are a part of the dominions or the crown of Great Britain? If not, Parliament has no jurisdiction, if they are, as many statutes have declared them to be, they must be proper subjects of our legislation."

Lord Lyttleton's rejection of federalism as incomprehensible was a good argument in the abstract, for it rested upon the assumption that within the state there must be some one supreme authority, without which there would be chaos. If sovereignty is supreme authority, it is by definition destroyed when divided. Yet Lyttleton's argument lacked realism; for however convincing his logic, the British Empire had in fact become a federal state, and the American colonies had long exercised a considerable degree of sovereign autonomy.

In the debate in Commons, most members were unwilling to accept the American doctrine of deputy representation. George Grenville, author of the Stamp Act, declared for the complete sovereignty of Parliament and added that "taxation is a part of the sovereign power." Another member stated that "enacting laws and laying taxes so intirely go together that if we surrender the one we lose the others." With reference to the claim that taxation and representation were inseparable, a third member said: "I thought that argument had been beat out of the House. There never was a time when that Idea was true."

However, America was not without friends in Parliament. In

the Commons the great William Pitt lent the weight of his immense prestige to the American cause. He upheld the supremacy of Parliament, but almost alone among Englishmen he insisted at the same time that "taxation is no part of the governing or legislating power." He followed this assertion with a direct attack upon the whole theory of virtual representation, which he called "the most contemptible idea that ever entered the head of man." In the House of Lords, Lord Camden put forth the same idea with the statement that "taxation and representation are inseparable;—this position is founded on the laws of nature." Camden alluded to the American doctrine of limited government in his categorical claim that "the legislature cannot enact anything against the divine law."

The shrewdest commentary upon the whole conflict was made by Edmund Burke, in after years to become known as the great English champion of American rights. On parliamentary taxation, he pointed out that "some of the Charters declare the Right, others suppose it, none deny it." But he saw "a real Distinction in every Country between the speculative and practical constitution of that country . . . The British empire must be governed on a plan of freedom, for it will be governed by no other." The colonies, he continued, "were mere Corporations, Fishermen and Furriers, they are now commonwealths. Give them an interest in his [the king's] Allegiance, give them some Resemblance to the British Constitution . . . ," and American loyalty would then follow as a matter of course.

Burke was issuing a warning that if dead constitutional theories were allowed to blind Parliament to the fact that the colonies were rapidly becoming great and powerful states, then the empire was headed for disaster. The colonies were not corporations, but great states, whose population, commerce, and industry were thriving and whose economic and social order was now powerful enough to stand alone, even if British politicians were unaware of it. Their requests for freedom from taxation and for internal autonomy were demands, however confused, that this situation be recognized. Should British statesmen persist in their failure to recognize it, the empire's disruption was highly probable.

At the end of a lengthy debate, Parliament repealed the Stamp Act, but it was a surrender of convenience, not of principle; for

Parliament accompanied repeal with the emphatic words of the Declaratory Act affirming the absolute supremacy of Parliament over the colonies "in all cases whatsoever."

THE TOWNSHEND ACTS; COLONIAL OPPOSITION

The words of the Declaratory Act were largely ignored in the rejoicing in America upon the repeal of the stamp duties. But Parliament had not abandoned the principle of colonial taxation. In 1767, a new shift in the ministry brought Pitt, now Earl of Chatham, into office as prime minister. As he was too sick to play an active role in the government, actual power fell to young Charles Townshend, Chancellor of the Exchequer. Townshend prepared to take advantage of the distinction certain Americans had raised between external and internal taxation, a distinction which admitted the legality of the former while denying the legality of the latter. Since Benjamin Franklin, in his famous examination before the House of Commons on the Stamp Act of 1766, had also drawn the distinction, Townshend might be excused for his assumption that the colonists would not seriously object to the raising of revenue through duties levied on colonial imports.

The Townshend Revenue Act, which was passed by Parliament in June 1767, accordingly levied a series of duties upon glass, red and white lead, painters' colors, tea, and paper imported into the colonies. While the manner of collection was not different from those older duties incident to the enforcement of the Navigation Laws, the law's preamble specifically stated that it was a revenue measure for "the support of civil government, in such provinces as it shall be found necessary." The law was an undisguised tax measure, not a commercial regulation.

The Americans were alarmed particularly by Townshend's proposal to use the proceeds of the law to create a colonial civil list, from which colonial governors and judges would receive their salaries. This struck directly at the hard-won control which the assemblies had come to exercise over the colonial governors. If the governors were given independent salaries and a civil list independent of assembly control, much of colonial autonomy would be destroyed.

Another statute sponsored by Townshend and passed at this time created a separate five-man board of customs commissioners

for the American colonies. The ministry hoped to administer the customs more efficiently by this reform, and oddly, it believed this would help reconcile the Americans to the new tax program. The colonists, however, saw the board merely as another instrument of sharpened British control and unconstitutional taxation. The board, seated at Boston, immediately became a source of additional irritation to the resentful colonists. Still another Townshend statute created new admiralty courts and specifically authorized the hated Writs of Assistance in customs cases.

Colonial opposition to the Townshend measures was intense and took the form of merchant boycotts and mob action as well as pamphleteering. And true to the Anglo-Saxon legalistic tradition, the colonists did not neglect constitutional argument. There now appeared one of the most brilliant interpretations of the colonial position written during the entire Revolutionary controversy, *The Letters of a Pennsylvania Farmer*, by John Dickinson. Appearing serially in several newspapers of America for some weeks beginning in November 1767, the letters almost immediately won the attention and respect of a wide audience.

Dickinson's convincing argument began with an attack upon the supposed distinction between external and internal taxation. No such difference could be admitted; instead he held that Parliament had no authority "to lay upon these colonies any tax whatever." He admitted that Parliament had in the past levied certain charges incident to the regulation of trade. These were in no way taxes, however, for their main purpose was the regulation of commerce, and the duties were purely incidental to that end. To Dickinson, there was a profound difference between the power to regulate commerce and the power to tax. That Parliament properly could regulate the trade of the colonies no one denied; that it could tax the colonies in any guise, Dickinson utterly denied.

This statement clearly implied that two types of governmental powers were exercised within the empire, those properly exercised by Parliament, and those properly exercised by the local or colonial governments. Here was plainly a federal conception of the British Empire. Dickinson went on to describe the empire as it had in fact existed for a century—a great federal state with a practical distribution of authority between local and central governments. The description did not fit the elaborate constitutional theories of the

gentlemen in London, but it did fit that "practical constitution" to which Burke had referred.

The *Farmer* played no small part in leading the colonists toward an understanding of the federal principle, shortly to become a cornerstone of the American constitutional system. The Constitution of 1787 was to embody much the same distribution of authority between local and central governments as Dickinson had set forth twenty years earlier.

Dickinson also emphasized heavily the doctrine of the supremacy of the constitution and the requirement that government operate within the limitations there imposed. In one famous passage he inquired rhetorically, "For who are a free people?" and then gave this stirring answer: "Not those over whom government is reasonably and equitably exercised, but those, who live under a government so constitutionally checked and controuled, that proper provision is made against its being otherwise exercised." In summary, Dickinson expounded the two principles which are the essence of the American constitutional system, federalism and limited government.

Very similar to the ideas in the *Farmer* were those incorporated in the *Massachusetts Circular Letter*, an address by the Massachusetts General Court to the assemblies of the other colonies informing them of Massachusetts' attitude toward the Townshend Acts. The *Circular Letter* was adopted in February 1768, after considerable political maneuvering. It was primarily the work of a radical faction in the legislature under the leadership of Sam and John Adams and James Otis. These men had already made the General Court a hotbed of opposition to the Crown in New England, and the Townshend Acts gave them further opportunity to continue their attacks on royal authority. The actual drafting of the *Circular Letter* was done by Sam Adams, whose brilliant mind and vitriolic pen were from that time on to render much service to the extremists in the colonies.

The *Circular Letter* was a classic exposition of the twin doctrines of constitutional supremacy and limited government. Adams began with the observation that "in all Free states the Constitution is fixed; and as the supreme Legislative derives its Power and Authority from the Constitution, it cannot overleap the Bounds of it, without destroying its own foundation." The British constitution was of this

sort, and engrafted in it was the "fundamental Law" that what a man has honestly acquired "cannot be taken from him without his consent." The Townshend Acts violated this principle because they were imposed "with the sole and express purpose of raising a Revenue," and because, since the people "are not represented in the British Parliament, his Majestys Commons in Britain, by those Acts, grant their property without their consent."

These were stirring words, adopted as they were by a vote of the General Court, and they provoked a wrathful response from Lord Hillsborough, the Secretary of State for the Colonies. The Secretary instructed Governor Sir Francis Bernard to order the General Court to rescind its action on pain of dissolution. In July, however, the General Court refused to take this step, and Bernard thereupon dissolved it. The whole incident was a victory for the radicals, for the *Circular Letter* was a deliberate move toward concerted colonial resistance to British authority. By it, the breach between Massachusetts and the government in London was definitely widened.

Legislative remonstrance, colonial boycotts, and declining trade soon made the British ministry aware of the ominous nature of the colonial temper. In 1769 Parliament repealed all the obnoxious duties except the tax on tea, with the result that colonial boycotts for the most part collapsed. By 1770 the crisis precipitated by the Townshend Acts was at an end.

THE PERIOD OF QUIESCENCE; EMERGENCE OF THE DOMINION THEORY OF EMPIRE

There now ensued a period of quiescence in the quarrel between Britain and her colonies, lasting from 1770 to 1773. Many moderate men in the colonies had become frightened by the frequent outbursts of mob violence and by the intemperate character of radical leadership. They drew back in alarm from the specter of revolution, especially abhorrent to conservative men of position and property. Moreover, the period 1770–1773 was one of revived commercial prosperity, in which merchants, craftsmen, planters, and farmers were more interested in making money than in pursuing what now seemed to be a dead political quarrel with the mother country. Even the Boston "Massacre" in March 1770 produced little more than a temporary flurry. It was followed by long months of quiet which

thoroughly discouraged Sam Adams and other radicals in their efforts to keep alive the controversy with England.

Toward the end of this period of comparative calm a great debate occurred in Massachusetts between Governor Thomas Hutchinson and the legislature on the nature of the British Empire. The controversy was precipitated by Hutchinson, who would have been better off to let sleeping dogs lie. In a message to the General Court in 1773, he tactlessly challenged the whole theory of colonial autonomy. The governor held that the colonies had always admitted the supreme authority of Parliament and it was absurd to suppose that there was any limit to the sovereignty of that body. He knew of no line that could be drawn between the supreme authority of Parliament over America and the complete independence of the colonies. In Hutchinson's thinking it was impossible to imagine two independent legislatures within the same state. The colonial legislatures, he said, were mere corporations, similar to those erected in England, with power to make by-laws for their own convenience, but completely subject to the supreme authority of the government in London.

Such a theory was anathema even to the moderates in the assembly. It gave Sam Adams a fine new opportunity to exercise his pen in behalf of the radical cause. He now had the audacity to deny that Parliament had any authority whatever over the colonies. The original domain of North America, he wrote in the message returned to the governor by the House, was not part of the realm of England but adhered to the Crown alone, as the king's personal property. The king, through his prerogative, had the power to dispose of his domains as he wished. Queen Elizabeth and James I and their successors had exercised this right by granting away portions of the royal domain in a series of charters to various of their subjects. These grants, Adams contended, established a direct relationship between the colonies and the Crown, but they were outside the authority of Parliament, not a party to the contract.

Adams then fired at Hutchinson a categorical denial of any parliamentary authority whatever over the colonies: "Your Excellency tells us, 'you know of no line that can be drawn between the supreme authority of Parliament and the total independence of the colonies.' If there be no such line, the consequence is, either that the colonies are the vassals of the Parliament, or that they are totally

independent. As it cannot be supposed to have been the intention of the parties in the compact, that we should be reduced to a state of vassalage, the conclusion is, that it was their sense, that we were thus independent."

This theory was a remarkable forerunner of the idea of dominion status which long afterward was to come into being within the British Empire. It presented the empire as a confederation of sovereign states, a commonwealth of nations, each with its own independent government united with Britain only through the person of the Crown. The theory denied all parliamentary authority whatever within the various American colonies. The dominion idea was to be realized within the British Empire during the late nineteenth and twentieth centuries, when Canada, South Africa, Australia, and New Zealand achieved almost precisely the autonomous status for which Sam Adams had argued in 1773. Obviously, however, Adams' theory did not present a realistic portrayal of the British Empire of his own time, and his ideas appeared to be little less than seditious and treasonable to conservative Englishmen and loyalist Americans. Nonetheless the dominion conception of the colonies' status became more and more prevalent in American thought on the eve of the final break with England, and it proved ultimately to be the theory of empire incorporated in the Declaration of Independence.

THE CRISIS OF 1774 AND THE RISE OF REVOLUTIONARY GOVERNMENT

In spite of the attitude adopted by the extremists, it is quite possible that the differences between the colonies and the mother country might in time have been adjusted had it not been for the colossal blunder committed by the ministry of Lord North, in May 1773. The venerable East India Company was in serious financial straits. To rescue it from bankruptcy, Parliament granted it a bounty on its tea exports to America, thereby making it possible for the company to sell its tea in the colonies at a price below that offered by any other importer, including smugglers. As the company proposed to establish its own agents in America, the act threatened to destroy the lucrative tea business of colonial merchants. The uproar which followed the passage of the act rivaled even the row over the Stamp Act.

The most famous incident was of course the affair since dignified by the title of the Boston Tea Party. The tea thrown overboard in Boston harbor that gray December afternoon in 1773 was valued by the East India Company at more than £20,000.

In London, the reaction to the Boston Tea Party was one of furious anger. Parliament under the leadership of the North ministry prepared immediately to enact a series of punitive measures to bring the colonists to their senses and break the power of the radical party in Massachusetts.

The Boston Port Act, March 31, 1774, closed the port of Boston until the town should make restitution to the East India Company. The Massachusetts Government Act, May 20, 1774, altered the charter of Massachusetts in an attempt to bring the colony more directly under the control of the English government. The assistants were no longer to be elected by the General Court but appointed by the Crown. The governor was also given the power to appoint, without consent of the council, all judges of inferior courts, and to nominate all judges of superior courts. In the future, also, no town was to call any meeting of its selectmen other than the annual meeting without the consent of the governor.

The Administration of Justice Act, May 20, 1774, provided that in case of alleged felonies committed by Crown officers, magistrates, and so on, in pursuit of their duties in Massachusetts Bay, trial was, upon order of the governor, to be moved to some other colony or to Great Britain. The act was intended to protect officials in the discharge of their duties by guaranteeing them against the wrath of colonial juries. The Quartering Act, June 2, 1774, permitted officials in any colony to quarter royal troops upon the inhabitants of a town when necessary. This law was intended to force the colonists to make adequate provision for housing soldiers wherever they might be needed; yet clearly it violated one of the traditional guarantees of the Petition of Right.

The Quebec Act, passed June 22, 1774, although not intended as a punitive measure, was so regarded in America. The law extended the boundaries of the Province of Quebec to include the area north of the Ohio and west of the Proclamation Line of 1763, and it thus appeared to violate several colonial charters by stripping the colonies of their trans-Allegheny possessions. The law also extended religious liberty to the Catholics of Quebec. While this pro-

vision was of no constitutional or social significance to the seaboard colonies, it was nonetheless represented by Sam Adams and other radicals as an attempt to impose the hated Church of Rome upon Protestant America.

Amid the indignation and determination to resist that swept America when the so-called Intolerable Acts became known, the colonists took their first steps toward extralegal or revolutionary government. Perhaps the earliest move of this kind had occurred in Massachusetts, when, in November 1772, Sam Adams brought about the formation by the town of Boston of a "Committee of Correspondence." Similar committees were soon established in most New England towns and in Virginia; and in the agitation against the Intolerable Acts, the committee system spread rapidly through all the continental American colonies.

Although the ostensible purpose of the committees of correspondence was innocent enough—they supposedly served to communicate matters of mutual interest to other towns—the committees from the start assumed duties commonly vested only in sovereign political bodies. Most important was their attempt to give colonial boycott agreements the force of law by means of publicity, intimidation, and resolutions against offenders. In reality the committees were revolutionary bodies, taking the lead in concerted resistance to British authority.

These committees soon gave rise to colony-wide revolutionary governments. Thus in Massachusetts, General Thomas Gage, now governor of the colony, dissolved the regularly constituted General Court in June,[3] and the Boston committee of correspondence thereupon demanded the election of a provincial congress to take charge of the government of Massachusetts until Parliament and the Crown should accept their constitutional functions. The provincial congress met in October 1774, and henceforth the effective government of Massachusetts Bay was no longer in the hands of the governor and the other regularly constituted Crown officers, but in the hands of the provincial congress.

Events took a similar turn in the other colonies. In Virginia, the royal governor, the Earl of Dunmore, dissolved the assembly in

[3] At the last session of the old Massachusetts legislature, held in Salem on June 17, the assembly hastily chose five delegates to the forthcoming Continental Congress at Philadelphia, while the governor's secretary vainly hammered at the locked doors with the message of dissolution.

May because of its rebellious temper. Thereupon a portion of the House of Burgesses under the leadership of Patrick Henry, Thomas Jefferson, and others, issued a call for an election of members of a provincial congress to meet in Williamsburg on August 1. By the close of 1774, all the royal and proprietary colonies except New York, Pennsylvania, and Georgia had established provincial congresses, and these three colonies took this step the following year. In the two charter colonies of Connecticut and Rhode Island, the legal governments were so nearly autonomous that no such move was necessary. The existing governments simply accepted the patriot cause.

In most of the colonies the governor's dissolution of the regularly constituted legislature or his refusal to call it into session was the immediate occasion for the erection of the provincial congress. In some cases, a congress was a rump of the regular assembly, composed of delegates in sympathy with the popular cause. This was true in Massachusetts, New Hampshire, Delaware, Virginia, and North Carolina. In New Jersey, Maryland, and South Carolina, delegates to the congresses were chosen through elections held at popular meetings throughout the colonies.

As noted, the provincial congresses were in fact revolutionary state governments. Although the members loudly protested their loyalty to the Crown, they engaged in steady suppression of the remnants of royal authority in the colonies. Thus the Massachusetts Congress, late in 1774, took over the tax machinery and the operation of the courts, and began raising an army for the field. Much the same seizure of power occurred in all the colonies. The American colonies were now in the process of becoming the American states, a metamorphosis completed by 1776, some time before the Declaration of Independence was signed.

THE FIRST CONTINENTAL CONGRESS

While this revolution was going on within the various colonies, the pyramid of revolutionary government was completed by the establishment of an intercolonial congress. In September 1774 the First Continental Congress, called at the suggestion of several of the provincial congresses, met in Philadelphia. All the colonies except Georgia were represented, and some of the most distinguished men in America were present, among them Sam and John Adams of

Massachusetts, Stephen Hopkins of Rhode Island, Roger Sherman of Connecticut, John Jay and Philip Livingston of New York, John Dickinson and Joseph Galloway of Pennsylvania, George Washington, Richard Henry Lee, and Patrick Henry of Virginia, and John Rutledge of South Carolina.

Although the delegations varied in size and represented colonies of different territorial extent and population, it was nevertheless shortly decided that the vote would be taken by states, each state present having one vote. Thus the principle of state equality was established, a principle soon to be incorporated in the Articles of Confederation and later to gain limited recognition in the Constitution of the United States.

The temper of the Congress, despite its revolutionary status, was at first somewhat conservative. The delegates were inclined to listen to men of caution in the persons of Dickinson, Jay, Galloway, and Rutledge. These men advocated a constructive solution of the imperial problem rather than a break with England. The more radical and revolutionary views of the two Adamses, Hopkins, Lee, and Henry were thrust temporarily into the background.

For a time the delegates considered a plan of union submitted by Joseph Galloway of Pennsylvania, not unlike Franklin's proposals at the Albany Congress some twenty years before. This plan proposed the establishment of an intercolonial legislature or "grand council" composed of delegates chosen for three years by the respective colonial assemblies. A president-general appointed by the king would preside. The grand council would be "an inferior and distinct branch of the British Legislature," and would have authority over the general affairs of the colonies. Either the British Parliament or the grand council would enact legislation for intercolonial matters, but the assent of both legislatures would be necessary before any statute became valid.

In a calmer day the plan might have been adopted and might have paved the way for dominion status for America, but the trend was against conciliatory measures. After some indecision the plan was tabled by a majority of one vote, and the Congress turned toward more radical proposals.

The first evidence that the extremist faction was obtaining the upper hand came with the introduction of the Suffolk Resolves, a series of resolutions of a popular convention in Suffolk County,

Massachusetts. The Resolves asserted that no obedience was due the Intolerable Acts and that no taxes should be paid into the provincial treasury until constitutional government was restored in the colony. Their introduction was in reality a successful stratagem to force the Congress toward a more radical position. Although the Congress took no positive action upon the Resolves, the reaction toward the measures nonetheless indicated the steady growth of radical opinion among the delegates.

The Declaration and Resolves of the First Continental Congress, a series of resolutions adopted by Congress on October 14, showed how far radical sentiment had progressed in the gathering. This document, though conciliatory in tone, virtually reiterated the dominion conception of colonial status which had been advanced by Sam Adams in his argument of 1773 with Governor Hutchinson and which had become extremely popular among the colonial radicals. The Declaration and Resolves held the colonists to be "entitled to a free and exclusive power of legislation in their several provincial legislatures . . . in all cases of taxation and internal polity, subject only to the negative of their sovereign. . . ." The only concession to parliamentary authority was a provision that "from the necessity of the case, and a regard to the mutual interest of both countries, we cheerfully consent to the operation of such acts of the British parliament, as are bona fide restrained to the regulation of our external commerce. . . ." Apparently this slight concession to the power of Parliament over the colonies, admitted as a matter of convenience and not of right, was a necessary gesture by the radicals in Congress to win the support of certain moderate delegates to the resolutions. The Declaration and Resolves came close to a flat assertion of a commonwealth-of-nations theory of the empire.

Other provisions of the resolutions amounted essentially to an assertion of a colonial bill of rights as against even royal authority. The colonists were declared entitled to "life, liberty, and property," and to "all the rights, liberties, and immunities of free and natural-born subjects within the realm of England." They were further declared entitled to the common law of England, to the benefits of such English statutes as had existed at the time of their colonization and which had been found applicable to American circumstances, and to all the privileges and immunities granted by the several royal

charters or secured by their own legal systems. The resolutions affirmed further the colonists' right to assemble peaceably, consider their grievances, and petition the king. They denounced as "against law" the maintenance of a standing army in any colony in time of peace without the consent of the legislature of that colony. Finally, they condemned appointment of colonial councils by the Crown as "unconstitutional, dangerous, and destructive to the freedom of American legislation."

Six days after the adoption of the Declaration and Resolves came the formation of the Continental Association, the first positive measure of resistance to British authority taken by the colonies acting in their united capacity. Through this organization Congress laid down an intercolonial non-importation agreement against all British goods, effective December 1, 1774. The slave trade as well was banned as of the same date. The Congress also threatened to invoke non-exportation to Britain, to be effective September 1, 1775, unless the obnoxious acts of Parliament were repealed. The boycott was given sanctions by recommending the formation of local committees "whose business it shall be attentively to observe the conduct of all persons touching this association."

With the creation of the Continental Congress, the pyramid of local, state, and federal revolutionary governments was complete. However, neither the local committees of correspondence, the provincial assemblies, nor the Continental Congress before January 1776 laid claim to any regular sovereign political authority. Nor, at first, was it their overt intention to engage in armed rebellion against England. Actually, however, they not only steadily carried out the seizure of authority from agents of the Crown, but in April 1775 they began an armed rebellion against British troops.

THE COMING OF INDEPENDENCE

When the Second Continental Congress met in May 1775, the battle of Lexington and Concord had been fought, armed clashes had occurred in Virginia, and the major battle of Bunker Hill was in the offing. The Congress responded to the challenge by raising and appointing an army and naming Washington to command it. In July, the Congress issued a Declaration of the Causes and Necessity of Taking Up Arms, a document prepared by Dickinson and Jefferson. It disavowed any intention of seeking independence, but

pledged resistance until Parliament abandoned its unconstitutional rule in America. The estrangement between England and America was now complete, though there was a general reluctance in the colonies to admit the fact. The king's Proclamation of Rebellion in August 1775, the Prohibitory Act of December 1775, by which Parliament declared the colonies outside Britain's protection and proclaimed a blockade of all colonial ports, and the steady extension of military engagements, made reconciliation impossible. Throughout 1775 most colonials denounced the idea of independence, but early in 1776 there developed a marked increase in the sentiment for formal separation from the mother country.

In January 1776, Thomas Paine's famous pamphlet *Common Sense* made its appearance and at once attained extraordinary circulation and popularity. *Common Sense* greatly accelerated the growth of colonial sentiment for independence, for it went far to undermine attachment to the English king and loyalty to Britain.

There were two principal ideas in the pamphlet: a slashing attack upon the institution of monarchy, and a plea for immediate separation from the mother country. Government, Paine thought, was but "the badge of lost innocence: the palaces of kings are built on the ruins of the bowers of paradise." Human corruption rendered government necessary, but this also offered a clue to the only proper sphere and function of government: "freedom and security." But how poorly the English monarchical system accorded with this ideal! Paine admitted that the English constitution was "noble for the dark and slavish times in which it was erected," but its component parts were nonetheless "the base remains of two ancient tyrannies, compounded with some new republican materials." The king was a remnant of monarchical tyranny; the Peers were a remnant of aristocratic tyranny. Only in the Commons were there republican elements, and upon their virtue depended the freedom of England. But Paine made it clear that there was far too little republicanism in Britain to protect freedom and security; the survival of monarchy hopelessly corrupted the English political system.

The institution of monarchy, Paine added, was a base insult to intelligent free men. "There is something exceedingly ridiculous," he observed, "in the composition of monarchy; it first excludes a man from the means of information; yet empowers him to act in cases where the highest judgment is required." Nature herself dis-

approved of the principle of hereditary right; "otherwise she would not so frequently turn it into ridicule by giving mankind an ass for a lion." The first kings had been nothing better than "the principal ruffian of some restless gang," and the English monarch's title was no better: "A French bastard, landing with an armed banditti and establishing himself King of England against the consent of the natives, is in plain terms a very paltry, rascally origin." Paine concluded that "of more worth is one honest man to society, and in the sight of God, than all the crowned ruffians that ever lived."

Paine then attacked sentimental loyalty to Britain as stupid. Britain had founded, nurtured, and protected the colonies from motives of pure selfishness; "she would have defended Turkey from the same motives, viz. for the sake of trade and dominion." England was no loving parent; the colonists had fled to America "not from the tender embraces of a mother, but from the cruelty of the monster; and it is so far true of England that the same tyranny which drove the first emigrants from home, pursues their descendants still."

Further dependence upon Britain, Paine contended, had become ruinous; "the injuries and disadvantages we sustain by that connection are without number. . . ." Submission to Britain "tends directly to involve this continent in European wars and quarrels; and sets us at variance with nations who would otherwise seek our friendship, and against whom we have neither anger nor complaint." Moreover the association was commercially disastrous, since in any European war "the trade of America goes to ruin because of her connection with Britain." Dependence was absurd from a political and governmental point of view: "To be always running three or four thousand miles with a tale or a petition . . . will in a few years be looked upon as folly and childishness—there was a time when it was proper, and there is a proper time for it to cease." In any event, "there is something very absurd in supposing a continent to be perpetually governed by an island." Every possible argument, Paine concluded, pointed to the wisdom of immediate separation. "The blood of the slain, the weeping voice of nature cries, 'tis time to part."

Powerful as it was, Paine's pamphlet did no more than hasten an already inevitable separation. By 1776 the rebellious colonists had carried their movement too far to turn back without abandoning

the whole cause and placing their very lives in danger. They had organized *de facto* state and national governments and had shot the king's troops, ousted his officials, and destroyed his trade. Conciliation, as Paine had said, was impossible. Independence was already a fact, and it remained only to make it true in theory and law as well.

In the spring of 1776 events moved swiftly toward the establishment of formal independence. On April 6 the Congress declared all colonial ports open to foreign trade. On May 10 it adopted a resolution calling upon the several colonies to create regular state governments. A preamble to this resolution, adopted on May 15, went even further; it stated that since Great Britain had placed the colonies outside her protection and made war upon them it was now necessary that every kind of authority under the Crown should be totally suppressed and all governmental powers transferred to the people of the several colonies.

On June 7, Richard Henry Lee, acting in accordance with instructions from the state of Virginia, laid the following resolution before Congress:

> *Resolved*, that these United Colonies are, and of right ought to be, free and independent States, and that they are absolved from all allegiance to the British Crown, and that all connection between them and the State of Great Britain is, and ought to be, totally dissolved.

On June 11, Congress referred the foregoing to a committee of five men, Thomas Jefferson, John Adams, Benjamin Franklin, Roger Sherman, and Robert Livingston, who were assigned the task of drafting a "declaration to the effect of the said resolution."

It was still not certain, however, that Congress would adopt a formal declaration of independence. On the first day of July, the delegations of only nine states were positively in favor of this move. The Maryland delegation had been instructed late in May to oppose any such declaration, while in New York, division of sentiment was so great that the delegates were uninstructed. Members from Pennsylvania were also badly divided on the question. John Dickinson, although loyal to the American cause, opposed a formal break, and not until the last moment was Franklin able to swing the delegation to independence. On July 2, a resolution of independence was finally adopted by a unanimous vote of twelve states; the New York dele-

gation, still being uninstructed, did not vote. After some further debate, the document we know as the Declaration of Independence was unanimously adopted on July 4.

The Declaration of Independence was mainly the work of Thomas Jefferson, although Adams and Franklin suggested certain minor alterations. The document consists of five parts: an introductory paragraph setting forth the intent of the Congress in issuing the Declaration, a brief statement of contemporary American political philosophy, an indictment leveled against the misgovernment of George III, the resolution of independence adopted on July 2, and the signatures.

The opening paragraph in words of solemn magnificence reveals at once the purpose behind the Declaration:

> When in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

These words reveal the Declaration to have been intended as an appeal to public opinion—an attempt to draw favorable attention to the revolutionary cause—among the French, among America's friends in Britain, and even among waverers in the colonies. Treason is at best an ominous business, and the Congress was determined that Great Britain and not the revolting colonies should stand condemned before the bar of world public opinion.

Jefferson next presented a condensed statement of the natural law–compact philosophy then prevalent in America:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed. That whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government. . . . Prudence, indeed, will dictate that governments long established should not be changed

> for light and transient causes; . . . But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security.

There are four fundamental political ideas here: the doctrine of natural law and natural rights, the compact theory of the state, the doctrine of popular sovereignty, and the right of revolution. These conceptions were common to nearly all seventeenth- and eighteenth-century natural-law theorists, but Jefferson's phraseology was closely modeled on John Locke's *Second Treatise.* Several of Jefferson's most telling phrases were borrowed directly from Locke's essay. Jefferson had in fact succeeded admirably in condensing Locke's fundamental argument into a few hundred words.

Jefferson's declaration that "all men are created equal" is of special interest, since later these words were to take on a significance quite different from their eighteenth-century meaning. In Andrew Jackson's day, they became one of the cornerstones of equalitarian democracy. Indeed, in our own time the words seem to have a self-evident meaning. However, Jefferson did not intend to lay down any broad premise of extreme democratic equality. Natural-law theory did indeed hold that in a state of nature all men were equal in the possession of certain inalienable rights—"life, liberty, and the pursuit of happiness," as Jefferson put it. Government was instituted to protect those rights and could not impair them. It was in this sense that all men were created equal—equal, that is, before the law. This concept did not imply intellectual, moral, or spiritual equality, although a later generation imbued with the spirit of democracy might read it so.

Jefferson's "life, liberty, and the pursuit of happiness" was a variation from the expression "life, liberty, and property" sanctioned by Locke. Why did Jefferson substitute "the pursuit of happiness" for property? The idea was not entirely new. James Wilson, noted Pennsylvania lawyer and later justice of the United States Supreme Court, had asserted in a pamphlet of 1774 that government was founded "to increase the happiness of the governed" and that "the happiness of society is the first law of every government." The Virginia Bill of Rights, drafted by George Mason a few weeks before the Congress adopted the Declaration, also anticipated Jefferson.

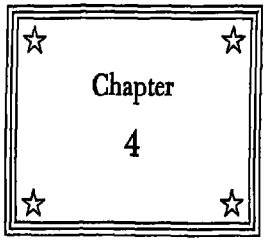
It stated "That all men are by nature equally free and independent, and have certain inherent rights . . . namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." One can only conclude that Wilson, Mason, and Jefferson all rejected the emphasis in Locke and the common law upon the protection of property as the fundamental end of government. They believed rather that government existed to protect human rights as well as property rights. Jefferson was among the earliest statesmen of importance in Western culture to draw sharply the difference between the conservative and liberal conceptions of the role of the state in human affairs. He believed that even property rights must in the last analysis yield before the imperatives of the common social welfare.

Ironically, Jefferson made his declaration of natural rights in a society which countenanced slavery. Of the signers of the Declaration of Independence a considerable number were slaveholders. Jefferson was aware of the inconsistency involved in a slaveholders' avowal that freedom was an inalienable human right, and it was in part for this reason that he sought to transfer the responsibility for slavery to Britain. His original draft of the Declaration contained a passage condemning George III for conspiring to perpetuate the slave trade and slavery in America. Upon the insistence of the delegates from South Carolina and Georgia, the Congress struck this paragraph out of the final draft, but the implication of natural rights for the institution of slavery was not lost upon the leaders of the revolutionary cause. The antislavery movement in America dated from Revolutionary days.

The indictment of George III was presented by Jefferson to illustrate "the long train of abuses" which had spurred the colonies to revolt. Most of the alleged offenses had grown out of issues that had arisen since 1763 and which involved disputes over the validity of various acts of Parliament asserting authority over the colonies. Yet the Declaration attacked the misgovernment of George and said virtually nothing of Parliament. This seeming incongruity occurred because Jefferson and the Congress had come generally to accept the dominion theory of colonial status, first broached by Sam Adams in the Great Debate in 1773. This theory, it will be recalled, presented the colonies as united to Britain only through

the person of the Crown, and it denied all parliamentary authority over the colonies. The colonists could hardly revolt against a parliamentary sovereignty whose very existence they denied. Hence, for good reason, the Declaration inveighed not against Parliament but against the tyranny of George III, although that mild-mannered monarch was responsible only in a very minor degree for American grievances.

The Declaration of Independence consummated the Revolution. From a constitutional standpoint the Revolution and the Revolutionary War must not be confused. The Revolution was the transfer of power and sovereignty from Great Britain to the states and to the United States, the shift of authority from agencies of the Crown to agencies of the states and of Congress. This process was complete by 1776. The war that followed was fought to confirm it.



The First State Constitutions and the Articles of Confederation

THE FORMATION of legally constituted state and federal governments was early recognized by patriot leaders as a strategic move in the revolutionary process. The provincial congresses and the Continental Congress were mere *ad hoc* revolutionary bodies, poorly adapted to everyday matters of government. Moreover, the old colonial assemblies, some of which survived even until 1776, became the resort of Tories who worked to impede the Revolution. By establishing governments recognized as the sole legally constituted authorities, the radicals would go far toward winning ascendancy over their opponents.

In all the states and in the Congress as well, the problem was solved by drafting a written constitution erecting a government, providing for its main outlines, and stipulating certain rights reserved to the people. This resort to written constitutions was based upon tradition and colonial custom. The early colonies invariably had some kind of written fundamental law setting up government —either a trading company, proprietary, or royal charter—and this

custom of establishing government under a written constitution had continued throughout the colonial period. By 1776 the habit of living under a fundamental supreme law was a century and a half old in America. Moreover, since the days of the Fundamental Orders of Connecticut the colonists had had some experience with the actual creation of written constitutions by formal covenant. It was easy to revive that practice now.

Prevailing political philosophy in 1776 also encouraged the creation of new governments by formal compact. Locke and other recognized philosophers had held that revolution destroyed all existing social compacts and reduced society to a state of nature, in which the people were free to enter into a new compact setting up government once more. Locke did not advocate formal written constitutions, but Vattel, whose *Law of Nations* gained some attention in America on the eve of the Revolution, insisted that the fundamental law ought to be a fixed and written document. The revolutionists were also much concerned with natural rights. They were familiar with English charters, notably Magna Charta and the Bill of Rights, granting certain rights to the people, and upon breaking with Britain they hastened to reaffirm in writing not only the traditionally recognized rights but also certain new ones—the product of the recent quarrel with Britain.

THE FIRST STATE CONSTITUTIONS

The Congress very early encouraged the formation of regularized state governments. In June 1775 it suggested to the Massachusetts provincial congress that it would be wise to erect a new government which would restore to the commonwealth the privileges of the original charter, and in November it made a like recommendation to New Hampshire and South Carolina. Thus inspired, New Hampshire adopted a very brief, temporary constitution in January 1776, and South Carolina did the same in March. In May 1776, Congress ordered the formal suppression of all remnants of royal authority in the states, so that the way was then cleared for the erection of permanent constitutional systems. Between 1776 and 1780, therefore, all the states except two adopted new written constitutions. In Rhode Island and Connecticut the old charters were still regarded as acceptable frames of government, and they continued to serve well into the nineteenth century.

Judged by later-day standards, the process of constitution-making was in most instances an exceedingly irregular one. While revolutionary political philosophy emphasized the distinction between organic supreme law and mere statute law, the distinction between a constitutional convention and a legislature was as yet little understood or appreciated. In New Jersey, Virginia, and South Carolina the revolutionary provincial congresses drafted the permanent constitutions, without seeking any new authority from the people and while engaged in other legislative business. New Hampshire, New York, Pennsylvania, Delaware, Maryland, North Carolina, and Georgia all held special elections for new congresses to draft constitutions, but these conventions also concerned themselves with legislative matters. In none of the states acting in 1776 and 1777 did the conventions submit their work to the people for approval; rather, they merely proclaimed the new constitution in effect.

In Massachusetts, however, the distinction in theory between a legislative body and a constitutional convention called to perform the organic function of drafting the supreme law received dramatic recognition. The provincial congress first drafted a constitution in 1777. When submitted to the people, this document was rejected, in part on the grounds that it was not the product of an organic convention but had been drafted by the legislature. The congress then called for the election of delegates to a separate constitutional convention. This body met in 1779 and drafted a second constitution, which was submitted to the people and accepted by the required two-thirds constitutional majority the following year.

Considerations of theory alone were not always decisive in keeping the other states from following the example of Massachusetts. In many states it would have been dangerous to call conventions or to submit the proposed constitutions to a popular vote. Nowhere were the radicals in a heavy majority; yet the new constitutions were intended to place power in their hands. Had the Tories and moderates been permitted to vote, they might in some states have undone the work of the revolutionaries.

Compared with the constitutions of a later day, those of 1776 are notable for their brevity, most of them being but five to seven pages in length. They provided merely for the skeletal outlines of government, and save for a few simple restrictions the legislatures were left to fill in the details. The people had not yet had instilled

in them the deep distrust of the legislature which was to become prevalent during the nineteenth century.

Seven of the state constitutions contained separate bills of rights, while the remainder incorporated certain provisions of this kind. They set forth, often in declamatory style, the now familiar idea of natural rights and the compact theory of the state. Many provisions reflected those in the famous English Bill of Rights of 1689; others were the product of the century-long struggle between colonial legislatures and governors over local self-government. Still others reflected the recent quarrel between the colonies and England; thus Virginia and Massachusetts banned writs of assistance, while several constitutions prohibited the levying of taxes without the consent of the people or their representatives. All the bills of rights incorporated the now traditional guarantees of Magna Charta and the common law concerning procedural rights and fair trials in criminal cases.

The Virginia Bill of Rights, drafted largely by George Mason and adopted in June 1776, has long been recognized as a masterpiece of revolutionary political philosophy. This document set forth the doctrine of natural rights, the compact theory of the state, and the right of revolution in language remarkably like that which Jefferson was shortly to employ in the Declaration of Independence. There followed guarantees of the separation of powers and free elections, and prohibitions against writs of assistance and taxation without the consent of the people or their representatives. Other provisions extended the rights of jury trial, moderate bail, and fair procedure in criminal cases. The document also guaranteed freedom of the press, espoused the principle of a free militia, declaimed against standing armies in peacetime, and ended by enunciating the principle of religious liberty.

All the constitutions except that of Pennsylvania provided for a bicameral legislature. The lower house was invariably based upon district representation; the upper house was usually elected separately on the same basis. In South Carolina and Georgia, however, the upper chamber was elected from and by the lower, while in Maryland a system of indirect election was used.

The bitter rivalry between governors and assemblies in colonial times had instilled in the people a deep distrust of the executive, and the new constitutions reflected this. The governor's term was short—

from one to three years—and his authority was closely hedged. Under most of the state constitutions the governor was elected by the assembly and was intended to be its creature, but in New York and Massachusetts and under the rejected New Hampshire constitution of 1779 [1] the governor was elected by popular vote. Most of the states made the governor's veto subordinate to a mere majority of the legislature, although Massachusetts required a two-thirds majority to override. North Carolina provided merely that bills be signed by the speaker before becoming law, thus obviating the veto, while New York vested the veto in a separate Council of Revision composed of the governor and several judges, a body distinct from the Senate. Even the appointive power, by long tradition an executive prerogative, was often drastically impaired by provisions for appointments by the legislature or council. In New York the appointive power was given to the governor's council, in which the governor had but one vote. In New Jersey the appointive power was bestowed upon the legislature.

The ascendancy of legislature over executive was in curious contrast to another provision, concerning the separation of powers. Some of the constitutions specified the distinct existence of the three principal departments of government. Thus the Virginia constitution provided that "The legislative, executive, and judiciary department, shall be separate and distinct, so that neither exercise the powers properly belonging to the other." Provisions of this kind were in part the product of contemporary political thought as exemplified by Montesquieu;[2] in part they were the product of more than a century of colonial practice in which executive and legislature had derived their authority from separate and distinct sources, the Crown and the electorate, and in which the differences between the two branches had been accentuated by recurrent conflict.

Were the early state constitutions democratic instruments of government? By present-day standards the answer is a qualified No, but they were decidedly more democratic than were the charters

[1] New Hampshire wrote four constitutions in all during the Revolutionary era: in 1776, 1779, 1781, and 1783. The constitution of 1776 was intended to be temporary; those of 1779 and 1781 were rejected. The constitution of 1783 was adopted the following year.

[2] Baron de Montesquieu (1689–1755) was a renowned political philosopher of the French Enlightenment. His *Spirit of the Laws* (1748), in which he argued that liberty could best be secured by a balance and separation of power between different governmental functions, had much influence in America.

of colonial times. Most constitutions retained simple property qualifications for the suffrage; all of them set up heavy property requirements for legislators and governors. In Massachusetts, for example, the governor must possess not less than £1,000 in property, and members of the General Court must possess £300 and £100 for the upper and lower houses respectively; in Maryland, deputies must have £500 in property, senators £1,000, and the governor £5,000, including a £1,000 freehold estate. Possession of a simple freehold was the most common suffrage qualification, but the Pennsylvania constitution opened the franchise to all taxpayers and sons of freeholders.

Many of the colonial religious qualifications for suffrage and for office were swept away. Also, all of the constitutions guaranteed religious liberty and equal political rights for all Protestants, while several extended this guarantee to all Christians, Protestants and Catholics alike. Several of the constitutions, among them those of New York, New Jersey, Pennsylvania, Virginia, and the Carolinas, expressly provided against compulsory support of any church. In Maryland, the legislature might still appropriate for the support of various churches, but only in Massachusetts was the way left open for the continuation of a regularly established state church supported by direct taxation.

By and large, these provisions were more liberal than those of the colonial period, and generally they were far more liberal than those of the same day in Europe. Certainly they were moving toward the democratic principles recognized in later state constitutions.

An important constitutional practice was the new institution of judicial review, which, although not embodied in the new constitutions, attained formal recognition in several state cases between 1778 and 1787. Judicial review was fundamentally an outgrowth of colonial and Revolutionary political philosophy. Its basic postulates were the supremacy of the constitution, the limited power of the legislature, and the independence of the judiciary, achieved through the separation of powers. If one grants that the constitution is supreme, that the legislature cannot modify it or act against its provisions, and that the judiciary is an independent branch of the government with the right to interpret the constitution, the groundwork is established for judicial review—for the right of the judiciary

to refuse to recognize a legislative enactment which in its opinion violates the constitution.

Judicial review thus arose out of the revolutionary climate of ideas. It will be recalled that James Otis, in the Writs of Assistance Case, had held that an act against the supreme constitution was void, and that it was the duty of the courts to "pass the law into disuse"—that is, to refuse to enforce it. Again in 1765 a Virginia county court actually held the Stamp Act void as contrary to the British constitution and Virginia's charter rights. While there are several shadowy earlier state precedents, the first well-authenticated instance, after independence, of a state court's holding a law void occurred in New Jersey in 1780. The case, *Holmes v. Walton*, involved the validity of a legislative act of 1778 providing for six-man juries in cases arising out of confiscation of enemy goods. The New Jersey constitution of 1776 had guaranteed the right of jury trial in perpetuity, and the court held the act in question void as in conflict with this provision, since traditionally common-law juries had been composed of twelve men. In the more famous *Trevett v. Weeden*, a Rhode Island case of 1787, the state supreme court voided a paper-money force act as contrary to the property guarantees of the old charter, which still served as the constitution. In still another instance, *Bayard v. Singleton*, a North Carolina case of 1787, the state supreme court voided an act confirming the titles of persons who had bought lands confiscated from Tories during the Revolution. After much delay and with evident reluctance, the court held the act void as contrary to the constitutional guarantees that "every citizen had undoubtedly a right to a decision of his property by trial by jury." There were other state cases prior to 1787 in which the question of judicial review arose, although they did not actually involve the voiding of statutes as contrary to the constitution.

The doctrine of judicial review was not, however, universally accepted in the Revolutionary era. It was in direct conflict with the idea of legislative ascendancy, so prevalent at the time, which held the legislature to be the fundamental organ of government, properly in control of the other two departments. Both in *Trevett v. Weeden* and in *Bayard v. Singleton* the assertion of the right of judicial review provoked strong opposition in the assembly. In

Rhode Island the legislature, controlled by the paper-money interests, upon hearing of the decision, condemned the court in a joint resolution, called the judges in for examination, and even sought to remove them from office. In the North Carolina case, the legislature also called the court to its bar, but here the assembly, with some resistance, finally sustained the judges' action. In spite of popular opposition, however, the doctrine of judicial review persisted. Between 1787 and 1803 state courts held void state laws in more than twenty instances, and after 1789 the doctrine of judicial review passed into the federal judiciary under the Constitution.[3]

THE ARTICLES OF CONFEDERATION

While the various states drafted constitutions, the Congress took steps to establish a regular government for the entire nation. Benjamin Franklin, making the first move in July 1775, introduced into the Congress a plan for a "league of friendship," which would have given the Congress much the same powers as were ultimately delegated to that body under the Articles of Confederation. The idea was too advanced, however, for the state of opinion at that time, and Franklin dropped his suggestion.

When, on June 7, 1776, Richard Henry Lee's resolution looking toward the Declaration of Independence was introduced into the Congress, it was accompanied by a resolution that the Congress set up a committee to draft a constitution for the "United Colonies." The suggestion was adopted, and John Dickinson was placed in charge of the committee. After some weeks of labor the committee reported a plan of confederation on July 12.

Some months of intermittent debate followed, during which certain changes were made in the original draft. The principal points of dispute on the floor of Congress were the provision apportioning the expenses of the government among the states according to population and the provision giving Congress power to adjust disputed state boundaries. The conflict between localists and small-state men on the one hand and nationalists and large-state men on the other was already taking shape. The states' rights group won a most important victory when it secured the introduction of a clause guaranteeing to each state "sovereignty, freedom and independence."

[3] See Chapters 7 and 9 for the rise of judicial review under the Constitution.

The Articles of Confederation were submitted to the states by the Congress in July 1777, and all the states except Maryland ratified within the next two years. However, Maryland insisted on a cession of all the states' trans-Allegheny land claims to Congress before she would enter the Confederation. These claims, based upon old royal charters, overlapped in a manner creating serious confusion. Thus Virginia, Pennsylvania, Massachusetts, New York, and Connecticut all had rival claims to the region north of the Ohio. Five states—New Hampshire, Rhode Island, New Jersey, Delaware, and Maryland—had no western land claims, and among these states there was a strong feeling that all western lands were properly the common possession of the nation and ought therefore to be ceded to Congress.

In 1779 Congress adopted a resolution which asked that all states transfer the titles to all trans-Allegheny lands to Congress. New York made the first important concession in February 1780, releasing its entire western land claim to Congress. Maryland, convinced that similar cessions by other states were only a matter of time, now yielded and ratified the Articles in March 1781.

The Articles of Confederation were largely a legalization of the *ad hoc* government which had developed long before 1781 with Congress as its center. The Articles placed the full authority of the Confederation government in the hands of Congress, while the principle of state equality in that body, first recognized in September 1774, was also retained, each state delegation being allowed but one vote. The powers granted to Congress were those which it had already been exercising, and significantly they were essentially those of Parliament and the Crown under the old empire. Thus Congress was given the authority to make war and peace, to send and receive ambassadors, to enter into treaties and alliances, to coin money, to regulate Indian affairs, and to establish a post office.

Two extremely important powers, taxation and the regulation of commerce, were withheld from Congress. Both of these powers had but recently been involved in the dispute with England, and the new states were apparently reluctant to grant them to any central government. Failure to grant Congress the right to levy taxes obliged the Confederation to rely upon the system of state appropriations that had proved so inefficient in the colonial period. The result was financial chaos. Before many years had passed statesmen would

realize that it was impossible to operate even a confederation government effectively unless it had the power to levy taxes and exercise some control over commercial activity.

The Articles made no direct provision for executive authority. Instead Congress was authorized to establish such "committees and civil officers as may be necessary for managing the general affairs of the united states under their direction." Congress might also appoint one of their number to preside over Congress, this "president" to serve for but one term of one year in any three years. In practice, the "president" of Congress proved to be little more than a presiding officer possessing almost no executive authority.

Executive authority rested in a series of committees erected to deal with various problems as they arose. Some of these, notably the Committee on Foreign Affairs, the Marine Committee, the Committee on Finance, and the Board of War, eventually attained the status of permanent departments. The basic weakness of this system lay in the divided character of executive responsibility. Even within a given committee there was at first no one individually responsible for policy, while the multiplicity of the committees created—at one time there were ninety-nine—and the overlapping of the functions of various committees aggravated the confusion.

In 1781, Congress remedied much of this confusion when, after extensive study, it created departments of Foreign Affairs, War, Marine, and Treasury, and placed each under a single permanent secretary. The number of lesser committees was also successively reduced. Had the Confederation government lasted, it is probable that the various departments would have drawn together under the control of a single executive committee or cabinet. Indeed, the Committee of the States, established in 1784, was a step in that direction, although Congress by that time lacked sufficient energy to inaugurate the idea successfully.

This development leads to the speculation that a parliamentary cabinet system was in evolution under the Confederation. The Articles have often been criticized for executive feebleness, yet those who voice this criticism usually accept the doctrine of separation of powers. For the moment the executive was indeed weak; potentially, however, it was at least as efficient as that later provided under the Constitution, and it was more responsive to popular will.

Cabinet government, properly correlated with a two-party system in the legislature, has many advantages over the presidential system, not the least of which are freedom from paralysis in crisis and greater responsiveness to popular will.

One of the weakest features of the Articles of Confederation was the lack of a federal judiciary. The central government was given but four types of jurisdiction over causes, all narrow. Congress was given power, through an involved process, to establish *ad hoc* courts to deal with interstate disputes, should any state, a party to such dispute, appeal to Congress. The decision of such a court was to be final, the verdict, by implication at least, having the force of an act of Congress. Congress was given power to settle in a like manner certain cases arising out of private land title controversies involving land grants from two or more different states. In addition, the Articles authorized Congress to establish courts to try cases of piracy and felony committed on the high seas, and to establish courts to determine finally appeals in "cases of captures," or prize cases.

Congress settled some six interstate disputes during the Confederation period, the most important being a case between Connecticut and Pennsylvania over conflicting claims to what is now western Pennsylvania. The judicial power thus granted to settle disputes between the states may be regarded as establishing a precedent for the like power of the Supreme Court of the United States under the Constitution of 1787.

How is the government under the Articles of Confederation to be classified? In some respects, it was like a "league of friendship" or loose confederation among independent states, each with practically undepleted sovereignty. The Articles specifically provided for the "sovereignty, freedom and independence" of the separate states, evidence that the states were regarded in theory as the ultimate repositories of sovereignty. This provision was incorporated by amendment in Congress before submission to the states. It is clear that Congress was aware of its meaning.

Other portions of the Articles seemingly support the idea that they envisioned an association of states each of which would continue to act in most respects as a free and independent nation. The provision for the extradition of fugitives from one state to another is an example. Extradition is ordinarily a feature of international

comity between friendly states in the family of nations; it does not exist automatically in international law, but it may be established by treaty.

The Articles also contained a clause by which "full faith and credit shall be given in each of these states to the records, acts and judicial proceedings of the courts and magistrates of every other state"—a form of recognition common among members of the family of nations. A marriage performed in New York, for example, is ordinarily recognized as valid in France, while a contract in Massachusetts for sale of land in that state may be enforced in the British courts in accordance with the provisions of the Massachusetts law.

Finally the Articles provided that the inhabitants of every state were "entitled to all the privileges and immunities of free citizens in the several states." Thus citizens of Virginia, for example, might freely enter and leave the state of New York, might own land, carry on any lawful business which the state of New York permitted its own citizens, have the same recourse to the courts, and expect the same police protection of life and property, and the same guarantees of liberty and human rights as New York extended to her own people. These are again courtesies which sovereign states commonly extend to one another, sometimes voluntarily, sometimes by treaty.

These three provisions, adapted as they were from international comity, were to pass over directly into the Constitution of 1787. As such they live and function at the present time. Obviously, however, the United States in the twentieth century is no mere league of sovereign states, nor is there anything left of the doctrine of complete state sovereignty. The presence of these provisions in the Articles of Confederation, therefore, can hardly be regarded as conclusive evidence that the Confederation was nothing more than a loose-knit league. Rather it must be said that, although the provisions were adopted from international comity, they have since proven their value to a rather close-knit federal state.

There is some evidence also that the Articles of Confederation and acts of Congress were intended to be accorded the status of law within the various states. Article XIII provided that "every state shall abide by the determinations of the united states in congress assembled, on all questions which by this confederation are submitted to them." The Articles were also to be "inviolably observed by every state." This is in a sense anticipatory of Article VI of the

Constitution of 1787, which makes the Constitution, treaties, and acts of Congress the supreme law of the land. At this point, however, a difference appears, for the Articles merely charged the states with the preservation of the Articles, while Article VI specifies how the Constitution is to be observed: it is to be enforced in the courts. Therein lies the vital difference: the Articles made no provision for their enforcement as law, while the Constitution does. The very fact that the Articles could not be enforced as law constituted one of their most serious weaknesses.

Alexander Hamilton saw this clearly and must be given credit for the idea that the Articles ought to be enforced as supreme law. In a New York case in 1784, *Rutgers v. Waddington,* involving a conflict between an act of the state legislature confiscating Tory property and the Treaty of Peace, he argued that the treaty as an act of Congress must be recognized by the New York courts. He won his point, but even so the principle was not given general recognition at the time.

The weaknesses of the Articles may appropriately be recapitulated:

Most serious, perhaps, was the failure to delegate an adequate group of powers to the central government. Without the power to tax, the Confederation was forced to depend upon the old levy system, which had failed in colonial and Revolutionary times. Levies upon the states for the most part went unpaid, or were paid only in part, and the government was thus doomed to operate under the handicap of chronic bankruptcy. Failure to delegate to the Confederation the power to regulate interstate commerce led to disastrous "economic wars" among the various states, and made a national commercial policy impossible. It is conceivable that, had the power to tax and the power to regulate commerce been granted to the Confederation government, that government might have succeeded in overcoming its other weaknesses. Failure to grant these two powers doomed the Articles.

Almost as serious was the fact that the government was obliged to depend upon the states as agents for certain necessary functions of the central government. It is an overstatement to say, as has sometimes been said, that the Confederation depended entirely upon the states to perform its functions, whereas under the Constitution the federal government was able to discharge its functions without

any intermediary. The Confederation government performed many of its functions without the aid of an agent; for instance, Congress through its committees sold western lands, carried on foreign affairs and relations with the Indians, maintained an army and a navy, and operated a post office.

In two very important respects, however, the states did act as agents of the Confederation government. First, they supplied the Congress with revenue. Second, in so far as the Articles and acts of Congress gave rise to rights, titles, and interests at law, it was necessary to enforce them in the state courts.

The states failed miserably as agents of the national government. They were repeatedly derelict on annual requisitions levied upon them by Congress—to such an extent that they put the Confederation government into chronic bankruptcy. The states were equally irresponsible as agents for the enforcement of Confederation law. They flouted the Treaty of Peace of 1783 with England: their legislatures violated its provisions at will, while their courts generally refused to recognize any rights other than those arising under the laws of their own respective states.

The solution lay in the elimination of the states as agencies of the national government. This would mean that the central government would be given the power to levy taxes directly and collect them through its own officials. Equally important would be the establishment of a system of national courts in which individuals could sue out rights pursuant to national law, and the central government could enforce its interests against private citizens and even against the states.

There was much confusion about this problem during the Confederation period. Most of the suggested remedies involved some plan to coerce the states into proper performance of their duties. Yet if the states were eliminated as agents, such coercion would be unnecessary.

Allied to this problem was the one inherent in all federal systems: the need of a mechanism to determine the proper respective spheres of the states and the national government. The Confederation government had certain powers, while the residue remained with the states; but there was no one to settle conflicts of authority which arose between the two bodies. If a state legislature chose to ignore

the Articles and legislate upon Indian affairs, there was no federal agency to gainsay it. Since the national government lacked agencies to enforce its will, the decision of the separate states as to the extent of national authority almost invariably prevailed. This problem was also to be solved by the establishment of a national judiciary.

The lack of a clearly defined executive has already been discussed. The weakness, however, did not lie in the fact that the functions of the executive were exercised by a committee, for if given an opportunity a committee could have developed into the parliamentary-cabinet type of executive. The real difficulty was the lack of executive unity. Instead of many committees, there should have been one to formulate a common policy and control a number of co-ordinated ministries. There is evidence that this development was under way when the Constitutional Convention brought it to an abrupt end.

Finally the extreme difficulty of passing effective legislation through Congress may be mentioned. This was due primarily to the fact that a vote of nine of the thirteen states was required for enactment. Since the principle of state equality prevailed, the votes of any five of the less populous states could block a measure desired by eight of the more important states and a great popular majority of the nation.

Further amendment of the Articles could be obtained only by a unanimous vote of all states. In 1781, for example, the refusal of Rhode Island blocked an amendment to permit the Confederation to collect a five per cent import duty which would have solved, at least in part, the revenue problem.

Yet, when all the weaknesses of the Articles are surveyed, it is clear that in principle they were fundamentally sound. They might have been amended into a highly satisfactory instrument of government. Had the federal government been given the power to tax and to regulate commerce, had federal law been made supreme and enforceable by a federal judiciary, had steps been taken to hasten the unification of the executive branch, and had proportional representation been substituted for state equality in Congress and a workable amendment provision adopted, the Articles might well have served as the basis for a sound and lasting union.

FAILURE OF THE CONFEDERATION GOVERNMENT

Whatever the theoretical deficiencies of the Articles of Confederation, there was no doubt about the failures of the Confederation government in practice. Most of Congress's difficulties between 1776 and 1787 were connected in some degree with its financial incompetence, in turn ascribable to its lack of taxing power and the habitual failure of the states to meet their assessments promptly. During the Revolutionary War, the army went chronically unpaid, while in 1783 the officers encamped at Newburg, New York, threatened mutiny in attempt to recover back salaries. In despair the Continental Congress resorted to the printing presses to finance itself, issuing, by 1780, some $40,000,000 in paper money, the entire issue ultimately being virtually repudiated. Also Congress borrowed several millions between 1778 and 1783 from the French and Dutch governments; during the Confederation period it was unable even to meet the interest on these loans, and interest and principal accumulated until the national debt was refunded under the Constitution. Financial weakness after 1783 also made it difficult to protect the great trans-Allegheny wilderness region acquired in the Peace of 1783, for Congress was utterly without the resources to garrison the West properly in order to protect settlers, keep out British and Spanish intruders and control the Indian tribes. As a result, Britain, contrary to the provisions of peace, retained her forts in the Northwest Territory, both Spain and England intrigued to separate the West from the new republic, and Indians ravaged the settlements in Kentucky and Tennessee.

Another important series of difficulties arose out of congressional impotence in the field of foreign and interstate commerce. It was almost impossible for Congress to negotiate commercial treaties with foreign states, in part because they realized that Congress could not guarantee compliance by the states with any commercial policy agreed to. When John Adams, American Minister to England, sought a commercial treaty with Britain, Foreign Secretary Charles James Fox contemptuously suggested that ambassadors from the thirteen states ought to be present, since Congress had no authority over the subject. Recognizing that Congress was impotent to impose a retaliatory commercial policy, Britain closed the West Indies to American trade, and discriminated against

Yankee merchantmen in her own ports. Within the Confederation, the various states carried on retaliatory trade wars against one another, Congress being powerless to interfere. New York, for example, profiting by her port of entry, laid duties upon incoming commerce destined for New Jersey and Connecticut, while these states in return taxed interstate commerce with New York.

Further numerous difficulties arose out of the inability of Congress to compel obedience by the states and individuals to acts of Congress and treaties. The weakness of Confederation foreign policy was in part due to this fact. Congress was unable to compel the states to execute the provisions in the treaty of peace with respect to the return of Tory property and the payment of merchant debts, and Britain used this as an excuse to retain control of the Northwest forts. France and Holland also hesitated to negotiate treaties with a nation which could not meet its commitments.

Inability on the part of Congress to prevent the states from intruding upon the sphere of congressional authority also contributed to an extremely bad financial situation within the various states. Theoretically, the monetary power was delegated to Congress; however, the states did not regard this as prohibiting their own issues. Within most of the states, a continuous struggle went on between a paper-money faction, composed of small farmers, debtors, and artisans, and a hard-money faction composed of creditors, merchants, and large planters. Very often the paper-money faction won control, and several states passed acts fixing prices in paper and making it a misdemeanor to refuse paper currency at its face value. Other states passed stay-laws suspending the collection of debts and forbidding courts to grant judgments for debt.

In Massachusetts, the quarrel over money and credit precipitated in 1786 the outbreak known as Shays' Rebellion, a conflict in which armed bands of farmers closed the courts in the interior of the state and even threatened to lay siege to Boston in order to force passage of inflationary legislation. Difficulties of this kind frightened conservatives, accelerated the movement for constitutional reform, and were directly responsible for those clauses in the Constitution of 1787 which prohibit the states from coining money, emitting bills of credit, making anything but gold and silver legal tender in payment of debt, or impairing the obligation of contracts.

However, not all the difficulties of the Confederation era were

chargeable to deficiencies in the form of government. The period was one of great agricultural and commercial prostration, and the causes for this condition were only in small part political. The United States was now outside the British mercantile system. The West Indies were closed, while goods could be sold in England only over British tariff walls. The war had nearly destroyed New England's fisheries; the ravages of war and the loss of English bounties on rice and indigo had much to do with the agricultural decay of the South. These conditions were to be greatly improved by the onset of the French Revolution and by the long period of European war beginning in 1792, which created a war market for American agriculture. Recovery from depression was thus ultimately brought about primarily by developments outside the country. Yet to conservatives in the Confederation period the economic difficulties of the day appeared to rise in considerable part out of the weakness of the government, and the economic crisis thus contributed to the impetus for constitutional reform.

THE MOVEMENT FOR CONSTITUTIONAL REFORM

The move for constitutional reform began even before the Articles of Confederation had been ratified. In a letter to James Duane in September 1780, Alexander Hamilton suggested that Congress reassume its revolutionary powers and call a "convention of all the states" to draft plans for a "general confederation." In a pamphlet published about the same time, Tom Paine made the same proposal. The following year, Hamilton, writing under the pseudonym of "The Continentalist," asserted that "we ought without delay to enlarge the powers of Congress." A convention of the New England states at Boston in 1780 proposed that the American states immediately form a "more solid union," and both in 1781 and in 1782 the New York Assembly recommended "a general convention of the states specifically authorized to revise and amend the Confederation."

Such agitation made itself felt upon the floor of Congress. In February 1781, Congress submitted to the states for ratification a proposed amendment to the Articles to permit the Confederation government to levy a five per cent *ad valorem* import duty for independent revenue. A month later, a special committee headed by James Madison recommended that Congress request of the states

authority to "employ the force of the United States as well by sea as by land to compel the states to fulfill their federal engagements." In August, a second committee of three, Oliver Ellsworth, James Varnum, and Edmund Randolph, reported twenty-one deficiencies in the Articles and recommended a general enlargement of the powers of Congress to include taxation, the admission of new states, the embargoing of commerce, control of suffrage, and the right to distrain the property of states delinquent in their financial obligations to the central government.

For the time being these fine words came to nothing. Twelve states responded favorably to the request for authority to levy an import duty, but Rhode Island, obsessed with the importance of her own commercial system, refused. The recommendations of Madison's committee and those of the committee of three were too strong for Congress, which took no action on either report. Congress in 1783 again asked the states for permission to levy an import duty; again Rhode Island refused and several other states failed to take action. The idea was several times alluded to within the next few years, but nothing ever came of it.

By 1786, it seemed to many people that the United States was a political failure, destined for extinction. The Confederation treasury was empty. The country was in the depths of commercial and agricultural depression. The sharp social struggles within the states appeared to presage general civil war. It was frequently said that the United States was too large to form a single nation; and there was talk of forming three confederacies, one for each section—New England, the Middle States, and the South.

In a final surge of energy, Congress again turned its attention to the reform of the Articles. Charles Pinckney of South Carolina led the way in forcing the issue of a constitutional convention upon the floor. But Congress refused to call a convention, the self-love of the chamber being apparently too great to deliver into other hands the task of reform.

Failing in this step, Pinckney finally obtained the appointment of a "grand committee" to "report such amendments to the Confederation as it may be necessary to recommend to the several states." When the committee reported, it recommended only that Congress be given power to regulate foreign and domestic commerce and collect duties on imports. The requisition system was to be retained,

but Congress might specify when the appropriations were to be paid by the states. A defaulting state would be charged ten per cent interest, and if, after an interval, the levy remained unpaid, a federal tax might be collected directly from the township and county governments. Congress took no action on this scheme, which was cumbersome beyond belief and devoid of ingenuity. It was apparent that the vitality and prestige of Congress had sunk too low for positive action.

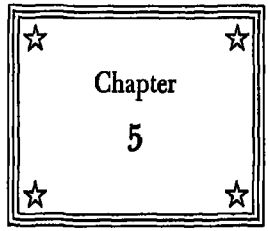
Before this impasse in Congress had been reached, however, the series of events which finally resulted in a constitutional convention in Philadelphia were under way. In 1785, Virginia and Maryland signed an agreement settling a long-standing dispute over commercial regulation of the Potomac. The idea of interstate agreement proved so attractive to the Maryland legislature that it now proposed to Virginia a general commercial convention to include Delaware and Pennsylvania. Virginia suggested that the invitation be extended to all the states and that the convention consider a common interstate commercial policy.

The convention met in Annapolis, Maryland, in September 1786. In one sense the meeting was a failure, for delegates from but seven states were in attendance, those from New England, the Carolinas, and Georgia failing to appear. Yet Hamilton and Madison, the moving spirits of the gathering, used the occasion to issue a call for a new convention. At their instance, the Annapolis convention unanimously adopted an address to the states to send delegates to a constitutional convention to meet in Philadelphia the following May.

Congress was too jealous of its prerogative to give this call the formal sanction of the central government, but the Virginia assembly saved the day with a stirring resolution adopted in November 1786, calling upon the other states to send delegates to Philadelphia. Pennsylvania and New Jersey responded within a few days, North Carolina followed in January, and Delaware in February. In February, Congress perceived the inevitable and saved face with a recommendation for a convention to meet at the same time and place, although the resolution said nothing of the Annapolis convention or its recommendation. Within a short time the other states, with the exception of Rhode Island, also nominated delegates.

Thus by 1787 the country's leading statesmen had come to recognize fatal deficiencies in the Articles of Confederation, and the

movement for reform had finally resulted in a constitutional convention whose efforts were to be crowned with spectacular success. Yet the failure of the Confederation government should not obscure the substantial contributions made by the Articles to the Constitution drafted in 1787. The Articles and the Constitution contained essentially the same conception of a federal state, inherited from the old British empire. Each adopted the same system of interstate comity taken over from the society of nations. The Constitutional Convention was to adopt sweeping reforms of a profoundly important character, but nevertheless it built upon the constitutional foundations erected in the Confederation era.



The Constitutional Convention

THE CONSTITUTIONAL CONVENTION marked in a sense both the culmination and the close of the Revolutionary period. The crisis of 1765–1775 had been precipitated by the failures of the old British imperial system. When Britain had attempted greater centralization, the colonies had resisted, and had finally broken up the empire. The states had in turn established a central government of their own, but they had consented only to the erection of an extremely weak confederation in place of the vacated British position of control. Yet the Confederation's weakness had produced chaos and had finally convinced thoughtful men that a much more centralized federal system was essential to the nation's stability and welfare. By 1787 most statesmen were ready to accept what some twenty years before they had so bitterly resisted at the hands of Britain—a central government having the power to tax and to regulate commerce. However, in place of the unity Britain would have imposed from London, there now appeared a self-imposed unity, controlled by a central government in America.

THE CONVENTION'S PERSONNEL AND ORGANIZATION

Although the Convention had been scheduled to convene on the second Monday in May, only a few delegates were actually on hand

at the appointed time. Those present simply adjourned from day to day for want of a quorum. It was not until May 25 that delegates from seven states were present and the Convention was able to proceed. Not until the end of June were eleven states represented, and individual delegates continued to straggle into the Convention during the next two months. Rhode Island sent no delegation to the Convention, and the New Hampshire deputies did not put in an appearance until late July. Meanwhile two of the New York delegates had withdrawn, and the remaining man from New York, Alexander Hamilton, was not allowed to cast the vote of his state. Hence no more than eleven states were ever represented at one time for voting purposes.

Of the seventy-four men named by the various state legislatures as delegates, only fifty-five appeared at the Convention. The real work was done by not more than a dozen men. But this small group included several of the most eminent figures in America.

George Washington, a delegate from Virginia, was present at very great personal sacrifice. He had been reluctant to attend, for his health was bad, his finances were in poor shape, and his estates were in need of immediate attention. Only when Madison and others made it plain to him that his immense prestige would go far to assure the Convention's success did he consent to come to Philadelphia. Elected the Convention's presiding officer, he proved to be an invaluable asset. Though he took little direct part in the proceedings, his presence did much to keep the Convention at its task when the heat of argument might otherwise have ruptured proceedings beyond repair.

James Madison without doubt supplied the greatest measure of intellect and leadership in the Convention. Unprepossessing in appearance and a somewhat mediocre speaker, he was nonetheless a brilliant scholar and public servant. The Virginia Plan, which the Convention took as the starting point in its labors, was probably mainly his work, and from start to finish he played a leading role in the struggle for a strong nationalist government. Also, historians are indebted to Madison for his careful notes on the Convention's proceedings. Published more than fifty years later, they constitute the most important source of what happened on the floor, and they are far more valuable than the Convention's official journal, comprising nothing more than the bare bones of motions and votes,

often inaccurately recorded. Altogether, Madison deserved the title later bestowed upon him—"the father of the Constitution."

James Wilson, a member of the Pennsylvania delegation, was the outstanding legal theorist of America in the latter eighteenth century. A Scot by birth, Wilson had emigrated to America about the time of the Stamp Act. After studying law under John Dickinson, he had first won wide attention in 1774 with his *Considerations on the Nature and Extent of the Authority of the British Parliament*, in which he was among the first to conclude that Parliament had no legal authority whatever over the colonies. In the Convention, he emerged as one of the four or five firm believers in a completely national government founded upon a popular electoral base, and he also fathered the electoral college idea when he saw that election of the executive by a direct popular vote could not win the support of the Convention. In after years he was a lecturer in law at the University of Pennsylvania, and in 1789 Washington appointed him an associate justice of the Supreme Court.

Gouverneur Morris, also a Pennsylvania delegate, was another important leader in the fight for strong national government. A product of the landed aristocracy of New York, his political philosophy was characterized by an outspoken contempt for democracy. His suave air and too smooth mannerisms won him the distrust of many Convention members, but his marked ability as a statesman and public speaker nonetheless gave him great influence. The task of putting the Constitution into its final literary form was probably entrusted to him.

The outstanding member of the New York delegation was Alexander Hamilton. A West Indian by birth, Hamilton had married into the aristocratic Schuyler family of New York and had already acquired reputation as an officer on Washington's staff, a lawyer, and an ardent advocate of strong national government. Yet Hamilton was not able to exercise an influence in the Convention proportionate to his national stature. The explanation lay in part in the opposition of the other two members of the New York delegation, John Lansing and Robert Yates, who consistently outvoted Hamilton to place New York with the states supporting weak government. In part, also, Hamilton's outspoken affection for the institutions of constitutional monarchy and the British government, and his known belief that effective government required complete cen-

tralization, placed him out of line with the general sympathies of the Convention. When Lansing and Yates left the Convention, Hamilton was left without the right to vote, and since it was then apparent that he could not influence the course of affairs appreciably, he left the Convention and thereafter seldom put in an appearance.

Connecticut furnished three men of first importance to the Convention. Oliver Ellsworth already had a great reputation as a lawyer; he had also served in Congress and was now chief justice of the highest court in his state. He was brilliant in debate, a master parliamentarian, and a stubborn fighter in any cause in which his convictions were thoroughly aroused. Later he was to sit in the United States Senate, where he acquired a reputation for legislative skill so tremendous that the tradition of it lingered on in the upper chamber for more than a century. In 1796 he became Chief Justice of the United States Supreme Court. Among his later accomplishments was authorship of the Judiciary Act of 1789, a great landmark in the development of the American constitutional system.

William Samuel Johnson—Dr. Johnson, as he was known to his contemporaries because of his Oxford degree of Doctor of Laws—had one of the most respected legal minds of America. He had been a judge of the Superior Court of Connecticut and a member of the Continental Congress. His gentle manner and able intellect gave him an important position in the Convention. An advocate of moderate national government, he did his most valuable work in the compromise of disputes. He was one of the men who kept the Convention at its task when differences threatened to tear it asunder.

The third Connecticut delegate, Roger Sherman, was an example of the American ideal—a self-made man. He had risen from shoemaker to lawyer, judge, and public leader. Long a member of the Continental Congress, he holds the unique distinction of having signed the Declaration of Independence, the Articles of Confederation, and the Constitution of 1787. Though in general he favored strong central government, his principal efforts in the Convention were directed to the end that the autonomy of the individual states should not be completely destroyed.

In Rufus King, Massachusetts contributed one of the more important figures of the Convention. Most of his distinguished career lay in the future, but at Philadelphia he revealed himself as a strong

nationalist, a lucid thinker, and an eloquent speaker. Later Senator from New York and minister to England under John Adams, he was the Federalist candidate for the presidency in 1816. In his old age he found himself again in the Senate, where he played an important part in the Missouri Compromise debates.

Elbridge Gerry, also of Massachusetts, played a prominent but curiously inconsistent role in the Convention. A former satellite of Sam Adams, he had become a member of the Continental Congress in 1776, and he continued to sit in that body throughout the Confederation period. In the Convention he often voiced fears of popular government; yet he more than once professed adherence to "republican principles" and refused to sign the finished Constitution on the grounds that it was "monarchical" in character. In later years, Gerry became a noted Jeffersonian politician, serving as a member of Adams' XYZ mission to France in 1797, governor of Massachusetts, and Vice-President under Madison. The term *gerrymander* remains today as testimony to the manipulative skill in Massachusetts politics attributed to him by his contemporaries.

John Rutledge, head of the South Carolina delegation, was a polished lawyer-statesman of the kind his state made famous in later years. A former leader of the revolutionary party in South Carolina, he helped draft the state's constitution of 1776 and served as governor of the beleaguered state in the late years of the war. In the Convention, he supported effective national government, but spent his principal energies in defense of Southern sectional interests by proposals that wealth be made the basis of representation and that no restrictions be placed upon the slave trade. Washington appointed him an associate justice of the Supreme Court in 1789, and named him to be Chief Justice in 1794, the latter nomination being defeated by the Senate because of his opposition to the Jay Treaty.

Charles Cotesworth Pinckney, usually designated "C. C." or "General" Pinckney to distinguish him from his younger cousin, was also a South Carolina planter and lawyer-statesman. He had won his military title as a brigadier general in the Revolutionary War; later he became a leading Federalist and was the party's candidate for the vice-presidency in 1800 and for the presidency in 1804 and 1808. In the Convention, he also championed Southern interests, insisting that slaves be counted in the basis of representation and that no limitations be placed upon imports.

The outstanding champion of state sovereignty in the Convention was Luther Martin of Maryland, who as attorney general of his state had achieved a reputation as one of the most eminent lawyers in America. In the Convention he battled with all his strength against the nationalistic tendencies of the majority. Unfortunately for his cause, he was a rambling, diffuse, and interminable speaker, who on occasion held the floor for hours to the mortification and boredom of everyone present. Though his role in the proceedings was largely negative, he deserves credit for moving that the section in the New Jersey Plan making the constitution the supreme law of the respective states be incorporated in the Convention's draft. In spite of his early opposition to any powerful central government, Martin after 1789 became a strong Federalist. Eventually, he ruined his career by drunkenness, although he was to achieve brilliant heights in the defense of Justice Chase and in the trial of Aaron Burr.

Another distinguished member of the small-state bloc [1] was William Paterson, author of the so-called New Jersey Plan. Paterson already had a distinguished legal career behind him, having served successively as a member of New Jersey's revolutionary provincial congress, the state's constitutional convention, the New Jersey legislative council and the Continental Congress. Later he was to serve with distinction as a United States Senator from New Jersey and as an associate justice of the Supreme Court. While a defender of small-state interests, he was moderate of speech and thought and readily accepted the Constitution as a satisfactory compromise.

Other delegates deserve some mention. Benjamin Franklin, renowned the world over as a statesman and scientist, was a member of the Pennsylvania delegation. Franklin's contribution to the Convention was spiritual rather than technical—as an influence for harmony and compromise he was second in importance only to Washington. Franklin was now eighty-two years of age, and while he was by no means in his dotage, he was not his old brilliant self. His speeches were rambling and somewhat off the point, and seldom contained much of immediate practical value. Robert Morris, the financier of the Revolution, was another Pennsylvania delegate. Although he never once took the floor, he probably exercised considerable influence within the eight-man Pennsylvania delegation.

[1] For a discussion of the controversy between the large and the small states see pp. 124 ff.

Edmund Randolph of Virginia was the nominal author of the Virginia plan. While he was a man of moderate learning and capacity, his fine manners and ingratiating air made him an excellent asset to the Convention's nationalists. George Mason, also of Virginia, was an outstanding liberal of late eighteenth-century America. A friend of Jefferson and author of the Virginia Declaration of Rights of 1776, he was far ahead of his time in his democratic social philosophy. He refused to sign the finished Constitution, which he regarded as too aristocratic. Charles Pinckney, twenty-nine-year-old cousin of C. C. Pinckney, was the author of the so-called Pinckney Plan, now known to have had little influence on the Convention's proceedings. He spoke often and at length, but his ideas were erratic and probably carried little weight with the other delegates.

Abraham Baldwin of Georgia, a native of Connecticut, formerly a professor of divinity at Yale and later the founder of the University of Georgia, was respected both for his good sense and for his moderate temperament. He probably had some influence in bringing about the great compromise on the composition of the legislature. John Langdon, a merchant who had sacrificed his personal fortune in the Revolutionary cause, threw the influence of New Hampshire on the side of moderate nationalism. John Dickinson, delegate from Delaware, hardly exercised an influence proportionate to his ability and former reputation. In the Convention he was chiefly concerned for the rights of the small states, although he accepted the necessity for a more effective central government. Nathaniel Gorham of Massachusetts, silversmith, businessman, and member of the Confederation Congress, was a quiet man who lent some weight to the cause of strong national government.

These men constituted as distinguished and brilliant a body of statesmen as America could have brought together, nearly all of America's great men of the day being present.[2] Most of the delegates had long experience in public office, and many were to rise to further eminence in the service of the government they were creating. While most were lawyers and statesmen, the mercantile

[2] Thomas Jefferson was then serving as *minister* to France; John Adams as *minister* to Great Britain. Patrick Henry had been chosen a delegate from Virginia but had declined to serve. Sam Adams, who opposed strong national government, was not named a delegate.

and landed classes were also well represented. There were a few weaklings among them; yet it is difficult to imagine the young nation calling an abler group to serve in the great task that confronted the Convention.

It may clarify matters to explain the organization and procedure of the Convention. Much of the work was done in committee, so that most of the debate on the floor of the Convention was devoted to a discussion of committee reports. The delegates devoted the first two days after May 25 to the details of organization. They elected Washington presiding officer, chose William Jackson as secretary, and appointed a Committee on Rules. This committee recommended that voting be by states, and that a majority of the states present decide any question. Each state decided its own vote by polling its delegation; occasionally this resulted in a divided vote which eliminated the state from the count on the point at issue.

On May 27, Edmund Randolph presented the Virginia Plan to the Convention. This was referred to the Committee of the Whole in order to permit informal discussion of its provisions. The Committee of the Whole sat from May 31 to June 19, during which time it debated the Virginia Plan point by point, voting to accept, reject, or modify each item in the resolutions. From June 19 to July 26, the full Convention debated the report of the Committee of the Whole. The deadlock over the composition of the legislature resulted early in July in the appointment of a Compromise Committee of one delegate from each state, which reported the details of the so-called Connecticut Compromise.

On July 26, the Convention handed some twenty-three resolutions upon which it had been able to reach an agreement to a five-man Committee on Detail. This committee on August 6 reported a draft constitution of twenty-three articles, embodying the substance of the resolutions hitherto agreed upon by the Convention. The full Convention then debated this draft for several weeks. Early in September, certain unsettled matters were referred to a committee of eleven on unfinished business. This committee recommended the method finally adopted for choosing the President. The final draft of the Constitution was the work of the Committee of Style, appointed on September 8.

THE VIRGINIA PLAN

The Virginia Plan served as the original point of departure for the subsequent work of the Convention. It provided for a legislative body of two chambers, the lower house to be elected by the people of the respective states, and the upper house to be chosen by the lower house from nominations submitted by the state legislatures. The powers of Congress were to be those enjoyed under the Articles of Confederation, with the important addition of the right "to legislate in all cases in which the separate States are incompetent." The executive was to be chosen by the legislature for an unspecified term and was to be ineligible for re-election. The executive, together with a portion of the national judiciary, was to constitute a Council of Revision, with an absolute veto over acts of the legislature. A national judiciary was to be established, consisting of one or more supreme courts, and such inferior tribunals as the legislature might determine upon. Federal judicial authority was to extend to all cases involving piracies and felonies on the high seas, captures from an enemy, foreigners or citizens of different states, collection of the national revenue, impeachment of national officers, and questions involving national peace and harmony.

The Virginia Plan contained an exceedingly nationalistic solution for the problem created under the Articles of Confederation by the absence of any mechanism for defining the respective spheres of the central government and the states. What was needed was some arrangement by which the central and state governments would each exercise effective jurisdiction unhampered within their respective spheres without intruding upon the functions entrusted to the other, and which would settle any disputes which might arise as to the extent of state or national power.

The Virginia Plan attempted to solve this problem by several devices. It gave Congress a right to disallow state legislation. Congress was empowered to "negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union." This was a power similar to that which had been exercised by the Board of Trade over the various colonial legislatures before the Revolution. The Virginia Plan also gave Congress a broad and indefinite grant of legislative authority in all cases where the states were "incompetent." It is not clear from the

phraseology whether the plan intended to give Congress the power to alter at will the extent of its authority and that of the states; at the very least, however, *the plan proposed to solve the problem of federalism by giving Congress the power to define the extent of its own authority and that of the states.* There was to be but one check upon this power: the Council of Revision was authorized to examine "every act of a particular legislature before a negative thereon shall be final."

The disallowance provision was rendered the more impressive by the succeeding clause, which empowered Congress to coerce a state—by force if necessary. Congress was authorized "to call forth the force of the Union against any member of the Union failing to fulfill its duty under the articles thereof." This proposal may be considered from two quite different viewpoints. The fact that it followed immediately the proposal to allow Congress to define the extent of its own authority gives rise to the assumption that the plan intended that the national government be given the authority to support, with force if necessary, its own interpretation of the compact between the states and the national government. On the other hand, it will be recalled that under the Confederation the states had been derelict as agents of the central government in the execution of its will. On the assumption that the states were to continue as such agents, coercion might be regarded as a device for enabling the national government to exact a more conscientious performance from the states.

Yet in this sense, coercion would be unnecessary under the Virginia Plan. *The new government was to be truly national in character, in that it would operate directly upon individuals, rather than upon the states, and would possess its own agents—courts, attorneys, marshals, revenue officers, and the like—to carry out its functions and impose its will.* It was for this reason that the nationalists in the Convention, who had originally considered coercion essential to any effective government, eventually abandoned the idea as irrelevant and unnecessary for the truly national government they were creating.

With the Virginia Plan before it, the Convention went into a committee of the whole house. Immediately thereafter, the nationalists scored an important victory when, at the suggestion of Gouverneur Morris, Randolph moved the postponement of the first point

in his plan in order to present a new resolution. This asserted that no "Union of the States merely federal" nor any "treaty or treaties among the whole or part of the States" would be sufficient. It concluded:

> That a *national* government ought to be established consisting of a *supreme* Legislative, Executive and Judiciary.

The meaning of this resolution was clear. It went beyond any proposal to establish a federal state with limited powers in the central government. In the discussion that followed, Morris contended "that in all Communities there must be one supreme power, and one only," and proposed that this supreme power be lodged unequivocally in the national government. Several delegates objected to the proposal as meaning that state sovereignty was to be obliterated and replaced by a powerful national government. The resolution was nevertheless adopted, only Connecticut voting in the negative.

This was an astounding victory for nationalism in a Convention which had been commissioned merely to modify the Articles of Confederation. It put to rout at the very beginning proponents of state sovereignty and those who wished merely to patch up the Articles. Later the localists were to rally sufficiently to secure the formation of a government based upon the principles of divided sovereignty, but for the moment it appeared that the proponents of national sovereignty were in complete control and that any suggestions for preserving state autonomy would be swept aside.

The Convention had thus committed itself to a serious breach of its authority. Called to amend the Articles, a majority of the delegates had boldly decided to disregard their instructions and instead to create an entirely new frame of government. Only the tremendous prestige of many of the delegates and the common recognition of national danger could secure acceptance of their work.

THE PROBLEM OF THE LEGISLATURE

With this crucial decision disposed of, the Committee of the Whole now took up the provisions of the Randolph plan point by point. Most of the early discussion was centered on the composition of the legislature. On this issue a major cleavage between the large and small states arose. One faction, the large-state bloc, comprised the delegations of Massachusetts, Pennsylvania, and Vir-

ginia, with support on most occasions from North Carolina, South Carolina, Georgia, and Connecticut. The small-state bloc was composed of the delegates of New Jersey, Delaware, Maryland, and New York, and, on certain issues, of Connecticut and Georgia. New Hampshire's delegates were not yet present. Although on most occasions the large states were at first able to control the vote of the Convention, the small states were able eventually to force a compromise by implying that they would withdraw from the Convention unless their views were heard.

The composition of the legislature involved two main issues: the method of electing the membership of the two chambers, and the method of apportioning representatives among the states. The nationalistic large-state party desired direct popular election for both houses, a method implying that the central government rested directly upon individuals rather than upon the states and was truly sovereign in character. The large-state faction also wanted representation in both houses apportioned according to population, a nationalistic scheme which would give them a superior position in the legislature. On the other hand, the small-state group, intent on preserving states' rights, wanted state representation and state control of the national government, and therefore it favored retaining the Confederation plan of having the state legislatures elect delegates to Congress. The small-state faction also desired the retention of state equality, which not only would bolster the influence of the small states in national affairs but would also imply state sovereignty rather than national ascendancy.

On the mode of election both sides showed a disposition to compromise. The small states offered no serious opposition to the Virginia Plan's proposal for direct popular election of the lower house, the resolution to this effect being approved on May 31, 6 to 2. However, almost no one approved of the proposal that the lower house elect members of the upper, and that resolution was voted down, 7 to 3, when it was first considered.

After some delay, Dickinson moved on June 7 that the Senate be elected by the various state legislatures. In the debate that followed, Madison and Wilson contended that authority in a truly national government ought to flow directly from the people, while Sherman, speaking for the small-state faction, argued that representation of the states as such would maintain balance and harmony

between the states and the national government. It was clear that the small states were prepared to insist upon representation of the states as such in at least one chamber, and at the end of the discussion, the Convention adopted Dickinson's resolution unanimously.

Meanwhile, the Convention attacked the more vital issue of whether representation in the two houses should be apportioned according to population or based upon state equality. Debate continued for some days, and at times became very heated. Madison and Wilson repeatedly insisted that in a proportionate system, the people as such, rather than states, would be represented, and that on this basis the people of Delaware would have the same representation in Congress as would those of Pennsylvania or Virginia. They were nonetheless unable to quiet the apprehensions of the small-state faction that proportional representation would swallow up the existence of the small states, and Paterson proclaimed that his state would "rather submit to a monarch, to a despot, than to such a fate." Wilson impatiently struck back with the warning that "if New Jersey will not part with her Sovereignty, it is in vain to talk of government."

Many moderates in the small-state faction were in reality prepared to compromise on the issue of proportionate versus equal representation, and to concede proportionate representation in the lower house, insisting only upon state equality in the Senate. Sherman suggested this solution on June 11, at the opening of an important debate on the question.

However, the nationalists were at the moment in control of affairs, and they carried the day without compromise. Sherman's proposal was silently rejected, and immediately thereafter Rufus King moved that suffrage in the lower house ought to be "according to some equitable ratio of representation." [3] After some debate, the resolution was carried, 7 to 3, only New York, New Jersey, and Delaware opposing, with Maryland divided. Sherman thereupon moved that each state have one vote in the upper house. "Everything," he said, "depended upon this," since "the smaller states would never agree to the plan on any other principle than an equality of suffrage in this branch." In spite of this warning, the Convention

[3] This formula implied possible representation of land and slaves, as well as free population.

rejected his motion, 6 to 5; and then adopted by the same vote a resolution of Wilson and Hamilton that representation in the upper house be apportioned "according to the same rule as in the 1st branch."

Thus as the Committee of the Whole neared completion of its work, the nationalists had scored victories on three out of four points. They had won proportionate representation in both chambers and popular election in the lower house, and had conceded only that state legislatures might still elect the Senate. Whether the nationalists could retain their gains, however, remained to be seen.

THE NEW JERSEY PLAN

On June 15, the Committee of the Whole finished its discussion of the Virginia Plan and prepared to report the revised draft out upon the floor of the Convention; but at this point the small-state party counterattacked powerfully. Their ranks had been augmented by the arrival of additional delegates from the small states, among them Luther Martin of Maryland, Gunning Bedford of Delaware, and John Lansing of New York, and they evidently felt that if the drift toward complete centralization was to be checked at all, it must be done then and there. Accordingly, Paterson of New Jersey now asked permission to introduce an alternate plan, of which the small states approved and which was "purely federal" in principle as opposed to the nationalistic Randolph Plan.

The New Jersey Plan proved to be merely a modification of the Articles of Confederation. It would have expanded the powers of Congress by adding the right to tax and the right to regulate commerce. It retained state equality in the legislature and erected an executive directly subject to state control. It would also have granted the federal government the right to coerce recalcitrant states, strong evidence that coercion was now regarded as more consistent with state sovereignty than the Congressional veto, of which the plan said nothing.

The most significant clause in the New Jersey Plan was one which would have made all treaties and all acts of Congress under the Confederation the supreme law of the respective states, enforceable in the state courts. This was in reality the key to solution of the problem of federalism, but at the time it escaped notice, for

momentarily the Convention was altogether preoccupied with the legislature.

After acrimonious discussion in the Committee of the Whole, in which the deficiencies of the Articles were again treated at length, the New Jersey Plan was voted down, 7 to 3. Again the nationalists had triumphed. Yet the small states were now determined to force a compromise between nationalism and state sovereignty, and because of the certainty that no plan emerging from the Convention could succeed unless the small-state group supported it, they were aware of the strength of their position.

The modified Virginia Plan was reported from the Committee of the Whole on June 19, and the legislative fight continued on the open floor. By large majorities the Convention accepted popular election of the lower house and election of the upper chamber by state legislatures, but when, on June 27, the Convention touched upon the question of proportionate representation versus state equality in the two chambers, all the differences between the large- and small-state factions flared up again. Luther Martin harangued the Convention for two days, insisting that the central government existed merely to preserve the states and that state equality was "essential to the federal idea." Madison in reply made the astute observation that the small states in reality need not fear a combination of large states against them, for the economic interests of the large states were altogether diverse: Massachusetts, he said, depended largely on fish, Pennsylvania on flour, Virginia on tobacco. As the discussion grew embittered, some delegates openly hinted that the Convention was on the verge of failure. Benjamin Franklin, free-thinking skeptic that he was, piously appealed to the power of prayer and suggested that the Convention solve its dilemma with a daily invocation to the Deity.

On June 29, the Convention again voted, six states to four, for proportionate representation in the lower house. The moderates on both sides at once saw in this vote the possibility of compromise—the small-state faction would grant proportionate representation in the lower house in return for state equality in the upper. Arguing for this solution, Oliver Ellsworth pointed out that "we were partly federal, partly national." The compromise, he said, recognized both the national and federal elements and would mutually protect the large and small states against one another. The nationalists were

not yet ready to accept this solution, however, and several days of acrimonious debate followed in which all the well-known arguments on both sides were restated. On July 2, the question of proportionate representation in the upper house was put, and the small-state faction succeeded in deadlocking the vote, 5 to 5.

The moderate nationalists now recognized that compromise was necessary. At C. C. Pinckney's suggestion, therefore, the Convention appointed a committee of eleven, one man from each state, to devise a compromise. The committee chosen was composed of Gerry, Ellsworth, Yates, Paterson, Franklin, Bedford, Martin, Mason, Davie, Rutledge, and Baldwin. Significantly, all these men were either moderates or die-hard defenders of state sovereignty. The compromise which they reported on July 5 was regarded by the nationalists as a distinct setback to their cause. The committee recommended:

> That in the lower house each state be allowed one member for every 40,000 inhabitants.
>
> That all bills for raising or appropriating money originate in the lower house, and not be amended by the upper.
>
> That each state have an equal vote in the upper house.[4]

Further discussion by the Convention led to the acceptance of one other proposition, introduced by Elbridge Gerry: that the vote in the Senate be by individuals, and not by state delegations. With this one modification the Convention accepted the committee report substantially without change.

SIGNIFICANCE OF THE GREAT COMPROMISE

This plan was the "Great Compromise" of the Convention. Without it, the gathering probably would have broken up in failure. Historians have sometimes called the settlement the "Connecticut Compromise," because of the role which the Connecticut delegation is supposed to have played in bringing it about, but the phrase is not altogether justified. Roger Sherman of Connecticut seems to have been the first delegate to suggest that the Convention allow an equal vote in the Senate, and Oliver Ellsworth of Connecticut

[4] It had already been decided that the Senate was to be elected by the legislatures of the several states.

was not only a member of the committee of eleven, but also aided in the defense of the scheme on the floor. Also, Connecticut had paved the way for compromise by acceding in some degree to the demand of the large states for nationalism, and in supporting the demands of the small-state men for equality in the Senate. Yet Nathaniel Gorham, George Mason, John Dickinson, and Elbridge Gerry all contributed something to the compromise, and one may doubt that the Connecticut delegation acted together in a concerted and prearranged fashion to bring about the final settlement.

The Great Compromise did not, in fact, affect the subsequent development of the constitutional system very profoundly. The supposed conflict between small-state interests in the Senate and large-state interests in the House failed to materialize. Nor did the Senate become the champion of the states against the national government. As Madison predicted in the Convention, the great controversies of American history have been drawn along sectional rather than interstate lines. Hence, though the Senate theoretically represents the states, the chamber has on most occasions been as nationalistic as the House, if not more so, and has divided along the same sectional lines.

The one notable exception occurred during the slavery controversy, when the Senate tended to become the champion of states' rights and Southern sectional interests, while the House became the champion of Northern nationalism and Northern sectional interests. The explanation for this division lay in the relative power of the North and South in the Senate and the House. Early in the slavery controversy the more populous Northern states with their larger delegations in Congress proved able to control the House of Representatives, which thereafter reflected the growing spirit of Northern nationalism as well as Northern attitudes on the slavery question. The number of slave and free states long remained about the same, however, so that the less populous Southern states could control about half the votes in the Senate, where the states were represented on a basis of equality. Party organization on most occasions enabled the South to pick up some Northern votes in the Senate, so that the Senate usually reflected Southern attitudes on slavery and Southern states' rights doctrine. Save for Southern dominance in the Senate, the history of the slavery controversy might

have been quite different, for in a national legislature based entirely upon proportionate representation by population, the South would have been forced either to submit to the national will or to withdraw from the Union long before 1860.

In many of the great sectional conflicts since 1865 the Senate has actually been more nationalistic than the House. This is largely because the less populous states, now western as well as southern, have sought from the national government various forms of assistance which could be conveyed only under a broad interpretation of national power.

As Madison predicted, the provision that all revenue bills must originate in the House of Representatives has been inconsequential. The provision nominally is still observed; however, the Senate is free to accept, amend, or reject any House measure, and by those means it exercises as much control over revenue measures as does the lower chamber. The fact that the Senate cannot initiate revenue bills has been of small importance; the essential fact is that it can amend such bills into any form which both the Senate and the House may be willing to pass.

A much more serious consideration was the import of the compromise for the problem of sovereignty. The compromise was undoubtedly a concession to the principle of state equality, and hence by implication, to the principle of state sovereignty. The nationalists—Madison, Wilson, Morris, and their supporters—perceived this fact clearly and accordingly fought the compromise bitterly. Gouverneur Morris warned in a stirring speech that "this country must be united. If persuasion does not unite it, the sword will." He predicted that the Senate would become the bulwark of the small-state interests, eventuating in a collapse of the national government.

The final contest over state sovereignty did not develop precisely as Morris had predicted, but in their fear that state sovereignty might at length endanger the nation the nationalists were overwhelmingly right. They yielded to the majority only when they saw that no other solution was possible and that the compromise was necessary if the Convention was to proceed with its work. In later days the doctrine of state sovereignty, partially recognized in the structure of the Senate, helped pave the way for the great controversies on the nature of the Union and for the recurring revival

of the contention that the federal government was a mere league of sovereign states and that the ultimate repositories of sovereignty were still the states.

Other details concerning the legislature were adjusted with relative ease. Certain of the delegates, notably Rutledge and the two Pinckneys, thought that property ought to be recognized in the apportionment of representatives in the House. The committee of eleven nonetheless adopted population as the sole basis of representation, although the Convention later gave limited representation to property in slaves by accepting the so-called "three-fifths clause," suggested by C. C. Pinckney, by which three-fifths of the slave population was counted for purposes of representation. In the absence of any certain knowledge of the population of the various states, the Convention fixed temporary arbitrary quotas for representation in the House and provided for subsequent apportionment by decennial census.

THE EXECUTIVE OFFICE

Although the Convention's great crisis developed over the legislature, the delegates spent even more time thrashing out certain vexatious problems relating to the executive. At no time did these difficulties threaten to break up the Convention; yet they caused long discussion and many stalemates.

The delegates were divided into two schools of thought on the executive. One group, represented chiefly by Sherman, Dickinson, and Martin, believed in a weak executive, chosen by and responsible to the legislature, a mere instrument of legislative will. Their belief reflected the prevalent Revolutionary doctrine of legislative ascendancy. A second group, led by Wilson, Madison, Gouverneur Morris, and Hamilton, believed in a powerful independent executive, preferably chosen by direct popular election. This attitude was inspired to some extent by the doctrine of separation of powers, a notion theoretically inconsistent with legislative ascendancy. The strong-executive men were also the Convention's nationalists, and they were convinced that a powerful executive representing the nation at large was essential if the new government was to have the capacity for decisive action. As Wilson put it, they wanted the executive possessed of "energy, dispatch, and responsibility."

These two conceptions of the executive office came into conflict

the moment the Committee of the Whole took up the matter. The strong-executive men attacked the Randolph Plan's provision for an executive elected by Congress, and Wilson suggested direct popular election as an alternative. This idea received little favor with most of the delegates, in part because of the antidemocratic views of many delegates, in part because the idea of a popularly elected executive was as yet largely foreign to American experience.

Wilson then suggested as a compromise that the people of the various states choose presidential electors, who should then meet and choose the executive magistrate. This proposal, with some modifications, was eventually adopted by the Convention, but when first set forth the idea attracted little favor. On a vote, Wilson's motion was defeated, eight states to two. The Convention immediately thereafter by the same margin ratified the plan for the election of the President by Congress, and there matters stood when the Committee of the Whole reported on June 15.

The strong-executive party, however, simply would not allow the election of the executive by the legislature to stand. In a series of debates throughout July, Wilson, Morris, and Madison hammered away at the idea that an executive chosen by Congress would be corrupt and incompetent, and that free government demanded that the executive, legislature, and judiciary be independently constituted. They scored a temporary success when, on July 19, the Convention voted, 6 to 3, to accept the electoral college idea, the electors to be chosen by the state legislatures. Yet a few days later, on July 26, after an able speech by George Mason defending legislative choice, the Convention voted, 7 to 2, to return to legislative election. And in spite of repeated attacks by the strong-executive party, this decision was embodied in the Report of the Committee on Detail submitted early in August.

On August 31, as the Convention neared its close, it appointed a new committee of eleven, one delegate from each state, to "Consider such parts of the Constitution as have been postponed." This committee settled a number of minor details, but its most important accomplishment was a lengthy paragraph describing a proposed compromise method of choosing the executive.

The committee recommended the choice of the President by an Electoral College, with certain modifications designed to win the favor of the adherents of legislative ascendancy and states' rights.

Each state was to "choose its electors in such a manner as its legislature may direct." This plan recognized the states; yet left the door open for popular choice of electors. The electors were to vote by ballot for two persons, the man receiving the greatest number of votes to be President, provided the number of votes cast for him constituted a majority of all the electors. If no candidate received a majority, the Senate was to elect the President from among the five candidates receiving the highest number of electoral votes. This last clause was a direct concession to the doctrine of legislative ascendancy.

When the matter was debated on the floor of the Convention, several delegates expressed the opinion that in most elections no candidate would receive a majority, and that the choice would therefore usually devolve upon the upper house. Although the strong-executive adherents objected to this feature, it was precisely what was needed to win over such proponents of legislative ascendancy as Mason and Randolph. The Convention accordingly adopted the report almost in its entirety.

Only one substantial modification of the committee's recommendation was made. At Sherman's suggestion, the election of the President was referred to the House of Representatives instead of the Senate. A majority of the delegates approved of this change on the ground that election of the executive by the House rather than by the Senate was less aristocratic in character. To insure against a possible combination by which three or four of the large states might band together and elect the President, it was provided that the vote in the House should be by states, and that a majority of all the states be required to elect.

The Electoral College was thus a compromise device, adopted to meet the objections which various delegates had raised to other proposed methods of election. A distinct majority who believed in the separation of powers opposed choice of the executive by the national legislature, but another majority feared both the nationalism and the democracy of direct popular election. Election by state legislatures, the only other alternative, was equally repugnant to the nationalists. The Electoral College, though an artificial device, provided the only apparent way out of the difficulty.

What was the significance of the compromise on the executive? At the time the answer was not clear, but from the vantage point

of today, two things are plain. First, the plan turned out to be a victory for both nationalism and democracy. Within a very few years after 1789, nearly all the states had by law established popular election of their presidential electors, who were rapidly reduced to figureheads.[5] Thus the proponents of a truly national foundation for the executive eventually had their way.

Second, the plan was a substantial victory for the doctrine of the separation of powers and hence for a separately constituted and independent presidency. Had the choice of the President by Congress been permitted to stand, it is probable that the executive would have become simply an arm of the legislature, and the United States would have emerged with what is known as a parliamentary-cabinet form of government, in which the executive is a committee of the legislature.

This conclusion has been disputed by certain theorists, notably Edward S. Corwin. Professor Corwin contends that the distinctive feature of a parliamentary government is the power of the cabinet to coerce the legislature through the right to prorogue the legislature whenever the latter fails to do the cabinet's bidding. This is the situation in England, where the Cabinet maintains its ascendancy and control of Parliament by this method. Corwin concludes that the emergence of a parliamentary government would have been impossible under the Constitution, even had the Convention provided for election of the President by Congress, for the executive would still have had no general power to prorogue a dissident legislature.

The power to prorogue is not, however, absolutely essential to all types of parliamentary government. In the Third French Republic, the power to prorogue existed in theory, but was seldom resorted to. There a vote of non-confidence in a government immediately resulted in the cabinet's resignation and the formation of a new cabinet which was formed with the intention of winning a vote of confidence in the Chamber of Deputies. Unlike the English system, that in France assured unity between executive and legis-

[5] By 1800 the principle was fairly well established that electors were mere creatures of party will and could exercise no personal discretion in voting, but instead must vote for the designated party candidates for President and Vice-President. Thereafter electors virtually never acted as other than mere instruments of party will. In 1820, one elector, William Plumer of New Hampshire, failed to vote for Monroe, his party's candidate, apparently on the grounds that he disapproved personally of Monroe's re-election to the presidency.

lature by providing for the dominance of the latter. It was the cabinet, and not the legislature, which re-formed in case of differences between the two. Hence there existed no need to prorogue the legislature. In short, while it may be conceded that the British cabinet system could not have developed under the Constitution, there seems to be no reason why a parliamentary system like that of France could not have emerged. It would have been necessary to develop the principle of ministerial responsibility, but this would not have been difficult once Congress controlled the election of the President and could put a man of its own viewpoint in the office. This is precisely what happened in France, where the president was elected by the legislature for a fixed term, but eventually came to perform no real functions, all of which were taken over by a ministry responsible to parliament. Indeed, congressional control of the executive would not have involved a new principle in the United States, for it already existed under the Articles of Confederation.

The committee of eleven also settled the question of the executive's eligibility for re-election. The Virginia Plan had made the executive ineligible for re-election. When the matter first arose in the Convention, the delegates expressed the fear that an executive chosen by Congress and eligible for re-election would court the favor of Congress so completely as to destroy all executive independence. Once the provision for independent election was adopted, however, this objection to re-election became irrelevant, and the Convention therefore removed all limitations upon eligibility to re-election. A president might remain in office indefinitely, but a four-year term was specified so that he would have to ask for a vote of confidence at regular and fairly frequent intervals.

THE FEDERAL PROBLEM AND THE JUDICIARY

Intermittently the Convention returned to the two related problems that lay at the heart of the central government's difficulties under the Articles of Confederation: the use of the states as agencies of the central government, and the issue of the respective spheres of the state and federal governments.

The proposal in the Virginia Plan to solve the problem of Federalism by empowering the national government to coerce a state deficient in its obligations to the federal union appeared to be more

and more irrelevant as discussion in the Convention progressed. As explained above, it became obvious that the new government would rest directly upon individuals, and would carry out its functions through its own agents without the assistance of the states. For example, the new government would impose excise and customs taxes directly upon individual citizens in the country, and it would proceed to collect them through its own revenue officers. The states would play no part in the imposition or collection of federal taxes. Coercion, in short, would be meaningless in a truly national government functioning directly upon individuals.

Viewed in this light, the very idea of coercion implied that the Union was still to be a league of sovereignties and that the central government would still be dependent upon the will of the various sovereign states. Coercion of a state would then come dangerously close to an act of war. Madison observed that the use of force "would look more like a declaration of war, than an infliction of punishment, and would probably be considered by the party attacked as a dissolution of the union." At his suggestion, therefore, the idea of coercion was dropped. The nationalists also had in mind the congressional veto of state legislation as a more effective device for controlling the states, and were therefore the more willing to abandon coercion.

Coercion reappeared in the New Jersey Plan, proof that the notion was dear to the proponents of state sovereignty, but after the failure of that plan, it was not heard of again. As Randolph remarked at the time, "we must resort to a national legislation over individuals"; and coercion had therefore become undesirable.

The more serious and difficult problem remained. Who was to define and safeguard the respective spheres of the states and the national government? The position of the nationalists on this question was conditioned by the fear that the states would gradually usurp the functions of the central government and reduce it to impotence, while the attitude of the states' rights men reflected the fear that the new government would supersede the states altogether and reduce them to "mere corporations."

The Virginia Plan, it will be recalled, had sought to solve this problem by stating the national government's sphere of authority in indefinitely broad terms and empowering Congress to disallow state laws contravening the Constitution. Had this plan been fol-

lowed, the new Constitution would have settled the question of the locus of sovereignty. While a sphere of autonomous authority would have been left to the states, the ultimate power to define and interpret both state and national spheres would have rested plainly with the national government.

At first it seemed certain that the Convention would adopt this extremely nationalistic solution of the federal problem. In spite of some resistance from the states' rights men, the Committee of the Whole incorporated in its report to the floor on June 15, congressional disallowance of state legislation. However, a growing number of moderates and states' rights delegates thereafter became convinced that the congressional negative constituted a genuine menace to the states, and they determined to eliminate it. The critical debate occurred on July 17. Roger Sherman contended that the congressional negative involved a "wrong principle" in that every state law not negatived would by implication remain operative, even though contrary to the fundamental nature of the Constitution. This idea, drawn from a well-known doctrine of the common law, was highly suggestive to the lawyers present. They saw at once that Congress would have to consider every state law passed to determine whether or not it was contrary to federal legislation or to the Constitution. Such a provision would not only place an onerous burden on Congress; it would have the further result of allowing any state law not acted upon by Congress to remain operative, no matter how seriously it violated the Constitution.

A second highly constructive criticism of the Congressional negative was advanced by Gouverneur Morris, who, though a strong nationalist, now denounced it as "terrible to the states" and then observed that the device was not really necessary, since a law contrary to the articles of union would in any event not be recognized by the courts. Although Madison argued vigorously that the negative was utterly necessary to effective national government, his words were unavailing. At the end of debate the Convention voted to abandon the device, only Massachusetts, Virginia, and North Carolina favoring its retention.

Luther Martin now brought forward a provision of the New Jersey Plan, hitherto little noticed, designed to solve the federal problem by making federal law supreme but making the state courts the agency by which the states and federal government would be

kept within their respective spheres. After the debate of July 17, the delegates accepted without opposition Martin's suggestion, the nationalists apparently believing this solution to be better than none. After some modification, the provision read as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The provision ultimately appeared in Article VI of the finished Constitution.

The states' rights men evidently regarded this provision as something of a victory. While it made the Constitution, treaties, and acts of Congress supreme over state law, it apparently lodged in an agency of the state governments—the state courts—the power to determine the extent of state and federal authority under the Constitution. This was precisely the opposite of what the nationalists had sought. Late in August the nationalists therefore made a final plea for the restoration of the Congressional negative. Wilson called the negative the "key-stone wanted to compleate the wide arch of Government we are raising." But his eloquence was wasted, the Convention rejecting the negative by the close vote of six states to five.

Yet the nationalists' apparent defeat on this issue was actually a victory. The supremacy clause of Article VI, inserted at the suggestion of Luther Martin, arch-champion of states' rights, later became the cornerstone of national sovereignty. This occurred because the Judiciary Act of 1789 provided for appeals from state courts to the federal judiciary, and finally to the Supreme Court of the United States. The ultimate effect of this statute was to give the Supreme Court, an agent of the national government, the final power to interpret the extent of state and national authority under the Constitution.

Was this the intent of the members of the Constitutional Convention? It certainly was not the intent of William Paterson, author of the New Jersey Plan, or of Luther Martin. They and the other states' rights men were interested in preserving the autonomy, even

the sovereignty, of the states. Had they known that the very principle against which they had fought so bitterly in the congressional negative would later be established by legislative fiat and constitutional growth, they would have regarded their proposal in a very different light. It was certainly not their intent to establish national supremacy. Furthermore, the dissatisfaction of Madison and Wilson with the guarantees established by the provision against encroachment by the states upon national authority and their repeated attempts to win adoption of the negative make it clear that the nationalists also were unaware of the potentialities of the provision.

The Constitution does not provide specifically for appeals from state to federal courts. There is substantial evidence, however, that certain members of the Convention assumed that such a right would exist. The original Virginia Plan provided not only for one or more supreme tribunals, but for a lower federal judiciary. This provision was attacked in the Committee of the Whole by the states' rights men, who contended that lower federal courts were unnecessary. Rutledge of South Carolina argued that the state courts could decide federal cases in the first instance, and that uniformity of decisions could be secured by granting a right of appeal to the supreme national tribunal. Behind this contention apparently was a fear that a lower federal judiciary would take away certain types of cases from the state courts, which would suffer a loss of business and prestige. Although Wilson and Madison both defended the necessity for an inferior federal judiciary, the Convention rejected the provision by a 5-to-3 vote. Immediately thereafter, Madison and Wilson moved to make inferior federal tribunals optional with Congress, and this provision carried, 8 to 2.

It is clear, therefore, that the Convention contemplated the possibility of appeals from state courts to the Supreme Court in the event that Congress should choose not to erect inferior federal tribunals. Thus, ironically enough, it was the states' rights faction which insisted upon the right of appeals, later to play a vital part in confirming national sovereignty, as a substitute for a lower federal judiciary.

Perhaps the soundest conclusion is that most members of the Convention did not regard the right of appeals as establishing a general power in the federal judiciary to interpret the extent of state authority under the Constitution. Eventually, the supremacy of

national law and the right of appeal from state courts to national courts helped to establish not only the supremacy of the national government but also the right of the Supreme Court to determine the extent of state and national authority. To the men of 1787, however, the compelling logic of their work and of future events was not as clear as it is to us now.[6]

Closely related to the whole matter of federal sovereignty and the right of appeals from state to federal courts is the question of whether the Convention intended to vest the federal judiciary with the power to determine the limits of state and congressional authority under the Constitution. This problem has usually been assumed to be identical with that of whether the Convention intended to bestow upon the federal judiciary the power to declare acts of Congress void. However, there are reasons for questioning this assumption.

There is substantial evidence in the debates of the Convention that many of the delegates believed that the federal judiciary would have the right to refuse to recognize an unconstitutional federal law. At one time or another this viewpoint was expressed by several members, including James Wilson, Elbridge Gerry, Nathaniel Gorham, Luther Martin, and George Mason. It is probable that a majority of the delegates would have agreed with Morris, who "could not agree that the judiciary should be bound to say that a direct violation of the constitution was law." On the other hand John Mercer of Maryland "disapproved of the doctrine that the Judges as expositors of the Constitution should have the authority to declare a law void," while John Dickinson thought that "no such power ought to exist."

If we grant for the sake of argument that most of the delegates

[6] In No. 80 of *The Federalist* Hamilton asserted that the right of appeal from the state courts to the federal judiciary upon constitutional questions was an imperative necessity, as the only available means of enforcing constitutional limitations upon the state legislatures and securing a final interpretation on such constitutional questions. There must, he said, be some "effectual power" in the national government to "restrain or correct the infractions" of the prohibitions upon the states. "This power must either be a direct negative on the State laws, or an authority in the federal courts to overrule such as might be in manifest contravention of the articles of Union. There is no third course that I can imagine. The latter appears to have been thought by the convention preferable to the former, and, I presume, will be most agreeable to the States." It must be remembered, however, that Hamilton, a thoroughgoing nationalist, was here propagandizing the cause of strong national government.

assumed this power to be inherent in the judiciary, this question remains: Was the power to declare void an act of Congress recognized as tantamount to a general power to interpret the Constitution and to define the ultimate limits of national and state authority? Direct evidence upon this point is small, but one incident which Madison records is significant. On August 27, the provisions dealing with the Supreme Court in the resolutions prepared by the Committee on Detail came up for discussion. One section read that "the jurisdiction of the supreme court shall extend to all cases arising under the laws passed by the legislature of the United States." Dr. Johnson then moved to insert the words "this Constitution and the" before the word "laws," so that the jurisdiction of the Supreme Court would extend to all cases arising under the Constitution and laws of the United States. Let Madison's notes speak:

> Mr. Madison doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising under the Constitution & whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department.
>
> The motion of Dr. Johnson was agreed to nem: con: it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature.

If the import of this passage is correct, the delegates were generally agreed that the federal judiciary was not to possess the general right of expounding the Constitution. In other words, the right to declare void an unconstitutional federal law was not supposed to confer any general power to interpret the compact. In the twentieth century "the Constitution is what the Supreme Court says it is," to quote Charles Evans Hughes. But this condition came about only as the result of a long process of evolution which was not freely confirmed until the latter portion of the nineteenth century. It was a development not foreseen by the members of the Convention.

Regardless of where the final power to interpret the Constitution was to be lodged, there is no doubt that the Convention intended the federal sphere of sovereignty to be a limited one. In the original Virginia Plan, the scope of federal power was defined in a very broad and general fashion to include power over all mat-

ters in which the states were incompetent as well as those matters over which power was exercised by the Confederation Congress. This proposal, had it been allowed to stand, would have given Congress vast authority of a vague and undefined character, inconsistent with the very nature of a federal state. The problem of federal spheres would have been solved by permitting Congress to define the extent of its own authority.

Although two or three delegates expressed alarm at the sweeping grant of congressional power implied in the Virginia Plan, the Convention took no positive action until the Committee on Detail produced a draft constitution early in August. In this draft the Committee had abandoned the original vague statement of congressional authority, and incorporated instead a series of specific delegated powers. Madison's notes give us no hint as to why this was done, although certain members of the Convention had expressed strong fear of an indefinite grant of legislative authority to the national government. The personnel of the Committee on Detail—Rutledge, Randolph, Gorham, Ellsworth, and Wilson—yields no specific clue as to what occurred in committee, although three of these men were moderate states' rights men and only one, Wilson, was a powerful nationalist. The likelihood is, however, that Rutledge, Gorham, and Ellsworth insisted upon a limitation of congressional authority by enumeration, and they may have pointed out that in no other way could the state courts be counted upon to give supremacy and precedence to national law. Perhaps the committee was also convinced that only if the powers of Congress were specified and enumerated would the states consent to ratify the new Constitution. At any rate, enumeration marked another moderate victory for the states' rights bloc, for it meant that those powers not specifically delegated to the national government would reside in the states. A great majority of the Convention apparently took enumeration for granted. It was in the tradition of American federalism, and occasioned little discussion.

THE LOCUS OF SOVEREIGNTY

In summary, it is clear that the Convention did not make a decisive disposition of the locus of sovereignty in the new union. A partial solution of the problem was indeed made. The federal government was given only limited and enumerated powers; the residue

of sovereignty was left by implication with the states. Yet within its sphere, the federal government had most of the appurtenances of a truly sovereign national government. Unlike the government of the Articles, it functioned directly upon individuals in all instances, and had its own agencies, executive and courts, to execute its will. Moreover, the Constitution, treaties, and acts of the national government were made the supreme law of the land, and the state courts were required to enforce that law regardless of any provision in their own state constitutions or laws. The new legislature was in large part national in character, although the principle of state equality received implied recognition in the upper chamber.

No one body received specific final authority to interpret the Constitution. Article VI seemingly lodged that power with the state courts, and this would seem to be what Martin, Paterson, and other champions of states' rights intended. It is possible to demonstrate logically, however, that the Constitution by implication authorizes appeals from state courts to federal courts, and some delegates apparently took such appeals for granted. In all probability, however, neither the nationalists nor the states' rights bloc understood that this procedure would eventually lodge the general power to interpret the Constitution with the Supreme Court.

Certainly the Convention did not anticipate the future role of the Supreme Court as the final arbiter of the constitutional system. Some of the members of the Convention obviously believed that the federal courts had the power to declare acts of Congress void, but they hardly assumed that this was synonymous with the power to interpret the general nature of the Constitution or to settle all constitutional issues.

The vague and uncertain character of the Convention's solution of the problems of sovereignty opened the way to the development of two constitutional issues of great importance.

The first of these was the question of state sovereignty. Were the states still sovereign? Was the national government supreme within its limited sphere of powers, or was it a mere agency of the states? Who had the ultimate power to interpret the nature of the Constitution and to decide disputes between state and national authority? By failing to provide specifically for an indisputable negative upon state laws, by failing to make it clear beyond question

that the national government had sole power to interpret the Constitution, the Convention had opened the way for the assertion that the states had the right to interpret the nature and extent of their powers under the Constitution. Madison himself was to advance that assertion before eleven years had passed.

Fifty years later, statesmen and theorists were to quarrel about whether the Constitution was a compact or an "instrument of government." The argument had little meaning as of 1787. The Constitution was indeed a compact, for it was an agreement by which the people of the United States set up government by covenant or consent. Revolutionary political philosophy assumed that all free government was created by compact. Calhoun later tried to argue that as a compact the Constitution was a mere voluntary agreement between the states and as such of no binding force. The argument, however, ignored the whole implication of eighteenth-century compact philosophy. Eighteenth-century political philosophers regarded the compact upon which the state was founded as supreme law.

Later northern nationalists were to hold that the sovereignty of the national government was above and beyond the states because the Constitution was ratified by the people of the states, rather than by the states themselves. This raises a question in sheer metaphysics. The Constitution was referred by the Convention to the states, which had the power to act or not as they chose. The Constitution required that the act of ratification itself be performed by organic conventions which in theory represented the people of the various states. Did this reduce the states themselves to mere convenient electoral districts for the purpose of ratification? To put it differently, was the Constitution ratified by the State of Virginia, or by the people of the state of Virginia? One can only say that the question lacks historical reality, for it did not even occur to the men of 1787.

Ultimately the question of sovereignty was not settled by any fine-drawn political debates about the meaning of the Constitution. The Constitution became the instrument of government in a country which at first had little sense of unity and nationalism. But the advancing years saw the growth of a powerful nationalism in America which bound the various sections firmly together into one nation, and which gave most Americans a new conviction that the

federal union was no mere league but a truly national government. In the face of this belief, the question of the sovereignty of the federal government in 1787 becomes insignificant. Only in the South was there after 1820 a serious disposition to challenge the new nationalism. The attempt of the South to use the doctrine of state sovereignty to defend its economic institutions led to war, and to the permanent destruction of any claim that the federal government was not supreme, or that the United States was not a nation.

The second important issue which grew out of the vague solution of the problem of respective spheres was that of the role of the judiciary in relation to the Constitution. From 1803, when John Marshall expounded at length the dictum that the federal courts had a right to declare void an act of Congress, down to 1937, when the great battle over President Roosevelt's attempt to curb the judiciary was fought, the role of the federal judiciary in constitutional interpretation became at intervals a matter of bitter controversy.

THE CONSTITUTION COMPLETED

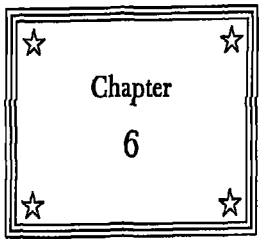
In early September the Convention neared the end of its work. On September 8, with all details of consequence disposed of, the Convention appointed a Committee of Style, consisting of Hamilton, Johnson, Gouverneur Morris, and King. The actual task of drafting the finished Constitution was performed mainly by Morris, and the result was the brilliant clarity of legal style which characterizes the document. Here and there ambiguities remained to puzzle future generations, but the Convention could not have ironed them all out had it sat for another decade. The Committee's draft was accepted almost as it stood, the only substantial change being a reduction of the ratio of representation for members of the lower house from 40,000 to 30,000, a change proposed by Hugh Williamson of North Carolina and supported by Washington.

A debate on the method of ratification then took place. The Convention had previously decided upon ratification by state conventions, favorable action by any nine states to be sufficient to establish the Constitution among those states so acting. This plan was in a sense illegal, for it violated the method of amendment in the Articles of Confederation, which stipulated that proposed amendments must be submitted by Congress and must be ratified

by all the states before becoming effective. Several delegates, among them Hamilton, Gerry, and Randolph, were of the opinion that the Convention's plan of ratification was a bit high-handed, but their alternative suggestion that the Convention submit its work to Congress for approval in the regular manner was voted down on the ground that such action would endanger the chances of adoption.

An overwhelming majority of the delegates present in mid-September approved of the final draft. Although a few extreme states' rights men who disapproved of the Convention's work, among them Luther Martin, Lansing, and Yates, had left in disgust well before the day of adjournment, both the nationalists and the moderate champions of states' rights signed the document. To lend an appearance of harmony Franklin suggested that the Convention submit its work to the nation over the formula: "Done in Convention by the Unanimous Consent of the states present," and this somewhat disingenuous proposal was adopted. Only three of the delegates then present refused to sign: Randolph, in the belief that the Constitution would fail of adoption and in the wish to be free to support a second convention; George Mason in the conviction that the Constitution was too aristocratic; Elbridge Gerry on the grounds that the new government would have too much irresponsible authority. On September 17, 1787, the remaining thirty-nine members affixed their signatures to the document.

The Convention then adjourned. Most of the delegates prepared to return home to champion the Constitution in their respective states. The fate of their efforts now rested with the state conventions.



Ratification of the Constitution

TEN DAYS after the Convention adjourned, an unenthusiastic Congress submitted the Constitution to the states. The Constitution provided for ratification by state conventions, and the various state legislatures therefore proceeded to set convention dates and issue calls for the election of delegates. In Rhode Island, where the paper-money faction that was in control objected to the financial provisions in the Constitution, the assembly refused to do this, and as a consequence that state remained completely aloof during the struggle over ratification. In all the other states, however, the attempts of opponents to block the calling of conventions were defeated. Within the next few months, delegates met in twelve states to debate and vote upon the great question of entry into the new union.

In the course of the fight for adoption, the supporters of the new instrument of government shortly became known as Federalists, a name which anticipated that of the later political party, although the Federalists of 1787 should not be confused with the partisan organization that emerged a few years later. The Federalists dubbed the enemies of ratification Antifederalists, a title that reflected no

great credit upon the latter, for it seemed to imply that they were opponents of all national union.

ECONOMIC AND CLASS DIVISION

Although local issues confused the division, it is possible to perceive not only an economic and class separation but also a sectional demarcation between the Federalists and Antifederalists. Long ago O. G. Libby, a student of the Constitution, observed that if a line were drawn along the coastal plain from Maine to Georgia, parallel to the sea and fifty miles inland, it would separate "pretty accurately" the Federalist tidewater area from the Antifederalist interior. Broadly speaking, the statement is true, although there were several important exceptions. Certainly the tidewater, with the exception of North Carolina and Rhode Island, was generally heavily Federalist. But, although the interior was for the most part strongly opposed to the Constitution, the presence of sizable Federalist groups in the back country of New Hampshire, Massachusetts, Pennsylvania, Virginia, and Georgia was of great importance. Without the support of these areas the Constitution probably would have failed of adoption.

The sectional division between tidewater and back country was related closely to the economic and class differences which marked the two parties. The merchants, the larger planters, the land speculators, the men of wealth who held the bonds of the Confederation, groups dwelling in the cities or plantations on the seaboard, were generally in favor of a government which would protect commerce and remove the burdens of interstate tariffs. They were enemies of the paper money experiments then prevalent in most of the states. Some of them desired a national policy to protect the large investor in western lands. Most of all they wanted a sound national credit established.

A notable exception, however, occurred in New York, where the owners of the great estates along the Hudson were for the most part opposed to adoption. The reason was simple: New York's government was supported by the taxes the state was able to levy upon interstate commerce. The Constitution would end state tariffs and necessitate land taxes, a development which the landed aristocracy feared and objected to. Also in New York, and to some extent elsewhere, many lawyers opposed adoption in the fear that a new federal

court system would deprive them of favorite state connections and practice.

The great interior upland plain, running back into the Allegheny foothills, was the home of a numerous class of small farmers and frontiersmen who constituted an important part of the population of the United States at that time. Many of these men believed they had small reason to support the Constitution. They cared little for the promotion of interstate commerce, and the Constitution appeared to offer but few benefits in the marketing of small agricultural surpluses. The small farmers' monetary interests, then as always, were inflationary. Nearly always disappointed in grain, livestock, and whisky prices, knowing that paper money would increase agricultural income, and wishing to meet obligations with cheap money, the small farmers had fought in all the state legislatures for paper issues to relieve the postwar deflation of the 1780's. To them a constitution which promised to make state paper illegal and which was dedicated to "sound"—that is, deflationary—credit policies was anything but attractive.

Small farmers and frontiersmen were also interested in a weak national land policy. They were extremely hostile to large land speculators, and they feared that the new government might fall into the hands of "the speculative blood-suckers." Also some were squatters upon the public domain, and they did not like the idea of a government which might force them to pay for lands they occupied illegally.

Certain farmer and frontier groups, however, threw in their lot with the Federalist tidewater. The farmers living along the waterway of the upper Connecticut River in New Hampshire felt themselves economically and culturally associated with the downriver communities in Massachusetts and Connecticut and therefore supported a government which would facilitate interstate commerce and break down state provincialism.

In Massachusetts there were alignments of a similar character. In the central interior over four-fifths of the people were opposed to the Constitution, for this was the area from which the followers of Daniel Shays had so recently risen in rebellion. But in western Massachusetts, in the Springfield area, sentiment was about evenly divided, for here the farmers were interested in downriver Connecticut markets.

In Virginia the tidewater coastal area was very heavily in favor of the Constitution, while the interior farming upland or piedmont was almost as heavily opposed, with only about a fourth of the people favoring ratification. But still farther west, in the Shenandoah Valley and in what is now West Virginia, sentiment was almost unanimously pro-Federalist. Here again the chief explanation lay in market connections. The Shenandoah Valley, already a booming wheat area, opened toward the north into Maryland and Pennsylvania, northeastward toward the tidewater. The natural market outlets of this region were Baltimore and Philadelphia. A government that would assure free access to markets in other states was of prime importance to farmers already beginning to produce an important cash crop. The vote of this region was in marked contrast to that of Kentucky, then a part of Virginia, for this typically frontier area was heavily against adoption.

In Georgia, still a frontier state, even outlying settlements supported the Constitution. The state was one of the first to ratify. Here the reason lay in the people's fear of the Creek Indians, with whom the Georgians were experiencing difficulties. Georgians believed that a strong national government would take a firm line with the southwestern tribes and would perhaps send troops to pacify the frontier.

THE DEBATE OVER RATIFICATION

The native American propensity for translating economic conflicts into legalistic and constitutional terms characterized the discussion carried on in press and pamphlet and in the state conventions on the Constitution's merits. The argument revolved chiefly around the Constitution's mechanical details; occasionally it was concerned with abstract principles of government; almost never did it touch directly upon the proposed government's economic aspect. Opponents of adoption posed as friends of an "adequate" or "correct" federal union, but attacked the proposed constitution as inimical to good government and as destructive of the rights of the states and the liberties of the people. Although endless trivial objections were raised, many thoughtful criticisms were presented. Some of these appear to be irrelevant or immaterial today; yet they reveal the hopes and fears of the men of 1787 in their struggle for a "more effective union."

One criticism repeatedly advanced was the absence of a bill of rights. This matter had been discussed very briefly on the floor of the Philadelphia Convention, where George Mason had introduced a resolution, supported by Elbridge Gerry, to appoint a committee to prepare a bill of rights. Roger Sherman had replied briefly that the various state constitutions already had bills of rights, which should prove sufficient under the new government, and Mason's motion had then been defeated 10 to 0. But in the ratification controversy, absence of a federal bill of rights became a focal point of attack upon the Constitution by the Antifederalists, who pointed out that since the new government had a sphere of sovereignty of its own and functioned directly upon individuals, the absence of a bill of rights prepared the way for encroachments upon the liberties of the people.

In reply, several of the recent delegates to Philadelphia offered two explanations as to why they had not included a bill of rights in the Constitution. The first, advanced by Madison and C. C. Pinckney among others, was that the new government was one of specific and enumerated powers and possessed no authority except in those spheres where it had received a grant of power. The various state legislatures possessed residual plenary powers; hence it was advisable to place limitations upon those powers in the state constitutions. But since the powers of Congress were limited by enumeration, it would be absurd to attach an additional section to the Constitution specifying what Congress could not do. The second explanation, advanced by Washington and James Wilson among others, was that an enumeration of the rights of the people as against the new government was by implication restrictive. The delegates, said Wilson, had found a bill of rights "not only unnecessary, but it was found impracticable—for who will be bold enough to enumerate all the rights of the people?—and when the attempt to enumerate them is made it must be remembered that if the enumeration is not complete, everything not expressly mentioned will be presumed to be purposely omitted." Since it was hopeless to attempt to enumerate all natural rights, the delegates had preferred to fall back again upon their insistence that all natural rights were guaranteed to the people by the very nature of constitutional government.

The absence of a bill of rights proved a bargaining point for the Federalists in some of the state conventions, for they were able to

pledge the adoption of a new bill of rights by amendment once the new government was established. In several conventions, among them those in Massachusetts, New York, and Virginia, the Federalists at the last moment won over certain moderates in the opposition with this understanding. Several of the state conventions submitted proposed amendments containing bills of rights at the time that they ratified. These were made the basis of the first ten amendments to the Constitution, adopted by Congress in 1789 and by the states within two years after the establishment of the new government.

The Antifederalists also repeatedly expressed the fear that in one way or another the new government would destroy the sovereignty and even the autonomy of the states. This was the line of attack selected by Patrick Henry, who led the Antifederalist forces in Virginia, and by Luther Martin in Maryland. The argument had several variations. One was that the "necessary and proper" clause in Article I, Section 8, was a grant of plenary legislative authority in disguise, and that the federal government would be able to use it to usurp the powers of the states. Another was directed against Article VI, which made the Constitution supreme law and established national supremacy and by implication thus seemed to challenge the sovereignty of the states. Another pointed out the vast size of the new nation, the distance of the new capital from its sources of authority, the people, and the consequent probability of abusing the grant of authority by usurpation. And still another pointed to the broad powers of taxation possessed by the new government and warned that these could be used to drain the states' sources of revenue and thus reduce them to impotence.

These arguments the Federalists met in various ways. In the Virginia convention Madison explained that the new government was not altogether national and was in some respects "federal," for the states were still given direct representation in one branch of the legislature. As for fear of the new government's taxing powers, the Federalists everywhere were able to point out the disastrous financial record of the Confederation, the failure of the requisition system, and the necessity of guaranteeing the new government an adequate revenue.

An objection commonly raised in the New England states was directed against the biennial system of election to the House of

Representatives, and the long term in the Senate. New Englanders had a long tradition of annual elections to their legislative bodies which they disliked to disturb. In Massachusetts, for example, several delegates insisted that congressmen absent from home for two years would lose touch with their constituents and would conspire to seize dictatorial power and perpetuate themselves in office. The argument seems totally without meaning in the twentieth century, when a two-year term of office is regarded as brief rather than lengthy. But at the time it had to be met with observations on the great difficulties of wintertime travel over long distances and the difficulties which legislators from one state would encounter in conspiring together to seize power.

The ten months' struggle for ratification produced several worthwhile pieces of political literature, by far the most important of which was *The Federalist*. This work was inspired by Hamilton, who was greatly concerned by the large number of Antifederalist pamphlets that made their appearance in New York soon after the Philadelphia Convention had adjourned. He therefore decided to publish a series of scholarly and analytical articles which would examine the Constitution point by point. Hamilton secured the support of Madison and John Jay for his project, and in October the articles began appearing in the New York press under the pseudonym of "Publius." Eighty-five articles in all appeared between October 1787 and July 1788. Of these, about fifty were the work of Hamilton, thirty of Madison, and five of Jay.

Notable for penetration of argument, *The Federalist* is one of the great treatises upon the American constitutional system. The amazing thing about the work is the accuracy with which it predicted the behavior of the constitutional system in actual operation. Even today one marvels at the ability of the authors to describe accurately the operation of a government which at the time existed only on paper.

The Federalist was not an objective treatment of the Constitution but a restrained work of partisanship. Its authors had two distinct and not altogether harmonious objectives in mind. First of all they sought to win over doubters and hesitant Antifederalists to the support of the Constitution. For this purpose, the power and authority of the national government had in certain respects to be portrayed in subdued colors. Many pages of *The Federalist* were thus devoted

to explanations of the necessity for various provisions of the Constitution and to reassurances that the new government would not destroy the sovereignty of the states or become an instrument of tyranny. Madison pointed out the now familiar argument that Congress would have only enumerated powers beyond which it could not go. Unwise, tyrannical, or unconstitutional legislation would have to run the gamut of two houses of Congress, the presidential veto, and the courts before becoming effective. If past experience was any criterion, the states had little to fear from usurpations by the national government; rather the national government would have to fear usurpations by the states. If by some mischance liberty should be endangered by the tyranny of the federal government, Americans should remember that they had once before defended their rights by resort to the sword, and if necessary could do so again.

Hamilton, Madison, and Jay were also strong nationalists, and somewhat inconsistently with their purpose of reassuring Antifederalists, they made their treatise a defense of the doctrine of national ascendancy. They insisted on the necessity of appeals from state courts to federal courts as essential to a uniform interpretation of the Constitution and to national unity, and Hamilton also argued for the right of the federal judiciary to declare acts of Congress void. Madison even went so far as to interpret the "necessary and proper" clause in a guarded fashion as giving Congress the power to make all laws directed toward constitutional ends not specifically denied by the Constitution. This was a direct anticipation of the doctrine of loose construction laid down two years later in Hamilton's bank paper.

The nationalistic character of these ideas explains in part the success of *The Federalist* in predicting the course of later constitutional development. After 1789, this line of constitutional interpretation was sponsored by Hamilton and the Federalist party. Between 1800 and 1835 Chief Justice John Marshall was to write the doctrine of national supremacy into the growing body of constitutional law, and the idea ultimately triumphed completely through the verdict of the Civil War. It would be interesting to know to what extent *The Federalist* served as a guidebook for the congressmen who wrote the Judiciary Act of 1789, and for the decisions of John Marshall. There is no way of settling this question with complete

certainty, but there is some evidence that the influence of *The Federalist* was considerable.

The most effective Antifederalist work to appear was *The Letters from the Federal Farmer,* published by Richard Henry Lee of Virginia in December 1787. This work, moderate and reasoned in tone, immediately won a wide audience in Virginia and the other states. Lee admitted that the Constitution contained many excellent features, but he thought it "aimed too strongly at one consolidated government of the United States." He thought that centralized government was impractical and dangerous to liberty. The Constitution, he said, was also undemocratic, for it placed the majority under minority control. The congressional scheme was bad, since the small House of Representatives could not possibly represent all the people, while state equality in the Senate constituted an injustice to the large states. He also deplored the absence of a bill of rights. While he did not absolutely oppose ratification, he deemed certain reforms essential, and he cautioned Virginians not to rush into ratification before these changes were secured.

TRIUMPH OF THE FEDERALISTS

The successful issue of the struggle for adoption was not assured until June 1788. In seven states the Constitution was ratified by two-to-one majorities or better, but in four others ratification was secured only with difficulty and by narrow majorities, while in two states it was at first rejected.

The Constitution was thought generally to be more favorable to the less populous states because of the provision for equal representation in the Senate, and it was mostly the small states that were the first to ratify. Delaware and New Jersey gave their assent in December 1787; Georgia and Connecticut followed in January, and Maryland ratified in April after an unsuccessful attempt by Luther Martin to filibuster the Convention. Of these states, four were small and without any back country, while Georgia was small in population and influenced by fear of the Indians.

The Federalists also won impressive victories in Pennsylvania and South Carolina. Pennsylvania was the second state to ratify. Here the critical struggle over ratification occurred in the state legislature, where the Antifederalists stayed away from the assembly in an attempt to defeat the quorum necessary to do business, and

so block the call for a convention. But the assembly, without a quorum present, voted to call the convention, and the next afternoon the necessary quorum to validate this vote was secured when a mob dragged two Antifederalist assemblymen into the state house and held them in their seats by force. The Federalists under the leadership of James Wilson controlled without difficulty the convention that followed, and secured ratification in December, 46 to 19, after a three weeks' session. Similarly in South Carolina, the real struggle took place in the state legislature, where the Antifederalists attempted to block the motion to call a convention, on the grounds that the Philadelphia Convention had exceeded its authority. This move failed, and when the convention met, the Antifederalists were unable to offer serious opposition to ratification.

In Massachusetts, Virginia, New York, and New Hampshire, ratification was secured only by narrow margins and after hard-fought struggles. Indeed, in Massachusetts it appeared at first as though the enemies of the Constitution had the upper hand. Shays' Rebellion was but lately concluded, and the convention which met in January was filled with the bitter consciousness of social conflict. Most of the distinguished men present, among them Nathaniel Gorham, Rufus King, Caleb Strong, and James Bowdoin, favored ratification. But the Antifederalists seemed to have the weight of numbers on their side, while John Hancock, whose prestige in the state was very high and who was nominal chairman of the convention, at first avoided taking a stand on the issue by failing to put in an appearance. Sam Adams also hung back from endorsement in the belief that the Constitution provided for a too centralized government.

The Federalists overcame these handicaps very skillfully. They won over Hancock by dangling before him the promise of support in his campaign for the governorship or even the vice-presidency. Hancock then took the chair and proposed a number of amendments to the Constitution in order to win over certain moderate Antifederalists. The proposed amendments were of course not mandatory; yet there was some assurance that they would be adopted. This reconciled Sam Adams and several other delegates to ratification. Although the Antifederalists tried to filibuster the convention and later sought to adjourn the meeting without action,

these tactics were unsuccessful, and on February 6, 1788, the Constitution was ratified by the narrow vote of 187 to 168.

In Virginia, the support of the Constitution by Washington, Madison, Randolph, and Marshall was offset by the opposition of Patrick Henry, George Mason, and Richard Henry Lee, all of whom had much influence. When the state convention met in June 1788, Patrick Henry at once launched an intemperate attack upon the Constitution, in which he spared no invective in his denunciation of the proposed frame of government. He demanded an investigation of the Federal Convention and even implied that the delegates at Philadelphia had engaged in a criminal conspiracy. He sneered at the Constitution as a bastard hybrid, "so new, it wants a name." He warned that the Constitution would destroy the liberties of the people; aristocracy would give way to monarchy and despotism. Mason attacked the clause guaranteeing the slave trade until 1808, while other delegates feared that the new government would destroy the states once it was set in operation.

Madison met the impassioned pleas of Henry and his followers with quiet reasoned arguments which eventually won over doubters. The Constitution, he admitted, did indeed establish a government difficult of description; it was "partly national, partly federal." The new government did not threaten liberty, however, for it had only specific derived powers, though he implied that he had no objection to a bill of rights. An effective national government was essential to the protection of liberty, and Madison made it clear that the greater danger of despotism arose out of the deficiencies of the present system.

As in Massachusetts, the technique of offering proposals for amendments to appease the moderate Antifederalists was successful, and Virginia ratified the Constitution on June 25, by the close vote of 89 to 79. Forty suggested amendments accompanied ratification. Earlier in the month New Hampshire had also ratified, so that with ratification by ten states the adoption of the Constitution was now assured.

New York was another state in which ratification was secured only after a long fight and by the narrowest of majorities. Governor George Clinton, an Antifederalist, refused to convene the legislature in special session to consider a convention, and not until the regular session in February 1788 did the assembly call for the election of

delegates. This election the Antifederalists won by an impressive majority, so that when the convention met, forty-six of the delegates were supposedly hostile to the Constitution while but nineteen favored adoption.

The convention assembled in June. Since over two-thirds of the delegates were Antifederalists, it appeared that ratification of the Constitution was destined for speedy defeat. Robert Livingston, John Lansing, and Governor Clinton,[1] representatives of the local aristocracy who feared the effect of the Constitution upon the state's revenue system, led the opposition. Hamilton, an ardent champion of ratification, was known to regard the Constitution as defective and to favor adoption only because the document was the best available under the circumstances. Yet the skill of Hamilton in debate and the news that Virginia and New Hampshire had ratified eventually carried the day. A portion of the opposition was at length won over under the promise of conciliatory amendments. A proposal was made to make ratification conditional upon adoption of a large number of concomitant amendments, with the specification that the state would quit the union if the amendments were not adopted within a certain time; but this proposal was defeated. The convention then adopted the Constitution unconditionally by a vote of 30 to 27, although, as a conciliatory gesture toward the Antifederalists, a resolution proposing a second constitutional convention was adopted unanimously.

By late July, only North Carolina and Rhode Island had failed to ratify the Constitution. The North Carolina convention did not meet until July 4, when ten states had already ratified. Probably because of the predominance of the rural and frontier elements in the state, an overwhelming majority of the delegates were Antifederalists. They did not reject the Constitution outright, but instead refused, 184 to 83, to ratify until a long list of proposed amendments were adopted. No other action was taken by the state until November 1789, when, with the new federal government already functioning, a second convention met and ratified the Constitution without serious opposition, 195 to 77.

In Rhode Island the paper-money faction in control of the state legislature continued to refuse to call a convention. Instead, it submitted the Constitution to a vote of the town meetings, where it

[1] Governor Clinton served as president of the convention.

was overwhelmingly defeated, the Federalists refusing to vote. In 1790 the paper-money faction lost control of the state legislature to the conservatives. The new assembly promptly called a convention which on May 29, 1790, ratified the Constitution by the narrow margin of 34 to 32.

REASONS FOR RATIFICATION

The triumph of the Federalists was due in part to the superiority of their arguments, in part to the tactical strength of their position in the ratification conflict.

The Federalists had the advantage of a positive program. They stood in the position of offering the country a remedy for the many ills besetting the nation. They freely admitted many of the shortcomings of the Constitution; and many leading proponents of adoption, among them Washington and Hamilton, were known to regard it as far from perfect as a frame of government. Yet the Federalists could truthfully say that it was the best available remedy for the obvious evils of the Confederation and that it was the most perfect instrument of government that the best minds of the nation working over a period of several months had been able to devise. If the opponents of the Constitution brought about its rejection, responsibility would be theirs for the chaos and disunion to follow.

Everywhere the proponents of ratification drew a terrifying picture of the results of rejection: monetary chaos and national bankruptcy, division of the Confederation into three or more separate nations, civil war, reconquest of the separate states by Britain or some other foreign power. It was because the Antifederalists could not answer such arguments, because they had no remedy except the feeble demand for amendment of the Articles of Confederation or the calling of another convention, that their position was gradually weakened and undermined.

The method by which the state constitutional conventions were elected also favored the Federalists. The delegates were elected from the existing legislative districts in the same proportion and on the same basis as were delegates to the state legislatures. The back country and the frontier had for decades been notoriously underrepresented in most of the assemblies. Reforms coincident with the Revolution had worked some increase in the representation of the

back country; yet in 1788 it was still true that state legislatures were controlled by the tidewater, which had many more delegates than they were entitled to on the basis of population. Hence the proponents of ratification, most of them from the tidewater, were in a much stronger position than public sentiment probably warranted. Overrepresentation of the tidewater was an important if not decisive factor in the triumph of the Constitution.

Suffrage requirements for the election of delegates to the convention were also such as to disqualify the landless and propertyless groups among whom sentiment against the Constitution was strong. Again, this was true simply because in every state except New York suffrage requirements duplicated those for ordinary state elections, in which persons of no property were for the most part disfranchised. Many of these people—artisans, squatter-farmers, and debtors, would have opposed adoption, but they were without influence in the choice of delegates simply because they could not vote.

The Constitution nonetheless was adopted by a process as democratic as any available at that time—certainly more democratic than that by which either the Declaration of Independence or the Articles of Confederation were adopted—and its ratification probably reflected popular will more accurately than did either of those two documents. It has sometimes been said that the Constitution would have been rejected had it been submitted directly to a referendum vote of the people in all the states, on a basis of free white male suffrage such as came to prevail some forty years later. The narrow margin by which the Constitution was adopted in four states plus the underrepresentation or disfranchisement of substantial elements presumably opposed to adoption lends some support to this contention. Probably not more than three per cent of the male population actually balloted upon the choice of delegates to the various state conventions. Yet this was due not only to the suffrage system, but also to the fact that only a small portion, seldom more than a fourth, of the population who were qualified to vote actually took the trouble to do so. Apparently the great question before the nation was greeted with apathy and indifference by many people. Circumstances of this kind make it extremely difficult to make any absolute statement as to whether or not the Constitution would have received a majority in a direct referendum based on universal

suffrage. In 1788, indeed, the idea of a mass democratic popular majority had hardly been entertained.

THE VENERATION OF THE CONSTITUTION

Although the battle over ratification was strenuous, all serious controversy over the Constitution ceased abruptly once it had been adopted. The enemies of ratification, if not convinced, were at least silent. If a few men, like Patrick Henry, sulked in their tents, their attitude did not seriously affect the steady growth of an effective sentiment in favor of the new instrument. Before a decade had passed, the Constitution, from being an object of partisan contention, became one of veneration. The new political parties, Federalists and Jeffersonians, which rose in the early years of the Republic, vied with one another in their expressions of respect for the supreme law. Men might differ as to the true meaning of the basic document; they might even come to blows over the nature of the government it erected; but the Constitution itself in time became sacrosanct.

As a common symbol of American patriotism and nationality, the Constitution eventually came to occupy a position rivaled only by the Declaration of Independence and in after years by Lincoln's Gettysburg Address. The men who had drafted it were honored as the Founding Fathers, and their achievement was celebrated as one of the great events in the nation's history. When George Bancroft in the mid-nineteenth century wrote of the Constitution, he treated the Convention's work as a culmination of the entire development of all preceding civilizations up to that time. To him, as to other Americans, the hand of God was clearly visible in the background. Although the men who drafted the Constitution had known little and believed less of the dogma of democracy, by Jackson's time the Constitution was regarded as a principal bulwark of a democratic state. In short, veneration of the Constitution became an integral part of popular political thought.

Why did this happen? One explanation lies in the relative absence of visible common symbols of sovereignty and national unity in American life. In England the king is the great symbol of political unity, above party and class, commanding the common loyalty of all Englishmen. The majesty of his position and the ceremony and trappings with which he has been surrounded are visible symbols of the tremendous authority of the state of which he is the cere-

monial head. The Constitution gave America no king. Even great political leaders do not stand above partisan hatred during their lives; only after death may they become common symbols of unity. The Constitution, it may be said, is America's uncrowned king. It is above party, a common object of veneration, a living symbol of national unity.

Doubtless it was because of the pinnacle of veneration to which historians and Americans in general had lifted the Constitution that a somewhat different interpretation of the place of the Constitution in the nation's history produced a strong popular and professional reaction. In 1913, Professor Charles A. Beard published his now famous *Economic Interpretation of the Constitution of the United States*. Briefly, his thesis was that the Constitution was the work of men of a particular class and that the document reflected the interests of that class: that the economic elite—merchants, large planters, financiers, land speculators, and creditors—brought about the Convention and wrote a Constitution reflecting their particular interests.

Beard offered several pieces of evidence in support of his argument. First, he pointed out that most of the delegates were lawyers, planters, and merchants, the small farmer group being unrepresented. Many of the delegates, he observed, were also bondholders in the Confederation government, while still others held large blocks of lands in the western domain. Both groups stood to gain by the erection of a strong national government which would restore credit and open the West for settlement.

The finished Constitution, Beard argued, directly reflected the interests of these groups. He cited the clause prohibiting the states from coining money or emitting bills of credit, obviously aimed at the paper money inflation then prevalent in many states. He pointed also to the provisions guaranteeing the national debt, forbidding the states from impairing the obligations of contracts, and giving the national government control over money and credit.

Certainly Beard's evidence does not justify the implication that the members of the Convention engaged in a conspiracy to line their own pockets. Many of the most prominent delegates, Washington, for example, participated at considerable personal sacrifice; many others, including Madison, held no Confederation bonds and stood to gain nothing personally from the Constitution. With two

or three exceptions the delegates were men of character beyond any imputation of selfish scheming.

Quite naturally, however, the delegates were drawn from the dominant social groups in the various states, for the idea of mass participation in government had not yet been born. The Convention's personnel was not in the least aristocratic beyond the average political gathering of the time. The same general group of men had written the Declaration of Independence, the Articles of Confederation, and the state constitutions, documents neither more nor less aristocratic than the Constitution of 1787.

Moreover, the Constitution must be judged by the political and social standards of the late eighteenth century, rather than by those of twentieth-century democratic liberalism. It was certainly as liberal a document as the state constitutions then drafted, and in some respects more so. The popular base of representation in the House was made identical with that in the various states, while the Senate merely continued the system of state representation prevailing under the Articles of Confederation. The electoral college was a cumbersome mechanism, but it was the result of compromise, not of attempts at aristocracy, and it opened the way for potential election of the President virtually by popular election, a fact well understood by some delegates.

The Constitution forbade religious tests or qualifications for office, banned titles of nobility, and laid down a very narrow definition of treason, all exceedingly liberal provisions by eighteenth-century standards. It incorporated certain of the traditional guarantees of English civil liberty, forbidding the states and federal government alike to pass bills of attainder and ex post facto laws and guaranteeing the federal writ of habeas corpus against suspension except when rebellion or emergency made such suspension necessary. Even the property guarantees were of a moderate character and were not at all designed merely to keep a landed or mercantile aristocracy in power. Most of them, that guaranteeing the national debt, for example, would be regarded as acceptable and even necessary in a constitution drafted today. The Constitution was in fact a sufficiently progressive frame of government so that, although penned in a day when the democratic ideal was as yet little known, it was able to provide the framework for a democratic national government of the twentieth century.

THE CONSTITUTION AS A PRODUCT OF EIGHTEENTH-CENTURY POLITICAL IDEAS

Much of the discussion over whether the Constitution was a liberal or democratic document can be put aside with the observation that the Constitution was a product of the Age of Enlightenment and of colonial political philosophy and experience.

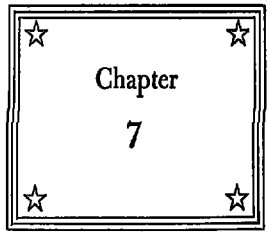
The Constitutional Convention was an expression of the Enlightenment's abiding faith in the supremacy of reason. Man was a rational being. It was therefore possible for men of various and conflicting interests to meet together and by discussion, by argument, by the application of reason, solve the problems of the state in a rational manner. This solution could then be embodied in a compact based upon the reign of law, simply because it was to the mutual interest of all rational men to accept the most intelligent solution of the problem of government which human reason could devise. The Convention inaugurated an era of formal constitution-making; the French Revolutionists and early nineteenth-century European liberals were also to engage in the same practice with the same implicit faith in the supremacy of reason.

The Constitution gave recognition to several ideas of colonial and Revolutionary political philosophy: the compact theory of the state, the notion of a written constitution, the conception of constitutional supremacy and limited legislative capacity, the doctrine of natural rights, and the separation of powers. As a formal compact setting up government, the Constitution's antecedents ran back to the Mayflower Compact, the Fundamental Orders of Connecticut, the great natural-law philosophers, and the state constitutions of the Revolutionary era. As a written document, the Constitution reflected the late colonial and Revolutionary belief that the compact ought to be a written one. The notion of constitutional supremacy was also recognized; the Constitution was made supreme law, controlling state law and by implication federal law as well. Federal legislative capacity was strictly defined and enumerated; by implication it was limited to the express terms of the grant. Although the Constitution contained no separate bill of rights, certain natural rights were specifically guaranteed against invasion in the clauses prohibiting ex post facto laws and bills of attainder and guaranteeing the writ of habeas corpus. The doctrine of the separation of

powers was implied in the Constitution's organization and content, legislative, executive, and judicial powers being granted separately in three different articles.

The powers granted the new government reflected in part American experience with federalism under the British Empire and the Articles of Confederation, in part the Enlightenment belief in the negative state. The scope of federal authority was essentially the same as that of the central governments under the old British Empire and under the Articles of Confederation. Experience had taught the statesmen of the Revolutionary era that a central government could not function effectively without the right to tax and to regulate commerce, and they now added these items to the grant of federal authority. Yet the federal government was still conceived of as having few other functions than the maintenance of peace against external and internal disturbance, though for this purpose it was thought that it must also be financially sound and efficient. Even the power over interstate commerce, eventually to become so potent an arm of federal authority, was apparently granted for negative rather than positive reasons—to protect trade from the manifold abuses of state control rather than to make possible extensive regulation by the central government.

The Constitution was thus an expression of eighteenth-century political ideas. It was conceived as the instrument of government in an eighteenth-century agrarian republic of less than four million people. Yet today the document of 1787 functions as supreme law in a twentieth-century state of one hundred and forty million people having an urban industrial economy. The success of the Constitution in bridging the gap between the eighteenth and twentieth centuries is due in part to the general soundness of the frame of government provided, but even more it is due to the remarkable growth in the meaning of the Constitution itself. Though nominally a fixed written document, the Constitution began to grow, evolve, and change with the first meeting of Congress, and it has been changing ever since. This process of growth made possible the adaptation of the Constitution as a frame of government for the modern world's first great experiment in democracy; it also preserved the document of 1787 in a twentieth-century society bearing little resemblance to that in which the delegates of 1787 lived and moved.



Establishing the New Government

THE DOCUMENT drafted at Philadelphia in 1787 provided a sound foundation for subsequent constitutional development, but the actual task of erecting the living structure of government devolved upon successive generations of statesmen and jurists. The ultimate character of the American constitutional system depended as much upon the objectives, methods, and policies of these men as it did upon the provisions of the original Constitution itself.

The decisions made by the statesmen who launched the new government were of especial importance, for the institutions they erected and the policies they inaugurated established precedents that were certain to affect profoundly the entire subsequent development of the constitutional system. Some decisions upon institutions and policy could be made with relative ease, either because the Constitution itself was explicit and clear upon the point in question, or because there was very general agreement among all interests as to what ought to be done. Other issues, however, gave rise to extended controversy, either because the Constitution was vague or silent upon the matter at hand, or because the question seriously affected the political or economic welfare of one or more sectional or class interests in the nation. Out of these controversies,

there emerged many of those institutions and policies which came to make up the living organism of government.

LAUNCHING THE NEW GOVERNMENT

In September 1788, after eleven states had ratified the Constitution, the Confederation Congress designated the first Wednesday of the following January for the selection of presidential electors, the first Wednesday in February for the casting of the electoral vote, and the first Wednesday in March (March 4) for the inauguration of the new government. The Constitution had left the method of selecting presidential electors to the state legislatures. In the first election the states accordingly chose their electors in a variety of ways, some by popular election on a general ticket, some by popular district election, and some by legislative vote. This lack of uniform electoral procedure was to continue for several elections, and it was not until after 1860 that the choice of electors on a general ticket became universal.

When the electoral vote was counted, George Washington was found to have received one of the two votes cast by every elector. This unanimity was not caused by any party mechanism, for political parties had not yet made their appearance; rather, it was ascribable to a general sentiment that Washington was the new nation's great man and the logical choice for the presidency. The electors scattered their other ballots among a half-dozen candidates. John Adams received the second highest number of electoral votes and thereby became Vice-President.

Meanwhile the various states held elections for members of the House of Representatives, and the state legislatures chose their senators. A large majority of the successful candidates for both houses had actively supported ratification of the new Constitution, although a few opponents of ratification won seats. The success of the Federalists was due in part to the prestige these men had gained through sponsorship of the Constitution and to the discomfiture of the Constitution's opponents, and in part to the fact that the Constitution's champions were vitally interested in the successful operation of the new government and hence sought office in greater numbers than did the Antifederalists.

The first Congress was thus decidedly more nationalistic than the Constitutional Convention had been; furthermore, President

Washington and Alexander Hamilton, who shortly became Washington's principal adviser, were also proponents of strong central government. This situation resulted in a consistently nationalistic interpretation of the Constitution during the early years of the new government. Those conflicts between nationalism and localism which the Convention had left unresolved were usually settled in favor of the champions of nationalism. Thus the first Congress, assisted by the executive, supplemented and strengthened the handiwork of the nationalists in the late Convention.

Congress, meeting in New York by direction of the Confederation Congress, obtained a quorum in both houses early in April. The two chambers then organized for business, a task involving the appointment of the few necessary officers and the delineation of rules of procedure. Legislative progress was somewhat delayed in the first Congress by the entire absence of systematic rules of procedure and by the fear of establishing undesirable precedents or of giving some agency too much power.

The Committee of the Whole, in which the entire chamber sat as a committee, very soon assumed a position of outstanding importance in procedure, particularly in the House of Representatives. The relatively small membership of the two houses, the successful experience with a like committee in the Virginia legislature and in the Philadelphia Convention, and the need for informal debate, all encouraged the use of the committee. When important legislation was under consideration, the Committee of the Whole usually worked out the general principles of the projected statute and then submitted its findings to a select committee to settle remaining details and to draft a bill. Standing committees were very seldom employed in the early sessions of Congress. For assistance in framing a measure the select committee usually relied heavily upon the head of the executive department most directly concerned, so that the bill reported actually was the result of co-operation between executive and legislature. Following the select committee's report, the House debated the measure anew, accepted or rejected proposed last-minute amendments, and put the bill to a final vote. If the proposed law passed, it went to the other house.

Because of the important place held by department heads in lawmaking, the first Congress seriously considered giving chief administrative officers the right to participate in debates on the

floor. Had this step been taken it would have stimulated the development of a parliamentary system of ministerial responsibility in the relations between executive and legislature. Though certain members ardently supported the idea, it was defeated after some discussion.

In early sessions of Congress, the House of Representatives assumed a position of considerably more importance than the Senate. Most important legislation was initiated in the lower chamber, the Senate functioning mainly as a body for modification and revision. The House was regarded as representing the people directly, an attitude attributable in part to the fact that until 1794 the Senate held its legislative as well as its executive sessions behind closed doors.

ORGANIZATION OF THE EXECUTIVE DEPARTMENT

Among the first statutes enacted by Congress were laws providing for the establishment of three executive departments—the State, Treasury, and War departments. The Constitution made no direct provision for administrative departments. Congress thus had a large measure of discretion in the matter, though the system of administrative departments evolved in the later Confederation period was available as a precedent. James Madison, now a member of the House of Representatives from Virginia, took a prominent part in formulating the statutes providing for the establishment of departments, as he did for much of the other legislation passed by the First Congress.

Madison's proposal of May 1789 to create a Department of Foreign Affairs precipitated a prolonged debate on the President's removal power. The bill expressly granted the President the right to remove the head of the prospective department. The Constitution was silent on the removal power, an omission which was to open the way for a century and a half of intermittent controversy on the question. Some congressmen now opposed the provision in Madison's bill on the grounds that the Senate, being associated with the President in appointments, was by implication properly associated with him in removals as well. Others contended that the removal power was an inherent part of the executive prerogative and a proper means of implementing the President's duty to take care that the laws be faithfully executed; hence, they held, the Presi-

dent could properly make removals without the Senate's consent. Still others argued that the Constitution permitted Congress to locate the removal power according to its judgment. The bill in question was finally phrased so as to imply that the power of removal had already been lodged in the President by the Convention. While this precedent was for a time generally followed in subsequent legislation, the question of the removal power arose again during the administrations of Jackson and Johnson and in the twentieth century.[1]

In the debate on the bill creating a Treasury Department an argument arose over whether a single individual or a board of commissioners should be placed at its head. Elbridge Gerry, who as a delegate from Massachusetts had sat in the Constitutional Convention, argued that the Treasury's duties were too arduous and important to be conferred upon a single individual. Although the House decided against him, Congress nonetheless took the precaution of surrounding the secretary with a comptroller, an auditor, a treasurer, and a register, thereby providing adequate safeguards against unauthorized payments.

Congress also took deliberate steps to make the Secretary of the Treasury responsible to Congress as well as to the President. The Secretary was required from time to time to make reports and "give information to either branch of the legislature, in person or in writing (as may be required), respecting all matters referred to him by the Senate or the House of Representatives, or which shall appertain to his office; and generally shall perform all such services relative to the finances, as he shall be directed to perform." Thus, while Congress made the heads of other departments subordinates of the President, it made the Secretary of the Treasury, primarily at least, its own agent to execute its constitutional powers in the field of finance.

Here again was an important move toward ministerial responsibility and parliamentary government. The basic proposition implied in the Treasury Act was that Congress could constitutionally make an executive department responsible to itself rather than to the President. Subsequent developments, however, were to arrest the trend toward ministerial responsibility.

The creation of other departments involved no major contro-

[1] For later controversies involving the removal power, see the discussion on pages 339–342, 471–477, and 708–711.

versies. The War Department received supervision over both military and naval affairs, an arrangement continued until 1798, when the quasi-war with France led to the establishment of a separate Navy Department. The Judiciary Act of 1789 provided for an Attorney General, whose chief duties were to prosecute cases for the United States before the Supreme Court and to give legal advice to the President and the heads of departments. Although he did not become the official head of a department until 1870, he became immediately a principal executive officer and presidential adviser. The post office was organized on an annual basis until 1794, when it was given permanent standing; not until 1829, however, did the Postmaster General become a regular cabinet member.

A proposal of August 1789 to create a Home Department failed because of the implied invasion of state authority; instead, Congress altered the name of the Department of Foreign Affairs to the Department of State, a title general enough to cover a variety of small additional duties then assigned to the department—among them the custody of public records and correspondence with the states.

THE JUDICIARY ACT OF 1789

No law enacted by the first session of Congress was of greater importance than the Judiciary Act of September 24, 1789, which incorporated the principle of national supremacy into the federal judicial system. The act was the work of a Senate committee dominated by staunch Federalists, with Oliver Ellsworth of Connecticut taking the leading role. It provided for a Supreme Court consisting of a Chief Justice and five associate justices, for thirteen federal district courts of one judge each—one district for each of the eleven existing states and two additional districts, in Virginia and Massachusetts, for Kentucky and Maine—and for three circuit courts, each composed of two justices of the Supreme Court sitting in conjunction with one district court judge. The jurisdiction of the various courts was stated in great detail, and to a lesser degree their organization and procedure were set forth in detail. Although this arrangement constituted a victory for those who advocated a complete system of federal courts, state courts were given concurrent jurisdiction in certain cases involving federal law. Thus the state courts became a part of the judicial system of the United States.

Section 25 of the act, a tremendous victory for the principle of

national sovereignty, provided in certain instances for appeals from state courts to the federal judiciary. Under this section, appeals could be taken to the United States Supreme Court whenever the highest state court having jurisdiction of a case (1) ruled against the constitutionality of a federal treaty or law; (2) ruled in favor of the validity of a state act which had been challenged as contrary to the Constitution, treaties, or laws of the United States; or (3) ruled against a right or privilege claimed under the Constitution or federal law. In effect, this meant that appeals would be taken in all instances where the state judiciary assertedly failed to give full recognition to the supremacy of the Constitution, or to the treaties and laws of the United States, as provided by Article VI of the Constitution.

This provision, which solved the problem of conflicts between state and national spheres of authority, was to become the very heart of the American federal system of government. If the Constitution and federal laws and treaties were to be "the supreme Law of the Land," it was vital that they be upheld against state law and that they be interpreted with reasonable uniformity. Unless the Supreme Court were given authority to review the decisions of state courts in disputes between the states and the federal government over their respective powers, it would be possible for state courts practically to nullify federal authority, just as state legislatures had virtually nullified the authority of Congress under the Confederation. Therefore the nationalists insisted that the Supreme Court must be the final interpreter of the Constitution and as such must have the right to receive appeals from state courts.

The Constitutional Convention had not specifically provided for appeals from state to federal courts, but Ellsworth and the other nationalists of Congress, now freed from the restraints formerly imposed by the presence of a strong states' rights faction, boldly assumed the right to be implied in the Constitution. In 1789 and for many years afterward, the critics of Section 25 of the Judiciary Act claimed that the Constitution specifically placed the responsibility for upholding federal supremacy upon the state courts and that Congress had no authority to subject their decisions to review by the Supreme Court of the United States. This opposition was motivated by the fear that the state judiciaries and state powers would be gradually absorbed by federal authority, a fear that made it

almost impossible for this group to see the necessity for the uniform upholding of federal supremacy throughout the Union.

In view of its later importance, it should be noted that the power of the Supreme Court to determine with finality the constitutionality of acts of Congress was not specifically recognized in the Judiciary Act of 1789. It might have been considered as implied, however, since decisions of state courts involving the constitutional construction of acts of Congress might be appealed to the Supreme Court and there presumably either affirmed or reversed. But to go beyond this implication was apparently considered either unnecessary or politically inexpedient at the time.

THE BILL OF RIGHTS

It will be recalled that during the contest over adoption of the Constitution, ratification had been won in several states through the technique of promising a series of constitutional amendments embodying a bill of rights. Many men in the First Congress now felt that the national government was under a moral obligation to fulfill these promises. Moreover, advocates of amendments believed that many persons still lukewarm or unfriendly to the new government might be won over should such amendments be adopted. One of the very few specific recommendations made by President Washington in his inaugural address was that Congress should give careful attention to the demand for these amendments.

In Congress, Madison took the initiative in advocating amendments, co-ordinating the suggestions of the state ratifying conventions and introducing them in the House. Although a majority of his colleagues supported this move, a few conservative nationalists, notably Fisher Ames of Massachusetts and Roger Sherman of Connecticut, opposed it as unnecessary and unwise. Since the federal government was one of enumerated powers, they said, the Constitution did not endanger the rights of the people, and it should be given a fair trial before attempts were made to amend it. On the other hand, certain champions of states' rights, among them Elbridge Gerry of Massachusetts and Thomas Tucker of South Carolina, were determined to add amendments protecting both citizens and the states against federal power. The partial victory of the nationalists is evident in the substantial curtailment of the amendments originally proposed.

Madison's proposal was not to add the amendments in a body at the end of the Constitution but to incorporate them in their proper places in the text by changes, omissions, and additions. Although this plan was later abandoned, it was at first agreed to by the House. The most numerous changes were to be additional limitations upon the power of Congress over citizens, to follow the clause in Article I, Section 9, prohibiting bills of attainder. By the proposed amendments, Congress was to be prohibited from abridging the freedom of religion, of speech, of the press, of assembly, or of bearing arms; and federal authority was closely restricted in quartering troops, in prosecuting citizens for crimes, and in inflicting punishments. Out of these proposals grew the first five and the Eighth and Ninth amendments. Extensive changes designed to guarantee to the citizen more fully a fair trial by a jury in his own district and the benefits of the common law were also proposed for Article III, Section 2, of the Constitution. These proposals eventually became the Sixth and Seventh amendments.

The proposed amendments were debated at length in both houses, several additions, alterations, and eliminations being made. The House at first agreed to add to the Constitution's preamble a statement reminiscent of the Declaration of Independence to the effect that government was intended for the benefit of the people and was derived from their authority alone, but this plan was eventually dropped on the grounds that the phrase "We the People" was sufficient evidence and proof of the popular basis of the Constitution.

Some of the ardent states' rights advocates also attempted to add to the proposed amendment guaranteeing the rights of assembly and petition a phrase guaranteeing the right of the people to instruct their congressmen on public questions. A combination of moderate and extreme Federalists, alleging that this proposal would undermine the representative and deliberative character of Congress by subjecting its members to direct popular control, succeeded in defeating the move.

The Senate, even more conservative than the House, killed several other suggestions, among them a clause exempting conscientious objectors from compulsory military service, an article specifically prohibiting any of the three departments of the federal government from exercising powers vested in the other two, and a limitation upon the states' police power proposed by the House, that

"no State shall infringe the right of trial by jury in criminal cases, nor the rights of conscience, nor the freedom of speech or of the press."

One of the most significant events in the course of the debate was the failure of the states' rights advocates in their attempts to alter the proposal that was to become the Tenth Amendment so as to limit the federal government to those powers "expressly" delegated by the Constitution. This move was blocked by Madison and other moderates as well as the nationalists, all of whom believed that in any effective government "powers must necessarily be admitted by implication." In later years extreme strict constructionists, adhering to a narrowly circumscribed conception of federal powers, were nonetheless to insist that the Tenth Amendment had made implied federal powers illegal.

In September 1789, Congress submitted twelve proposed amendments to the states. But before they were ratified by the existing states, the number of states in the Union increased from eleven to fourteen through the ratification of the Constitution by North Carolina and Rhode Island and the admission in 1791 of Vermont to the Union. Ratification by eleven states was therefore necessary. During the two years from 1789 to 1791 various states took favorable action on all or most of the amendments, and in November 1791 Virginia's vote made ten of the amendments part of the Constitution, although Massachusetts, Connecticut, and Georgia failed. to ratify them. The two remaining proposals, one providing that there should be not less than one representative in the lower house for every fifty thousand persons, and another postponing the effect of any alteration in the compensation of Senators and Representatives until an election had intervened, failed to secure favorable action by the necessary number of states and thus were defeated.

The ten amendments adopted worked no real alteration in federal power. They gave formal recognition to certain traditionally accepted "natural rights," hitherto incorporated in the great English charters, colonial grants, and state bills of rights. They took no substantive powers from Congress which could reasonably have been implied before the amendments had been passed, and most of the procedural limitations, trial by jury and the like, probably would have been taken for granted in any event. Only gradually did there

emerge the now almost universal conception of the first ten amendments as a great Bill of Rights.

THE HAMILTONIAN PROGRAM

In 1790, the national government having been safely organized, Alexander Hamilton, now Washington's closest adviser, launched an extensive financial program, conceived in the interests of conservative *mercantilistic nationalism.*

Though not an aristocrat in origin, Hamilton was the national spokesman for those of wealth and standing—for the rich, the wise, and the well-born, as he liked to term them. He neither understood nor sympathized with the great mass of people of little or no property; he simply attributed their condition to their incapacity and indolence. While he recognized that it was perhaps impolitic to exclude the masses from all political activity, he had a strong conviction that control of government should be lodged securely in the hands of the manufacturing, commercial, and landed aristocracies.

Hamilton therefore favored an efficient, coercive, and highly centralized state, which would foster commerce, manufacturing, and capitalistic development. Since he considered self-interest to be the mainspring of human conduct, he was confident that such a program would give the aristocracy a definite interest in the new federal government and thereby assure its ultimate stability and success.

Hamilton's opportunity came when Congress asked him to submit a report on the public credit. In reply, Hamilton in 1790 and 1791 made a series of reports embodying a number of proposals calculated to place federal finances upon a sound basis and to enhance the public credit both at home and abroad. He believed that a properly funded national debt would add to the stability of the government and would provide the equivalent of money for major private business transactions. He recommended that the national government refund the outstanding Confederation debt at face value, assume and refund the unpaid debts contracted by the several states to carry on the Revolutionary War, charter a national bank to assist in handling the government's monetary and financial problems, and enact a protective tariff law.

There was comparatively little opposition to the refunding of the national debt, which was guaranteed by the Constitution itself. However, certain congressmen did object to paying the old obligations off at face value, a step which they argued would redound to the advantage of the speculator class. And the states' rights faction attacked the assumption of state debts by the federal government as a scheme to consolidate national authority at the expense of the states. The Virginia legislature adopted a resolution declaring assumption to be both dangerous to the states and repugnant to the Constitution. Representatives from states which had already paid off a large part of their debts also objected to assumption. Hamilton nonetheless carried his proposal through Congress with the aid of a political bargain by which certain Southern members voted for assumption in return for some Northern support for a bill to locate the future national capital on the Potomac River.

Hamilton's proposal to charter a national bank was severely attacked in Congress on constitutional grounds. The opposition was led by Madison, who was becoming increasingly hostile to Hamilton's program. Although the two men had supported strong national government in the Convention and had worked together to secure ratification of the Constitution, neither their constitutional philosophies nor their economic interests were harmonious. Hamilton wished to push still further in the direction of a powerful central government, while Madison, now conscious of the economic implications of Hamilton's program and aware of the hostility which the drift toward nationalism had aroused in his own section of the country, favored a middle course between nationalism and states' rights.

In the Constitutional Convention Madison had proposed that Congress be empowered to "grant charters of incorporation," but the delegates had rejected his suggestion. In view of this action, he now believed that to assume that the power of incorporation could rightfully be implied either from the power to borrow money or from the "necessary and proper" clause in Article I, Section 8, would be an unwarranted and dangerous precedent.

In February 1791, the bank bill was passed by Congress, but President Washington, who still considered himself a sort of mediator between conflicting factions, wished to be certain of its constitutionality before signing it. Among others Jefferson was asked for

his view, which in turn was submitted to Hamilton for rebuttal.

In a strong argument Jefferson advocated the doctrine of strict construction and maintained that the bank bill was unconstitutional. Taking as his premise the Tenth Amendment (which had not yet become a part of the Constitution), he contended that the incorporation of a bank was neither an enumerated power of Congress nor a part of any granted power, and that implied powers were inadmissible.

He further denied that authority to establish a bank could be derived either from the "general welfare" or the "necessary and proper" clause. The constitutional clause granting Congress power to impose taxes for the "general welfare" was not of all-inclusive scope, he said, but was merely a general statement to indicate the sum of the enumerated powers of Congress. In short, the "general welfare" clause did not even convey the power to appropriate for the general welfare but merely the right to appropriate pursuant to the enumerated powers of Congress.

With reference to the clause empowering Congress to make all laws necessary and proper for carrying into execution the enumerated powers, Jefferson emphasized the word "necessary," and argued that the means employed to carry out the delegated powers must be indispensable and not merely "convenient." Consequently the Constitution, he said, restrained Congress "to those means without which the grant of power would be nugatory." Later as President, however, Jefferson was to become aware that those charged with the responsibility of the federal government must have some discretionary authority in the choice of means to perform its function.

In rebuttal Hamilton presented what was to become the classic exposition of the doctrine of the broad construction of federal powers under the Constitution. He claimed for Congress two kinds of powers in addition to those expressly enumerated in the Constitution, resultant and implied powers. Resultant powers were those resulting from the powers that had been granted to the government, such as the right of the United States to possess sovereign jurisdiction over conquered territory. Implied powers, upon which Hamilton placed his chief reliance, were those derived from the "necessary and proper" clause. He rejected the doctrine that the Constitution restricted Congress to those means which are absolutely indispen-

sable. According to his interpretation, "necessary often means no more than needful, requisite, incidental, useful, or conducive to. . . . The degree in which a measure is necessary, can never be a test of the legal right to adopt it; that must be a matter of opinion, and can only be a test of expediency."

Then followed Hamilton's famous test for determining the constitutionality of a proposed act of Congress: "This criterion is the *end*, to which the measure relates as a *mean*. If the *end* be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that *end*, and is not forbidden by any particular provision of the Constitution, it may safely be deemed to come within the compass of the national authority." This conception of implied powers was later to be adopted by John Marshall and incorporated in the Supreme Court's opinion in *McCulloch v. Maryland* on the constitutionality of the second national bank.

Hamilton had his way and the national bank was established. It served well most of the purposes he had outlined for it and in addition proved to be a decided boon to the nation's financial and commercial interests. Eventually also his broad interpretation of the scope of the authority of the central government was to be acquiesced in by practically all political and sectional groups. Before that time arrived, however, there were to be almost interminable debates and controversies over such an interpretation of the Constitution—controversies involving nullification, secession, civil war, and virtual congressional dictatorship.

In his report on manufactures, Hamilton shortly presented a powerful argument for a protective tariff for certain industries, as a means of attaining a proper balance between agriculture, commerce, and manufacturing, and a prosperous and expanding economy. Since the protection of industry was not an enumerated power of Congress, the authority for such action had to rest again upon the doctrine of implied powers. Although Hamilton's recommendation to Congress was adopted in only a modified form, the opposition to the protective tariff was based more upon policy than upon alleged unconstitutionality. Many times in later years, however, the constitutionality of the protective tariff was to be attacked with strong argument, although never with complete success.

THE TEST OF FEDERAL COERCIVE POWER

One of the basic difficulties of the Confederation period had been the lack of any coercive power on the part of the central government against either states or individuals. It will be recalled that the Constitutional Convention had considered and abandoned a proposal to give the new government the right to coerce the states, largely on the ground that the government would function directly upon individuals and that coercion of states would therefore be irrelevant and unnecessary. This in turn, however, implied that the national government would have the right to coerce individuals who resisted its lawful authority. In line with this assumption the Convention had in fact empowered Congress "to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."

The first occasion for the exercise of this vital authority came in the so-called Whisky Rebellion of 1794. In 1790 Congress, as a part of its new revenue program, had levied a direct excise tax upon whisky. The tax was very much resented in the frontier regions of the middle and southern states, for whisky was the frontiersman's principal medium for marketing his surplus grain. A considerable majority of westerners had been opposed to the adoption of the Constitution, and they did not now appreciate the necessity for an effective federal revenue program. The law therefore aroused much political unrest in western regions, where farmers, spurred on by antiadministration politicians, held meetings of protest and threatened forcibly to block the execution of the excise law.

Alarmed by frontier unrest and eager to assert national authority, the Federalist-controlled Congress on May 2, 1792, enacted a law authorizing the President to call out the militia in case an insurrection occurred against federal authority or in case a state, threatened by internal disorder beyond its control, called for federal aid. Although there were sharp divisions both in Congress and among the people over the expediency of such an enforcement measure, all factions were agreed that the employment of military power should be unequivocally subordinated to the processes of civil government. The act therefore provided that the militia were to be employed only when "the laws of the United States shall be opposed, or the

execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals." Even then the President was required first to issue a proclamation warning the insurrectionists to disperse peaceably.

Meanwhile, although Congress lowered somewhat the whisky tax as a concession to western sentiment, resistance in western Pennsylvania became more and more extreme. In 1794 it took on an organized character and threatened to result in a complete breakdown of the federal revenue laws.

Spurred on by Hamilton, Washington now determined to seize this occasion to demonstrate the strength and sovereignty of the national government before the decentralizing effects of frontier provincialism should undermine the federal constitutional system. On August 7, 1794, Washington therefore issued a proclamation in accordance with the Act of 1792, commanding all insurgents to submit to federal authority by September 1. When they failed to do so in the required time, he proceeded to call out 13,000 militiamen from Pennsylvania and near-by states to suppress the insurrection. Though federal military prestige was at the moment suffering from a series of defeats administered by the Indian tribes of the northwest frontier, the necessary troops were raised with but little difficulty, and an expedition was dispatched against the insurgents. The threatened insurrection quickly disintegrated. A few of the leading rebels were arrested and tried for treason; two were convicted but were subsequently pardoned by the President. The whole episode had demonstrated conclusively that the new federal government possessed ample power to enforce its authority over individuals, even recalcitrant ones.

EXECUTIVE RELATIONS WITH CONGRESS

The Constitutional Convention had contemplated a strong executive, who would not only execute federal laws but would also take a prominent part in the formulation of legislation. The Constitution provided several possible instruments for executive leadership in Congress, among them the President's duty to advise Congress on the state of the Union and to "recommend to their Consideration such Measures as he shall judge necessary and expedient," and his veto power. Eventually, also, the appointive power was to become

an important device for the control of policy, although it did not develop as such during Washington's time.

In advising Congress on the state of the Union, Washington early adopted the practice of appearing in person before Congress at the opening of each session to review the developments of the preceding year and to recommend matters for congressional consideration. During sessions also he sent special messages, chiefly to provide Congress with information as occasion arose. Although early Congresses followed an elaborate ceremonial in making formal response to the President's annual messages, they did not always accept his recommendations. The annual message was in fact not destined to become a major instrument of executive leadership in Congress.

The veto was also potentially an important instrument for the control of legislative policy, but it too did not become significant in the early national period. Federalist leaders favored the exercise of the veto power as a part of a desirable strong executive. Their opponents, on the other hand, conscious of the unpopularity of the governor's veto power in the colonial era and aware of the weak veto given most state governors, believed that the power should be used very sparingly.

Washington first used the veto in 1791, when he refused his assent to a bill apportioning representation in the House in such a manner that some states would have more than the one representative for every 30,000 inhabitants permissible under the Constitution. The President sympathized with Jefferson's argument that he ought not to refuse his assent to any bill unless he was certain that it was unauthorized by the Constitution. However, in his opinion the bill under consideration was unquestionably unconstitutional, and he finally vetoed it on that ground. While use of the veto in this case aroused little opposition, the veto power was to be used very rarely for a long time. Neither Adams nor Jefferson vetoed a single law, and not until Jackson's time was the veto used to defeat any measure which the President considered objectionable for reasons of policy.

During Washington's first administration, department heads took an active part in advising Congress upon legislative policy, even to the extent of drafting legislation. Hamilton in particular considered himself to be a kind of prime minister, a co-ordinator between Congress and the President. Washington, other department heads, and

many members of Congress were at first inclined to accept him as such. The House refused to allow Hamilton to appear before it in person; but by means of written reports, the domination of party caucuses, and the control of congressional committee personnel, the Secretary of the Treasury became for a time the most important person in the government in the determination of legislative policy.

This trend toward executive leadership in Congress was sharply checked during Washington's second term and the Adams administration. The change was due not to an altered conception of the presidency by either incumbent, but to a less favorable response to such leadership from Congress. With the rapid growth and crystallization of the Republican opposition in Congress,[2] Hamilton and his colleagues were faced by 1793 with a hostile majority in the House. Not only did Hamilton's hopes for a premiership disappear but also he was subjected to various attacks in both houses charging him with intruding upon congressional authority and with certain violations of law.

For several years thereafter, Congress struggled along without any definite or effective leadership. Eventually both houses were to develop standing committees as a means of providing responsible internal leadership, but the early Republicans moved in that direction with hesitation and even with trepidation.

DEVELOPMENT OF THE CABINET

The Constitutional Convention had made no specific provision for an advisory council for the President. The Virginia Plan had provided for a Council of Revision, but this had been proposed primarily as a veto agency and not as a real advisory council, and it had been abandoned without much consideration.

To some extent the finished Constitution implied that the Senate was to be a kind of advisory council to the President. It was given two specific advisory functions—treaty making and the appointment of diplomatic, judicial, and administrative officers. The Senate's small size—before 1796 it had not more than thirty members—and the fact that since colonial times the upper house in certain states had constituted an executive council strengthened the concept of the Senate as a presidential advisory body.

[2] For a discussion of the development of the Republican or Jeffersonian Party, see Chapter 8.

Influenced by this idea, Washington at first assumed that the Senate's advice and consent in treaty making would be obtained by personal consultation between the President and the Senate. In August 1789 he appeared in person with the Secretary of War before the Senate to discuss the terms of a treaty to be negotiated with certain Indian tribes. Washington had the important papers read to the Senators and then asked their advice upon several points in the negotiations and in the treaties. The Senators were embarrassingly hesitant about responding and finally asked that the papers be assigned to a Senate committee for study before they gave their advice and consent. Washington, obviously irritated at this unexpected delay, exclaimed, "This defeats every purpose of my coming here." Though he returned later to conclude the discussion, the inconvenience involved and the lack of responsiveness on the part of the senators discouraged him from repeating the procedure.

Thereafter, both in treaty making and in appointments, the President carried forward negotiations without formally seeking the Senate's advice. Individual senators were often consulted, and very occasionally the Senate was asked for instructions during negotiations. As a rule, however, the President merely submitted finished treaties to the Senate for their acceptance or rejection, and appointments were handled in the same fashion.

The development of a cabinet composed of department heads was both a cause and a result of the failure of the Senate to function effectively as an advisory body. While the cabinet was unknown as of 1789, Washington very early took advantage of the constitutional provision authorizing the President to request written opinions from department heads. Such formal opinions, however, did not satisfy the President's need to discuss problems fully and freely with a small body of trusted advisers.

In 1791 Washington, being personally absent from the capital, suggested that the department heads and the Vice-President should consult together upon any important problems arising during his absence. The resultant conference was in a sense the first cabinet meeting. The following year other consultations were held, and by 1793 regular meetings had become the rule and the term "cabinet" had come into fairly common usage.

The cabinet shortly came to be made up exclusively of men who were personally loyal to the President and in essential agreement

with him and with one another upon administration policies. Washington's attempt to draw advice from men of conflicting political philosophy, as he was obliged to do when Jefferson and Hamilton both headed departments, soon proved unsatisfactory, and he became accustomed to accepting Hamilton's opinion in most matters. Jefferson's retirement in 1793 followed as a consequence. This trend was conclusively emphasized in 1795, when Secretary of State Edmund Randolph was forced to resign because of his failure to support Washington's foreign policy. The President's power to remove principal policy-making subordinates, first confirmed by Congress in 1789, was eventually to become an additional important factor in establishing cabinet unity.

The administration of John Adams, who entered the presidency on March 4, 1797, experienced a partial and temporary disintegration of executive unity, largely because Adams retained Washington's cabinet, several members of which were loyal to Hamilton, now a factional rival of the new President. But when Jefferson became President, he formed a cabinet of men who willingly accepted his leadership and strove to carry out his program. Only on rare occasions thereafter were cabinet officers to be much more than the President's subordinates and agents.

The cabinet thus became a reasonably coherent consultative body where the major policies of the administration were discussed and formulated. Because of the extraconstitutional nature of the cabinet the President was not under legal obligation to abide by the vote or decision of his advisers, but as a matter of policy most Presidents have been inclined to do so except in extraordinary cases.

FOREIGN POLICY AND EXECUTIVE PREROGATIVE

The idea of the President as a powerful independent executive capable of initiating policy and controlling events on his own responsibility was strongly reinforced by the exercise of executive policy in foreign affairs during Washington's administration.

At the outbreak of war between France and Britain in 1793, France sent a new minister to the United States, one Edmund Genêt, to obtain this country's co-operation with the French war effort. Genêt came as emissary from the new French Republic, the monarchy having been overturned in 1792 by revolution. His recep-

tion by the United States would under international law constitute formal recognition of the new French government, and the question therefore arose as to whether under the Constitution the President was authorized to take this step. The cabinet nonetheless agreed that Washington should receive Genêt, an action which set a precedent for the absorption by the executive of the right to extend recognition to a foreign government.

Though the United States had signed a treaty of alliance with monarchist France in 1778, Washington's cabinet was unanimously of the opinion that the nation ought to remain neutral in the current war. It was accordingly agreed that Washington should issue a proclamation of neutrality, a step shortly taken.

The administration's opponents immediately charged that Washington's proclamation of neutrality had infringed upon the province of Congress, to which the Constitution had assigned the authority to declare war. Hamilton replied by publishing in the press, under the pseudonym of "Pacificus," an elaborate statement of his theory of the strong executive. "If, on the one hand," he concluded, "the Legislature have a right to declare war, it is on the other, the duty of the executive to preserve peace till the declaration is made."

Hamilton then advanced the startling contention that the President possessed an inherent body of executive prerogative, above and beyond those rights and duties specifically mentioned in the Constitution. "The general doctrine of our Constitution, then, is," he asserted, "that the *executive power* of the nation is vested in the President; subject only to the *exceptions* and *qualifications* which are expressed in the instrument." To put it differently, the clause in the Constitution vesting executive authority in the President was itself a general grant of executive power, and the subsequent enumeration of functions was not in any sense all-inclusive. Part of the inherent executive prerogative, Hamilton added, was the general authority to conduct foreign relations and to interpret treaties in their non-judicial aspects.

This broad claim of inherent executive prerogative caused Jefferson and Madison to believe with some reason that Hamilton was contriving to attach to the President powers approximating the royal prerogatives of the British Crown. To Jefferson and his colleagues the executive authority was limited by the specific grants of

the Constitution and of laws, and in domestic affairs this concept has since largely prevailed.[3] The Hamiltonian doctrine, however, strongly supported by the hard fact that the executive department is always available and has superior sources of information regarding foreign affairs, has succeeded in giving the President very broad powers in the conduct of foreign relations. This development was to become especially significant in the twentieth century.

The phase of the foreign policy of the Washington administration that aroused the bitterest opposition was the treaty drawn up by John Jay with Great Britain in 1794. It provided for the clarification of commercial relationships as well as for an amicable settlement of outstanding differences growing out of the misunderstanding and nonfulfillment of the Treaty of Peace of 1783. Since Britain now occupied an advantageous diplomatic position, most of the terms of the Jay Treaty were more favorable to her than to the United States. The treaty was therefore unpopular in many parts of the country, but the Federalist-dominated Senate in 1795 agreed to all of it except one clause.

Certain provisions in the treaty required appropriations of money before they could be put into effect. This necessitated action by the House of Representatives, where the opponents of the treaty were especially strong. By a considerable majority the House requested the President to furnish that body with a copy of the instructions to Jay and of other documents relative to the treaty. In taking this bold step the House was following the leadership of Albert Gallatin. He insisted that the House had a constitutional right to ask for the papers because its co-operation and sanction were necessary to carry the treaty into full effect and make it an integral part of the law of the land.

Washington, with the approval of his cabinet, refused to comply with this request, on the ground that the papers demanded had no relation to the functions of the House. He also reminded the representatives that the Constitutional Convention had very deliberately assigned the power of making treaties to the President and the Senate, and he insisted that "the boundaries fixed by the Constitution between the different departments should be preserved."

[3] In 1861 President Lincoln was to assume that the President possessed very broad executive powers to deal with the emergency of an extensive rebellion against national authority. For a discussion of this and related issues see Chapter 16.

The House then disclaimed any part in the treaty-making power but insisted upon its rights to originate all appropriations, even those for treaties, and therefore upon its inherent right to deliberate upon the expediency of carrying the treaty into effect. Washington held to his position and finally, by a very narrow margin, the House acquiesced and voted the necessary appropriation.

The controversy illustrated well the potentialities for conflict arising out of the difference between the procedure required for enacting a statute and that for making a treaty. The House technically cannot make a treaty nor control foreign policy, yet by withholding an appropriation necessary to execute a treaty it might in effect well do so. However, on most occasions after 1795, the House has responded almost automatically to the request that it vote funds for the execution of treaties, and it has never defeated a treaty by refusing to appropriate, though it very nearly did so upon occasion of the Alaskan purchase in 1867.

FEDERALIST JUDICIAL INTERPRETATON

Nowhere was Federalist control upon the developing constitutional system more pronounced than in the realm of judicial interpretation. Then, as now, opinions and decisions depended to a large degree upon the social and political philosophy of the presiding judges. To practically all federal judicial posts Washington appointed conservatives and supporters of strong central government. Hence a majority of the federal opinions written between 1789 and 1801 reflected Federalist political ideas and a conservative nationalist point of view.

The federal judiciary was relatively slow in acquiring a position of prestige and importance. During the first three years of its existence the Supreme Court had no cases to decide. Most legal matters were handled through the state courts, and many people were jealous of the potential power of the new federal judicial system. Only gradually did the Supreme Court's work grow in volume and importance.

It was the federal circuit courts, where Supreme Court justices also presided, that first brought federal judicial authority home to the people. Through the charges to grand juries by judges of these courts, the public was informed regarding the basic principles of the new government and the provisions of important federal stat-

utes. Under such circumstances the federal courts began the delicate and endless process of refining the details of the American constitutional system, for which the Constitution had provided the broad outline.

Federal justices almost at once adopted a policy of restricting their decisions and opinions to the adjudication of specific cases duly brought before the courts. Thus in 1792, in the so-called Hayburn's Case, certain circuit court justices unofficially challenged the constitutionality of a recent act of Congress which provided that the circuit courts should pass upon certain claims of disabled veterans of the Revolutionary War. "Neither the Legislative nor the Executive branches," said the judges, "can constitutionally assign to the judicial any duties but such as are properly judicial and to be performed in a judicial manner."

The following year President Washington, desiring legal advice on the questions of neutrality, had his Secretary of State address a letter to Chief Justice John Jay asking the justices of the Supreme Court whether the Chief Executive might seek their advice on questions of law. The judges were also presented with a list of specific questions on international law and neutrality. After due consideration the judges declined to give their opinion on the questions of law on the grounds that the constitutional separation of the three departments prevented them from deciding extra-judicial questions. This procedure became the permanent policy of the Supreme Court and tended to entrench that body as a tribunal of last resort whose decisions and opinions were beyond the authority of any other branch of the government.

The function of the federal judiciary that was of the greatest public concern during its first decade, and by and large until 1861, was its determination of the compatibility of state constitutions, statutes, and court decisions with "the supreme Law of the Land." This function was of the utmost importance in the operation of the federal system of government, for it not only tended to establish the Court as the final interpreter of the Constitution, but it also emphasized the supremacy of the national government. It will be remembered that the guardianship of the distribution of powers between the states and the central government was not explicitly assigned by the Constitution to the federal courts, but that the Judiciary Act of 1789 had taken a long step in that direction by providing

for appeals from state to federal courts on constitutional questions.

In May 1791 the United States Circuit Court for Connecticut took the lead in asserting federal judicial authority over state law when it held an act of that state unconstitutional as an infringement of the treaty of peace with Great Britain. The following year the Circuit Court for Rhode Island, in *Champion v. Casey*, declared void a state law giving a debtor citizen an extension of three years in which to pay his debts. "The Legislature of a State," the court said, "have no right to make a law . . . impairing the obligation of contracts, and therefore contrary to the Constitution of the United States." It will be remembered that many laws similar to this one had been enacted by various states during the period of the Articles of Confederation, and that the creditor element had been influenced by the resulting apprehension to strive for a stronger central government to check such "radicalism." However, the return of prosperity and the popular acceptance of the new federal government obviated any widespread opposition to this decision. In subsequent years various laws of other states were invalidated by the federal circuit courts without any serious challenge by states' rights advocates to the exercise of such power.

Considerable popular dissatisfaction, however, was aroused by the Supreme Court in 1796 in the case of *Ware v. Hylton*, which declared invalid a Virginia statute of 1777 sequestering pre-Revolutionary debts of British creditors. The treaty of peace had provided that no impediment was to be placed on the recovery by British subjects of debts due to them from Americans. Under the Articles of Confederation this provision had been of little practical value to British creditors. The Court now held that the treaty nullified the earlier law of Virginia, destroyed the payment made under it, revived the debt, and gave a right of recovery against the debtor, notwithstanding the payment made under the authority of the state law. Such a sweeping and retroactive interpretation of the supremacy of treaties over state law on the sensitive issue of Revolutionary debts naturally led to Republican criticism of the judges as pro-British Federalists.

Even more serious opposition to federal judicial authority was excited by the decision in *Chisholm v. Georgia* (1793), a case involving the right of the federal judiciary to summon a state as defendant and to adjudicate its rights and liabilities. The Constitu-

tion expressly gave the federal courts jurisdiction over "controversies between a state and citizens of another state." In the campaign for the ratification of the Constitution in the various states prominent Federalists had assured their apprehensive opponents that this provision would not encompass suits against states without their consent. Almost from the establishment of the federal judiciary, however, suits were instituted against states by citizens of other states. In *Chisholm v. Georgia*, two citizens of South Carolina, executors of a British creditor, brought suit in the Supreme Court against the state of Georgia for recovery of confiscated property. The state refused to appear and presented a written protest denying the jurisdiction of the Court. Meanwhile the Georgia legislature considered a resolution declaring that the exercise of such authority by the federal judiciary "would effectually destroy the retained sovereignty of the States."

The Supreme Court rendered its decision in favor of Chisholm, and the individual justices presented elaborate opinions explaining the nature of the federal union and the extent of federal judicial authority. The majority of justices, especially John Jay and James Wilson, discussed at length the nature of sovereignty and maintained that under the Constitution sovereignty was vested in the people of the United States for "purposes of Union" and in the people of the several states for "more domestic concerns." In ordaining and establishing the Constitution the people acted "as sovereigns of the whole country." They established, said Chief Justice Jay, "a constitution by which it was their will, that the state governments should be bound, and to which the state constitutions should be made to conform." Consequently the state of Georgia, "by being a party to the national compact," in order "to establish justice," consented to be suable by individual citizens of another state. In dissenting from the decision Justice James Iredell, while admitting that sovereignty under the Constitution was divided between the United States and the individual states, denied that the English common law, under which a sovereignty could not be sued without its consent, had been superseded either by constitutional provision or by statute law in this case.

In this case, however, the Supreme Court did not have the final word. The old Antifederalist hostility to a nationalistic or consolidated government flared up, especially in those states where suits

similar to Chisholm's were pending or were instituted against the state. Georgia refused to permit the Chisholm verdict to be executed. The day following the decision there was initiated congressional action, which a year later resulted in the submission of the Eleventh Amendment to the states for ratification. It provided: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Because of indifference or Federalist opposition the amendment was not ratified by the requisite number of states until January 1798. Thus for the only time in its history the federal judiciary had its jurisdiction directly curtailed by constitutional amendment.

The Federalist-minded national judiciary soon took steps toward asserting its authority to declare null and void any act of Congress found to be incompatible with the Constitution. In Hayburn's Case, previously referred to, several circuit judges successfully challenged the authority of Congress to assign them duties as pension commissioners, although the opinions handed down in this case were not of a strictly judicial character.

In *Hylton v. United States* (1796) the question of the constitutionality of an act of Congress, a measure levying a tax on carriages, came squarely before the Supreme Court. The specific issue was whether the levy in question was a direct tax or an excise. If the former, it would conflict with the constitutional provision requiring all direct taxes to be apportioned among the states according to population. The Court held that only land taxes and capitations or head taxes were direct taxes, and that the carriage tax was an indirect tax and therefore constitutional. The opinion openly assumed that the Court had the right to declare an act of Congress void, should the justices find that the law conflicted with the Constitution. By 1800, nearly all federal justices, as well as a majority of the legal profession, had accepted the principle that the Supreme Court could declare acts of Congress unconstitutional and therefore invalid.

THE DOCTRINE OF VESTED RIGHTS

Meanwhile some of the federal judges were attempting to incorporate the English common law and a doctrine of vested rights into American constitutional law. In May 1791 the Circuit Court for

Connecticut, relying on principles of common law, invalidated a Connecticut statute which sought to restrict the recovery of interest that had accrued to British creditors during the period of the Revolution. In the early national period, certain Federalist-appointed justices asserted the jurisdiction of the federal courts in cases involving criminal jurisdiction based on the common law in the absence of any federal penal statute. Such a judicial policy was viewed by many men of Antifederalist leanings as a dangerous and unwarranted extension of the authority of the central government, especially since most of those prosecuted under the common law were political opponents of the Washington and Adams administrations. Eventually, however, the Supreme Court was to hold, in *United States v. Hudson* (1812), that there was no criminal common law of the United States, nor any civil common law enabling individuals to bring actions in the absence of statutory provisions.

The doctrine of vested rights was a direct outgrowth of the natural rights philosophy of the Revolutionary period, which held that certain rights were so fundamental to an individual as to be beyond governmental control. Constitutional government existed for the protection of these natural rights, which were derived from the very nature of justice. Some of these rights were specified in the bills of rights to state constitutions, but these lists were not to be considered exclusive. Among the most important of these rights was the individual's right to be secure in his possession of private property. Therefore the legislature of a state did not have an unlimited right to interfere in an arbitrary manner with private property. According to the Federalist doctrine of vested rights, it was the duty of the courts to declare invalid statutes considered violative of existing property rights, not necessarily by virtue of any specific provision in the federal or state constitution but rather on the grounds that such statutes violated the fundamental nature of all constitutional government. The Federalist espousal of this principle of abstract justice implied the vesting of final governmental authority over certain important matters in the federal judiciary rather than in the state legislatures as the representatives of the people.

In 1795, Justice William Paterson in the Circuit Court for Pennsylvania stated this doctrine of vested rights in guarded terms in the case of *Vanhorne's Lessee v. Dorrance*. The decision turned upon the invalidity of an act of the Pennsylvania legislature which

attempted to vest the ownership of some disputed land in one party after the land had been originally granted to another party. Paterson asserted that "the right of acquiring and possessing property and having it protected, is one of the natural inherent and unalienable rights of man. . . . The legislature, therefore, had no authority to make an act divesting one citizen of his freehold, and vesting it in another, without a just compensation. It is inconsistent with the principles of reason, justice, and moral rectitude; it is incompatible with the comfort, peace, and happiness of mankind; it is contrary to the principles of social alliance in every free government." Paterson also declared the Pennsylvania act unconstitutional because it impaired the obligation of a contract and thus was prohibited by Article I, Section 10, of the Constitution.

This doctrine of vested rights was refined and restricted somewhat by the Supreme Court in *Calder v. Bull* (1798). The decision in this case hinged upon whether the provision in Article I, Section 10, of the federal Constitution forbidding states to enact ex post facto laws encompassed a prohibition upon state laws which interfered with the decisions of the state courts affecting property and contractual rights. The justices hesitated to interfere with a legislative practice which had been employed extensively in certain states and decided that "ex post facto laws extend to criminal, and not to civil cases." As Justice Iredell expressed it, "Some of the most necessary and important acts of legislation are . . . founded upon the principle, that private rights must yield to public exigencies."

In another opinion Justice Samuel Chase nonetheless found occasion to pay homage to the doctrine of vested rights. "There are certain vital principles in our free Republican governments," he said, "which will determine and overrule an apparent and flagrant abuse of legislative powers; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority."

To carry this doctrine of vested rights to its logical conclusion would have meant the investment in the federal judiciary of a comprehensive and indefinite veto power over state legislation without specific provision in the Constitution. Such a move was bound to

arouse strenuous opposition from those who believed in popular sovereignty and states' rights. That such a development did not occur was due in large measure to the fact that the clause of the Constitution prohibiting states from impairing the obligation of contracts was soon to be substantially broadened to provide protection of private property from interference by the states. As was indicated in connection with *Vanhorne's Lessee v. Dorrance*, the foundation for the expansion of the scope of the contract clause was being laid during the Federalist period, but its important development was not to begin until John Marshall's first contract decision in 1810.[4] Then during the late nineteenth century the doctrine of vested rights was to be revived, tied to due process of law, and used to defend corporate property rights.

THE ALIEN AND SEDITION ACTS

Fairly conclusive proof that the Federalist judges were influenced in their decisions by their social and political philosophy appeared in their interpretation and application of the Alien and Sedition Acts. These laws were enacted by the Federalist-controlled Congress in 1798, when there was serious threat of a war with France. The Alien Act authorized the President to order the deportation of an alien whom he deemed dangerous to the peace and safety of the United States. The Alien Enemies Act empowered the President in case of war to deport aliens of an enemy country or to subject them to important restraints if they were permitted to remain in this country. The Sedition Act not only made it a high misdemeanor for any person to conspire to oppose any measure or to impede the operation of any law of the United States but also made it illegal for any person to write, print, or publish "any false, scandalous and malicious writing . . . against the government of the United States, or either house of the Congress . . . , or the President . . . , with intent to defame . . . , or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States. . . ."

The first two laws were obviously aimed at French or pro-French aliens in the United States, who with practical unanimity favored the Republican Party, while the Sedition Act was designed to si-

[4] See pp. 276–277.

lence Republican criticism and opposition to the personnel and policies of the Federalist Congress and administration. It is difficult for the modern student to appreciate the intense apprehension and hostility among conservative people aroused by the doctrines and events of the French Revolution and by the sympathy of the American Republicans for the French Revolutionary cause. The Alien and Sedition Acts were Federalist attempts to protect the United States from the "evils" of French and American radicalism.

Jefferson's followers attacked the laws not only as very bad public policy but also as an unconstitutional exercise of congressional power. The laws affecting aliens were deemed to deprive persons of liberty without due process of law in violation of the Fifth Amendment, on the ground that they imposed penalties without judicial process upon persons not convicted of any offense. In view of subsequent statutes for the deportation of aliens and for limiting the civil rights of enemy aliens in wartime, this claim would not be held valid today, although it was plausible enough at the time.

The Sedition Law was attacked as a flagrant violation of the First Amendment by which Congress was forbidden to abridge the freedom of speech or of the press. The law's enemies contended that Congress was given no specific power to enact any sedition law, and that so dangerous a right could not reasonably be implied from any grant mentioned. They argued also that there was no federal criminal common law, and that the federal courts had jurisdiction over only those crimes specifically mentioned in the Constitution. Moreover, as Jefferson pointed out, the law designated as seditious, acts which could have no immediate relationship to the security and welfare of the United States. There was some hope among Republicans that the Alien and Sedition Acts would be declared unconstitutional by the federal judiciary, but that hope was ill-founded and short-lived.

Partly because President Adams was not enthusiastic about the Alien Acts, no aliens were actually deported. However, a number of citizens were arrested and indicted under the Sedition law, and several of them, all Republicans and most of them editors and printers, were convicted and punished. The courts interpreted and applied the law with extreme partisanship. The selection of juries was generally in the hands of Federalist officials, and the courts not

only refused to allow the constitutionality of the law to be challenged, but also deprived the accused of the protection of the provision in the law which permitted the truth of the alleged libel to be offered as a valid defense. In their charges to the juries, moreover, the judges repeatedly expounded Federalist political principles and made conviction almost inevitable. Most of those convicted had actually engaged in partisan criticism much less violent than that commonly accepted as a normal phase of political activity in later nineteenth- and twentieth-century campaigns.

The enforcement of the Sedition Act under Justice Samuel Chase, who proceeded in such a partisan manner and spoke so vehemently against Republican criticism that some of his trials became utter travesties upon justice, greatly increased the indignation and controversy aroused by the measure. In the case of James Callender, a Virginia Republican who wrote a pamphlet criticizing the Federalist administration, Chase boasted before the trial opened that he was going to teach the Virginians the difference between the liberty and the licentiousness of the press. In the trial he virtually brought about conviction by refusing to permit the counsel for the defendant either to substantiate the statements for which the defendant was being tried or to challenge the constitutionality of the Sedition Act.

In the light of modern constitutional law, it has become clear that the federal government has the constitutional power to enact a sedition law. Although no such grant is mentioned in the Constitution, the power may reasonably be inferred from the "necessary and proper" clause, as it is evident that attacks on the government may actually interfere with the performance of federal functions or the conduct of duty by federal officers. The guarantee of freedom of speech, of the press, and of assembly in the First Amendment does not protect actual overt attempts to overthrow the government or to destroy its officers, even though such attempts may not technically be treason. Jefferson's argument that there is no federal criminal common law has since been sustained; yet there is a federal criminal statutory law which is not limited to the crimes mentioned in the Constitution. The federal government may punish offenses in connection with its enumerated powers—counterfeiting, for example. Finally, it is now recognized that in wartime the First Amendment must be balanced against the federal war

power; hence attempts to interfere with the conduct of a war cannot be protected by the Bill of Rights.

The act of 1798 was nonetheless probably unconstitutional, even if adjudged by modern standards. In the first place, it punished mere political criticism of governmental officials, rather than attempts to interfere with the performance of federal functions or officers' duties. While the law required an actual intent to do injury, this requirement broke down completely in practice, and any severe political criticism, however remote its bad effects might be, was treated as seditious. The purpose of the First Amendment, protection of political discussion, was thereby defeated.

The Federalists responsible for the passage of the law had assumed that the English common law of sedition was still valid in the United States. They also thought that free speech should mean no more than it did under the somewhat narrow definition advanced by Blackstone, who had argued that the principle of free speech merely prohibited prior interference with the right to utter or publish but did not interfere with prosecution after publication. These Federalist views proved to be untenable; Madison's assertion that the First Amendment had swept away the entire English common law of sedition must now be regarded as correct, and Blackstone's limited conception of free speech has been largely discarded in this country.

Subsequent sedition acts, notably that of 1917, have not banned political criticism of government officials, even in wartime, but have merely prohibited overt interference with the conduct of the war—for example, deliberately inciting evasion of the draft or disobedience in the armed forces. Political criticism may achieve this purpose, but in general it is necessary to show both intent and a clear and immediate relationship between criticism and damage to the war effort to establish an offense as punishable.[5]

THE FEDERALIST FALL FROM POWER

In the election of 1800, the Federalists lost control of the presidency and both houses of Congress to the Jeffersonian Republicans. In an effort to retain control of at least one branch of the national government, the expiring Federalist-dominated Congress enacted the Judiciary Act of February 13, 1801. In addition to creating new

[5] For a discussion of later sedition and disloyalty see pp. 437–448 and 664–670.

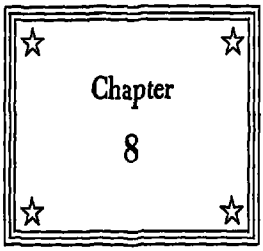
district courts, the law provided for six circuit courts, requiring sixteen new and separate circuit judges, together with marshals and clerks. The partisan character of the law was made evident by the provision reducing the number of Supreme Court justices from six to five, a deliberate attempt to deprive the incoming President of the opportunity to make an appointment to the Court. One plausible justification for the law was the objection that had been repeatedly raised to the provision in the Judiciary Act of 1789 requiring Supreme Court justices to serve as judges of the circuit courts, on the ground that the primitive transportation facilities of the day made circuit-riding arduous, especially to men of advanced age. The new act remedied this situation.

In the closing days and hours of his term, President Adams appointed good Federalists to all the offices created under the Act, and he also commissioned forty-two more men as justices of the peace for the new and sparsely settled District of Columbia. Republicans naturally denounced both the act and the appointments as a grave abuse of power and an attempt to defeat the popular will. "They have retired into the judiciary as a stronghold," wrote Jefferson, ". . . and from that battery all the works of Republicanism are to be beaten down and destroyed." The Judiciary Act of 1801 was repealed the following year and thus proved to be of little permanent value for the cause of conservative nationalism as embodied in the Federalist Party.

The Federalist cause, however, did receive a powerful lease on life through Adams' appointment in 1801 of John Marshall to the chief-justiceship of the United States Supreme Court. Though a staunch advocate, since the days of the Confederation, of the Federalist political and constitutional philosophy and closely associated with Federalist leaders both politically and economically, Marshall had revealed greater moderation of views and independence of character than many fellow-Federalists. He had publicly criticized the Alien and Sedition Acts, and later, as a member of Congress, had voted with the Republicans for the repeal of the latter statute. He had served on the famous X Y Z mission to France and in 1800 was made Secretary of State. In 1798 he had declined an appointment as associate justice of the Supreme Court, and he now received the nomination to the chief-justiceship only after John Jay had declined a reappointment. Marshall's background plus the un-

developed prestige of the Supreme Court caused his appointment to receive less public attention and less Republican criticism than it would otherwise have encountered. The real impress of John Marshall and his legal nationalism upon American constitutional law was yet to be made.

The Federalist defeat at the polls in 1800 had been by a relatively small margin, but the party was never again to secure control of either the legislative or the executive branch of the federal government, and within twenty years it was dead. The party of Hamilton, Washington, and their cohorts had represented the superior classes and had made valuable contributions to American constitutionalism by providing an effective organization for the new government and by guiding it through the early experimental stages. The first third of the nineteenth century, however, was to witness an increasingly successful demand for popular participation in government, and any party which proclaimed the incompetence of the masses was bound to go down before the rising tide of democracy. In the future, conservative groups and vested interests were to use political organization as a means to influence and control governmental policies, but they would pretend to be concerned primarily with the welfare of the people as a whole and would not openly espouse aristocratic political principles. Under these circumstances the federal judiciary under the able leadership of Marshall was to become a conservative and nationalistic bulwark against the dominant political forces of democracy and states' rights.



The Rise of Jeffersonianism

JEFFERSON frequently spoke of the popular defeat of the Federalists as the "Revolution of 1800." In reality, however, the overthrow of Hamiltonian constitutional and political principles by Jeffersonian democracy was an evolutionary and protracted development.

Few political leaders have ever reflected the genius of their country or inspired their fellow citizens of their own and succeeding generations as effectively as did the author of the Declaration of Independence. Throughout a long and illustrious public career Jefferson's social and political philosophy remained relatively constant in basic principles but quite flexible in means and solutions. A statesman as well as a political theorist, he fully realized the validity of the pragmatic test and often made the compromises and modifications necessary to the performance of public duty. He was, moreover, the leader of a great political movement and of a party which represented varied and even diverse interests, ideas, and programs. Jeffersonian Democracy encompassed a few fundamental political and constitutional principles which received shifting emphasis depending upon time, locale, and circumstances.

THE ORIGINS OF JEFFERSONIAN DEMOCRACY

The roots of the Jeffersonian movement ran far back through the opposition to the adoption of the Constitution, the populism of the Confederation, and the radicalism of the Revolution, to the elements of agrarian and individualistic democracy that had struggled for survival in colonial America.

Organized opposition to the Constitution had largely disappeared after its adoption. The favorable launching of the new federal government, the return of economic prosperity, and the adoption of the first ten amendments had eliminated all thought of returning to the constitutional system of the Confederation. As memories of the ratification struggles dimmed, the Constitution of the United States attained a practically universal acceptance and approval.

Almost simultaneously, however, disputes as to the meaning of certain portions of the Constitution and as to the nature of the "more perfect Union" began to arise. Economic interests and social groups tended to form political organizations and sectional blocs which in turn developed constitutional doctrines and explanations to uphold their position on important public issues. For much of the period from 1789 to 1861 there persisted a basic clash between the political leaders who upheld the Hamilton-Marshall-Federalist conception of a strong, active, nationalistic government, and those who insisted with Jefferson that the Constitution provided for a federal government of limited delegated authority with the residue of powers reserved to the states and to the people.

The student will miss much of the significance of American constitutional development, however, if he assumes that the struggle from the Philadelphia Convention to the battlefield of Appomattox was a simple and ever-present contest between capitalistic nationalists and agrarian champions of states' rights. At one time or another every economic interest, every geographical section, and almost every state, expounded a theory of states' rights to justify its opposition to the prevailing policies of the federal government. Likewise every interest, section, and state supported some federal measures of a strongly nationalistic character, and practically every state eventually went on record in condemnation of what it considered an excessive states' rights position of a sister state. Much depended upon the particular issue involved and upon which political,

economic, or sectional group was in control of the federal government.

Although the fears of a consolidated government were stirred again by the passage of the Judiciary Act of 1789, comparatively little popular opposition to the policies of Hamilton and the Federalists developed until 1790, when the issues of the federal assumption of state debts, the creation of a national bank, and the enactment of a protective tariff were raised. To many of the small farmers and southern planters such legislation seemed to be using the federal government to provide special favors for the mercantile and capitalistic interests at the expense of agrarian taxpayers. Many rural citizens opposed any governmental action that was favorable to speculators and stock-jobbers, while some of the more informed advanced a definite agrarian social and political philosophy.

One of the most intelligent and vocal agrarian philosophers was John Taylor of Caroline County, Virginia. In several pamphlets he expressed the belief that the liberty and happiness of the individual could be maintained only in a free society of tillers of the soil. He accepted the physiocratic doctrine that agriculture was the only really productive enterprise and maintained that the mercantile and financial interests actually prospered at the expense of the great mass of people who were agriculturists. Perceiving the close tie between politics and economics, Taylor denounced the Federalist laws as steps in a selfish scheme to subvert the Constitution by the creation of a consolidated nationalistic government. He held that the Declaration of Independence made each state a separate sovereignty and that each remained sovereign under the Constitution. These states he proclaimed to be the most inspiring examples of free republican government in the world. The state governments were considered the farmers' most "intimate associates and allies," while the federal government was criticized as "the associate and ally of patronage, funding, armies, and of many other interests" subsisting upon agriculture.

Although Jefferson was not as extreme in his agrarianism as his friend Taylor, he regarded a free yeomanry as the producers of real wealth, the guardians of liberty, and the backbone of every nation. Since the overwhelming majority of people were farmers and villagers, Jefferson felt that their welfare and happiness should be the primary concern of government. He distrusted the capitalistic

minority and opposed a constitutional development that would allow this or any other minority to control the policies of government.

Jefferson considered that the simple economic life of the time necessitated little regulation, and that the welfare of the people could best be secured through the state and local units of government, which would naturally understand the needs of each community better than a more distant government. He realized the necessity of having a central government of sufficient strength and prestige to control commercial and diplomatic relations with foreign countries, but in the field of domestic affairs he strongly believed that federal authority should be confined strictly to those powers enumerated in the Constitution and that other matters should be left to the states and to individuals. He therefore viewed Hamilton's broad-constructionist program with increasing concern, and in December 1793 he resigned from Washington's cabinet, convinced that the President was definitely committed to the Federalist program. Jefferson would have nothing to do with the creation of the leviathan state. Increasingly after 1793 he became the leader and director of the opposition to the Federalist interpretation of the Constitution as well as to Federalist political and economic policies.

Individualistic frontiersmen, most of whom had been either hostile or indifferent to the adoption of the Constitution, were made active opponents of the Federalist interpretation of the Constitution by the excise tax on liquor and the untoward incident of its enforcement. The Jeffersonian leaders carefully cultivated frontier discontent by emphasizing that the obnoxious tax was imposed to pay the increased expenses necessitated by Federalist financial policies. The American frontier was to remain for a century or more one of the main outposts of the Jeffersonian concept of government; many a frontier orator was to offer as his toast: "Equal rights for all, special privileges for none."

After 1792 an ideological quarrel over the democratic significance of the French Revolution further widened the gulf between the Federalists and the Jeffersonians. Although the clash between aristocracy and democracy had occurred repeatedly in colonial America, the great upheaval which began in France in 1789 gave the conflict renewed bitterness and provided both conservatives and liberals with a more specific philosophic foundation than they had hitherto possessed.

Prior to the French Revolution the democratic movement in America was unformed and inarticulate in spite of some tendencies toward democracy that found expression during the days of 1776. After the break with Britain the vast majority of Americans were opposed to monarchy; yet no respectable conservative person would admit to being a "democrat," and even liberal leaders were sensitive about the use of the term. By 1790, property and religious restrictions on suffrage and on office-holding were gradually being relaxed in many states; yet universal white manhood suffrage was still considered in conservative circles as radical and dangerous.

This situation was rapidly changed by the impact of the French Revolution. Few Americans had regretted the overthrow of the despotic Bourbon monarchy, but when in 1792 the revolutionaries proceeded to set up a democratic republic and institute a reign of terror directed against nearly all the conservative groups in France, public opinion in America divided sharply. The Federalists strongly favored Britain and denounced Americans who sympathized with the French Republic as anarchists, mobocrats, and Jacobins. To conservative Americans the violence of the Reign of Terror was proof that the untutored and unpropertied masses were interested primarily in despoiling the propertied classes and were unfit for the responsibility of governing. Many Federalists looked to the aristocratic British government as the bulwark against atheistic Jacobinism and favored strengthening the conservative controls of American government. Jefferson's followers, on the other hand, heralded the establishment of a democratic French republic as the vindication of the right of the people to rule and as the dawn of a new era for the world. Many Republicans applauded the views of Thomas Paine, who visited both Britain and France and who proclaimed in his *Rights of Man* that sovereignty was inherent in the majority will. They boldly accepted the leveling implications of democracy and popular sovereignty, and throughout America they organized democratic clubs to disseminate their revitalized principles of government. The label "democrat" was enthusiastically accepted by many Republicans, and a definite philosophy of democracy was widely proclaimed for the first time, even in localities where a large degree of democracy had long been practiced. This new democratic enthusiasm tended to bind together all the anti-Federalist elements into an effective political movement designed to wrest control of the

federal government from the Federalists and thereby put an end to conservative Hamiltonian "perversion" of the Constitution.

By 1796 the Jeffersonian Republicans had a practically nation-wide party organization and were steadily growing in power. They lost the presidential election of 1796 to John Adams by only three electoral votes, and under the prevailing constitutional provision Jefferson, with the second highest number of electoral votes, became Vice-President. The Federalists succeeded in retaining control of Congress, but it was apparent that the Republicans might well win control of the national government at no very distant date should their position continue to improve.

THE VIRGINIA AND KENTUCKY RESOLUTIONS

As was mentioned earlier, in 1798 the crisis with France following the X Y Z affair inspired the Federalist-controlled Congress to enact the Alien and Sedition Acts in order to restrict the activities of aliens and citizens of pro-French and anti-Federalist sympathies. Republicans were greatly incensed by the laws, which they regarded as a flagrant and unconstitutional invasion of the rights of individuals and of the states. Many asserted that the obnoxious statutes were another long step in the scheme of the Federalists to consolidate all authority in the central government and then to establish a monarchy. John Taylor and other extreme Republicans talked of having Virginia and some of the other states secede from the Union and establish a separate confederacy. But Jefferson and his colleagues would not countenance such a move. They believed that if the American people were made fully aware of the unconstitutionality of the Alien and Sedition Acts and of the danger inherent in the Federalist constitutional interpretation, the people would effectively voice their disapproval through existing political channels.

The strategic problem was to find a way to bring effective pressure for the repeal of the odious laws. The Federalist judges refused to permit the constitutionality of the controversial laws to be challenged in court. Although the Republican press and public meetings repeatedly denounced the measures, Jefferson and his associates felt that mere partisan unofficial opposition was insufficient, and they accordingly sought some formal legalistic mode of disapproval. Their choice fell upon the state legislatures, which

at that period were bodies of considerably greater prestige and relative importance than now. This was not the first and certainly it was not to be the last time that state legislatures were to sit in judgment on the constitutionality of acts of Congress.

Jefferson, working in collaboration with his party lieutenants, had Madison draft a set of resolutions denouncing the laws, and John Taylor presently submitted Madison's work to the Virginia legislature. The Vice-President himself secretly drafted similar resolutions, which his friend John Breckinridge introduced into the Kentucky legislature. After slight but not insignificant modifications, the resolutions were adopted by the respective legislatures and sent to the legislatures of the other states, a step attracting wide public attention. The immediate objective of the Virginia and Kentucky Resolutions was to rally the various states in an effort to get rid of the obnoxious laws and to discredit the constitutional tenets upon which the whole Federalist program rested. However, the resolutions are of permanent significance because of the constitutional theories which they promulgated.

The Virginia legislature expressed "a warm attachment to the union of the states" and a firm resolve to support the government of the United States in all of its legitimate powers, but it declared that it viewed "the powers of the Federal Government as resulting from the compact to which the states are parties, as limited by the plain sense and intention of the instrument constituting that compact; as no further valid than they are authorized by the grants enumerated in that compact." The resolutions added that "in case of a deliberate, palpable, and dangerous exercise of other powers not granted by the said compact, the states, who are parties thereto, have the right and are in duty bound to interpose for arresting the progress of the evil, and for maintaining within their respective limits the authorities, rights, and liberties appertaining to them." After protesting most emphatically that the Alien and Sedition Acts were a violation of the Constitution and of the First Amendment, the legislature expressed confidence that the other states would join in declaring the acts unconstitutional and in taking "the necessary and proper measures" to maintain unimpaired "the authorities, rights, and liberties reserved to the states respectively, or to the people."

The Kentucky Resolutions also declared the Constitution of the United States to be a compact to which "each State acceded as a

State, and is an integral party, its co-States forming, as to itself, the other party." Therefore, they added, "the government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself; since that would make its discretion, and not the Constitution, the measure of its powers." Each state as a party to the compact, the Resolutions declared, "*has an equal right to judge for itself, as well of infractions as of the mode and measure of redress.*" Therefore the Alien and Sedition Laws exceeded the constitutional power of Congress and were therefore "not law," but "altogether void and of no force." The legislature warned that the states would not tamely submit to such extension of congressional authority beyond the constitutional limits, and it added ominously that "these and successive acts of the same character, unless arrested on the threshold, may tend to drive these States into revolution and blood."

Jefferson's original draft had declared that "where powers are assumed which have not been delegated, a nullification of the act is the right remedy," and had expressed hope that the "co-States . . . will concur in declaring these [Alien and Sedition] acts void and of no force, and will each take measures of its own for providing that neither of these acts . . . shall be exercised within their respective territories." For expediency or other reasons this section was replaced by an appeal to the other states and by instructions to Kentucky's congressional representatives "to use their best endeavors to procure, at the next session of Congress, a repeal of the . . . unconstitutional and obnoxious acts." [1]

There were three fundamental constitutional ideas involved in the Virginia and Kentucky Resolutions—first, a theory of the nature of the Union; second, a theory of the extent of federal powers; and third, an argument that the final power to interpret the Constitution was lodged with the states.

The precise meaning of the argument that the Constitution was a compact to which "each State acceded as a State" is not clear even today. Conceivably this was nothing more than a somewhat self-evident statement of political philosophy derived from the Revolu-

[1] In January 1800, the House of Representatives actually voted for the repeal of part of the Sedition Act, but the Federalist-dominated Senate refused to support the repeal. Early in 1801 the Republicans in Congress were able, after extensive debate, to block Federalist attempts to extend the Sedition Act beyond its expiration date of March 3, 1801.

tion—the compact theory of the state and the limited character of federal sovereignty. Jefferson's language, in particular, would seem to imply, however, that the actual ultimate locus of sovereignty still lay within the states. Calhoun was later to interpret the Resolutions as statements of extreme state sovereignty and as implicit assertions that the federal government was a mere agent of the several states. A more probable estimate of Madison's and Jefferson's opinions, however, is that both men accepted the Revolutionary conception of divided sovereignty—both state and national governments had some sovereignty. Precisely where the ultimate abstract locus of sovereignty lay did not greatly concern them—they were primarily interested in achieving a political objective, not in setting up a fruitless speculation on the ultimate nature of sovereignty.

Although the Resolutions' theory of union was equivocal, they were clear and specific in their defense of strict constructionism. Madison's assertion that the federal authority was limited by the "plain sense and implication" of the Constitution and by the powers enumerated therein was a flat denial of the whole Hamiltonian nationalist program.

On the question of who had the final power to pass upon constitutional questions involving the extent of state and federal authority the Resolutions were again somewhat equivocal. They denied categorically that the federal government had any exclusive right to judge of the extent of its own powers. By implication this constituted a denial of the whole system of constitutional controls erected in the Judiciary Act of 1789 and the presumed right of the Supreme Court to settle constitutional questions.

Just how the Resolutions did propose to settle constitutional issues is less certain. Each state might interpret the Constitution for itself, but how could it enforce that interpretation? The Virginia Resolutions asserted that the states were in duty bound to "interpose"; the Kentucky Resolutions, even with the word "nullification" deleted, still warned that the states would not "tamely submit" to unconstitutional extensions of federal authority. These were strong words; conceivably they implied the use of force. However, a suggestion of the resort to force was not so radical in the post-Revolutionary era as it now sounds—the right of revolution had only lately been on all patriot lips. Certainly Madison and Jefferson

set forth no elaborate mechanism for "interposition" such as Calhoun later offered; indeed they offered no specific suggestions at all for the peaceable settlement of constitutional questions. This fact has made it possible for subsequent constitutional theorists to read virtually any desired constitutional implication into the Resolutions —to support the interpreters' own theories. Both statesmen and constitutional historians have played this game.

The success of the Jefferson-Madison attempt to establish their concept of constitutional theory as well as of their efforts to put an end to the Alien and Sedition Acts depended upon the co-operation of the other states. In most of the other southern states political sentiment was fairly closely divided, and no official responses were made to the Resolutions. On the other hand, the legislatures of all the northern states, which were controlled by the Federalists, adopted resolutions endorsing both the constitutionality and the propriety of the Alien and Sedition Acts. In practically every case, however, the Republican minority in the legislature dissented from the Federalist position and in different degrees approved of the position taken by the legislatures of Kentucky and Virginia.

The replies of the Federalist-controlled northern state legislatures maintained that the federal courts and not the state legislatures were the "proper tribunals" to determine the constitutionality of acts of Congress. Only Vermont, however, directly challenged the assertion of the Kentucky and Virginia Resolutions that the Constitution was a compact between the separate states. "The people of the United States," declared the Vermont Federalists, "formed the federal constitution, and not the states, or their legislatures." The other legislatures apparently either accepted the compact theory (though not necessarily the immediate implications thereof), or considered the constitutionality of the Alien and Sedition Acts to be the vital question, or perhaps believed that an assertion of the authority of the federal judiciary to make the final decision was a denial of the particular compact theory involved.

The replies of the northern states and other public discussions induced Virginia and Kentucky to make rebuttals. In the former state a committee headed by Madison prepared a report reaffirming the principles of the original Resolutions. Madison also explained that the word "states" as used in 1798 meant "the people compos-

ing those political societies, in their highest sovereign capacity," a conception that Calhoun was to employ to advantage a generation later.

Kentucky was much more emphatic in its defense of the rights of the states. Irked by charges of their disloyalty to the Union, the Kentuckians in their second Resolutions (1799) unequivocally declared their attachment to the Union and to the Constitution. But they vigorously reasserted their conviction that if the general government was the exclusive judge of the extent of its delegated powers, as several states had contended, the result would be "despotism." The heart of the new Resolutions was the bold declaration: "That the several states who formed that instrument [the Constitution] being sovereign and independent, have the unquestionable right to judge of the infraction; and, *That a nullification of those sovereignties, of all unauthorized acts done under color of that instrument is the rightful remedy*."

Whether such a doctrine approximated the Calhoun doctrine of nullification, as the South Carolinian later claimed, has been debated for over a century.[2] The phrase "nullification of those sovereignties" indicates a decided similarity to Calhoun's concept. On the other hand the Kentucky Resolutions, after declaring that the Alien and Sedition Acts were "palpable violations of the . . . Constitution," concluded not with a recommendation for extreme action but merely with a "solemn PROTEST" in order to prevent "similar future violations of the federal compact." This moderation and the fact that Kentucky took no overt steps to prevent the enforcement of the obnoxious acts lead to a conclusion that the Resolutions were a declaration primarily of constitutional theory and not of a mode of action.

Behind all this controversy lay the fact that there was as yet no general agreement as to the nature of the Union. Everybody agreed that the powers of government were divided between the states and the central government. It was also evident that the Constitution had made no explicit provision for the settlement of disputes over power between the two units of government. Article VI, which provides for the supremacy of the Constitution and federal laws, might be balanced against the Tenth Amendment, which provides for the reservation of undelegated powers to the states, without pro-

[2] The nullification controversy is discussed at length in Chapter 12.

ducing a conclusive answer. The government established under the Constitution was essentially a compromise between a confederation and a national state. In limited and varying degrees the political leaders realized that in the long run such a compromise might prove unworkable and that the federal system might evolve either into modified confederation or into a strongly centralized national government. The Republicans were essentially right in claiming that if a branch of the federal government had the final power to judge of the extent of federal authority, the states would ultimately and inevitably be reduced to a subordinate position. On the other hand, the Federalists were correct in asserting that the recognition of the right of each state to act as final judge in case of vital disputes would lead to utter confusion and probably to "an interruption of the peace of the states by civil discord." No decision on this all-important issue was reached in 1799, and in one form or another the question was to crop up almost continuously through the years until it was finally settled on the battlefield.

CONSTITUTIONAL RECOGNITION OF POLITICAL PARTIES: THE TWELFTH AMENDMENT

Most of the framers of the Constitution regarded political parties as factious and undesirable. They had witnessed with some trepidation the manipulation of radical forces during the Revolution and the operation of populist parties in several of the states under the Confederation. Moreover, few Americans seemed to appreciate the significance of the development of party government in eighteenth-century England. The framers assumed that the operation of the federal government would be entrusted to nonpartisan representatives of the upper classes, and therefore made no provision in the Constitution for political parties.

In particular, the Convention's scheme for electing the President implied no recognition of political parties. It will be recalled that under the method finally decided upon, each elector cast two votes for two different men, without differentiating between the vote for President and the vote for Vice-President. The candidate having the highest number of votes then became President, and the man with the next highest number became Vice-President. It was expected that most presidential contests would be staged between rival sectional or state candidates, and that in most elections no

candidate would receive a majority of votes and final choice would therefore devolve upon the House of Representatives.

The rise of political parties was to make this mode of election impracticable. Under a party system, the men chosen President and Vice-President might well be, and in the election of 1796 were, members of two different political parties, an undesirable situation both for executive unity and for continuity of administration should the President die in office. More serious, should the party mechanism function with sufficient rigidity, each elector could very conceivably cast a ballot for each of his party's two candidates, and a tie would thereupon result between the man whom the winning party had intended for the presidency and the man intended for the vice-presidency. The resultant tie, under the Constitution, would then have to be decided by the House of Representatives.

In the first election, that of 1789, no definite party division existed, and presidential electors were chosen on the basis of their personal appeal to the voters. By 1792, however, Federalist and Republican or opposition party organizations had been developed in every state. The Republicans did not oppose President Washington's re-election, but their electors supported a Republican, George Clinton of New York, against John Adams for Vice-President.

For the campaign of 1796 both the Federalists and the Republicans nominated candidates for President and Vice-President by means of the congressional caucus, and both conducted a partisan campaign. The result was the election of a Federalist President, Adams, and a Republican Vice-President, Jefferson. Party discipline had not yet become sufficiently rigid to produce a tie between Adams and the Federalist vice-presidential candidate, C. C. Pinckney, but it was becoming increasingly evident that the constitutional provisions for choosing the President were being outmoded by the growth of political parties. Several proposals were made to amend the Constitution, but for the moment Congress took no action.

In the election of 1800, however, increased party discipline resulted in a tie for the presidency. More Republican than Federalist electors were chosen, and each Republican elector cast one vote for Jefferson and one vote for Jefferson's running mate, Aaron Burr of New York. The election was thus thrown into the House of Representatives, where prolonged balloting occurred before the Federalists finally, in February 1801, permitted the Republicans to

elect Jefferson to the presidency with Burr receiving the vice-presidency.

This episode led to an immediate demand for an amendment to the Constitution to require electors to cast one set of ballots for President, and a second distinct set of ballots for Vice-President. At the next session of Congress the House adopted such a proposal, but it was not until December 1803 that it received the requisite two-thirds vote of both houses. Congressmen from some of the small states opposed the proposal on the ground that it would reduce the weight of their states in choosing Presidents and that it would reduce the chances of anyone from their states being elected. Some Federalists opposed the amendment because it gave the majority party virtually complete choice in selecting the President and Vice-President. Republicans controlled most of the state legislatures, however, and they were anxious to avoid another experience like that of 1801. They rushed the ratification through the requisite thirteen states by September 1804, so that the Twelfth Amendment became effective before the presidential election of that year.

Under the new amendment it was still possible, though not so probable as before, that a President would be elected by the House of Representatives. In case no candidate received a majority of the electoral votes, the House was required to choose the President from among the three candidates having the largest number of votes. Actually, however, this provision was to operate in only one presidential election, that of 1824.[3]

The speed with which the Twelfth Amendment was ratified created a false impression of the ease of changing the Constitution by the amending process. Jefferson in particular favored easy and frequent amendment in order to keep the Constitution abreast of the changing needs of the people. Later experience, however, was to furnish ample proof that only under extraordinary circumstances would any proposal receive the necessary two-thirds vote in Congress and subsequent favorable action by three-fourths of the states.

[3] The temporary breakdown of the two-party system in 1824 resulted in no candidate receiving a majority of the electoral votes, and therefore in February 1825 the House chose John Quincy Adams from among the three highest candidates for the presidency. In all other presidential elections, with the possible exception of the contested election of 1876, the operation of the party mechanism has resulted in the actual choice of the President being made by the party leaders and the voters. On the election of 1876 see pp. 485–489.

More than sixty years were to elapse before another amendment was to be added to the Constitution. Meanwhile many constitutional changes were to be effected by less formal processes.

THE JEFFERSONIAN CONSTITUTIONAL PROGRAM

Although some of the constitutional and political concepts held by Thomas Jefferson and John Adams were decidedly opposed and although the emotions of the people were greatly aroused by the issues of the campaign of 1800, Jefferson succeeded Adams as President on March 4, 1801, in an orderly and constitutional manner. This, at a time when such a procedure was impossible in all but a few countries in the world, was in itself a notable achievement for the constitutional system of the new nation and was in a sense prophetic of the new century which was to witness the progress of constitutional government, slow and irregular though it often was, in nearly all nations of the world where the impact of Western civilization was felt.

In his inaugural address, Jefferson set forth the general principles which would guide his administration. Urging a unity of heart and mind among his fellow-citizens, he proclaimed as a "sacred principle": "that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect." He stoutly disagreed with those who contended that republican self-government contained the seeds of its own destruction; he believed that it was "the strongest Government on earth" and could successfully combat with reason alone those few dissenters who "wish to dissolve this Union or to change its republican form."

"The sum of good government," asserted the champion of agrarian democracy, is "a wise and frugal Government, which shall restrain men from injuring one another, shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned." Jefferson then proceeded to outline the objectives of his administration in greater detail, though still in general terms:

> Equal and exact justice to all men, of whatever state or persuasion, religious or political; peace, commerce, and honest friendship with all nations, entangling alliances with none; the support of the State

governments in all their rights, as the most competent administrations for our domestic concerns and the surest bulwarks against antirepublican tendencies; the preservation of the General Government in its whole constitutional vigor, as the sheet anchor of our peace at home and safety abroad; a jealous care of the right of election by the people—a mild and safe corrective of abuses which are lopped by the sword of revolution where peaceable remedies are unprovided; absolute acquiescence in the decisions of the majority, the vital principle of republics, from which is no appeal but to force, the vital principle and immediate parent of despotism; a well-disciplined militia, our best reliance in peace and for the first moments of war, till regulars may relieve them; the supremacy of the civil over the military authority; economy in the public expense, that labor may be lightly burthened; the honest payment of our debts and sacred preservation of the public faith; encouragement of agriculture, and of commerce as its handmaid; the diffusion of information and arraignment of all abuses at the bar of the public reason; freedom of religion; freedom of the press, and freedom of person under the protection of the habeas corpus, and trial by juries impartially selected.

The new President recommended that the country could "safely dispense with all the internal taxes" and rely upon customs duties and revenue from the sales of public land. Congress responded with enthusiasm by repealing the excise on whisky which had been so obnoxious to the western farmers.

In keeping with their policy of governmental economy, the Jeffersonians reduced expenses substantially by eliminating certain civil offices and instituting a more effective accounting system as well as by curtailing the military and naval expansion program which the Federalists had launched during the trouble with France.

The Republican Party disagreed sharply with the Hamiltonian concept of the value of a national debt to the stability of the government. Led by Albert Gallatin, Jefferson's able Secretary of the Treasury, Congress adopted a program of paying off the debt as rapidly as possible. Jefferson also repudiated the mercantilist ideas of the Federalists by declaring that "agriculture, manufactures, commerce, and navigation, the four pillars of our prosperity, are . . . most thriving when left most free to individual enterprise." In practice as well as in theory the Republican system was as simple as the agrarian economy of the day.

A cardinal constitutional principle of the Jeffersonian creed was belief in a system of checks and balances among the three departments of the federal government in order to prevent any one of them from assuming despotic or unconstitutional power. During the Federalist regime the Republicans had repeatedly criticized what they considered unwarranted assumptions of authority by the executive and judicial branches. As the institution most directly responsible to the people, Congress was thought by Republicans to have a priority in a system of separated powers. The organization of Congress, however, had not been developed sufficiently to provide machinery for the assumption by that body of effective direction of the federal government. The party therefore had to devise ways of constructive leadership and co-operation between the executive and Congress without violating the principle of legislative priority or supremacy.

Jefferson solved the problem through his position as party leader, a solution made possible because of his tremendous prestige and unquestioned ascendancy in Republican ranks. Nominally, he accepted the theory of congressional ascendancy in legislation. Unlike Washington and Adams, he sent his messages to Congress by a clerk rather than reading them in person, and he was uniformly deferential in his messages and in his other relationships with Congress. He did not veto a single bill.

At the same time, Jefferson used the party mechanism to assert a strong executive leadership in Congress. He had his political lieutenants placed in key legislative posts, particularly as chairmen of the important standing committees, and he then worked through these men in carrying out his legislative program. Also Secretary of the Treasury Gallatin acted as a valuable liason officer between the President and Congress, both houses accepting him as Jefferson's chief agent. Although the Republicans had earlier condemned the Federalist practice of referring legislative matters to Hamilton as Secretary of the Treasury, they now revived the practice by asking Gallatin to make reports and proposals to the House. He attended committee meetings and assisted in the preparation of reports to be presented to the House. In general he became a sort of executive manager who co-operated with the congressional leaders in steering measures through Congress.

This unofficial fusion of the executive and legislative depart-

ments would have been very difficult if not impossible without the employment of another extra-constitutional device, the party caucus. From time to time the President, cabinet officers, and party members in Congress met in caucus and discussed proposed legislation fully and came to a conclusion upon policy before specific measures reached the floor of either house. It was alleged that Jefferson himself upon occasion presided at these secret meetings. By holding doubtful members in line, the caucus increased party solidarity in Congress and facilitated enactment of important measures.

The effectiveness of this close though unofficial relationship between the executive department and Congress depended largely upon the President's prestige and recognized ascendancy in his own party, and upon his capacity for leadership. From 1801 to 1809 such leadership was provided by Jefferson, and it resulted in a comprehensive legislative achievement. His successor, James Madison, lacked Jefferson's flair for political leadership, however, and during his term of office, the executive rapidly declined to a position subordinate to that of Congress.

THE ANNEXATION OF LOUISIANA

The outstanding event of Jefferson's presidency was the incorporation in 1803 of the Louisiana Territory into the United States. The occasion gave rise to two important and interrelated constitutional issues. The first concerned the constitutional right of the United States to acquire foreign territory; the second involved the right ultimately to admit the territory to the status of statehood without altering unconstitutionally the nature of the Union.

Upon their succession to power, the Jeffersonians were confronted with a difficult domestic and international problem. The lower Mississippi River flowed entirely through Spanish territory and for the people west of the Appalachians the Mississippi furnished an indispensable avenue of commerce. The American frontiersmen were an aggressive lot, not inclined to be restrained by unappreciated restrictions—even those of an international nature—and there were repeated protests when the Spanish increased the restrictions on American trade through New Orleans.

Jefferson was sympathetic with the westerners. When he learned that the Louisiana Territory had been ceded to France, then powerful and aggressive under Napoleon's leadership, the President moved

to secure American control of enough land in the New Orleans region to insure unrestricted navigation and use of the lower Mississippi. The result of the negotiations with France was America's greatest windfall: the purchase by treaty in April 1803 of the entire Louisiana Territory for approximately $15,000,000.

The American response to the acquisition was generally favorable, but the administration and Congress were confronted with a basic question of constitutionality. Republicans professed adherence to the doctrine of strict construction, according to which federal authority was definitely limited to those powers specifically mentioned in the Constitution. Yet the Constitution said nothing of any right to acquire territory, the framers of 1787 having simply neglected to make any statement on the point. If so sweeping a power as the right to acquire territory were considered to be implied merely because it was now convenient to do so, it would render the whole doctrine of strict construction absurd and instead confirm the Hamiltonian theory of implied powers.

More serious, to admit a given federal power as a matter of convenience would go far to impair the validity of the Tenth Amendment. The doctrine that the federal government was one of enumerated powers would then be replaced by the theory that federal authority could encompass any matter of sufficient importance to the national welfare. The whole Jeffersonian conception of the Union would thus be subtly altered, or even destroyed.

Jefferson at first wished to solve this dilemma by amending the Constitution to grant the federal government the requisite authority to purchase territory. He actually drafted proposals for a constitutional amendment to this end and submitted them to his advisers for their consideration. They argued, however, that it would be dangerous to allow the treaty to be delayed awaiting the slow and doubtful process of constitutional amendment, for Napoleon might change his mind and the great opportunity be lost. They also contended that the power to purchase territory could reasonably be implied from the treaty-making power. Reluctantly the champion of strict construction acquiesced, trusting, as he said, "that the good sense of our country will correct the evil of loose construction when it shall produce ill effects." Thus did the Jeffersonians deliver a severe blow to their own doctrine of strict construction of the Constitution.

The President called Congress into special session in order to obtain the advice and consent of the Senate for the treaty and to secure the action of both houses for measures to carry the treaty into effect. Constitutional issues played the leading role in the congressional debate. While the Federalists raised little objection to the mere acquisition of the territory, they vehemently denounced certain provisions of the treaty and their implications. They centered their attack upon Article III, which provided: "The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property, and the Religion which they profess." This provision was essentially a promise of eventual statehood for the people of Louisiana, although under the Constitution the admission of new states was left to the discretion of Congress.

Since the Federalist Party was centered in New England, its spokesmen objected to the creation in the South and West of new states which would almost inevitably add to the strength of the Jeffersonian cause. Probably most Federalists agreed with the declaration of Representative Roger Griswold of Connecticut: "A new territory and new subjects may undoubtedly be obtained by conquest and by purchase; but neither the conquest nor the purchase can incorporate them into the Union. They must remain in the condition of colonies and be governed accordingly." Griswold's policy, if adopted, would have made the United States at this early date an imperialistic nation.

The most extreme Federalist view was reflected by Senator Timothy Pickering of Massachusetts, who maintained that new states could not be admitted from the acquired territory even by constitutional amendment unless every state gave its consent, since the Union was a partnership to which the consent of each member was necessary to admit a new partner. Later, when the Federalists were defeated on the Louisiana issue, Pickering became the leader of the extremists who contemplated the secession of the northern states from the Union and the formation of a separate confederacy.

Fortunately for the future of the United States, the Republicans preferred realistic and progressive statesmanship to consistency.

They emphasized the authority to acquire territory under the war and treaty-making clauses of the Constitution, a position later upheld unequivocally by Marshall and the Supreme Court in *American Insurance Company v. Canter* (1828). Also, Republican spokesmen insisted that the treaty did not positively guarantee statehood, inasmuch as territorial status would satisfy the requirements of Article III of the treaty. Whether states should be admitted from the Louisiana Territory would be left to the future discretion of Congress.

The Senate ratified the treaty in October 1803, 26 to 5, and both houses then appropriated the money and made temporary provisions for the government of the new territory. Since a majority of Congress did not believe that the people of the acquired territory were yet ready for a large amount of self-government, the first governing act provided that all military, civil, and judicial authority in Louisiana should be vested in appointees of the President. As the Constitution explicitly gave Congress the power to "make all needful Rules and Regulations" respecting the territory of the United States there was inherent in this measure no serious question of congressional authority. However, objection was raised to the autocratic nature of the territorial government, and soon the administration sponsored another measure providing for a gradual preparation of the French and Spanish inhabitants of Louisiana for self-government. This second law provided for government by a powerful governor and a weak council to be appointed by the President from the property-holding residents of the territory.

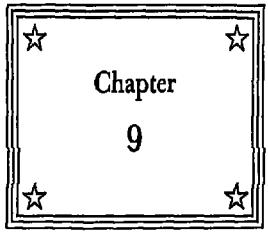
American immigrants were soon settling in Louisiana and demanding greater participation in the government. Consequently in 1805 a third act gave the Territory of Orleans, as the lower part of the Louisiana purchase was termed, a territorial government very similar to that outlined in the Northwest Ordinance of 1787. The vast area north of the present state of Louisiana contained few white people and was temporarily attached to Indiana Territory for purposes of administration. Thus did the territory acquired from France rapidly come to have a constitutional status practically identical with that of the original territory of the United States.

Opposition to the constitutional incorporation of Louisiana and its people into the federal union continued among the New England Federalists for several years. They saw the balance of power among

the original states being undermined to the detriment of New England. To provide a partial corrective Massachusetts and her sister states repeatedly proposed a constitutional amendment to increase their relative influence by entirely eliminating slaves in the apportionment of representatives in Congress. In 1812 the admission of Louisiana as a state encountered bitter opposition from the Federalists, who reiterated most of their former arguments against the incorporation of "outsiders" into the Union.

To be compelled to accept as political equals the untold and untutored masses who would settle beyond the Mississippi seemed to believers in government by the good, the wise, and the rich to constitute a catastrophe. "This Constitution," declared the conservative Josiah Quincy of Massachusetts, "never was, and never can be, strained to lap over all the wilderness of the West," without virtually subverting the rights of the original states and endangering the Union which they created.

In sponsoring the admission of a state from the Louisiana Territory the Republicans delivered a severe blow, consciously or otherwise, to their former concept of the Union as a compact among the original states and to the related doctrine of strict construction. The Louisiana Purchase doubled the size of the country; and the Republicans, by adopting a policy of admitting new states from that territory into the Union on an equal basis with the old states, greatly extended the liberal and successful program of nation-building launched by the Ordinance of 1787. No other modern nation has had an opportunity to incorporate a practically unoccupied region as large and potentially valuable as the Mississippi Basin, and fortunately both the constitutional structure and the statesmanship of the United States were equal to the occasion.



The Triumph of Jeffersonian Republicanism

NOWHERE did the impact of Jeffersonianism upon the American constitutional system produce such a sharp reaction as in the federal judiciary. While the judiciary, still in the hands of Federalists appointed prior to Jefferson's inauguration, looked to long-established law and precedent, Jefferson and his followers looked to the present and the future and insisted upon the right of the contemporary majority to shape its own institutions. This basic conflict had been sharpened by the enforcement of the Sedition Act and by the partisan enactment of the Judiciary Act of 1801. With the accession of the Republicans to power, a clash was inevitable.

REPEAL OF THE JUDICIARY ACT OF 1801

In the original draft of his first message to Congress, Jefferson had set forth his own theory of constitutional interpretation. Each of the three equal and independent departments "must have a right in cases which arise within the line of its proper functions, where, equally with the others, it acts in the last resort and without appeal, to decide on the validity of an act according to its own judgment, and

uncontrolled by the opinions of any other department." Such a public challenge to the advocates of judicial supremacy was not actually issued. Instead, in the message as delivered on December 8, 1801, Jefferson discreetly contented himself with calling the attention of Congress to the Judiciary Act of 1801 and with submitting a summary of the business of the federal courts since their establishment, designed to demonstrate that the courts created by the recent act were unnecessary.

On January 6, 1802, Senator John Breckinridge of Kentucky introduced a motion to repeal the disputed law. This precipitated a long debate on the question of Congress' constitutional authority to deprive the judges appointed under the act of their offices by abolishing the offices they held. Federalist spokesmen answered the question emphatically in the negative by maintaining that repeal would violate the provision of the Constitution which guaranteed tenure during good behavior to federal judges. Republicans replied that the creation and abolition of inferior courts were left by the Constitution to the discretion of Congress, and that the offices did not become the vested property of the judges. Senators and congressmen from Kentucky and Virginia in particular were well aware of the widespread sentiment among their constituents for the complete abolition of the inferior federal courts lest the decisions of those courts jeopardize existing land titles in those states. To the Federalist charge that the repeal bill was a partisan attempt to control what the Constitution had placed above partisanship, the Republicans retorted that the Judiciary Act of 1801 was the original sin in that respect.

Repeatedly during the debates the Federalists asserted the power of the Supreme Court to declare acts of Congress unconstitutional. The Constitution, they said, had provided for an "independent" judiciary which had "the power of checking the Legislature in case it should pass any laws in violation of the Constitution." In reply, Breckinridge reiterated Jefferson's doctrine, that the three departments are equal and co-ordinate, each having "exclusive authority on subjects committed to it." He concluded that "the construction of one department of the powers vested in it, is of higher authority than the construction of any other department; . . . that therefore the Legislature have the exclusive right to interpret the Constitution, in what regards the law making power,

and the judges are bound to execute the laws they [Congress] make." In the House John Randolph of Virginia emphatically denied the need for a judicial check on Congress by the blunt rhetorical questions: "Are we not as deeply interested in the true exposition of the Constitution as the judges can be? Is not Congress as capable of self-government?"

The forces of Jeffersonian democracy had their way, and on March 31, 1802, the repeal bill became law. The immediate effect was to revive the judicial system based on the Judiciary Act of 1789. Promptly the Republicans enacted another law providing for annual instead of semiannual sessions of the Supreme Court, the effect being to postpone the Court's next session until February 1803. The law's sponsors evidently hoped thereby to discourage any of the displaced circuit judges from attacking the validity of the Repeal Act before the Court.

In April 1802, the Republican-dominated Congress passed a new Circuit Court Act by which the country was divided into six instead of three circuits, to each of which was assigned a separate justice of the Supreme Court, who, together with a district judge, should compose the circuit court. As new states were later admitted into the Union this federal judicial system was extended, with no basic change being made until after the Civil War.

MARBURY V. MADISON

Chief Justice Marshall realized the need for immediate and bold action if he were to prevent Federalist constitutionalism from being overwhelmed by the triumphant Republicans. Jefferson and his congressional supporters had carried through a comprehensive legislative program based upon their own interpretation of the constitutional division of power, and then in the congressional elections of 1802 they had received the equivalent of a vote of confidence from the people. Marshall was aware that a frontal assault upon the power of the executive or of Congress might accomplish little of lasting value and might lead to the impeachment of judges in retaliation. A skillful political tactician, he therefore decided upon a flanking movement. He found his opportunity in *Marbury v. Madison* (1803), a case giving rise to his most celebrated opinion, if not his most important one.

William Marbury was one of President Adams' "midnight" ap-

pointees as justice of the peace for the District of Columbia. His commission had been signed and sealed but not delivered when Jefferson took office. The new President, believing that the appointment had not been consummated, ordered James Madison, his Secretary of State, to withhold the commission. Thereupon Marbury, acting under Section 13 of the Judiciary Act of 1789, applied to the Supreme Court for a "rule" or preliminary writ to Madison to show cause why a mandamus should not be issued directing the Secretary of State to deliver the commission. When the preliminary writ was granted Madison ignored it as a judicial interference with the executive department.

At the Court's next session in February 1803, Marshall handed down an opinion on Marbury's application for a mandamus. Ignoring for the moment the issue of whether or not the Supreme Court could properly take jurisdiction of the cause, Marshall first considered the question: "Has the applicant a right to the commission he demands?" His answer was that when a commission has been signed and sealed the appointment is legally complete. For Jefferson's and Madison's benefit he added: "To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right." In leaving the question of the Court's jurisdiction to the last Marshall reversed the usual and logical order of procedure, and by so doing he created for himself an opportunity to lecture the Secretary of State on his duty to deliver the commission and thus to obey the law.

If the applicant's rights have been violated, the Chief Justice next asked, "do the laws of his country afford him a remedy?" This question Marshall also answered in the affirmative: "Having this legal title to the office, he [the applicant] has a consequent right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy." Marshall denied that the Court in exercising its duty to decide on the rights of individuals was attempting "to intrude into the cabinet, and to intermeddle with the prerogatives of the executive." In the exercise of "certain important political powers" the President is free to use his own discretion, but where he is directed by act of Congress to perform certain acts which involve the rights of individuals he is "amenable to the laws for his conduct."

A third, and the determining question in the case was whether

the proper remedy for the applicant was "a mandamus issuing from this Court." Under the Judiciary Act of 1789, Section 13, the Supreme Court had been authorized "to issue . . . writs of *mandamus* . . . to . . . persons holding office under the authority of the United States." Since the Secretary of State definitely came within that description, "if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional." Marshall then argued that the Constitution prescribed specifically the Supreme Court's original jurisdiction, that this jurisdiction did not include the power to issue writs of mandamus to federal officials, and that Congress had no power to alter this jurisdiction. Therefore the attempt of Congress in the Judiciary Act of 1789 to give the Supreme Court authority to issue writs of mandamus to public officers "appears not to be warranted by the constitution." Consequently Marbury's application for a mandamus was denied.

Having declared void a section of the Judiciary Act of 1789, Marshall then passed to his now famous argument defending the Court's power to hold acts of Congress unconstitutional. His argument rested more upon certain general principles of constitutional government than upon specific provisions in the Constitution itself. First he observed that the Constitution was the "fundamental and paramount law of the nation." Second, it was the particular duty of the Courts to interpret the law—that is, "to say what the law is." "Thus," the Chief Justice concluded, "the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void, and that the courts, as well as other departments, are bound by that instrument." Therefore, in conflicts between the Constitution and acts of Congress, it is the Court's duty to enforce the Constitution and to ignore the statute, that is, to refuse to enforce the unconstitutional law.

Marshall's opinion was in reality a shrewd and audacious political attack on Jefferson's administration, in which the Chief Justice went out of his way to lecture his political antagonist in the Executive Mansion. In order to do so, he carefully avoided a prior consideration of the question of jurisdiction and instead treated first and at great length the constitutional duties and obligations of the executive. Much of this material was mere *obiter dictum*, since later in the

opinion Marshall held that the Court had no proper jurisdiction of the cause.

At the same time, Marshall carefully protected himself against political reprisals. He decided the immediate issue in favor of the administration and thereby avoided giving Madison and Jefferson any opportunity to defy the Court's authority. Had he issued the writ of mandamus requested, Madison would almost certainly have refused to comply, and the Court, its authority flouted, would have been made to look ridiculous. Moreover, in declaring void a portion of a statute on the grounds that it gave the Court authority in excess of constitutional limitations, he evaded any possible charge that the Court was engaged in self-aggrandizement of power.

In declaring void a section of the Judiciary Act of 1789, Marshall also violated a basic rule of statutory construction—that a law ought not to be held unconstitutional when it might be held valid by any other possible reasonable construction. A careful reading of the Judiciary Act of 1789 does not reveal any obvious and distinct attempt on the part of Congress to confer any additional category of original jurisdiction upon the Court beyond that authorized in the Constitution. The plain intent of Section 13 was to authorize the issuance of writs of mandamus in cases where the Court did have jurisdiction under the Constitution. In short, Marshall's interpretation of the section in question was a strained and unreasonable one, and was out of accord with the principles of statutory construction laid down by Marshall himself in subsequent opinions, in which he argued for a broad and liberal construction of statutes and of congressional powers under the Constitution.

Marshall's argument in favor of the Court's power to declare an act of Congress void was not of major significance at the time he made it, and the importance of *Marbury v. Madison* in the history of judicial review has in fact been somewhat exaggerated. The idea that the Court could invalidate acts of Congress was not then new. More than a score of analogous state cases, in which state courts had declared void the acts of their legislatures, had already occurred. In *The Federalist*, Hamilton had argued for the right of judicial review in the forthcoming federal judiciary, and the reader will recall that in *Hylton v. United States* (1796) [1] the Court had assumed the right, although it had decided that the statute in ques-

[1] For a discussion of this case see p. 193.

tion was constitutional. Prior to 1803, a decided majority of the bench and bar had apparently considered judicial review a necessary part of the constitutional system, and the principle had not been seriously disputed until the recent debate on the highly controversial Repeal Act of 1802. Marshall's reaffirmation of the Court's power therefore received but little attention from either the friends or the foes of the federal judiciary.

Moreover, Marshall's opinion is of doubtful significance as a precedent for the later exercise of the Court's power to act as the final arbiter of constitutional questions involving the validity of acts of Congress. Marshall nowhere asserted that the Court's decision regarding the constitutionality of acts of Congress was final and binding upon the other two departments of government, nor did he make the express claim that the judiciary's interpretation was superior to or entitled to precedence over that of Congress or the executive. The act he invalidated in part was not a general law, but dealt exclusively with the judicial department. In asserting the Court's right to pass on the constitutionality of such a statute, Marshall did not claim much more than that each department of the government rightfully should have the final authority to pass on constitutional matters affecting that department.

That the Court was not anxious at this time to assert too boldly and comprehensively its rights of judicial review was demonstrated a few days after the delivery of the Marbury opinion, when a majority of the justices officially acquiesced in the assignment to them of circuit court duty by the Judiciary Act of 1789 and the Circuit Court Act of April 1802. Marshall and some of the associate justices strongly believed that the Constitution did not authorize the assignment of Supreme Court justices to the circuit courts. But when the issue came before the Court in *Stuart v. Laird* (1803), the pertinent provisions of these acts of Congress were held to be valid for the remarkable reason that "practice and acquiescence" in the assignment of circuit court duty to the justices "for a period of several years, commencing with the organization of the judicial system [in 1789], affords an irresistible answer, and has indeed fixed the construction."

Marshall himself was shortly to express the thought that he did not consider the Court's opinion on constitutional matters to be binding in all cases upon the other two departments of government.

Less than a year after the Marbury decision he admitted privately that "a reversal of those legal opinions deemed unsound by the legislature would certainly better comport" with American institutions and character than the process of impeaching judges then being pursued by the Republicans. Either the Chief Justice was afraid of impeachment or he believed that Congress was not bound unalterably by opinions of the Court.

For more than half a century after *Marbury v. Madison* Congress and the President continued to consider themselves at least the equals of the judiciary in determining the constitutionality of legislation. In several important cases before the Supreme Court the validity of certain congressional acts was challenged, but in each case the Court upheld the act in question. Furthermore, practically every session of Congress was to witness lengthy constitutional debates in which the members would rely upon their own rather than the judges' interpretation. Likewise until after 1865 many more bills were vetoed by Presidents on the ground of their unconstitutionality than were invalidated by the Supreme Court. During that time it was generally assumed that the people of the United States could make the final interpretation of the Constitution themselves through the politically responsible departments or through amendments. Not until the latter decades of the nineteenth century was this theory of constitutional interpretation replaced by the juristic concept of judicial review, according to which the decisions of the Supreme Court determined constitutional issues with finality unless changed by amendment.

The reaction of the Republicans to the Marbury decision was varied but less critical than were their responses to some of Marshall's later decisions. Few grasped the potentialities of judicial review, and as a consequence the portions of the opinion affirming the Court's right to declare acts of Congress void aroused relatively little opposition. Most Republican leaders were determined that the politically responsible departments should have their way in important conflicts with the Federalist judiciary and were not deterred by the elaborate pronouncement of the Chief Justice. This attitude was encouraged by the decision in *Stuart v. Laird*, which virtually upheld the Republican cause as represented in the Repeal Act. And since the decision on the immediate issue between Marbury and Madison was in favor of the Jeffersonians, their chief criticism was

directed against Marshall's "interference" with the Executive Department. This they considered a political act, and they were determined to reply in kind.

IMPEACHMENT OF FEDERAL JUDGES

Under the United States Constitution impeachment was the only legal method of removing federal executive and judicial officers. The House of Representatives was authorized to impeach "all civil Officers of the United States" for "Treason, Bribery, or other high Crimes and Misdemeanors," whereupon they were to be tried before the Senate. As in many other provisions of the Constitution, the real scope and meaning of impeachment could be determined only by practical application and experiment.

Although the Constitution prescribed the impeachment of federal judges only for high crimes and misdemeanors, Jefferson's supporters were inclined to take an extremely broad view of the impeachment power. By the more partisan Republicans impeachment was considered a proper instrument for removing from office judges who had fallen too far out of step with public opinion. This conception made impeachment purely a political proceeding in which any judge could be removed from office should both the House and the Senate think it expedient to do so.

To the Federalist argument that the judiciary should be above political considerations, Jefferson's supporters replied that the federal judiciary had already entered the political arena and that it must abide by the consequences. More moderate Republicans were not willing to go this far, but they held that "high crimes and misdemeanors" might be construed broadly, so that bad judicial ethics or misconduct on the bench would become impeachable offenses. Some judges had taken advantage of their responsibility in charging grand juries to make political speeches from the bench; others had left their work to participate in political campaigns; still others had interpreted and applied the Sedition Law with gross partisanship. Many moderate Republicans thought these offenses properly impeachable.

The Republicans first tested the impeachment process against Judge John Pickering of the District Court of New Hampshire. In February 1803, while the Marbury case was pending, Jefferson sent

to the House of Representatives a message accompanied by documentary evidence showing that Pickering was guilty of intoxication and profanity on the bench. The House later impeached the judge on charges of malfeasance and general unfitness for office because of his loose morals and intemperate habits. In March 1804, Pickering was tried before the Senate, where evidence established that he was insane.

This raised the question of the extent of the impeachment power in a most embarrassing form. It could hardly be argued plausibly that an insane man's conduct constituted either high crime or misdemeanor, since such offenses implied "a vicious will" on the part of the person involved. Yet unless the impeachment power was to be construed broadly enough to remove Pickering, the precedent would be established that there was actually no method of removing an incompetent or incapacitated judge from office.

A majority even of the Republican senators were apparently persuaded that Pickering, being insane, could not properly be convicted on any of the specific counts in the House impeachment. Nonetheless they believed Pickering unfit for office and either abstained from voting or joined their colleagues in voting that the accused was "guilty as charged." He was convicted by a 19-to-7 vote and removed from office. The Pickering impeachment was so confused and contradictory, however, that it was not thereafter treated as having established the general right of impeachment for mere incompetence or incapacity in office.

Following Pickering's conviction, the administration moved to impeach Justice Samuel Chase of the Supreme Court. Republican leaders were generally agreed that Chase's conduct on the bench in the Sedition cases had been inexcusable; moreover, they felt that he had forfeited any claim to judicial impartiality by actively campaigning for Adams in 1800. In 1803 he provided additional grounds for impeachment, when in a long charge to a Baltimore grand jury he severely criticized Congress for abolishing the circuit judges and jeopardizing the "independence" of the judiciary. He also attacked the Jefferson administration and its doctrine "that all men, in a state of society, are entitled to enjoy equal liberty and equal rights," a doctrine which he said had "brought this mighty mischief upon us," a mischief that would "rapidly progress, until peace and order,

freedom and property, shall be destroyed." Universal suffrage, he contended, would cause "our republican Constitution" to "sink into a mobocracy."

At Jefferson's suggestion the House of Representatives in January 1804 appointed a committee to inquire into Chase's conduct. This resulted in the House's impeachment of Chase on March 12 by a strictly partisan vote of 73 to 32. To conduct the trial the House appointed a committee, headed by John Randolph of Virginia, which presented eight articles of impeachment. No infraction of law was alleged. The first seven articles concerned Chase's "oppressive conduct" as a presiding judge in several criminal trials of 1800 which had arisen under the Sedition Act. The final article related to the Baltimore address, which was characterized as "an intemperate and inflammatory political harangue," designed "to excite the fears and resentment . . . of the good people of Maryland against their State government . . . [and] against the Government of the United States."

In February 1805 the trial got under way before the Senate, presided over by Vice-President Aaron Burr, fresh from his duel with Hamilton. Justice Chase was defended by five eminent Federalist lawyers, headed by Luther Martin, whose hatred of the President was so great that in an age of intense partisanship his worst damnation of a man was to call him "as great a scoundrel as Tom Jefferson." It was evident to observers that although the fate of the federal judiciary might hinge on the verdict, the trial was to be an heroic partisan contest. At first the Republican leaders were confident of success, but as the trial progressed their confidence declined. The House managers were less competent lawyers than the defense counsel, while the testimony of their star witnesses proved to be contradictory and less damaging to Chase than anticipated.

It was generally recognized both in the presentation of the evidence and in the arguments of the case that the vital issue concerned the proper scope of impeachment under the Constitution. The counsel for the defense did not claim that Chase was above reproach, but they consistently maintained that an offense to be impeachable must be indictable in law.

On the other hand, certain members of the impeachment committee, notably Randolph, took the extreme view that impeachment was not necessarily a criminal proceeding at all, but rather that on

occasion it could be resorted to as a constitutional means of keeping the courts in reasonable harmony with the will of the nation, as expressed through politically responsible departments. They agreed essentially with a previous assertion of Senator William Giles that "if the Judges of the Supreme Court should dare . . . to declare an act of Congress unconstitutional, or to send a mandamus to the Secretary of State, as they had done, it was the undoubted right of the House of Representatives to impeach them, and that of the the Senate to remove them, for giving such opinions, however honest or sincere they may have been in entertaining them." The weight of this argument was increased by the fact that President Jefferson had just been re-elected in the presidential campaign of 1804 by an overwhelming electoral vote, with increased Republican majorities in Congress.

The other House managers did not adhere to such a broad interpretation of impeachment. They merely argued logically that, since impeachment was the only constitutionally recognized method of removing federal judges, the terms "high Crimes and Misdemeanors" must necessarily include all cases of willful misconduct in office, whether indictable in law or not.

The Senate was composed of twenty-five Republicans and nine Federalists, so that twenty-three votes were required for conviction. As the trial approached its climax the administration leaders became apprehensive that some of the Republican senators from northern states would not accept the House managers' interpretation of impeachment and would not vote for conviction. Consequently Jefferson and his co-workers began to shower attention on Vice-President Burr, with whom they had previously broken politically, in the hope that he would use his acknowledged influence with northern Republican senators to keep them in line. This effort was doomed to failure. Although the administration forces obtained a majority vote for conviction on three counts, they failed to secure the two-thirds majority required for conviction, falling four votes short of that number on the last article, where they had the strongest case.

The Federalists were jubilant, while the Republican leaders were bitterly disappointed. These reactions were intensified by the simultaneous failure of the Republican-controlled legislature of Pennsylvania in its impeachment of judges of the state Supreme Court.

Failure convinced Jefferson and many of his supporters that impeachment was "a bungling way of removing Judges," "a farce which will not be tried again." Immediately Republican leaders introduced into both houses of Congress resolutions to amend the Constitution so as to provide for the removal of federal judges "by the President on joint address of both Houses of Congress." Although this action was in part a gesture—since the Republicans could hardly have expected to secure the adoption of such an amendment at that time—they repeatedly used the threat of an amendment of this kind in their struggles with the Federalist judges.

That the abandonment of impeachment as a political device was salutary has been the general verdict of statesmen and historians. To say, however, that the conviction of Justice Chase would inevitably have led to the removal of his associates and to the destruction of the "independence" of the federal judiciary is to engage in unwarranted speculation. Elective judiciaries or other means of making judges responsible to public opinion were later adopted by most of the states without noticeable curtailment of the legal rights of the individual citizen.

Chase's impeachment had some beneficial consequences in that thereafter federal judges were more inclined to confine thir official opinions and actions to judicial matters and to refrain from lecturing the public on political or moral issues. This restraint did not compel federal judges to lose sight of political considerations, however, as was soon evidenced in the famous trial of Aaron Burr.

THE BURR TRIAL AND THE DEFINITION OF TREASON

Treason is the most serious crime which a citizen can commit against his country. In Britain and in many European countries, however, the offense has often been defined very loosely, to include a variety of political offenses against the state. To guard against this possibility, the Convention of 1787 wrote into the Constitution, Article III, Section 3, an extremely narrow definition of treason: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."

The first federal treason trials of constitutional significance were those arising out of the celebrated conspiracy of Aaron Burr. Burr had a brilliant though opportunistic political career which carried him to the vice-presidency, but his political break with Jefferson and his tragic duel with Hamilton in July 1804 brought his career to a premature end. To recoup his political fortunes he turned to the West, where popular discontent still prevailed. In the summer of 1806 Burr procured, although he did not actually attend, the assemblage of a small armed force at Blennerhassett's Island in the upper Ohio River and subsequently conducted it down the Mississippi toward New Orleans. What his ultimate objectives were is still a matter of controversy, but many men were then convinced that he plotted the treasonable separation of the Southwest from the remainder of the Union, and there is some evidence to substantiate this view. Jefferson was at first not much alarmed by Burr's activities, but in November 1806 he issued a proclamation calling for the seizure of Burr and his associates. The expedition ultimately reached the lower Mississippi, where it disintegrated. Burr fled into the wilderness of the Southwest Territory but was shortly captured and brought east for trial.

Burr's trial opened at Richmond, Virginia, in May 1807, in the United States Circuit Court for Virginia, presided over by Chief Justice John Marshall. The prosecution was in charge of District Attorney George Hay and the immature but brilliant William Wirt; defense counsel included Burr himself, Luther Martin, and several other famous lawyers of the day. The serious nature of the alleged offense, Burr's former high office, the administration's grim determination to secure a conviction, and Marshall's known bitterness toward Jefferson, all combined to produce one of the most dramatic trials in American history.

The first important constitutional issue presented by the case arose during the proceedings before the grand jury, when Burr moved that the court issue a subpoena to President Jefferson requiring him to appear with certain papers in his possession material to the case. A heated debate between counsel developed over the power of the court to issue a subpoena to the President, with Marshall finally ruling in favor of the court's authority. Both the Constitution and federal law, he said, gave an accused person the right "to

the process of the court to compel the attendance of his witnesses," and neither the Constitution nor any law exempted the President from this rule.

Jefferson refused to obey the order on the ground that the independence of the executive would be jeopardized were the President amenable to the court's writ. The President, he added, had duties which were superior to his duties as a citizen. In general, Jefferson's argument has since been sustained as correct, in particular where the court seeks to interfere with the conduct of executive affairs.

The main issue during the trial itself was whether Burr's actions constituted treason as defined in the Constitution of the United States. The defense maintained that Burr could have had no direct part in any overt act of levying war against the United States, since he had not been present during the assemblage of armed forces at Blennerhassett's Island. The defense thus attempted to draw a distinction between the real act of levying war and the mere act of advising such action, the former admittedly being treason but the latter being only "constructive treason." The prosecution, on the other hand, relied on the English common-law doctrine that "in treason all are principals," and argued accordingly that Burr as procurer of the unlawful assemblage was as guilty as any of the men who assembled on the fateful night.

In a very elaborate opinion Marshall accepted the defense contention. He drew a sharp distinction between actual presence with an armed force levying war against the United States and mere advice or procurement. The latter, he said, was conspiracy, not treason.[2] "To advise or procure a treason . . . is not treason in itself." The Chief Justice admitted, however, that procuring the armed force might be treason, but the procurement must then be charged in the indictment and proved by the testimony of two witnesses to the same overt act of procurement, as required by the Constitution. To the objection that procurement was by its very nature a secret act and that "scarcely ever" could two witnesses be produced to testify to the same overt act connecting procurement with assemblage, Marshall replied that "the difficulty of proving a fact will not justify conviction without proof."

[2] During the Civil War Congress by statute drew a distinction between conspiracy and treason. For a discussion of this and other aspects of treason during the Civil War, see pp. 411–416 and 437–448.

Since the prosecution could not produce two witnesses to overt procurement, the jury was obliged to find Burr not guilty "by any evidence submitted to us." Among the administration's supporters, this outcome was widely regarded as a gross miscarriage of justice, and Marshall was condemned as "morally guilty" for "screening a criminal and degrading a judge." In defense of Marshall it must be said, however, that Burr's guilt has never been definitely established, nor has Marshall's narrow construction of the Constitution's treason clause worked to the detriment of national welfare.

After 1807 several factors worked toward a gradual diminution of the antagonism between the judiciary and the dominant Republicans. In March 1809, with the accession of Madison to the presidency, the personal hostility between Chief Executive and Chief Justice that had prevailed during the Jefferson administrations disappeared. Also Madison realized the nationalizing value of the federal judiciary even when he disagreed with its policies. After 1811 a majority of the Supreme Court justices were Republican appointees, although on the bench they generally conformed more closely to Marshall's than to Jefferson's constitutional creed. Then the disintegration of the Federalist party after the War of 1812 removed much of the partisan motive for conflict between the judiciary and the politically responsible departments. And previous to this last development the predominance of foreign over domestic issues in the public mind tended to temper the resentment against John Marshall and his associates. Meanwhile the center of constitutional controversy shifted to the northern states, where the Federalists were still strong and decidedly opposed to Jeffersonian policies.

THE EMBARGO AND NORTHERN CHAMPIONSHIP OF STATES' RIGHTS

While the first few years of Jefferson's administration were prosperous and relatively free from the encroachments of international strife, after 1804 the bitter international struggle between Britain and Napoleon gradually projected itself more and more into American affairs. As the European war progressed, American commerce became increasingly important to both belligerents, the result being both increased profits and increased hazards for American merchantmen. Unfortunately for the United States, both Britain and

France in their determination to destroy one another had little regard for the maritime rights of neutral nations. Both belligerents in their attacks on neutral commerce with their enemies followed blockade and contraband policies which the American government regarded as flagrantly illegal, while Britain insisted also upon the supposed right of impressment—the seizure of seamen from American merchant vessels on the high seas on the ground that they were deserters from the Royal Navy.

Attacks on American commerce speedily became a source of controversy between the administration and the Federalists. Jefferson's followers, generally pro-French and anti-British in sentiment, were inclined to resent the British blockade, contraband, and impressment policies as affronts to American national dignity. Republican congressmen from the middle and southern states therefore clamored for measures of reprisal to protect American honor and dignity, and the administration was inclined to listen to their demands. The great merchants and shipmasters of the Federalist-dominated Northeast, however, were making very large profits out of the neutral carrying trade, and they were inclined to accept captures and impressments as a necessary business hazard. Accordingly they were loud in their disapproval of all suggestions that the administration resort to reprisals against Britain and France, for such measures would almost surely ruin a highly prosperous business.

After the failure of less drastic measures to compel observance of American neutral rights, Jefferson in December 1807 proposed that Congress pass an embargo act banning outright all foreign trade, both imports and exports. The theory behind the proposal was that American commerce was so indispensable to all belligerents concerned that Britain and France would relax their obnoxious regulations and practices in order to gain the benefits of American commerce once more. After but four days' debate, Congress passed the Embargo Act by large majorities, and it became law on December 22, 1807. A number of subsidiary enforcement acts were adopted within the next few months. As a coercive device the law was unsuccessful, for it hurt American commerce more than it hurt Britain and France. From the start, both violations of the embargo and demands for repeal were widespread, and in March 1809, just as Jefferson was retiring from the presidency, the law was finally repealed.

The embargo produced an intense constitutional debate both in Congress and in the press. Republicans justified the law by pointing to the federal power to regulate foreign commerce. The commerce power, they said, was complete, and could be extended to include outright prohibitions upon all commercial activity. Some administration supporters drew a distinction between federal power over interstate commerce and federal power over foreign commerce. They admitted that Congress could not constitutionally lay any outright prohibitions upon commerce between the states, but they insisted that federal power over commerce with foreign nations was of a more complete character, since the commerce clause was reinforced in that field by the government's control over foreign affairs. This distinction between federal power over interstate commerce and federal power over foreign commerce was to arise on other occasions and was to have a certain limited acceptance in the early twentieth century.[3]

The Federalist opposition, on the other hand, insisted upon an extremely narrow definition of the commerce power. The right to regulate, they said, implied only the right to protect in order to extend benefits thereto. The power was not restrictive, and certainly was not prohibitive. Neither, they said, could the commerce power be used for any ulterior purpose—that is, any purpose other than the protection of commerce itself. Here was the question of the motive behind the exercise of federal power, another issue of substantial consequence in later constitutional law.

It is interesting to note that the Jeffersonians and Federalists had now virtually exchanged places in their constitutional philosophy. The former strict constructionists now insisted upon a broad and liberal construction of the powers of Congress, while the former nationalists of Hamilton's day now fell back upon the Tenth Amendment, states' rights, and a narrow interpretation of congressional authority. Constitutional theory in both instances was apparently little more than the creature of economic and political interest.

In general, the federal judiciary supported the embargo's constitutionality. On October 3, 1808, Judge John Davis of the federal District Court for Massachusetts, though a Federalist, upheld the embargo's constitutionality in very broad terms. "The degree or

[3] See pp. 580–582.

extent of the prohibition" imposed upon foreign commerce, he said, must properly be left to "the discretion of the national government, to whom the subject appears to be committed." He rejected the contention that the commerce power could be used only for the protection of commerce itself: "the power to regulate commerce is not confined to the adoption of measures exclusively beneficial to commerce itself, or tending to its advancement; but in our national system, as in all modern sovereignties, it is also to be considered as an instrument for other purposes of general policy and interest." He also sustained the embargo under the war power as a preparation for war, and under the "necessary and proper" clause as appropriate for the protection of the nation's inherent sovereignty.

The Federalists were now no longer willing to acknowledge the federal judiciary as the final arbiter of constitutional questions, and like the Republicans of 1798 they turned to the state legislatures in order to register constitutional objections to national policy. The legislatures of both Massachusetts and Connecticut, for example, adopted resolutions reminiscent of those promulgated by Virginia and Kentucky in protesting the Alien and Sedition Laws. The Massachusetts Resolutions of February 1809 declared that the embargo was "unjust, oppressive, and unconstitutional, and not legally binding upon the citizens of this state." The legislature added: "It would be derogatory to the honour of the commonwealth to presume that it is unable to protect its subjects against all violations of their rights, by peaceable and legal remedies." The Connecticut legislature, in similar vein, endorsed Governor Jonathan Trumbull's declaration that "whenever our national legislature is led to overleap the prescribed bounds of their constitutional powers," it was the right and duty of the state legislatures "to interpose their protecting shield between the rights and liberties of the people, and the assumed power of the general government."

These resolutions virtually affirmed the right of state legislatures to judge of the validity of acts of Congress and to block the enforcement of unconstitutional national policies. However, neither Massachusetts nor Connecticut proposed any actual machinery for nullification, nor did they advance any clear-cut theory of state sovereignty or secession. A few Federalist extremists, notably Senator Timothy Pickering of Massachusetts, supported the idea of secession on several occasions after 1803, but most opponents of the

administration thought mainly in terms of political activity as a method for defeating what they considered to be unconstitutional legislation. The New England Federalists, in short, were closer to the position taken by Virginia and Kentucky in 1798 than they were to the well-defined theories of state sovereignty, nullification, and secession that were later to be advanced by Calhoun and his followers.

In 1809 the Pennsylvania legislature also found occasion to evoke the doctrine of states' rights and to challenge the authority of the federal judiciary. The occasion arose out of the so-called Olmstead Case, in which one Gideon Olmstead sought to recover from the state certain proceeds from the sale of a prize ship captured and sold during the Revolution. After some years, Olmstead's title was finally affirmed by Judge Richard Peters, in the United States District Court for Pennsylvania. The state legislature thereupon authorized the governor to use the state militia to prevent the federal marshal from serving a writ of execution. Olmstead then appealed to the Supreme Court of the United States, where he sought and obtained a writ of mandamus directing Judge Peters to issue the writ of execution.

Chief Justice Marshall's opinion in *United States v. Peters* (1809) was a characteristic defense of federal authority. "If the legislatures of the several states," he said, "may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals." Marshall also denied that the suit was either commenced or prosecuted against the state in violation of the Eleventh Amendment.

The Pennsylvania legislature ultimately yielded, but not without issuing another challenge to the federal judiciary's right to final judgment on constitutional questions. The assembly warned that it could not permit any infringement of the state's rights by the federal judiciary and added that "no provision is made in the constitution for determining disputes between the general and state governments." The legislature therefore recommended that a constitutional amendment be adopted creating an impartial tribunal to settle constitutional questions.

This suggestion was disapproved by at least eleven of the other

sixteen states, including Virginia, Kentucky, and Massachusetts, each of which had formerly issued resolutions similar to those of Pennsylvania. Apparently unconscious of any irony in its position, Virginia declared that the Constitution had already provided for a tribunal to act as final judge—"the Supreme Court," which was "more eminently qualified . . . to decide the disputes aforesaid in an enlightened and impartial manner, than any other tribunal that could be erected."

The Pennsylvania legislature was not convinced by this chorus of disapproval and soon found a new grievance in the attempt to renew the charter for the United States Bank. Accordingly the next year the legislators made their constitutional theory more definite, and perhaps more extreme, by declaring: "The act of union thus entered into being to all intents and purposes a treaty between sovereign states, the general government by this treaty was not constituted the exclusive or final judge of the powers it was to exercise." The resolutions as a whole make it reasonably clear, however, that the legislature was still appealing to the bar of public opinion, and was neither threatening to leave the Union nor setting itself unalterably against the measures of the federal government.

THE WAR OF 1812

The War of 1812, the first war fought by the United States under the Constitution, revealed almost tragically how far the American people still were from being a really united nation. The war was inspired and supported by the "War-Hawk" Republicans from the South and West, who expected to add both Canada and Florida to the United States and to redress British violations of American rights on the high seas as well. The Northeast, mindful of its commercial interests and preponderantly pro-Federalist in sentiment, strongly opposed the war.

The war produced a serious constitutional controversy on the nature and extent of federal power over state militia. The Constitution gave Congress the power "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions." Congress was also authorized "To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States."

These provisions apparently gave the national government full authority over state militia whenever necessary, but several New England states, where Federalists were in control, refused to permit their militia to be commanded by federal officers or to become an integral part of the army of the United States. In Massachusetts, the state Supreme Court ruled that neither the President nor Congress had the authority to determine *when* the militia should be called out, since this right was not specifically mentioned in the Constitution and could not be inferred from the actual right to call out the militia as mentioned in the Constitution. This was strict construction with a vengeance. The Connecticut legislature resolved that the Constitution did not authorize the use of state militia to support an offensive war. All the New England states attempted to ban service of their militia outside the respective states and in effect built up separate state armies for their own defense against British attack.

Several years after the war had closed, the Supreme Court in *Martin v. Mott* (1827) upheld the President's right, under authority of Congress, to be the sole judge of the existence of those contingencies specified in the Constitution upon which the militia might be called out. The Court added that the President's decision was binding upon state authorities and that the state militia in federal service was subject to the authority of officers appointed by the President. This opinion and subsequent similar ones, however, did not prevent the assertion of a large amount of state autonomy in the organization and administration of armies in both the Mexican War and the Civil War.

Connecticut and Massachusetts also practically nullified the so-called "Enlistment of Minors Act," passed in 1814, which authorized the army to accept enlistment of men aged eighteen to twenty-one. Both states passed acts directing the judges to release on writs of habeas corpus all minors enlisted without the consent of their parents. At the same time, the prospective passage of a federal conscription law inspired the Connecticut legislature to denounce the pending bill as "utterly subversive of the rights and liberties of the people of this state," and as "inconsistent with the principles of the constitution of the United States." Probably the only thing that averted a serious clash between federal and state authorities over army matters was the termination of the war early in 1815.

Meanwhile the Massachusetts legislature had issued a call to the New England states for a convention to meet at Hartford, Connecticut, to discuss the possibility of amending the Constitution for the better protection of New England's sectional interests. Convening in December 1814, the convention deliberated in secret for three weeks. Whatever the real intent behind the gathering, there was much open talk of disunion among Federalists in New England and in Congress at the time, and many Republicans feared that the convention was designed to effect the secession of the New England states. Whether the convention actually considered anything of a treasonable nature, however, is very doubtful; certainly there was nothing treasonable in the measures actually taken.

The Hartford Convention adopted several resolutions of a states' rights and obstructionist character. The states were urged to protect their citizens against unconstitutional federal militia and draft legislation, and to request the federal government to permit the separate states to defend themselves and to receive federal tax credits for such action.

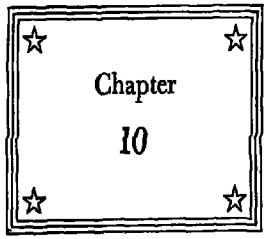
The convention also proposed seven amendments to the federal Constitution. These proposals were obviously designed to provide remedies for the chief grievances of New England and to increase the influence of that minority section in the federal government. In order to limit the power of the South, one proposal would eliminate the "three-fifths" compromise clause in the Constitution and base representation in the House of Representatives solely upon free population. Embargoes were to be limited to sixty days. A two-thirds vote of both houses of Congress would be required to admit a new state, to interdict commerce with foreign nations, or to declare war except in case of actual invasion. Naturalized citizens were to be disqualified from federal elective or appointive office. No President was to serve two terms, and no two successive Presidents were to come from the same state. The final resolution proposed the calling of another convention if the war continued and the federal government failed to respond favorably to the recommendations of the convention.

Commissioners were appointed to carry the resolutions to Washington, but they were met with the news of the termination of hostilities by the Treaty of Ghent and of Andrew Jackson's notable victory at New Orleans and so abandoned their mission. Only Mas-

sachusetts and Connecticut acted favorably upon the Convention's proposals, while nine states passed resolutions of disapproval or nonconcurrence. Thus the Hartford Convention and New England Federalism were repudiated by events and rejected by the American people.

How far the New England Federalists were ready to go to attain their objectives is questionable, since constitutional arguments cannot always be taken literally. It is difficult to determine from all the resolutions and protests, from all the claims of "sovereignty" and "independence," just what concept of the Union they were using as a basis of action. The non-co-operation and resistance of some of the states to war measures of the federal government amounted practically to nullification, although there was lacking the complete theoretical justification later found in Calhoun's doctrine. Some Federalist extremists were so strongly convinced of the existence of an irrepressible conflict of political and economic interests with the Republican forces of the South and the West that they were willing to have the "more perfect Union" broken up. The vast majority of Federalists, however, evidently preferred to work for the defeat or modification of their opponents' policies within the existing constitutional system.

The Hartford Convention revealed the constitutional degeneration that had occurred in Federalism. It had become increasingly provincial and devoid of that broad national outlook that distinguished the statesmanship of Washington, Hamilton, and Marshall. There was little philosophical justification even in the Federalists' states' rights doctrines; they were devised simply to protect their own sectional and class interests from the dominant forces of Jeffersonian democracy. The party had lost all capacity for constructive statesmanship, had been deserted by many of its younger statesmen, and was thoroughly out of touch with the rising spirit of democracy and political equalitarianism. The Federalist organization did not long survive the War of 1812.



Nationalism versus Sectionalism

THE CLOSE of the War of 1812 marked the beginning of a new era in the development of the youthful American nation and of its immature constitutional system. After 1815 the United States embarked upon a remarkable period of westward expansion, population growth, and agricultural, commercial, and industrial development. A new generation had grown up since the days of the Revolution and the Confederation, and the men of this generation were determined to make the United States into an effective union and a prosperous country. But the processes of American national growth involved a basic contradiction—a conflict between centralizing and nationalizing forces on the one hand and decentralizing and sectionalizing forces on the other. For a few years after 1815 nationalism was to be in the ascendancy, and after the Civil War it was again to become the dominant force in the United States. During the period from 1820 to 1865, however, nationalism generally was to be overshadowed by decentralization and sectionalism, which were to challenge some of the basic principles of the Constitution and eventually were to shake the nation to its very foundation.

The United States was growing at an astonishing rate. Its territory was more than trebled during the half-century between the

Louisiana Purchase in 1803 and the Gadsden Purchase in 1853. Meanwhile the area of settlement increased in approximately the same proportion. The population of the country was likewise growing at an amazing pace, increasing from 7,200,000 in 1810 to 17,000,000 in 1840, and to more than 31,000,000 in 1860. By 1850 the population of the United States had surpassed that of Great Britain, and it continued to increase with extraordinary rapidity. The American birth rate was very high and Europeans were immigrating in large numbers, especially after 1840. This population growth affected all sections and all states but was most pronounced in the new western states. In fact, westward migration within the United States was practically continual and was one of the outstanding developments of this period.

Thus the American people were spreading across the continent more rapidly than they were developing means to bind themselves into a unified nation. Under such a decentralized condition the people considered most of their problems to be of a local or state character rather than national. This situation encouraged the growth of provincialism and a widespread demand for local democracy, state autonomy, and freedom from interference by any "outside" body, such as the United States Supreme Court.

Meanwhile the economic development of the country was producing an intensified sectionalism that was to have serious constitutional consequences. By 1815 the northeastern section was undergoing an industrial revolution, at first predominantly in textiles, but later expanding to include such products as shoes, coal, iron and steel, brass, and glass. Extensive urbanization also occurred in this region. Along the north Atlantic seaboard the cities of Boston, Philadelphia, and above all New York were expanding their commercial and industrial activities and were growing rapidly in population and influence. Their prosperity was based upon their favored positions as gateways to the great continental hinterland and as centers of trade with London, Constantinople, Canton, and other remote markets of the world.

At the same time the southern states were experiencing a remarkable boom in short-staple cotton, a boom that carried the plantation system into the rich bottom lands of the Gulf coastal plain, that was instrumental in bringing a new group of slave states into the Union, and that gave a new impetus to the institution of Negro

slavery. While cotton was becoming "King" in the South, a great expansion in grain and livestock production was taking place in the new West—a somewhat indefinite area which included the Ohio River valley, the upper Mississippi valley, the Great Lakes region, and for a time even the western portions of New York and Pennsylvania.

This new era of expansion produced a whole new series of national political and constitutional problems to replace the older matters that had formerly occupied the attention of Congress and the nation. The political and economic problems of the United States in the first generation of independence had grown principally out of American relations with Europe. American commercial and agricultural prosperity had been dependent upon the exigencies of European war markets; party loyalties had been to some extent guided by support or opposition to the French Revolution; and the principal matters occupying the attention of Congress were diplomatic in origin and turned upon American relations with Britain and France. In a sense, the United States, still mainly concerned with its relations with the Old World, had remained virtually a colony of Europe.

The political questions of the new era rose chiefly out of internal expansion and national growth and were concerned mainly with the conflict of sectional interests incident to that growth. A section was sometimes divided on an important issue, and local prejudices and interests often cut across sectional lines; but in general a decided majority in each section either favored or opposed specific national policies. The expanding industries of the Northeast sought a protective tariff, an objective that soon came into sharp conflict with the agrarian interests of the South and eventually with those of the West, and ultimately precipitated the tariff and nullification crisis of 1833. Northeastern merchants and manufacturers also wanted a national banking system and a conservative federal money policy, but most of the westerners and southerners were farmers and debtors and as such fought the national bank and demanded an inflationary monetary system. The West, badly in need of roads and canals, constantly sought federal assistance for a program of internal improvements, but the Northeast had no desire to be taxed for westward expansion. West and East also quarreled over federal land policy: the West wanted the federal government to sell small farms

at low prices and on liberal credit terms, while the East, viewing the national domain as a source of revenue and desiring to check a western expansion that menaced the political ascendancy of the older states, preferred that western lands be sold in large blocks at a high price. The South generally opposed federal internal improvements and was divided on public land policies, but above all it sought to protect the interests of its "peculiar institution," Negro slavery. In the Missouri controversy around 1820 and in later controversies over questions of slavery, the West divided roughly along the Ohio River into the slave West which supported the South and the free West or Northwest which aligned itself with the Northeast.

The clash of sectional interests helped make the era one of great constitutional debate in Congress. The recognized ascendancy of Congress in national affairs throughout most of the period, the tremendous forensic skill and intellectual powers of John C. Calhoun, Henry Clay, Daniel Webster, Thomas Hart Benton, Robert Y. Hayne, and other great legislators, and the fact that the Supreme Court was not yet generally recognized as the final arbiter of constitutional questions gave congressional debate an importance never possessed before or since in American politics. The Missouri Compromise debates, those between Webster and Hayne in 1830, and those preceding the Compromise of 1850 were only the most famous of many prolonged and important discussions of constitutional questions.

Constitutional debate very often turned ultimately to a discussion of the fundamental nature of the Union. The question had many facets, among them the extent of federal authority under the enumerated powers of Congress, the implications of the general welfare clause, whether or not the Constitution was a compact between the states, and the methods by which constitutional disputes between a state and the federal government were to be settled. The ultimate question, however, was whether the United States was a sovereign nation or a mere league or confederacy of state sovereignties.

The constitutional doctrines advanced in Congress were generally based upon sectional interests. Whether a congressman championed nationalism and broad construction or states' rights and strict construction was largely a matter of the political and economic interests of his state or section. Daniel Webster, for example, began his career as a strict constructionist who opposed the protective tariff

on constitutional grounds. At that time New England's commercial interests were opposed to a protective tariff, which they feared would interfere with foreign trade. However, as industry developed in New England, sentiment changed in favor of the protective tariff, and Webster became ultimately an exponent of protectionism and a champion of nationalism.

Calhoun, on the other hand, began his career as a nationalist advocating an expansion of federal power and broad construction of the Constitution. As the South fell behind in population and began to realize that ultimately it could not control the course of national politics, the section began to view nationalism and broad construction with concern. Calhoun shifted with his section, and from 1830 to 1850 he was the great champion of the doctrine of state sovereignty.

On most occasions between 1815 and 1860 sectionalism and provincialism proved to be stronger forces than nationalism. There was as yet but little genuine national sentiment in the country. True, following the War of 1812 there was a temporary outburst of nationalistic feeling in Congress, and the Supreme Court under John Marshall's leadership for some years after 1815 consistently adhered to a nationalistic policy in constitutional interpretation. But the various sections and states were quick to oppose their own interests to national welfare and to raise the constitutional arguments necessary to do so. In spite of judicial nationalism there was probably an actual decay of nationalist constitutional philosophy in the nation between 1815 and 1850. By the latter year, certain congressmen commonly spoke of the United States as a "confederacy," while a large majority in the Senate in 1837 acquiesced in a resolution describing the Union as a mere league of sovereignties.

POSTWAR NATIONALISM; THE NATIONAL BANK

Congressional sentiment in the postwar period beginning in 1815 was at first decidedly nationalistic. The young Republican leaders who dominated both houses had grown up under the Constitution, and they had also witnessed the difficulties of the United States since 1806 in both foreign affairs and domestic matters growing out of an inadequate sense of national unity and the limited character of federal power. They were determined to remedy these defects. They had little sympathy with the old Jeffersonian doctrine of ex-

treme strict constructionism. As Calhoun expressed it, there was less danger of federal political and military usurpation than there was that justice and liberty would be destroyed because of the weakness of the central government. Clay, Calhoun, and other young nationalists admitted that they were more advanced than a majority of the people in their desire for a strong central government, but they believed that it was the duty of Congress to educate and lead public opinion in that direction.

The strict-constructionist bloc in Congress was still strong, however, both among the older Republican agrarians and among the dwindling Federalist minority. The strict-constructionist Republicans insisted that the new nationalistic measures were not only unconstitutional but in fact threatened to destroy the states by prostrating them "at the feet of the General Government." The able but eccentric John Randolph of Virginia was the House leader of this group, while Nathaniel Macon of North Carolina championed the same cause most effectively in the Senate. Outside Congress, John Taylor of Virginia still argued elaborately in favor of state sovereignty and strict constructionism, while Jefferson, now relieved of the responsibilities of high office, also returned in part to his earlier constitutional position.

With the coming of peace in 1815 President Madison had given the Congressional nationalists a decided advantage by advocating a comprehensive program of national legislation. In December 1815, he recommended the enlargement of the Military Academy and of the country's naval and militia organization, and Congress responded with legislation providing for some expansion. He urged Congress to pay particular attention in revising the tariff to the establishment of protective duties for those commodities considered essential to national independence and prosperity. Led by Calhoun, Congress enacted the Tariff Act of 1816, which definitely adopted the protective principle as a national tariff policy, although eventually this policy was to provide a serious constitutional controversy.[1] The President also advocated a new national bank, a system of roads and canals to be "executed under the national authority," and the establishment of a "national" university for the purpose of developing and diffusing those "national feelings" and "liberal sentiments" which "contribute cement to our Union." Congress provided for

[1] See Chapter 12.

a national bank but unfortunately did not succeed in establishing either a national transportation system or a national university.

The first postwar issue to provoke extended constitutional controversy was the proposal to recharter a national bank. In 1811 a Republican-dominated Congress had refused to grant a new charter to the Bank of the United States, but since that time many strict-constructionist Republicans had changed their viewpoint on both the wisdom and the constitutionality of a national bank. The disappearance of the first bank in 1811 had caused the states to charter a number of state banking institutions, many of which failed to observe the elementary rules of sound banking practice. They had issued large quantities of paper money, much of it of little or no value, which circulated as part of the nation's monetary system and often caused great confusion in commercial and industrial circles. The Constitution specifically forbade the states to coin money and emit bills of credit, but as Calhoun pointed out, the chartering of state banks had enabled the states to elude this restriction and usurp control of the monetary system. The absence of a national bank also proved a serious handicap to federal fiscal policy and financial activities during the War of 1812, for the government not only lacked any adequate agency of deposit, but it also missed the financial assistance such a bank might have been able to extend.

The Republican nationalists accordingly brought about the passage of a national bank bill in January 1815. Madison vetoed the measure as inadequate, but at the same time indicated his belief that the bank was constitutional, and in his annual message of December 1815 he again recommended passage of a national bank law. In January 1816, accordingly, Calhoun, as chairman of the special committee on uniform national currency, introduced a bill to incorporate a new bank of the United States for twenty years with a capital of $35,000,000, one-fifth of which was to be subscribed by the federal government.

Calhoun defended this measure's constitutionality by holding that it was a necessary and proper means to the establishment of a uniform national currency. The main object of the framers of the Constitution in giving Congress the power to coin money and regulate its value, he thought, must have been to give steadiness and fixed value to the currency of the United States. The various states, through their banking activities, had recently worked the defeat of

this end and had actually taken over control of the nation's monetary system. Consequently, he concluded, it was the duty of Congress to recover control over the monetary system, and this could best be done through the medium of a national bank.

Clay also presented an ingenious argument to explain his change of attitude toward the proposed national bank. He had voted against the bill to recharter the old bank, in part on constitutional grounds. Now, however, he explained that in 1811 he had opposed the bank because it had not then been necessary to carry into effect any power specifically granted to Congress; at that time, therefore, the bank had been unconstitutional. Conditions had now so changed, he said, that a national bank was necessary to give effect to the enumerated powers of Congress, and Congress thus now possessed an implied power not possessed five years before.

Another popular Republican argument in Congress in favor of the bill was that the bank's constitutionality was now a settled matter simply because Congress and public opinion had for some time recognized a bank as constitutional. Madison had advanced this argument even while vetoing the bill of 1815, observing that all question as to the bank's constitutionality had now been precluded by "repeated recognition under varied circumstances of the validity of such an institution in acts of the legislative, executive, and judicial branches of the Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation." Madison's argument amounted to the contention that a constitutional question could be settled by a kind of prescriptive process —by prolonged common recognition of a particular practice or constitutional doctrine. The notion was unorthodox Republicanism, but most students of constitutional history will recognize it as not far from the truth.

The strict-constructionist argument against the bank, best stated by Representative John Clopton of Virginia, rested on the old Jeffersonian narrow interpretation of the necessary and proper clause. This clause, Clopton said, "imparts not a scintilla of power to Congress which the preceding enumeration does not grant." Should it be admitted that the necessary and proper clause conveyed any substantive powers, it would "give to Congress general, unlimited, discretionary powers," an idea which would eventually sweep away "every vestige of authority reserved to the States." Clopton also

denounced Madison's argument that acquiescence in federal legislation could conclusively settle any constitutional question. Were this doctrine adhered to, he argued, the Constitution would in time "be superseded and rendered altogether a dead letter" by various acts of Congress.

Clopton and his sympathizers, however, were not able to stay the tide of nationalism in Congress. Although the Federalists joined the strict-constructionist Republicans in opposition, the bill to charter a second Bank of the United States became law on April 10, 1816. Future developments were to demonstrate, however, that the constitutionality of the national bank was far from being a dead issue.

THE INTERNAL IMPROVEMENTS ISSUE

Few issues were to be as repeatedly involved in constitutional controversy during the first half of the nineteenth century as that contemporaneously termed "internal improvements." The American people were constantly pushing westward into new and unoccupied regions, conquering the wilderness and building a nation. The great extent of fertile territory open to settlement encouraged the growth of widely scattered and largely isolated communities. As settlement increased, the people clamored for improved natural waterways, canals, and roads, to enable them to transport their products to market and to have manufactured and other needed goods imported at reasonable prices.

The individual states generally provided some internal improvements, often by chartering private turnpike and canal companies. Most of the trans-Appalachian region, however, was too sparsely settled and too undeveloped to make internal improvements attractive to private capital or financially possible for the new state governments. Moreover, there was obvious need for large interstate projects, beyond the financial and constitutional competence of the separate states. Such improvements would enhance the national prosperity and help to bind the states into a more effective union. Also many westerners thought it only fair that federal revenues derived from the sale of public land should be used for internal improvements.

Constitutional theorists in Congress were sharply divided on the internal improvements issue. The strict constructionists held that the general welfare clause did not authorize Congress to spend money

for any purpose not directly related to the enumerated powers of Congress. Internal improvements, they said, were not so related, and congressional appropriations for that purpose were therefore illegal. They could be made legal only by constitutional amendment.

The broad constructionists, on the other hand, argued that the general welfare clause authorized Congress to spend money for any broad national purpose, whether or not that purpose lay within the enumerated powers of Congress. Since Congress could spend the money, they contended, it could also control its expenditure, and even come into the possession of internal improvements which could be maintained as government property.

Some moderately broad constructionists in Congress drew a distinction between the power to appropriate for internal improvements and the power to own and operate. They agreed with other nationalists that the general welfare clause authorized appropriations beyond the enumerated powers of Congress but insisted that the appropriation of money must not lead to a new sphere of congressional authority. Hence, while Congress might constitutionally grant money to state or local governments or subsidize private enterprise for internal improvement purposes, it could not authorize the federal government itself to build or operate any improvement such as a canal or national highway. A few legalists, drawing a still finer distinction, insisted that while Congress might appropriate for and construct internal improvements, it could not operate them, but would have to surrender completed improvements to state or private hands.

The internal improvements issue first rose in Congress in 1806, when Jefferson recommended to Congress the application of surplus federal revenue to "public education, roads, rivers, canals, and such other objects of public improvement as it may be thought proper to add to the constitutional enumeration of Federal powers." As an orthodox strict constructionist, he added that he supposed a constitutional amendment was necessary, "because the objects now recommended are not among those enumerated in the Constitution, and to which it permits the public moneys to be applied."

Congress did not act on the President's suggestion that the Constitution be amended; it did, however, authorize the construction of the Cumberland National Road from Cumberland, Maryland, to the Mississippi River, a few miles of which were presently con-

structed. After 1806 internal improvements were for a time almost forgotten, as commercial restrictions and war eliminated the federal surplus.

The War of 1812 emphasized the need for internal transportation and communication facilities for purposes of effective national defense. In his annual messages of 1815 and 1816, Madison strongly recommended that Congress provide for a federal internal improvements program of roads and canals. In the latter message he took his stand with the strict constructionists, and asked that Congress submit a constitutional amendment to the states to make the program possible.

Led by Calhoun, the nationalists in Congress responded in December 1816 by sponsoring a "Bonus Bill" setting aside the $1,500,000 bonus paid by the national bank for its charter and the United States government's bank dividends as a permanent fund for internal improvements. In supporting the measure in the House, Calhoun delivered an exceptionally able speech, rivaling the broad constructionism of Webster and Marshall at their best. "No country, enjoying freedom," he said, "ever occupied any thing like as great an extent of country as this Republic. . . . We are great, and rapidly . . . growing. . . . We are under the most imperious obligation to counteract every tendency to disunion." Arguing for a broad construction of the general welfare power, he pointed out that "if the framers had intended to limit the use of the money to the powers afterward enumerated and defined, nothing could be more easy than to have expressed it plainly." While he admitted that the Constitution was founded upon "positive and written principles" rather than upon precedents, he nonetheless insisted that continuous popular approval of congressional action in favor of internal improvements furnished "better evidence of the true interpretation of the constitution, than the most refined and subtle arguments."

Although other members of Congress raised constitutional objections to the "Bonus Bill," the opposition was predominantly sectional in scope and based upon expediency. Many members from New England and the South Atlantic states opposed a rapid development of internal improvements, not only because relatively few would be constructed in their states, but also because improved transportation facilities would tend to drain off their population to

the West. Population was generally considered the mark of economic prosperity and the measure of political power. On the other hand, the Middle Atlantic region and especially the western states would benefit from the appropriation, and the members from these sections supported the measure with enthusiasm. Because of this sectional clash the "Bonus Bill" barely passed the House by a vote of 86 to 84, and the Senate by a vote of 20 to 15.

To the surprise of many, Madison vetoed the "Bonus Bill" on constitutional grounds. He adopted the narrowest possible interpretation of the general welfare clause, holding not only that it did not constitute any general grant of legislative power but also that it did not even authorize appropriations of money beyond the enumerated powers of Congress. He reasserted the benefits of internal improvements but insisted that a constitutional amendment was necessary to legalize them. Thus by a paradox of history the man who in the Constitutional Convention had championed a strong central government vetoed a nationalistic measure sponsored by the man who was soon to become the most celebrated proponent of state sovereignty.

In his first message to Congress in December 1817, President James Monroe also adopted a stand in favor of a constitutional amendment authorizing an internal improvements program. In the Senate, James Barbour of Virginia responded by introducing an amendment granting Congress the power "to pass laws appropriating money for constructing roads and canals, and improving the navigation of water-courses," provided that no action was taken without the consent of any state involved and provided that the money appropriated was distributed among the states in proportion to their representation in the lower house of Congress. In the House, a select committee headed by St. George Tucker of Virginia also took the constitutional question under advisement.

The broad constructionists in Congress killed the proposals for a constitutional amendment to legalize internal improvements. Barbour's amendment was ultimately tabled, 22 to 9, while Tucker's committee made a report rejecting Monroe's constitutional viewpoint and recommending once more that the bank bonus be set aside as a fund for roads and canals. Tucker explained why the broad constructionists opposed a constitutional amendment: If they believed they already had the power in question, they would be

wrong to ask the states to grant it. "For, if an amendment be recommended, and should not be obtained, we should have surrendered a power, which we are bound to maintain if we think we possess it." Henry Clay, then emerging as the great western champion of internal improvements, took the same ground. In support of this position the House shortly resolved, 90 to 75, that Congress had the power to appropriate money for post roads, military highways, and canals, although it rejected, 84 to 82, a resolution declaring that Congress had the power to construct such improvements.

Even had Congress submitted a constitutional amendment to the states, it would have had very little chance of adoption. New England and the South Atlantic states were largely opposed to a national internal improvements program. The eastern states would have gained very few direct benefits from internal improvements, while they, as the more populous portion of the Union, would have been obliged to pay a disproportionate share of the costs.

The constitutional impasse between President and Congress arrived at in 1818 ended for a time the hope for any broad federal internal improvements program. In 1819, Calhoun, now Secretary of War, submitted to Congress plans for a comprehensive system of internal improvements that he considered necessary for national defense, but the panic of 1819 reduced federal funds and prevented Congress from taking any action for the next three years.

In 1822 Congress passed a bill providing for federal toll gates and federal maintenance of the Cumberland National Road and giving the federal government certain jurisdictional rights over the road within the various states. Monroe had approved earlier Cumberland Road grants, but he vetoed the present measure as unconstitutional. Unlike Madison, he admitted that Congress could appropriate money for the general welfare, but he denied that the federal government could construct or operate any such improvement. Again constitutional amendments were introduced empowering Congress to construct roads and canals, and again Congress refused to adopt them. The impasse therefore continued.

The result of this situation was the gradual abandonment by Congress of plans for a national system of internal improvements and the adoption of a policy of appropriations to the states for this purpose, a device which all but a small minority of strict constructionists thought constitutional. Many western states now pre-

ferred to undertake their own canal- and road-building programs, and accordingly they sought financial assistance from the federal government rather than a separate national program. Consequently representatives from different states increasingly entered into "log-rolling" agreements to secure mutual support for appropriations for state-owned improvements and even for private canal corporations. Congress also adopted the policy of granting lands to western states which the states could sell or use as security to obtain money for their programs. When President John Quincy Adams, a nationalist and broad constructionist, in 1825 submitted new plans for a national internal improvements program, Congress ignored the suggestion and instead appropriated still larger sums to the various states for their own use.

Thus the internal improvements controversy resulted in a victory for states' rights and decentralization. Calhoun, Clay, Adams, and the other broad constructionists were defeated in their attempts to create a great national system of internal improvements. Undoubtedly such a system would have supplied a powerful and very badly needed force for unification in the youthful nation. Instead, internal transportation passed almost exclusively under state control at the very time that interstate commerce, by roads, canals, and railroads, was becoming important. Even the Cumberland Road was shortly relinquished to the states through which it passed. More than a generation was to elapse before a really national transportation system was to be developed, and then it was to be controlled by private corporations rather than by the federal government. In the intervening period, localism, sectionalism, and the doctrine of state sovereignty were to score their greatest successes.

THE MISSOURI CONTROVERSY

No political conflict of this period emphasized more powerfully the sectionalist character of the federal Union than did the great controversy over the admission of Missouri into the Union. Now for the first time a distinct political cleavage between North and South, based on the question of the westward extension of slavery, made its appearance.

In the first generation of national life, slavery had not constituted an important sectional issue, and indeed there seemed to be some grounds for belief that the institution was dying. Between 1777 and

1804 all the states north of Maryland took action to abolish slavery within their borders, usually by gradual emancipation laws, while all the Southern states abandoned the importation of Negro slaves from abroad. Both Northern and Southern delegates in the Confederation Congress supported the provision of the Ordinance of 1787 prohibiting slavery in the Northwest Territory, and representatives from both North and South also supported the Act of 1807 banning the foreign slave trade. Philosophic and humanitarian opposition to slavery was also fairly widespread in the South before 1815, particularly in the older plantation areas, where the institution was beginning to be unprofitable. There were numerous small antislavery societies south of the Mason and Dixon Line, and many prominent Southerners hoped that the institution would soon die.

The differing economic and cultural evolution of the Northern and Southern states nonetheless gradually laid the foundations for the sectional controversy over slavery. Slavery had no adequate economic foundation in the North, and by 1800 the gradual emancipation laws had assured its extinction. The Northwest Territory also remained free soil, and the states formed from it, beginning with Ohio in 1803, entered the Union as free states. In the South, however, the widespread introduction of short-staple cotton after 1795 created a new plantation boom, first in South Carolina and Georgia and then in the Gulf coastal plain. As a result, Alabama and Mississippi entered the Union as slave states, and slavery already existed in Louisiana when the territory was acquired in 1803. By 1819, the Mason and Dixon Line and the Ohio River divided the eleven free states from the eleven slave states, although this division was not as yet a matter provoking any great sectional selfconsciousness.

While the legal status of Negro slavery was primarily a local matter under the control of the individual states, certain provisions in the Constitution gave the federal government some control, either direct or indirect, over the institution and so supplied the legal groundwork for a constitutional controversy if slavery should become a subject of serious dispute.

Though the Constitution nowhere used the word "slavery," three provisions dealt directly with Negro servitude. Article I, Section 2, provided that three-fifths of the slaves should be counted in apportioning taxes and representatives in the House. Article I, Section 9,

prohibited Congress from interfering with the importation of slaves before 1808. Article IV, Section 2, provided for the return of fugitive slaves. The three-fifths clause, a compromise provision satisfying in part the contention of Southern delegates to the Constitutional Convention that property as well as population should be included in the representative base, was never a source of serious controversy, although this provision was occasionally challenged by Northerners—in the Hartford Convention, for example. The section forbidding interference with the foreign slave trade before 1808 had been a concession to certain Southern states which felt the need of an increased labor supply, but both Northern and Southern congressmen had voted in 1807 to end the importation of slaves in 1808, and no large groups of Southern congressmen ever thereafter seriously proposed to reopen the foreign slave trade. The fugitive slave clause seemingly left enforcement to the states, but Congress nonetheless in 1793 enacted a statute to supplement state machinery. The law worked well enough for several decades.

There were other constitutional provisions which, although they did not deal directly with slavery, nonetheless ultimately became involved even more than the direct provisions in the slavery controversy. The Constitution gave Congress the power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." Congress at first apparently assumed that this provision gave it full authority over slavery in the territories, but ultimately the clause became the source of a long and embittered argument as to whether Congress could legally ban slavery in the territories.

The Constitution also gave Congress the power to regulate commerce between the states; in the later slavery controversy some Northern extremists argued that Congress thereby had power to regulate or forbid the interstate slave trade. Although such a contention would seem plausible today, it was not then taken seriously by most Northerners and never became an important cause of sectional friction.

The provision which became the center of conflict in the Missouri controversy was that part of Article IV, Section 3, which stated that "New States may be admitted by the Congress into this Union." This phraseology had resulted from a compromise in the Convention of 1787 between those who wished new states admitted

upon terms of equality with the original members of the Union and those who wished to preserve the dominance of the older states. Constitutional theorists in Congress generally agreed that by the terms of this clause, Congress was permitted to admit new states but was not required to do so. But to what extent could Congress impose conditions upon new states before their admission to the Union? Could Congress, for instance, require that a prospective state ban slavery or impose other limitations upon Negro servitude? This was to be the crucial constitutional question in the prolonged controversy over the admission of Missouri.

Prior to the admission of Missouri, Congress had admitted nine new states into the Union without any important controversy over the matter of slavery. In every instance, geography and prior territorial legislation had previously largely disposed of the slavery issue and had made apparent the state's future status as slave or free soil. Also Congress had been able to balance the admission of a new free state with the admission of a corresponding slave state, so that the political equilibrium of free and slave states remained undisturbed.

Missouri's case was not disposed of so easily. The prospective state lay athwart a projection of the dividing line between free and slave states and had not been definitely committed for or against slavery either by history or by geography. During the territorial period, however, Missourians had been permitted by Congress to hold slaves, and they expected to continue the practice after attaining statehood. Furthermore, Missouri's admission into the Union would disturb the existing balance between free and slave states.

In 1818 the Missouri territorial legislature petitioned for statehood, and in January 1819 the House of Representatives took up the consideration of an enabling bill—that is, a measure that would permit Missouri to draft a constitution, organize a state government, and make formal application for admission to the Union.

Representative James Tallmadge of New York now offered an amendment to the bill prohibiting the further introduction of slavery in Missouri and declaring free at the age of twenty-five all slaves born after the state's admission to the Union. The House adopted the Tallmadge Amendment by an almost straight sectional vote, nearly all the proposal's supporters coming from Northern states. However, with two senators from each state the Southern

position in the Senate was stronger, and the upper chamber refused to concur in the Tallmadge Amendment. Neither the House nor the Senate would recede, and Congress adjourned in March without further action on the Missouri Bill.

Throughout 1819 the public was much aroused over the Missouri issue. The predominant sentiment in the free states was strongly in favor of the Tallmadge Amendment. In the slave states, on the other hand, public protests were made against congressional restrictions on slavery expansion. The people of Missouri also protested in various ways against the attempt of Congress to restrict their freedom in drawing up a state constitution. Simultaneously with the development of this issue the alarm of many states' rightists was increased by the restriction of state authority over bankruptcy and banking brought about through the Supreme Court's decisions in the Sturges case and the McCulloch case.[2] The combination of congressional and judicial nationalism was very disturbing to the champions of states' rights and strict constructionism.

In December 1819 Missouri renewed its application for statehood, and at this time Maine, then a part of Massachusetts, also asked for admission as a separate state. The House promptly passed a bill for Maine's admission to the Union as a free state. The Senate then added two important amendments to the Maine bill. The first provided for Missouri's admission without restriction as to slavery; the second, introduced by Senator Jesse Thomas of Illinois, prohibited slavery forever in any remaining portion of the Louisiana Purchase above the parallel of 36°30′ north latitude, an extension of the line forming the southern boundary of Missouri.

While the House at first refused to concur in the Senate's proposals, a Senate-House conference committee ultimately made the Thomas Amendment the basis for compromise. The committee recommended the passage of a separate act admitting Maine as a free state and the passage of the bill to admit Missouri as a slave state with the Thomas Amendment attached. Both houses concurred, although the antislavery men in the lower chamber fought to the end against the compromise and lost in a very close vote.

President Monroe at first considered vetoing the Missouri Act as unconstitutional on the ground that Congress had no authority to prohibit slavery in the territories. But when his cabinet, which

[2] These decisions will be discussed in detail in the following chapter.

included three slaveholders, unanimously assured him that the bill did not violate the Constitution, he signed the measure.

THE CONSTITUTIONAL DEBATE

The principal constitutional issue in the Missouri debates was whether or not the constitutional provision, "New states may be admitted by the Congress into this Union," empowered Congress to impose restrictions upon a new state as a condition of admission to statehood. If so, then Congress could ban slavery in Missouri as a prior condition of the state's entry into the Union.

Northern antislavery men insisted that Congress had a right to impose such conditions. They emphasized the word "may" which implied that Congress had complete discretion as to whether or not it wished to admit any state. Admission to the Union, they said, was "a privilege and not a right," and when Congress granted the favor of statehood, it could "annex just and reasonable terms." This argument they enforced with historical precedent—Congress had imposed a variety of restrictions upon the various states admitted to the Union since 1789, while the enabling acts for Ohio, Indiana, and Illinois had required those states to prohibit slavery in their constitutions.

Southerners admitted that Congress could reject a state's application for admission, but denied that Congress could impose any conditions upon its entry. The Union, they argued, was one of equal states. Were additional states admitted under limitations not required of the older states in the Union, the result would be a union of states unequal in "sovereignty" and a consequent fundamental alteration in the nature of the Union. Therefore they held that since the original states of the Union were under no limitations on the subject of slavery, Congress could not impose such limitations upon Missouri.

The antislavery men also brought the territories clause of the Constitution to bear on their argument. Congress, they said, had complete authority to dispose of the territories as it wished, and to govern them in any fashion it saw fit. Congress could therefore impose any restrictions or requirements it wished upon the Territory of Missouri. Conditions so imposed became a contract between the Territory of Missouri and the United States and could be enforced after the territory's admission to statehood.

Most Southerners admitted that Congress could prohibit slavery in the territories, a point later to become a matter of great controversy. They were almost unanimous, however, in their insistence that such a restriction had no binding effect upon the state after its admission to the Union.

Proslavery men argued also that the Louisiana Purchase Treaty had imposed a condition upon the federal government which obligated it to admit Missouri without any restrictions as to slaves. Article III of the treaty, they pointed out, guaranteed that the inhabitants of Louisiana would be admitted to all the rights, privileges and immunities of citizens of the United States. This, they said, amounted to a guarantee of slavery in the Louisiana Territory, since slaveholding might be construed as a privilege of citizens of the United States, and the federal government could not revoke the guarantees extended in the treaty of 1803.

Northerners denied, on the other hand, that any treaty could work a diminution of the constitutional right of Congress to exercise discretion in the admission of new states. "The treaty-making power," declared Tallmadge, encompassed "neither the right nor the power to stipulate, by a treaty, the terms upon which a people shall be admitted into the Union."

Many years later, the Supreme Court ruled upon various aspects of the right of Congress to impose restrictions upon a state entering the Union. The Court's general position was that Congress may require a territory to fulfill certain conditions as a precedent to statehood, but that such conditions, with certain exceptions, are not binding upon a state after admission. Certain conditions involving private rights of a non-political character, such as land titles, constitute such exceptions. In any case, Congress may not impose restrictions which impair the state's political equality in the Union.

On the other hand, it is recognized today that a treaty cannot deprive Congress of legislative power which it would otherwise possess. Even though a treaty has placed an obligation or limitation upon the United States, Congress may subsequently set that obligation aside in the ordinary legislative process. To do so may constitute a violation of the international obligations of the United States, but congressional competence to do this is beyond question. In short, the Southern argument that the Louisiana treaty had worked a permanent limitation of federal authority in the territories en-

compassed in the purchase would nowadays be regarded as untenable.

NEGRO CITIZENSHIP AND THE SECOND MISSOURI COMPROMISE

Missouri's constitution, presented for final approval to the next session of Congress (1820–21), provoked another controversy. The constitution submitted contained a clause requiring the state legislature to pass a law banning free Negroes from entering the state. Northerners at once attacked the provision, and another prolonged debate ensued, provoking considerable bitterness and sectional feeling.

Northern congressmen contended that the clause banning free Negroes from Missouri violated Article IV, Section 2, of the federal Constitution, which provided that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." They pointed out that in some of the Northern states—Massachusetts, New Hampshire, and Vermont—Negroes were granted citizenship rights. Were such a Negro, a citizen of one of these states, to go to Missouri, he would be denied entrance in violation of his constitutional rights. The Northern congressmen maintained that the right to enter and settle in a state was one of the most important privileges enjoyed in common by the citizens of the several states.

In reply, Southern spokesmen contended that the privileges and immunities of citizens were not extended to free Negroes and mulattoes by the Constitution. Although their definitions of citizenship varied, most Southerners held that Negroes could not be considered citizens unless they possessed all the civil and political rights of white citizens living under the same circumstances. Since the free Negroes of none of the states actually possessed equal rights with white citizens, Negroes could not be recognized as citizens under the Constitution. The privileges and immunities clause, in short, did not apply to Negroes. In support of this contention, Charles Pinckney of South Carolina, a member of the Constitutional Convention in 1787, claimed that he was the author of the privileges and immunities clause of the Constitution and that it was designed on the positive belief that Negroes were not and never would be citizens. In essence, Southerners maintained, as Chief Justice Taney

later did in the Dred Scott case, that the Constitution was a white man's document.

This argument over what constituted state citizenship was possible mainly because the federal Constitution had failed to define either state or national citizenship. Whether a state could define citizenship was uncertain; presumably in the absence of any federal definition, it could do so, but whether this meant that the other states were required to accept as citizens any group of persons so defined by a state was open to question. The whole matter of citizenship was in fact not cleared up until the Fourteenth Amendment, adopted in 1868, defined national citizenship, made it primary, and made state citizenship dependent upon it.[3]

Most Southerners insisted that in any event Missouri had already become a state by virtue of the enabling act and that Congress therefore had no further discretion whatever either in seating the state's congressmen or in imposing any further limitations upon the state's sovereignty. Northerners replied that Missouri was not a state until the formal resolution of admission had been passed by Congress. Precedent certainly supported this contention, for in the past the enabling act had been followed by a resolution of admission before the state's representatives were seated. Accordingly, the Northern-dominated House rejected the resolution of admission, 93 to 79.

Henry Clay now assumed the lead in formulating a compromise. He secured the appointment of a House committee with himself as chairman, which proposed that Missouri be admitted on condition that the state legislature should agree never to pass any law preventing the citizens of any state from entering Missouri. When the Northern majority voted down this proposal, Clay secured the appointment of a joint Senate-House committee, which reported the same formula in somewhat more exacting terms—Missouri was to be admitted upon the fundamental condition that her constitution should never be construed to authorize the passage of any law which should exclude the citizens of any state from enjoying those privileges and immunities guaranteed by the Constitution of the United States. And further, Missouri was to be required to give her assent to this provision. Although this change in the formula was little less than pure sophistry, the House of Representatives

[3] The evolution of the Fourteenth Amendment and the definition of citizenship therein are discussed on pp. 458–463 and 490–495.

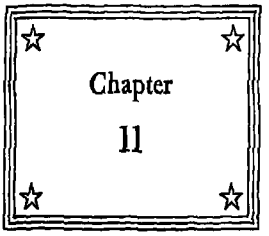
accepted it by a close vote, and with the Senate's concurrence the resolution of admission was adopted. Missouri's forthcoming assent was hedged with some reservations, but President Monroe ended the matter by issuing a proclamation of admission on August 10, 1821.

The Missouri Compromise quieted the slavery controversy for a time. But by the close of the Missouri controversy, it had become apparent that the wave of postwar nationalism had not succeeded in submerging the fundamentally sectionalist character of the Union. It was evident not only that the various sections had highly divergent economic and political interests, but that sectional champions in Congress could not agree upon either the nature of the Union or the exact extent of federal authority. Certain statesmen of the North and West, notably Webster and Clay, continued to emphasize nationalism and broad construction of federal powers. Their position reflected the desire of certain economic interests for a protective tariff and a strong federal banking system, and a Northern awareness that the growth of Northern population assured that section ultimate control of Congress and of national policy.

At the same time Southern statesmen, led by Calhoun, gradually became aware that nationalism did not serve the political and economic interests of the South. Broad construction, they eventually realized, could be used to underwrite northeastern tariff and banking policies, which they regarded as disastrous to Southern interests. The realization also grew, although slowly at first, that national power might conceivably be used to make an attack upon the institution of slavery. Hence nationalism and broad constructionism gradually disappeared among Southern statesmen, while their adherence to the doctrines of strict construction, of states' rights, and even of state sovereignty became more and more general.

For a generation after 1821 the Northwest served as a balance between the economic interests and constitutional philosophy of the Northeast and the South. As a rapidly growing section of free states the Northwest did not share the South's fear of ultimate domination by the Northeast or of federal interference with its domestic institutions. On the other hand, as an agrarian region the Northwest generally opposed a strong federal banking system and eventually turned against the protective tariff. Also the Northwest received more support from the South than from the Northeast

for its cherished policy of speedy removal of Indians and the opening of new lands to settlement. Consequently agrarian interests, moderate states' rights, and strict construction secured ascendancy in the Northwest, although the people there opposed nullification and eventually opposed the extension of slavery and secession.



John Marshall and Judicial Nationalism

THE WEAKENING of the spirit of nationalism in Congress was in marked contrast to the Supreme Court's success after 1815 in building up a comprehensive body of nationalistic constitutional law. Between 1815 and 1830 the Court, dominated by the nationalist and conservative Federalist, John Marshall, struck blow after blow in support of the doctrine that the United States was a sovereign nation and not a mere confederacy of sovereign states. The Court was unable to outweigh the realities of provincial and sectionalist politics, nor was it able to arrest the growing tendency in the South to embrace the doctrines of strict construction and state sovereignty. Yet its voice was of great importance in fostering the growth of American nationalism and in providing nationalist sentiment with rational legal arguments. Eventually nationalism triumphed over sectionalism, and the judicial opinions formulated between 1810 and 1830 became the foundations of much modern constitutional law.

The Court's nationalism was in large part a reflection of its membership. John Marshall, Chief Justice from 1801 to 1835, lost nothing of his Federalism in his later years on the Court. His opin-

ions after 1810 were dominated by the same consistent regard for strong central government and conservative property rights that had once served the Federalist Party in the days of Alexander Hamilton. Postwar judicial nationalism was in a sense the final afterglow of Federalism; the ideals of the Federalists lived on in the federal judiciary after the party itself was dead.

After 1811 a majority of the men appointed to the Supreme Court were nominally Republicans, but actually most of these Republican judges differed but little from Marshall in their political and social philosophy, and on most occasions they accepted his leadership without much question. This situation prevailed in part because of the strength of Marshall's personality and the quality of his intellectual leadership, in part because most of the new appointees were conservative lawyers whose ideas and concepts contrasted markedly with those of the many men of comparatively radical tendencies who were elected to Congress and to state legislatures during those years. The very nature of the Supreme Court's position as the nation's highest judicial body also influenced the justices to view issues from a nationalistic rather than a provincial standpoint, especially when national authority tended to safeguard the established social and economic order.

Two of the new Republican justices, William Johnson (1804–1834) and Joseph Story (1811–1845), both appointed at the youthful age of 32, deserve special note. Johnson, a South Carolinian and Jefferson's first appointee to the Supreme Court, was a liberal nationalist of notable intellectual independence. He was the first great dissenter on the Supreme Court, and, like Justice Oliver Wendell Holmes a century later, his dissenting opinions served as an incisive critique and a potential check on the rulings of the majority. As a consistent champion of positive law he held that the popularly elected Congress rather than the appointed Supreme Court should be the final umpire of the federal system. Accordingly, in cases of conflict between national and state authority, he consistently upheld congressional power on the principle of broad construction. But when the action of a state clashed with questionable rights of private property without infringing positive national authority, Johnson generally opposed Marshall's broad interpretation of the constitutional restrictions upon the state's legislative competence.

Story, appointed by Madison, was without previous judicial ex-

perience, but he was exceptionally well trained, and his extensive knowledge of international and admiralty law was a distinct asset to the Court, especially during his first years on the bench. Although nominally a Republican, he showed no great attachment to Jeffersonian principles and was soon Marshall's most able and vigorous collaborator. Story's great knowledge of law and his studious habits made him a most effective complement to the Chief Justice, who was less learned in the law but who possessed a remarkable grasp of the practical needs of American government and a bold determination to make the Supreme Court a conservative nationalist safeguard against the forces of decentralization and agrarian radicalism.[1]

Marshall and his colleagues received influential support and encouragement from members of the American bar. This was a period of great forensic efforts before the Supreme Court as well as in the halls of Congress. In many of the significant cases the litigants were represented by the nation's ablest lawyers, men like Daniel Webster, William Pinckney, William Wirt, Joseph Hopkinson, and Henry Clay. In rendering the decision in several important cases, Marshall actually took the argument of counsel, stripped it of extraneous material, and welded it into the dictum of the Court, thereby making it a part of American constitutional law. In this connection the Chief Justice admitted his indebtedness, especially to Pinckney and Webster.

Beginning in 1816 the Court at almost every term decided issues touching vital spots in the American constitutional system, most of them involving the interrelationship of the states and the central government. Most of the constitutional restrictions upon the states and some of the most important powers of Congress had not previously been interpreted by the Supreme Court. By employing broad construction in both of these fields the Court deliberately promoted legal nationalism at a time when it was greatly needed.

Social and economic conditions following the War of 1812 were similar to those that had prevailed after the Revolution. Speculation, wildcat banking, and questionable financial schemes were followed by depression and hard times. All this was accompanied by

[1] Joseph Story, *Commentaries on the Constitution of the United States*, 3 v. (Boston, 1833), is one of the great treatises on the American constitutional system and reveals both Story's scholarship and his nationalism.

the inevitable conflicts between creditor and debtor elements. The latter turned, as had other debtors in the 1780's, to the state legislatures for relief. Widespread popular demands arose for legislation that would suspend burdensome contracts, postpone the payment of debts, and increase the volume of money in circulation. The state legislatures, being close to the people and directly responsible to the current majority, responded to the popular demand with various laws reminiscent of the Confederation period.

The conservative, propertied creditor interests turned to the courts for protection against what they considered radical and unconstitutional legislation, seeking to have such laws invalidated as invasions of national authority or as violations of the constitutional prohibitions upon the states. They secured the best legal talent in the country to represent them in court and to carry their cases to the Supreme Court of the United States if necessary to obtain a favorable decision. In most of the important cases of this character to reach the highest tribunal the verdict was against the states and in favor of the vested interests. Thus conservatism and nationalism were closely joined in American constitutional law.

Because of the disintegration of political parties after 1815, the main source of organized opposition to the nationalistic judicial interpretation was the state governments, especially those whose interests were affected adversely by the Court's decisions. Provincialism and state pride were strong in all sections, and state legislatures and state judiciaries were often exceedingly jealous of their handiwork. Consequently most of the states were greatly aroused at one time or another by what they considered outside interference with their action and restrictions upon their "sovereignty." The political leaders of the state involved usually protested strongly, and in some cases attempted to circumvent or nullify the adverse consequences of the Court's action. Marshall and his colleagues were not unaware of this popular attitude. They were willing to take their stand against it.

EXPANSION OF THE CONTRACT CLAUSE

A principal objective of the men who framed the Constitution had been to put a stop to the practices which state legislatures often adopted at that time of interfering with vested rights by enacting stay and tender laws, making paper money legal tender and setting

aside court decisions. Conservatives in 1787 had been alarmed over the lack of security for property rights from what they considered arbitrary action by popularly controlled state legislatures. Consequently the Constitution, in Article I, Section 10, had forbidden the states to emit bills of credit, make anything but gold and silver legal tender in payment of debts, or enact any law impairing the obligation of contracts.

No interpretation of these prohibitions upon the states had been made by the Supreme Court during its first twenty years, although the federal judiciary early had taken some hesitant steps toward the incorporation into American constitutional law of the doctrine of vested rights.[2] This amorphous doctrine was to reappear later, but during Marshall's regime the Supreme Court with one or two exceptions relied for protection of property and contract rights primarily upon more specific restrictions imposed by the Constitution upon the states.

The first case involving the obligation of contracts clause was that of *Fletcher v. Peck* (1810), the old and notorious Yazoo Land Fraud Case. In 1795 the Georgia legislature, influenced in part by bribery of many of its members, had granted millions of acres of land along the Yazoo River to certain land companies. At the next session of the legislature the grant was rescinded, but not before some of the land had been sold to innocent third parties. The status of the Yazoo lands was debated repeatedly in Congress and dragged through the courts until it finally reached the Supreme Court in 1810. There was strong evidence that the case was a feigned or collusive one, and Justice Johnson asserted that only respect for counsel in the case had induced him to abandon his belief that it should not be adjudicated. The other justices, however, considered the case acceptable.

The Court, in unanimously invalidating the rescinding act of the Georgia legislature, for the first time in its history held a state law void because it conflicted with a provision of the Constitution of the United States. Previously state laws had been held unconstitutional because they conflicted with federal laws or treaties.

Marshall's opinion followed very closely an opinion of Alexander Hamilton, expressed in a pamphlet published in 1796, on the merits of the Yazoo grant and the repeal act. The Chief Justice first

[2] See pp. 193–196.

upheld the original grant made by the Georgia legislature on the grounds that the courts could not inquire into the motives of legislators no matter how corrupt those motives might be. He next challenged the validity of the rescinding act on the ground that it was a fundamental interference with private rights and hence beyond the constitutional authority of any legislative body—an allusion to the old doctrine of vested rights.

Marshall was not willing to rest the decision entirely on such general principles, however, and he next held that the Georgia rescinding act came within the constitutional provision forbidding any state to impair the obligation of contracts. A contract he defined as "a compact between two or more parties," and as "either executory or executed." Either kind of contract contained obligations binding on the parties. A grant made by a state and accepted by the grantee, he added, is in substance an executed contract, the obligation of which still continues. The constitutional provision, he observed, made no distinction between public and private contracts. The rescinding act was therefore invalid.

In holding that the obligation of contracts clause applied to public grants as well as to private contracts, Marshall in all probability misconstrued the intent of the Constitution's framers. The preponderant evidence indicates that the Convention had intended merely to prohibit the states from interfering with the contractual relations of two or more private persons. By holding that contracts entered into by the state also came under the contracts clause, Marshall gave the provision a far broader meaning than the Convention had intended.

Also in this case Marshall might well have held the original grant creating the contract invalid because of the bribery involved. His failure to do so and his apparently unwarranted extension of the contract clause made the Court's decision extremely unpopular with democratic elements and states' rights leaders, who attacked Marshall as a speculator and landholder incapable of approaching the case with judicial disinterestedness.

Two years later, in *New Jersey v. Wilson* (1812), the Court extended the contract clause to protect and perpetuate a state grant of exemption from taxation. Some years before the Revolution, New Jersey had granted the Delaware Indians exemption from taxation on certain lands held by them. After the Revolution the lands

in question were sold to white men, and when New Jersey attempted to tax them, the owners appealed to the courts, claiming that the original grant of tax exemption had passed to the new owners. When the case reached the Supreme Court, Marshall wrote an opinion holding that New Jersey's attempt to tax the lands involved constituted an impairment of New Jersey's obligation of contract.

The decision not only lacked adequate precedent but also had the effect of impairing New Jersey's indispensable power of taxation and was certainly very dubious public policy. Nevertheless Marshall's opinion was accepted by the entire Court and has never been repudiated by that body. As a consequence many later state constitutions either prohibited or sharply limited legislative grants of tax immunity.

Marshall's most celebrated opinion on the contract clause came in *Dartmouth College v. Woodward* (1819), in which the Court ruled that a charter of incorporation was a contract protected against legislative infringement by the Constitution. The case grew out of the efforts of the New Hampshire legislature to alter the charter granted by George III in 1769 to the trustees of Dartmouth College, conveying to them "forever" the right to govern the institution and to fill vacancies in their own body. The charter continued unchanged throughout the Revolutionary period, but in 1816 the Republican governor and legislature, believing that the old charter was based upon principles more congenial to monarchy than to "a free government," attempted to bring the college under public control. Accordingly they passed laws which virtually took the control of the institution from the hands of the Federalist-dominated trustees and placed it under a board of overseers appointed by the governor. The trustees thereupon turned for relief to the state judiciary, but the New Hampshire Superior Court upheld the legislature's acts, chiefly on the ground that the college was essentially a public corporation whose powers and franchises were exercised for public purposes and were therefore subject to public control.

The trustees of the college then appealed the case upon writ of error to the Supreme Court, before which body the college was represented by two of the most able and eloquent lawyers of the day, Daniel Webster and Joseph Hopkinson. Although the elaborate argument of the case took place in 1818, two of the justices

were unable then to make up their minds, so that the Court did not render its decision until the following year. Meanwhile the two doubtful justices were persuaded of the soundness of the college's position by the arguments of such conservative legal authorities as Chancellor James Kent of New York.

Finally, by a vote of 5 to 1, the Court decided that the New Hampshire laws in question were unconstitutional as impairment of the obligation of contract. The Chief Justice, in giving the opinion of the Court, admitted an important constitutional argument of the state: that "the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government." He went to great length, however, to demonstrate that Dartmouth College was not a public institution subject to state control but instead was a "private eleemosynary institution." Although he cited no authorities, Marshall declared that the charter granted by the British Crown to the trustees was a contract within the meaning of the Constitution. By virtue of the Revolution, he said, the powers and duties of government had devolved upon the people of New Hampshire. At any time prior to the adoption of the Constitution the power of the state to repeal or alter the charter was restricted only by the state constitution, but after 1789 that power was further restrained by the obligation of contract clause.

The Dartmouth case was the first in which the Court held that a charter was a contract protected by the Constitution, but its influence has nonetheless been somewhat exaggerated by conservative lawyers and historians. The opinion made it clear that state legislatures might reserve the right to repeal or to modify the charters which they granted, and in the future most legislatures took advantage of this right. While the decision did reassure corporate interests somewhat, the rapid increase in the number and importance of private corporations in the fields of transportation, finance, and industry was due less to their legal intrenchment than to the evident economic advantages of incorporation in large-scale business enterprise. Moreover, after 1880, when the right of the states to control and regulate business corporations became a great national issue, the Supreme Court was to base its restriction of the states' regulatory powers upon the due process clause of the Fourteenth Amendment rather than upon the obligation of contracts clause.

Green v. Biddle (1823), a case involving the relationship be-

tween the contract clause and political agreements between states, was of less permanent significance than *Dartmouth College v. Woodward,* but the Court's decision aroused much greater popular opposition. At the time of Kentucky's separation from Virginia, the two states had entered into an agreement by which Kentucky recognized the validity of land titles issued under Virginia law. Land titles in Kentucky were nonetheless extremely confused because of the large number of overlapping and conflicting claims, and for many years after 1792 they gave rise to a constant procession of lawsuits in the state's courts. In order to remedy this situation, the Kentucky legislature enacted a series of laws providing that no claimant should be awarded possession of land to which he proved title without compensating the occupant for the latter's improvement; in default thereof, the disputed title was to rest in the occupant upon payment of the value of the land without improvements. By implication at least, these laws impaired the full validity of land titles secured under the Kentucky-Virginia agreement, and the acts in question were therefore attacked in the federal courts.

The Supreme Court, speaking through Justice Bushrod Washington, held that the contract clause in the Constitution applied to contracts between two states as well as those between private persons or between a state and a private individual. The Court also denied Kentucky's claim that the agreement in question was invalid because Congress had not given its assent to the agreement as required by the Constitution. The Constitution, Justice Washington observed, required no particular mode of consent by Congress, and he held that Congress had implicitly assented to the compact when it admitted Kentucky to the Union.

The opinion provoked widespread criticism, for the prevailing opinion was that the Convention of 1787 had never intended to include interstate political agreements within the contract clause. In Congress there arose a renewed demand for reform and restriction of the federal judiciary. Kentucky, embittered because the Court's decision benefited numerous absentee landowners, continued for the most part to enforce its own laws, thereby virtually ignoring the Court's ruling. Moreover, later cases involving interstate issues were usually decided under the interstate compact clause.

THE CONTRACT CLAUSE AND BANKRUPTCY LAWS

Cases involving the legality of state bankruptcy laws were closely related in social origins and constitutional import to those arising out of other impairments of contract. State legislation in the field of bankruptcy and insolvency grew both in volume and in importance after 1815, and the attitude of the Supreme Court on these matters was anxiously awaited in many circles.

Sturgis v. Crowninshield (1819) involved the constitutionality of a New York law for the relief of insolvent debtors from debts contracted before the law was enacted. Two related issues were involved: first, whether the state had the right to enact any bankruptcy legislation in the light of the provision in the Constitution specifically delegating to Congress the power to make uniform laws on bankruptcy; and second, whether the New York act violated the contract clause. Marshall held that state bankruptcy legislation was permissible in the absence of any federal statute, provided the act in question did not violate other constitutional requirements. However, he also held that the New York law impaired the obligation of contracts. Any law, said Marshall, which released a man in whole or in part from his agreement to pay another man a sum of money at a certain time, impaired the obligation of contracts and could not be reconciled with the Constitution.

Sturgis v. Crowninshield resulted in a general limitation of state authority over bankruptcy matters. Congress had for many years consistently refused to enact any bankruptcy law, while at the same time the Supreme Court in this case had greatly restricted the possibility of state action, though it had not entirely prohibited it. The result hardly contributed toward an effective settlement of the problem of debtor-creditor relationships.

The panic of 1819 and the subsequent economic depression led several states to seek a loophole in *Sturgis v. Crowninshield* by enacting bankruptcy laws applying solely to debts contracted after the statute's passage. Presumably such a law would place a limitation on contracts subsequently entered into and hence would make bankruptcy proceedings on such contracts constitutional, notwithstanding Marshall's ruling that state power over bankruptcy was limited by the contract clause. Moreover, the membership of the

Court had changed somewhat since the Sturgis decision, and a more liberal interpretation might be expected.

In *Ogden v. Saunders* (1827) the Court ruled, 4 to 3, that a state bankruptcy law discharging both the person of the debtor and his future acquisition of property did not impair the obligation of contracts entered into after the passage of the law. The decision was accompanied by six elaborate opinions, which revealed that the Court was not only badly divided on the present question but had also been divided in *Sturgis v. Crowninshield*. The earlier decision, Justice Johnson now admitted, had been arrived at substantially as a compromise among the justices rather than as an act of "legal adjudication." Johnson and the other more liberal-minded justices, it appeared, had acquiesced in the invalidation of state laws regulating anterior contracts only with the proviso that the opinion be so guarded as to secure the states' power over posterior contracts. It was this latter point that the present majority now insisted upon.

The majority justices arrived at their identical position by differing logical paths. Justice Washington argued that a bankruptcy law in existence at the time the contract was made was a part of the contract itself; hence subsequent bankruptcy proceedings in accordance with the law were within the obligation of the contract in question. Both Johnson and Robert Trimble, on the other hand, argued substantially that the states had the authority to prescribe "what shall be the obligation of all contracts made within them." As Johnson expressed it, "all the contracts of men receive a relative, and not a positive interpretation: for the rights of all must be held and enjoyed in subserviency to the good of the whole. The state construes them, the state applies them, the state controls them, and the state decides how far the social exercise of the rights they give us over each other can be justly asserted." This was substantially an anticipation of the later doctrine of the state's police power.

This view sounds reasonable in the twentieth century, but it was heresy to Marshall and Story, with their conservative legal doctrines of vested rights and the inviolability of contracts. In a dissenting opinion the Chief Justice declared that the Constitution protected all contracts, past or future, from state legislation which in any manner impaired their obligation. He maintained that the position of the majority would virtually destroy the contract clause of the Constitution. Marshall admitted, however, that the constitu-

tional prohibition of the impairment of the obligation of contracts by a state did not prohibit its legislature from changing the remedies for the enforcement of contracts. Even his sympathetic biographer, Albert J. Beveridge, labels Marshall at this time "the supreme conservative." It was symbolic of a new era of constitutional interpretation that in 1827 the Court for the first and only time voted against Marshall on an important question of constitutional law.

On another issue raised in *Ogden v. Saunders* Johnson joined Marshall and the conservatives in a majority opinion. They declared that a state's insolvency law could not discharge a contract owed to a citizen of another state, since such action would produce "a conflict of sovereign power, and a collision with the judicial powers granted to the United States."

In conclusion, then, the Supreme Court's position was, first, that state bankruptcy and insolvency laws were unconstitutional when they operated on contracts entered into before their passage but were constitutional with respect to contracts entered into after their passage; and second, that they were unconstitutional if they invalidated a contract owed to a citizen of another state. Thus the Court took the first important step in restricting the scope of the contract clause as it had been interpreted between 1810 and 1819.

The immediate effect of the decisions on the obligation of contracts clause was to make the Supreme Court a conservative stronghold against the growing power of state democracy and popular sovereignty. In most of the other important constitutional decisions of this period the Court invalidated state laws or state court decisions in order to uphold the authority of the national government. Generally such a policy proved to be beneficial to the American people, especially since the national government was responsible to them. In the contract cases, however, the Court's decisions favored vested interests at the expense of the states, without any considerable benefit accruing to the national government.

THE CONTROVERSY OVER APPELLATE JURISDICTION

While the Supreme Court was striving to determine the nature and the scope of the obligation of contracts on the part of the states, its own right to review the decisions of the highest state courts was seriously challenged by the Virginia states' rights champions. Here

again were involved the persistent and basic questions of the nature of the Union and of the location of the authority to act as a final arbiter in disputes between the states and the central government.

It will be recalled that Article III, Section 1, of the Constitution was the result of a compromise in the Constitutional Convention between those who wished a completely national judicial system and those who wished to leave original jurisdiction almost entirely in the state courts, even in cases in which national issues were involved. As finally drawn, this section permitted Congress to establish inferior federal courts but did not obligate it to do so. In the Judiciary Act of 1789 the nationalists had won out by establishing a complete system of federal courts with final appellate jurisdiction vested in the Supreme Court. Although the state courts were given concurrent jurisdiction in certain types of cases, the crucial twenty-fifth section of the act provided that whenever the highest state court rendered a decision against a person who claimed rights under the federal Constitution, laws, or treaties, the judgment could be reviewed, and possibly reversed, by the Supreme Court. At the time some of the states' rights advocates approved this arrangement because it gave the state courts a share in a jurisdiction which might otherwise have been assigned exclusively to federal courts. Others saw only the danger to the sovereignty of the states if their highest courts could be overruled by the federal judiciary.

The first important controversy over the question of the Supreme Court's appellate jurisdiction from state courts grew out of an old case involving the vast lands of Lord Fairfax, a Virginia loyalist. During the Revolution, Virginia confiscated his estate and also enacted a law denying the right of an alien to inherit real property. After the Revolution, Virginia according to this law refused to allow Fairfax's English heir to inherit the estate, despite his rights under treaties with Great Britain. The Virginia Court of Appeals eventually upheld the state laws, but the case was taken on writ of error to the United Sates Supreme Court, where the Virginia decision was reversed. Since Marshall had earlier participated in the litigation, he absented himself, and the Court's decision was rendered by Justice Story. The decision practically emasculated the state's alien-inheritance and confiscation laws, which had been enforced by the state judiciary for a generation. The Virginia judges, headed by

Spencer Roane, responded by declaring unconstitutional Section 25 of the Judiciary Act and by refusing to carry into effect the Supreme Court's mandate.

This refusal caused the case to be taken again to the Supreme Court as *Martin v. Hunter's Lessee* (1816). Story again rendered the opinion and presented a powerful argument in support of the Court's right to review decisions of state courts. He maintained that, since Congress constitutionally could have vested all federal jurisdiction in the federal courts, the voluntary granting of concurrent jurisdiction in certain cases to the state courts did not divest the Supreme Court of its appellate jurisdiction. In other words, the concurrent jurisdiction clauses of the Judiciary Act had incorporated the state courts, for certain cases, into the federal judicial system. Story declared, moreover, that the Constitution, laws, and treaties of the United States could be maintained uniformly as the supreme law of the land only if the Supreme Court had the right to review and to harmonize the decisions of all inferior courts applying that supreme law.

The Court's stand was repeatedly attacked by the states' rights Virginians. Judge Spencer Roane presented their ablest argument. He maintained not only that the Constitution established a federal rather than a consolidated union, but also that it contained no provision which authorized the central government to be the final judge of the extent of its own power, legislative or judicial. Nor, he argued, was there any clause in the Constitution which expressly denied the power of state courts to pass with finality upon the validity of their own legislation. To be sure, he said, the judges in every state were bound by the Constitution to uphold "the supreme law of the land," even when it was in conflict with the constitution and laws of any state; but they were bound as state judges only, and therefore their decisions were not subject to review or correction by the courts of another jurisdiction. Hence, he contended, Section 25 of the Judiciary Act was unconstitutional. In fact, Roane concluded, the state's sovereignty could not be protected against federal encroachment if the final decision on the constitutionality of both federal and state acts rested with the Supreme Court.

The Court's opportunity to answer Roane came in *Cohens v. Virginia* (1821). The Cohens were convicted by a Virginia court of selling lottery tickets in violation of a state statute, although

they claimed the protection of an act of Congress authorizing a lottery for the District of Columbia. When the Cohens appealed to the Supreme Court under Section 25 of the Judiciary Act, counsel for Virginia denied the Court's right of review and insisted that a state could never be subjected to any private individual's suit before any judicial tribunal without the state's own consent. This immunity resulted, the state claimed, in part from the sovereign nature of the states, "as properly sovereign now as they were under the confederacy," and in part from the Eleventh Amendment, which prohibited the federal judiciary from taking jurisdiction of a suit prosecuted against a state.

Marshall began his opinion by defining the extent of federal judicial power. The jurisdiction of the federal courts under the Constitution, he observed, extended to two general classes of cases. In the first class, jurisdiction depended upon the "character of the cause," and included "all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." In the second class, jurisdiction depended on the character of the parties, and included controversies between two or more states, between a state and citizens of another state, and between a state and foreign states' citizens or subjects. Any case falling within either of these classes, Marshall said, came within the jurisdiction of the federal courts, even though one of the parties might be a state of the Union.

Marshall then examined Virginia's contention that because of the sovereign, independent character of the states they could not be sued without their consent. The Chief Justice replied that for some purposes the states were no longer sovereign—they had surrendered some of their sovereignty into the keeping of a national government. Maintenance of national supremacy, he continued, made it necessary for the states to submit to federal jurisdiction; the contrary situation would prostrate the government "at the feet of every state in the Union."

Nor did the Eleventh Amendment, which protected the states against suits by private individuals, exempt the state of Virginia from federal jurisdiction in the present instance. The present action, Marshall said, was not commenced or prosecuted by an individual against a state; rather the appeal was merely part of an action begun by the state against the Cohens, and thus the state could not claim

immunity from that appeal by virtue of the Eleventh Amendment.

Finally Marshall turned to Virginia's argument that in any event there existed no right of appeal from the state courts to the United States Supreme Court, because the state and federal judicial systems were entirely distinct and the Constitution did not provide for such appeals. Marshall's reply again was to cite the doctrine of national supremacy and to argue that the maintenance of that supremacy made such appeals necessary. "America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes, her government is complete; to all these objects, it is competent. The people have declared, that in the exercise of all powers given for these objects it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory." In a government so constituted, Marshall continued, the national judiciary must be able to decide whether or not the constitution and laws of any state are conformable to the federal Constitution and laws, and for this purpose the Supreme Court's right to hear appeals from the state courts was an imperative necessity.

The Court then decided the specific question at issue in favor of Virginia, holding that the congressional lottery ordinance was limited to the city of Washington and that the Cohens therefore had no legal right to sell tickets in Virginia.

Virginia's nominal victory brought the state little satisfaction. It was overshadowed by the Court's sweeping and definitive interpretation of its right of appellate jurisdiction over decisions of the highest state courts in all questions involving national powers. It was widely recognized that the Court's assertion of authority would greatly enhance its prestige and its opportunity to be the final arbiter of constitutional questions.

Although the decision was applauded by some and passively approved by many, it was vigorously attacked by the Virginia states' rightists and their numerous sympathizers. Judge Roane and his friends wrote a series of newspaper articles, bitterly attacking the Court's usurpation of authority over the states. Roane tried to persuade ex-President Madison to lead the attack, but the latter refused; in fact he agreed essentially with Marshall's position in regard to the appellate jurisdiction of the Supreme Court. Jefferson, more hostile to Marshall, denounced the decision as another step in the

scheme of the Supreme Court to destroy the federal constitutional system by consolidating all authority in the central government.

John Taylor, the veteran champion of agrarian localism, elaborated the arguments against the Court in a series of pamphlets on constitutional interpretation, one graphically entitled *Construction Construed and Constitutions Vindicated.* He argued that Marshall's concept of the Court's jurisdiction would make it the supreme, irresponsible, and tyrannical arbiter of all constitutional disputes and thus would destroy the independence of both the states and the other branches of the federal government. The Court, or a bare majority of its members, he charged, was actually molding and changing the character of the Constitution, whereas this function was the rightful authority of three-fourths of the states through amendments. The great evil of the federal judiciary was the absence of any obligation on the part of the judges to act in accordance with the will of the sovereign people or of their chosen representatives. If any branch of the federal government was to be the guardian of the Constitution, it should be Congress, the politically responsible body. Constitutional change, Taylor insisted, must be effected by popular will, and not by judges who were responsible only to "God and their own conscience."

IMPLIED POWERS AND NATIONAL SUPREMACY

John Marshall's most comprehensive exposition of the American constitutional system was his opinion in *McCulloch v. Maryland* (1819). The case involved the second Bank of the United States, at that time one of the most controversial issues before the American people. The new bank had neither checked speculation nor improved financial conditions sufficiently to prevent a serious panic in 1819, followed by a depression which caused innumerable banking and business failures with resultant unemployment, hard times, and popular discontent throughout the country. Certain branches of the bank had also engaged in reckless speculation, mismanagement, and outright fraudulent financial practices, and had almost ruined the bank and its reputation for integrity.

Several of the states of the South and West, where the Bank of the United States was most unpopular, took action to prevent the operation of its branches within their borders, either by direct prohibition in the state constitution or by prohibitory taxation,

Among the latter was Maryland, where the legislature in 1818 levied a heavy tax on the bank's Baltimore branch. The validity of the Maryland law was upheld in the state courts, whereupon the bank appealed the case to the United States Supreme Court.

The case was elaborately argued by six of the greatest lawyers in the country, including Daniel Webster and William Pinckney for the bank, and Luther Martin and Joseph Hopkinson for Maryland. Three days after the close of the argument, on March 6, 1819, the Chief Justice handed down the unanimous judgment of the Court, upholding the constitutional power of Congress to charter the bank and to have exclusive control over it, denying the right of Maryland to interfere with the federal government by taxing its agencies, and declaring the state law unconstitutional.

The first important question involved in the case was: "Has Congress power to incorporate a bank?" In answering this question in the affirmative Marshall proceeded to analyze at some length the nature of the Constitution and the American Union. His argument was directed mainly to upholding the doctrines of national sovereignty and broad construction. National sovereignty he upheld by emphasizing that the federal government rested directly upon a popular base, having derived its authority from the people of the states rather than from the states as sovereign entities. Marshall admitted that sovereignty was divided between the states and national government and that the states retained a sphere of sovereign authority. But the national government, he said, "though limited in its powers, is supreme within its sphere of action." This argument that national sovereignty was derived from the direct popular base of the Constitution was later to be eloquently reasserted by Webster and Lincoln and was to become one of the main tenets of American nationalism.

Marshall then set forth what was essentially the same doctrine of broad construction and implied powers that Hamilton had advanced in his bank message of 1791.[3] He admitted that the right to establish a bank was not among the enumerated powers of Congress, but he held that the national government also possessed implied powers as well as those enumerated in the Constitution. Implied powers, he said, could be drawn from two sources. First, every legislature must by its very nature have the right to select appro-

[3] See pp. 177–180.

priate means to carry out its powers. Second, he pointed to the necessary and proper clause, which he construed as broadly as Hamilton had previously done. "Necessary and proper," he said, did not mean "absolutely indispensable," for there were various degrees of necessity. Then followed the test for determining the constitutionality of an implied power, stated almost in the words of Hamilton's original formula: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

The second question involved in the case was whether the state of Maryland could constitutionally tax a branch of the national bank. In defending Maryland's right to tax the bank, counsel for the state had resorted to the classic states' rights argument of dual federalism. The states and the federal government, according to this view, constituted two mutually exclusive fields of power, the sphere of authority of each being an absolute barrier to the encroachment of the other. The right to charter corporations was a state power, and the state therefore had a right to regulate or exclude from its limits corporations not chartered by itself.

In refuting this argument Marshall again resorted to the principle of national supremacy. He pointed to the clause making the Constitution, treaties, and acts of Congress the supreme law of the land, and observed once more that when state law conflicted with national law, the latter must prevail. Since the bank was a lawful instrument of federal authority, the act of Congress establishing it must prevail against any state attempt to limit or control the bank's functions. The state's attempt to tax the bank was therefore illegal, for "the power to tax involves the power to destroy." If federal functions could be taxed by the states, their continuance would be dependent upon the will of the states rather than that of the national government—an inadmissible conclusion. The American people, he said, "did not design to make their government dependent on the states." The Maryland tax act was therefore unconstitutional and void.

The importance of this decision was recognized immediately, and has been ever since. It was reprinted by newspapers in all sections of the country and was widely discussed by men in public life. In conservative circles of the Northeast the decision was generally approved, partly because the national bank was favored there,

and partly because nationalism and broad construction of the powers of Congress were returning to popularity in that section.

On the other hand, the decision was condemned and bitterly denounced in most of the western and southern states. There a majority of the people saw their efforts to get rid of the hated bank stopped by a tribunal beyond the control of public opinion. They seemingly forgot that the bank had been established by a majority of Congress. Newspapers, public meetings, and state legislatures protested that the effect of the decision was to obliterate the last vestige of the sovereignty and independence of the individual states. Resentment was especially strong in the South, where the concern for state sovereignty was heightened by the Missouri controversy, then in progress. In Virginia in particular, Marshall's interpretation of the Constitution was challenged by a formidable array of states' rightists, led by Judge Roane of the Court of Appeals, and supported by the leading newspaper editors and by ex-Presidents Madison and Jefferson.

Out of such strong opposition to the McCulloch decision arose a movement for a constitutional amendment designed to prevent clashes between the states and the federal government by granting power to the former to exclude branches of the national bank from their territory. Most of the state legislatures considered the question, and five states formally approved of a request to Congress for such an amendment. Nine states disapproved, however, and the movement died.

The most definite and defiant action in opposition to the Court's decision was taken by the state of Ohio. Economic and financial conditions there were particularly distressing, and much of the blame was heaped upon the national bank. In February 1819 the Ohio legislature had levied the exceedingly heavy tax of $50,000 on each branch of the bank within the state, and had granted the state auditor wide powers of search and seizure in collecting the tax. When the McCulloch decision was handed down shortly afterward, the state determined to disregard it on the ground that the case was a feigned one designed to save the bank from the effects of its "extravagant and fraudulent speculations" by exempting it from state taxation. In order to prevent the state from enforcing its act, the bank obtained an injunction from the federal Circuit Court against Ralph Osborn, the state auditor. Osborn and his aides ignored

the injunction, and after demanding and being refused payment of the tax, seized the bank's specie and notes and conveyed them to the state treasury. The bank then instituted a suit for damages against the state officials involved, whereupon the legislature banned the bank from Ohio in entirety. A subsequent attempt by the state to compromise the tax question was rejected by the bank.

The controversy finally reached the Supreme Court as *Osborn v. The Bank of the United States* (1824). Although the appellant's counsel argued that the Ohio tax and outlaw acts were constitutional, the Court considered that their validity could not be maintained in face of the McCulloch decision. Chief consideration, therefore, was given to the bank's constitutional means of protection against illegal state action. The crucial question was whether the suit was an action against the state and therefore not within the jurisdiction of the federal judiciary because of the Eleventh Amendment, or whether the state's agents were personally responsible for their acts. Marshall and his colleagues held that the United States Circuit Court had jurisdiction, on the ground that the suit was not against the state, because the state was not the actual party on record. This decision was another step in the direction of limiting the states' protection from suits under the Eleventh Amendment.

Of greater importance was the Supreme Court's ruling that the agent of a state, when acting under authority of an unconstitutional statute, was personally responsible for any injury inflicted in his attempt to execute the act. This involved a transfer to constitutional law of the old English and American principle of private law that every man is responsible for the wrongs he inflicts. This principle is essential for the protection of personal liberty, for since governments or legislatures cannot be sued for torts, the injured person's only recourse is to sue their agents. Thus in this case both the state of Ohio and its agents were defeated by the United States Bank before the nation's highest judicial body.

As in the cases involving obligation of contract, the Supreme Court's decisions in the bank cases placed it in the role of defender of corporations and vested rights against popular sovereignty as embodied in the state legislatures. Again the Court's nationalism was tinged with conservatism. That fact helps to explain the defeat suffered by the bank a few years later when its request for a new

charter was rejected by the veto of President Jackson, a rejection sustained by implication by the electorate.[4]

THE POWER TO REGULATE COMMERCE

Another of the chief objectives of the framers of the Constitution had been to replace the confused condition of foreign and interstate commercial relations prevailing in 1787 with an orderly and uniform system. Consequently the Constitution empowered Congress "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." After the adoption of the Constitution the volume of both foreign and interstate commerce increased rapidly. Congress early made legal provision for the regulation of ships and cargoes from foreign countries and passed a law providing for the licensing of vessels engaged in the important coastal trade. On the other hand, Congress took virtually no positive action for the control of interstate commerce, but such commerce flourished without much federal aid or regulation, since the states abandoned their former discriminations against vessels and products from other states.

During the first quarter of the nineteenth century the steamboat was developed into an important means of transportation in the coastal trade and especially on the rivers and lakes of the interior of the country. By the 1820's the free development of interstate trade by this new means of transportation was being threatened by attempts of various states to grant "exclusive privileges" to various interests over the steam navigation of "state waters." This policy led to retaliation of state against state. Thus monopoly and localism were joining hands in a movement of state restriction upon interstate commerce that was reminiscent of the days of the Confederation.

In 1808 Robert Fulton and Robert Livingston, pioneers in the development of a practical steamboat, secured from the New York legislature a grant of the exclusive right to operate steamboats on the state's waters. From this monopoly Aaron Ogden secured the exclusive right to certain steam navigation across the Hudson River between New York and New Jersey. Thomas Gibbons, however,

[4] Later constitutional controversies involving the national bank are discussed on pp. 332–341.

proceeded to engage in competition with Ogden, claiming the right under a license granted under the federal Coasting Act. Ogden's suit to restrain Gibbons from engaging in this interstate navigation was sustained by the New York courts in 1819 and 1820, with Chancellor James Kent, perhaps the most learned jurist in America, upholding Ogden and the steamboat monopoly act.

Gibbons appealed to the United States Supreme Court, where the case of *Gibbons v. Ogden* was finally heard in 1824. Thus thirty-five years after its establishment, the Court was first called upon to give a general interpretation of the nature and scope of the power of Congress to regulate interstate commerce. Moreover, the case was decided when the Court was under serious attack in Congress and in the public press for previous nationalistic decisions.

Although the argument of the case took a wide range, Chief Justice Marshall, in handing down the unanimous decision of the Court, devoted himself to four main points or questions. First, what does commerce comprehend? Second, to what extent may Congress exercise its commercial regulatory power within the separate states? Third, is congressional power to regulate interstate commerce exclusive, or does a state have concurrent power in this field? Fourth, should the commerce power of Congress (and inferentially other powers too) be construed broadly for the national welfare or be construed strictly in order to protect the reserved police powers of the states?

In discussing the first question, Marshall rejected the argument of Ogden's counsel that commerce should be narrowly defined as "traffic" or the mere buying or selling of goods, including only such transportation as was purely auxiliary thereto. "Commerce, undoubtedly, is traffic," he said, "but it is something more; it is intercourse." It encompasses navigation and general commercial relations. The meaning of the word, he added, is just as comprehensive when applied to "commerce among the several states" as when applied to foreign commerce, where it admittedly comprehends "every species of commercial intercourse."

Turning to the second and vital question of the power to regulate commerce, the Chief Justice admitted that "the completely internal commerce of a state" was reserved to the state. Interstate commerce, however, cannot stop at "the external boundary-line of each state," but "comprehends navigation within the limits of every

state in the Union." Congress' power to regulate foreign and interstate commerce, "like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution," which did not apply to the case under consideration.

Marshall's clear-cut and emphatic disposition of the first two points was lacking in his treatment of the question of the concurrent power of the states over interstate commerce within their own limits. Marshall did not actually hold that federal power over interstate commerce was exclusive, although he almost appeared to do so. Instead he merely held that the state law in question violated the federal Coasting Act, and he left in great uncertainty the question of whether the states had any actual concurrent power over interstate commerce in the absence of federal regulation.[5]

In failing to hold that the commerce power was exclusive and in suggesting by implication that the states could therefore exercise some jurisdiction over interstate commerce, Marshall took a much less nationalistic position than he did in most of his other opinions. He might have foreclosed conclusively the field of interstate commerce from any state regulation; instead he left the door open to that possibility. Why he did so is uncertain. Perhaps he recognized the necessity for some state regulation of commerce which might incidentally touch upon interstate commercial activities. It is possible, also, that he hoped to enlarge the sphere of the Court's jurisdiction, since it would now be necessary in the future to define the extent of permissible state activity.

To the fourth and more general question of whether the enumerated powers of Congress should be construed narrowly or broadly, the Chief Justice gave an emphatic answer. At the outset he rejected narrow construction on the ground that it "would cripple the government and render it unequal to the objects for which it is declared [in the preamble] to be instituted, and to which the powers given, as fairly understood, render it competent."

Gibbons v. Ogden was Marshall's last great decision, and, as if it were his valedictory, he closed with a vigorous and significant protest against the swelling chorus of strict construction and state sovereignty: "Powerful and ingenious minds, taking, as postulates,

[5] In a concurring opinion Justice Johnson held that Congress' power to regulate commerce was not only very broad but definitely exclusive.

that the powers expressly granted to the government of the Union are to be contracted, by construction, into the narrowest possible compass, and that the original powers of the States are retained, if any possible construction will retain them, may, by a course of well digested, but refined and metaphysical reasoning, founded on these premises, explain away the constitution of our country, and leave it a magnificent structure indeed, to look at, but totally unfit for use. . . . In such a case, it is peculiarly necessary to recur to safe and fundamental principles. . . ."

For once John Marshall had handed down a popular decision. It was a death blow to the steamboat monopoly, and at the time monopolies were very unpopular. This aspect of the decision received so much attention that few people fully appreciated its nationalistic implications. The popularity of the decision temporarily checked the agitation and movement in Congress for changes in the size and powers of the Supreme Court. The only serious opposition to the principles of *Gibbons v. Ogden* came from the extreme adherents of localism, especially in Virginia and North Carolina. In the Court's broad construction of national control over interstate commerce these men perceived a serious danger to states' rights in general and to the interstate slave trade in particular.

The broader significance of *Gibbons v. Ogden* became evident only with the passage of time. Steamboat navigation, freed from the restraint of state-created monopolies, both actual and potential, increased at an astonishing rate. Within a few years steam railroads, encouraged by the freedom of interstate commerce from state restraints, were to begin a practical revolution of internal transportation. The importance of national control of commerce in the rapid economic development of the country is almost incalculable. For many years after 1824 Congress enacted but few important regulatory measures, and commerce was thus free to develop without serious monopolistic or governmental restraint.

The constitutional result of this situation was that the Supreme Court became a virtual collaborator with Congress in the regulation of foreign and interstate commerce.[6] Pursuing its policy of selective exclusiveness of national authority, the Court was repeatedly called upon to draw a line between the commerce power and

[6] Later developments of the interstate commerce power are discussed in detail especially in Chapters 13, 21, and 22.

the rights of the states, especially their taxing and police powers. Within five years after 1824 Marshall himself rendered two opinions making such distinctions.

In the first of these, *Brown v. Maryland* (1827), Marshall formulated the "original package" doctrine. The question at issue was whether a Maryland statute requiring wholesalers of imported goods to take out a special license came within the state's taxing power or infringed upon the federal commerce power. The Chief Justice declared that whenever imported goods became "mixed up with the mass of property in the country" they became subject to the state's taxing power, but that as long as the goods remained the property of the importer and in the original form or package any state tax upon them constituted an unconstitutional interference with the regulation of commerce. The principle was stated so broadly that it would apply to interstate as well as foreign commerce and to any degree of state taxation.

Two years later, however, in *Willson v. Black Bird Creek Marsh Company* (1829), Marshall upheld a Delaware law authorizing the damming of a creek to exclude water from a marsh, even though the stream was navigable and had occasionally been used in the coasting trade. Willson's vessel was licensed under the same coasting act as that cited in *Gibbons v. Ogden*, and Marshall therefore might have held that the state statute infringed upon the federal commerce power. Instead, however, he held that the federal government had not yet acted, and that the state's regulation was therefore valid in the absence of any federal statute. Thus Marshall and the Court inaugurated the policy of judicial determination of whether a challenged state law was a valid exercise of its police power or was an unconstitutional infringement upon the federal power to regulate foreign and interstate commerce.

FAILURE AND SUCCESS OF MARSHALL'S LEGAL NATIONALISM

During Marshall's tenure the Supreme Court declared unconstitutional acts of more than half of the states. In practically every case the state involved naturally objected in some form to the Court's decision, and often the state received sympathetic support from other states with similar statutes or interests. Frequently, however, other states supported the Court. In nearly every instance the state was motivated primarily by concern for its immediate interests rather

than by a broad political theory or constitutional concept. Paradoxically, the greatest theoretical opposition to the Court's legal nationalism came from Virginia at a time when one of its citizens, James Monroe, was the nation's President and another was the Chief Justice of the United States Supreme Court. Jefferson, Madison, Taylor, and Roane formed a very talented quartet to argue the cause for states' rights even though their argument was essentially the one formulated in 1798.

The Court's repeated invalidation of state statutes demonstrated that the states' rights adherents had largely failed in their efforts to make the states rather than the Court the final arbiter in disputes between the states and the central government. Consequently the Court's opponents attempted to curb its power by congressional action, especially between 1821 and 1827, when state statutes were being set aside at almost every session of the Court. The chief arguments in Congress against the Court were the same ones used by state agents and legislatures: the absence of any specific constitutional authority on the part of the Court to invalidate state statutes or judicial decisions, the Court's lack of responsibility to the people, its natural policy of upholding federal authority at the expense of the state, and the threat of such a powerful body to the "sovereignty" of the states and the liberties of the people.

The most drastic attempt to restrict the Court's authority was that initiated by Senator Richard Johnson of Kentucky, who proposed to constitute the Senate a court of last resort in all cases which involved the constitutionality of state laws or to which a state should be a party. More numerous were the efforts to increase the size of the Court and to require more than a bare majority decision to invalidate a state law. None of these proposals was adopted by Congress. Rejected also were the bills sponsored by friends of the Court to relieve Supreme Court justices from circuit court duties. The House did pass a bill increasing to ten the membership of the Supreme Court and rearranging the circuits, but the measure failed in the Senate.

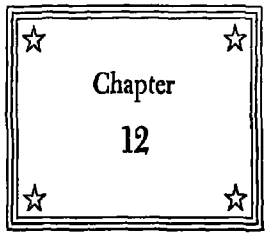
The continued refusal of Congress to make any changes in the federal judiciary was due to a combination of several factors: political and sectional cross currents, the absence of definite party organization, the confidence of many groups in the Supreme Court, realization that the proposed remedies involved greater disadvantages than

the existing system, and belief that the veteran justices would soon be replaced by jurists more sympathetic toward states' rights and popular sovereignty.

The anticipated transformation in the Court's personnel and viewpoint was already under way by appointments made during the late 1820's, although it did not become thorough until after Marshall's death in 1835. Ultimately some of the principles of constitutional law announced by Marshall and his colleagues were gradually modified, and a few were virtually abandoned. In the new judicial atmosphere conservative nationalism seemed less important than democracy, popular sovereignty, and the states' police power. Eventually, however, democracy and judicial liberalism became badly confused, both politically and legally, with states' rights and the defense of slavery. The result was secession and civil war.

Yet the impact of Marshall's nationalism upon the constitutional system could not be effaced. For a long time Marshall's constitutional law served as a check upon the strong popular trend toward state sovereignty and decentralization. Under Marshall's Democratic successor, Roger B. Taney, the Supreme Court continued to emphasize certain powers of Congress and the doctrine of national supremacy as enunciated in Article VI of the Constitution. Moreover, the Supreme Court continued to be recognized as the final arbiter of all judicial cases involving the extent of federal and state authority and the interpretation of the Constitution.

Marshall's most important contribution was his insistence that the Constitution was an ordinance of the American people and not a compact of sovereign states, and therefore that the United States was a sovereign nation and not a mere federation of states. In the generation following Marshall's death this concept often seemed to be in eclipse, but it was still potent when the supreme crisis arrived. Between 1861 and 1865 more than a million men voluntarily took up arms to maintain an indissoluble Union, and tens of thousands of them gave their lives "that that nation might live."



The Nullification Controversy

CONFLICT between state and national interests had been a fruitful source of political and constitutional controversy since 1790, when Virginia launched the attack upon Hamilton's assumption plan. Champions of state interests had indignantly denounced federal encroachments upon state autonomy, and had even declared, usually for the benefit of local political audiences, that the states were sovereignties whose constitutional rights were equal or superior to those of the national government. In at least one political crisis, that of 1798, a states' rights faction, led by Jefferson and Madison, had formulated a fairly coherent theory of the Union as resting upon a compact of "co-states" who possessed the right to "interpose" against "usurpations" of power by the national government.[1] It will be recalled that between 1807 and 1815 certain New England politicians had also talked state sovereignty, and had even used the word "nullification." State sovereignty and nullification were thus not altogether new ideas, although their exact content had never been clarified. Hence, when in 1832 South Carolina was to climax her growing opposition to the tariff with an attempt at actual nullification, it was possible for her statesmen to claim with at least some

[1] The development of this theory is discussed in Chapter 8.

show of plausibility that they were merely following in the footsteps of Madison and Jefferson, and even New England.

The tariff crisis of 1832, however, differed sharply from earlier state-federal conflicts. In the first place, South Carolina did what no state, with the possible exception of Georgia, had ever done before —she actually took positive steps to block the enforcement of a major federal statute within the state. Equally important, the South Carolina nullifiers developed a far more elaborate and coherent theory of the Union as a mere league of sovereign states and of nullification as a remedy for unconstitutional federal legislation than anyone had advanced at any time between 1798 and 1815. Calhoun's theories were in fact so well developed that they were presently adopted as the legal basis of the South's argument in the slavery crisis, and they were ultimately used to justify secession in 1861.

GEORGIA'S DEFIANCE OF THE UNITED STATES ON THE INDIAN QUESTION

South Carolina's defiance of federal law was anticipated by a controversy between Georgia and the United States, inspired by Georgia's attempt to remove the remaining Creek and Cherokee Indians from the western portion of the state. In the course of the controversy Georgia openly flouted the authority of federal treaties governing the Indians' status and even threatened to use force against United States troops if that proved necessary to defend state interests.

The status of the American Indians, like so many other matters, was left indefinite under the Constitution. By implication the Indians were almost outside the constitutional system. They were denied citizenship, exempted from taxation, and not counted in the apportionment of representation and direct taxes. Congress was authorized merely to regulate commerce with the Indian tribes. Under this authority and the treaty-making and war powers the federal government from the beginning had dealt with the Indians as autonomous nations and had pursued a policy of removing the Indians from the paths of the white men as the tide of settlement moved westward.

In accordance with this policy, the federal government at the time of Georgia's cession of her western domains had undertaken

to secure for the state at federal expense all Indian lands lying within the state "as early as the same can possibly be obtained on reasonable terms." The Indians in Georgia were the relatively civilized Creeks and Cherokees, who were determined not to give up their homeland, and federal evacuation therefore proceeded very slowly.

During the 1820's Georgia became extremely dissatisfied with the slowness of the United States government in removing the Creeks and determined to assert its authority over the tribe's territory. Although in 1826 the Creeks had been "persuaded" by the federal government to cede all their lands except a small strip along the western border of the state, Georgia's militant Governor George M. Troup nonetheless bitterly charged the government with failure to carry out its promises, and ordered state surveys to be made of the lands in question. When President Adams threatened to use the army to restrain Georgia's surveyors, the arrogant governor informed the President that such action would precipitate civil war, and he prepared to defend Georgia's "sovereignty" by force of arms. An open clash between the state and federal governments was averted only by the capitulation of the Creeks and their removal beyond the Mississippi.

A few years later the attempt of the Cherokee Indians within Georgia to organize themselves as an "independent nation" led the state to defy the authority of the federal judiciary. In 1827 the Cherokees adopted a written constitution and proclaimed themselves an independent state, whereupon the indignant Georgia legislature extended state law over Indian territory, annulled all Indian law, and directed the seizure of all Cherokee lands. In accordance with the newly asserted jurisdiction, the state presently tried and convicted a Cherokee Indian, one Corn Tassel, for murder. The United States Supreme Court shortly granted Corn Tassel a writ of error, but the state refused to honor it, and Governor Troup with the support of the legislature declared that he would resist all interference from whatever quarter with the state's courts. Suiting action to words, the state promptly executed the Indian.

President Jackson refused to take any action in defense of Indian treaty rights such as Adams had done, but friends of the Cherokees sought an injunction in the Supreme Court to restrain Georgia from enforcing its laws over the Indians and from seizing their lands. In *Cherokee Nation v. Georgia* (1831) the Court held in

an opinion of Chief Justice Marshall that an Indian tribe was neither a state in the Union nor a foreign nation within the meaning of the Constitution, and therefore could not maintain an action in the federal courts. But he added that the Indians were "domestic dependent nations" under the sovereignty and dominion of the United States, and that they had an unquestionable right to the lands they occupied until title should be extinguished by voluntary cession to the United States. The following year, in *Worcester v. Georgia* (1832), a case involving Samuel Worcester's conviction by the state for residence upon Indian lands without a license from the state, Marshall went further and held that the Cherokee nation was a distinct political community, having territorial boundaries within which "the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves or in conformity with treaties and with the acts of Congress." Georgia openly flouted this decision, refusing either to appear at the bar of the Court or to order Worcester's release.

President Jackson refused to take any steps to implement the Court's opinions in these cases, and it appeared that there was no practical way to force him to do so. In the Worcester case Marshall strongly implied that it was the President's duty to uphold the appellant's rights under federal law, to which admonition Jackson is reputed to have replied: "John Marshall has made his decision, now let him enforce it." Jackson in fact could rightfully claim some discretion in the choice of means and time for the execution of laws, and in this instance he chose to persuade the Cherokees to sign new treaties providing for the cession of their lands and for migration to new lands west of the Mississippi River.

Georgia's conduct in the Indian question constituted an ominous precedent for state nullification of federal authority; yet the conflict never assumed the proportions of a serious national crisis. The vast majority of Americans accepted the removal of the Indians as both desirable and inevitable, and they therefore sympathized with Georgia's objectives if not with her methods. Since Indian tribal organization interfered with the police powers of the states, several states were simultaneously crowding the Indians from their boundaries. Jackson considered the Indian question temporary, and was unwilling to allow it to precipitate a national crisis. These cir-

cumstances permitted Georgia to defy federal authority successfully. Within a few months, however, South Carolina attempted to nullify the tariff act of 1832, and a constitutional crisis of major proportions resulted.

FROM NATIONALISM TO NULLIFICATION IN SOUTH CAROLINA

For thirty years after the establishment of the Constitution, South Carolina was relatively nationalistic. The state repeatedly championed the central government against charges of usurping state authority and favored broad construction of national power. As late as 1820 the lower house of the state legislature, although opposed to the tariff, deprecated the tendency of certain states to array themselves as sovereign entities in opposition to national authority.

In harmony with this view, South Carolina's great statesman, John C. Calhoun, at first stood forth as a thoroughgoing nationalist and a strong advocate of broad construction. It will be recalled that he had sponsored the second national bank, and had argued effectively for both a protective tariff and a national system of internal improvements. He urged the adoption of these measures in order to bind together the sprawling young nation, asserting at the same time that disunion was the worst evil that could befall the American people.[2]

During the 1820's, however, the South Atlantic states, South Carolina included, entered upon a period of decline in economic prosperity and population growth. South Carolina in particular suffered a severe commercial and agricultural depression. The fundamental cause of this collapse was the spread of cotton cultivation to the up-country and ultimately to the Southwest or "lower South," especially to the fertile region stretching across Georgia, Alabama, Mississippi, and Louisiana to Texas. Increased cotton production brought lower prices, to the ruination of eastern planters, many of whom in despair picked up families and slaves and migrated westward. The resultant population loss still further accelerated the economic decline. It also had political significance, since the older seaboard states would inevitably lose power in Con-

[2] Calhoun's nationalistic leadership is discussed in Chapter 10.

gress both to the thriving Southwest and to the rapidly growing North.

Most statesmen of the Southeast, however, did not engage in economic analysis of this kind; instead they tended to lay the responsibility for their section's ills upon the protective tariff, which rapidly became a kind of evil political symbol for all the economic difficulties into which the Southeast had fallen. The drift of sentiment in South Carolina became apparent in 1824, when George McDuffie, long an outstanding protariff nationalist representative of the state in Congress, joined the opponents of the tariff act of that year. The state senate also denounced the new law as unconstitutional, and while the lower house at first opposed this position, it changed its own stand within a year and passed a resolution attacking the tariff as illegal. Behind this change in attitude there lay a gradual abandonment of the original Southern expectation that the South would share in the benefits of industrial expansion, an expectation now recognized as unrealistic. It was true, also, that the agricultural South received almost no direct benefit from the protective tariff, and the popular Southern argument that the tariff was in effect a tax upon Southern agriculture for the benefit of Northern industry contained more than a little truth in spite of the fact that the antitariff argument oversimplified the South's economic difficulties.

South Carolina's attitude toward the tariff now inspired her statesmen to formulate an extremely advanced doctrine of state sovereignty and nullification. When Congress in 1828 enacted the so-called "Tariff of Abominations," the most highly protective tariff to that date, the South Carolina legislature officially protested against it as "unconstitutional," and published, as a committee report, the South Carolina Exposition. This document was secretly drafted by Calhoun, who was Vice-President from 1825 to 1832 and who was not yet ready in 1828 to repudiate openly his former nationalistic position. The Exposition declared that a sovereign state had the right to determine through a convention whether an act of Congress was unconstitutional and whether it constituted such a dangerous violation "as to justify the interposition of the State to protect its rights." If so, the convention would then decide in what manner the act ought to be declared null and void within the limits of the state, and this declaration would be obligatory, not only on her

own citizens, but also on the national government. The state's action would be definitive unless the federal Constitution were subsequently altered by constitutional amendment.

Although South Carolina's reliance in 1828 was still upon words rather than action, the people of the state were rapidly dividing into two parties over the policy of nullification. The more radical elements, who eventually became the majority, gradually coalesced into the States' Rights Party and advocated the active nullification of the tariff unless the protective principle was abandoned. They strove to combat the popular apprehension that nullification might involve disunion and civil war by insisting that their program was legal, constitutional, and peaceful. The more moderate elements within the state formed the Union Party; although they opposed the protective tariff, they condemned nullification as fallacious and revolutionary. Many of these Unionists were willing to secede from the Union if that became necessary as a last resort, but they considered secession an exercise of the right of revolution.

The doctrine of nullification was given national publicity in January 1830 by the famous Webster-Hayne debate in the United States Senate. The controversy originated over public land policy, but it culminated in a great debate between Robert Hayne of South Carolina and Daniel Webster of Massachusetts on the nature of the Union and the validity of nullification. Hayne maintained more definitely than had the South Carolina Exposition that sovereignty was indivisible and resided in each state and that therefore nullification was constitutional. Webster replied with a powerful defense of national sovereignty, insisting that the Constitution emanated not from the states as such but from the American people, that the national government was not a creature of the states, and that nullification was nothing less than revolutionary.

CALHOUN'S THEORIES ON SOVEREIGNTY AND THE UNION

The following year Calhoun added the weight of his position as Vice-President to the States' Rights Party with an open espousal of nullification and soon won recognition as the foremost theorist of nullification and state sovereignty.

Calhoun rested his theoretical position upon the general proposition that sovereignty was by its very nature absolute and indivisible. In asserting the indivisibility of sovereignty he was adopting a con-

ception common in Europe, but one which had previously exercised very little influence upon American thought and institutions. According to this view, sovereignty was not the sum of a number of governmental powers, but rather the ultimate will of the political community, which hence could not be divided without being destroyed. In a federal state, governmental powers were distributed between local and central governments, but ultimate sovereignty must rest in one or the other. It could not be inherent in both.

From this premise Calhoun then argued that ultimate sovereignty in the American Union rested in the separate states and not in the central government. He supported this proposition with both historical and analytical arguments. The American colonies, he maintained, had always existed as distinct political communities, which by revolution became free, sovereign, and independent states. As such they were leagued together under the Articles of Confederation. The Constitution had also been drafted by delegates acting and voting as states and had been ratified by the separate states, each state acting as a sovereign entity. The various states had indeed delegated a portion of their functions to the federal government, but they had not surrendered their ultimate sovereignty, something by nature indivisible, and consequently they still retained the latter undiminished under the Constitution.

Calhoun reached the same conclusion as to the nature of the Union by an analysis of the nature of the Constitution, which he concluded was not supreme law but a mere contract or agreement between sovereign states. Law was by definition, he said, the fiat of a superior sovereign entity imposed upon an inferior. But the Constitution was an agreement between equal sovereign states, who thereby set up the federal government to perform certain functions for the contracting parties. An agreement between equals, however, was not law, but rather a compact—something in the nature of a treaty. It followed that the central government organized under the Constitution could not pretend to sovereignty; instead it was the mere agent of the various sovereign states. There was no such thing, he said, as the American nation.

Calhoun also argued his cause from the fundamental nature and purpose of government. Free government, he observed, was instituted to insure liberty and justice to all citizens. The basic problem, then, was to restrain government by constitutional checks in

order that it be kept just. In his early career, Calhoun said, he had believed that the good sense of the people and the popular checks provided for in the Constitution were adequate safeguards for liberty and justice. Ultimately, however, he had become convinced that "the people" were a political fiction, and that governmental policies in reality resulted from combinations of the strong against the weak. Those in control of the central government would strive to extend its power and prerogatives. Thus the numerical majority would become tyrannical and would disregard the Constitution in order to destroy the power of minority groups. Calhoun believed that within the various states the popular majority might somehow be kept in check, but that neither the American people nor the Constitution would prevent a majority in control of the national government from using its power to destroy minority rights. Hence he became more and more fearful of the growth of the federal government and of broad construction of national powers. The more he observed the behavior of congressional majorities on the various issues of the day, the more he became convinced that the only safeguard for minority rights lay in state sovereignty and nullification.

Calhoun's theories were in reality a thorough rationalization of the South's new political position within the Union. The great South Carolina statesman recognized before other Southerners that the North was fast outstripping the South in population, economic power, and western settlement. In the not far distant future a Northern majority would control both houses of Congress and the presidency, as it already controlled the House of Representatives. The South would then have to submit to unfriendly federal legislation on the tariff, money, land, and internal improvements, and it might ultimately see the federal government used to attack slavery itself. In the last analysis it was not state sovereignty but rather Southern sectional interests that Calhoun sought to protect, and his analysis of the South's future weak position in national policy making was fundamentally sound.

Nullification offered a method for protecting the Southern minority against the Northern majority. Since, according to Calhoun's theory, the states possessed complete and undivided sovereignty, it followed that they were possessed of the final authority to interpret the Constitution. Hence, whenever a state found a con-

gressional act to be a dangerous violation of the Constitution, the state could declare the law void and make it inoperative within its limits. Nullification was "simply a declaration on the part of the principal, made in due form, that an act of the agent transcending his power is null and void."

Calhoun admitted that a nullifying state might be overruled by a federal constitutional convention or by constitutional amendment. This meant in effect that a nullifying state's interpretation of the Constitution would stand unless three-fourths of its sister states disagreed. The obligation to clarify or alter the Constitution rested upon the majority favoring the nullified act and not upon the nullifying state, since only thus would the minority have protection against the majority.

Should three-fourths of the states overrule the nullifying state, Calhoun added, the state might still exercise its ultimate sovereign right to withdraw from the Union. At this time the right of secession was not emphasized by Calhoun, since he advocated nullification as a method of preserving the original Constitution and the Union. He recognized, however, that if the national government persisted in enforcing a nullified law the state's final resort could only be secession: In fact, because of the practical failure of nullification, the right of secession ultimately became the most significant element in Calhoun's theories.

Calhoun's doctrines were open to very serious objections on historical, theoretical, and practical grounds. The historical foundation of his theories was exceedingly weak. At no time during the Revolutionary period had the various states ever acted as though they were completely sovereign entities. Though the Articles of Confederation declared that each state retained its "sovereignty," the Articles also conferred upon Congress, and denied to the states, certain powers and governmental functions—such as the power to make war, peace, and treaties—without which no state could be wholly sovereign. Informed public opinion of the 1770's took it for granted that sovereignty could in fact be divided, as it had been in practice under the old British Empire.

Calhoun also ignored the overwhelming evidence that the Constitutional Convention had intended to erect a government that was truly national, though functioning within a limited sphere of sovereignty. The Convention had early resolved to establish a national

government, and had proceeded to create one functioning for most purposes directly upon individuals without the intervention or control of the states. A whole series of powers, all essentially sovereign in character, had been vested in the new government. Finally the Constitution and federal treaties and laws had been expressly declared to be supreme over state law, a situation incompatible with undiluted state sovereignty.

Calhoun also misconstrued the eighteenth-century theory of compact government. In his insistence that the Constitution was a compact entered into by "co-states" Calhoun thought he had demonstrated that the Constitution could not be law and that the federal government could not be possessed of sovereignty. Yet the men of the Revolutionary era had regarded compact as the only possible method by which legitimate sovereign government could be created. Contrary to Calhoun's later belief, they had thought of all lawful government as flowing from agreement between equals, not as imposed by the fiat of a superior. In other words, to assert that the Constitution was a compact was in reality to offer historical evidence that it was the foundation of a sovereign government.

Even Webster failed to understand this point, for he spent his main energies in attacking the assertion of Calhoun and Hayne that the Constitution was a compact ratified by the various states. He insisted instead that the Constitution was an "instrument of government," and that it had been ratified by the people of the separate states rather than by the states themselves. Whether the Constitution had been in fact ratified by the states acting as organic sovereign entities or by the people of the United States using the states as convenient political divisions was a metaphysical question which had been of little relevance to the statesmen of 1787. It seems reasonable to suppose that either political entities or individuals could create a sovereign government by agreement among themselves.

Nullification itself was open to criticism on several counts. At best the idea was extraconstitutional and rested upon a tenuous and overelaborate argument as to the nature of the Union and the Constitution. Most men outside South Carolina refused to believe that so important and complicated a constitutional process as nullification had been left to mere implication.

A more serious consideration was that nullification in practice

would have paralyzed the entire constitutional system. The doctrine gave any one of the states the right to veto any federal act, no matter how vital its importance, even when the law in question had supposedly been authorized by the Constitution. Since it could be expected that nearly every federal statute of consequence would meet opposition in some section of the Union, the result would be a general breakdown of federal authority. The only appeal from a state's action under the doctrine would be to a general convention of all the states. Such a body would presumably have to sit almost continuously to handle a recurrent series of constitutional crises provoked by state nullification. Uncertainty regarding federal law would be widespread, a situation that might well lead to open conflict and violence should either party to a controversy press home its case with determination.

Finally the nullification theory disregarded the fact that forty years of constitutional growth had evolved a very different and quite workable method for the settlement of constitutional disputes. The Convention had specifically made federal law supreme over state law, and the Judiciary Act of 1789 had provided for appeals from state courts to the federal judiciary and so had lodged the final right to decide constitutional questions in the Supreme Court, an agent of the national government. This right had been repeatedly exercised by the Court; and although the system had occasionally been challenged, as in the writings of John Taylor and Judge Roane and by counsel for Virginia in *Cohens v. Virginia*,[3] the dissenters had not been successful in disturbing the practice. As of 1832 the Court's right to act as arbiter of the Constitution was accepted by the great majority of American statesmen, lawyers, and common citizens.

In short, Calhoun and his fellows of the States' Rights Party wanted a constitutional system different from that created in 1787 and developed by more than forty years of orderly growth. Almost half a century after the creation of a limited national government, during which time the main trend had been toward the confirmation of federal authority, they were now attempting to substitute a confederation of sovereign states for the prevailing federal system. Such an attempt was in reality little short of revolutionary.

[3] See pp. 287–288.

THE ATTEMPT AT NULLIFICATION

By 1832 the South Carolina extremists were ready to put theory into action. In July Congress passed a new tariff law continuing the protective system but moderating some of the higher duties of the previous act. Three South Carolina Unionist congressmen supported the new tariff as a move in the right direction, but the others formally denounced the measure as unconstitutional and oppressive to the Southern people. In the subsequent state election that fall, the States' Rights and Unionist parties made the tariff and nullification the chief issues, and when the States' Rights group elected more than two-thirds of the legislature, it promptly called a state convention.

The convention met in November 1832 and by a vote of 136 to 26 adopted an ordinance of nullification. The ordinance, drawn up by Chancellor William Harper, declared the tariff acts of 1828 and 1832 "unauthorized by the Constitution" and therefore "null, void, and no law, nor binding upon this State, its officers or citizens." It instructed the legislature to adopt all measures necessary to give full effect to the ordinance and to prevent the enforcement of the tariff acts after February 1, 1833. It declared that in no case at law or equity in the courts of the state could the validity of the ordinance or the legislative acts pursuant to it be questioned, and that no appeal in such a case could be taken to the Supreme Court of the United States. State officers and jurors impaneled in any case involving the ordinance and subsidiary acts were required to take an oath to obey and enforce the ordinance. Finally, the nullifiers declared that any effort of the federal government to employ naval or military force to coerce the state, close its ports, destroy or harass its commerce, or enforce the tariff acts, would impel the people of South Carolina to secede from the Union and organize a separate independent government.

A separate address to the people of the state warned them that citizens of South Carolina owed no direct allegiance to the federal government and reminded them of their sole allegiance to the state. Still another appeal, defending South Carolina's position and suggesting a general convention of the states for further consideration of the tariff problem, was directed to the citizens of the other states.

A few days later the legislature reassembled and proceeded to

enact measures giving effect to the ordinance of nullification. Unionists in and out of the legislature opposed such action as the "mad edict of a despotic majority," provocative of civil war. Nonetheless the extremist majority pushed through a test oath act for judges and jurors, and a replevin act authorizing the owner of imported goods seized for nonpayment of duties to recover them or twice their value from customs officials. Since this was the point where an actual clash was most likely to occur between state and federal authority, the law also authorized the governor to call out the militia to enforce the laws of the state.

The success of nullification would depend upon the stand taken by the federal government and by the other Southern states. Andrew Jackson as President was the key man in formulating federal policy, and in this case he was determined to uphold national authority at all hazards. During the fall of 1832 he dropped quiet hints that federal law must be obeyed, encouraged the South Carolina Unionists, and took military precautions for a possible emergency requiring force. Then on December 10, the President issued a proclamation to the people of South Carolina, refuting the doctrines of nullification, appealing to the intelligence and patriotism of the people of the states, and rebuking the nullifiers for provoking a national crisis. He asserted that the people of the United States for many purposes constituted a sovereign nation, and that the Constitution formed "a government, not a league." Using the most emphatic and sweeping language, Jackson said he considered "the power to annul a law of the United States, assumed by one State, *incompatible with the existence of the Union, contradicted expressly by the letter of the Constitution, unauthorized by its spirit, inconsistent with every principle on which it was founded, and destructive of the great object for which it was formed.*" Therefore, he said, not only was nullification illegal, but secession was revolutionary, and disunion by armed force was treason. He warned that he would enforce the tariff law in all the states, by force if necessary, and he asked the people of South Carolina not to bring dishonor upon themselves in a futile attempt to destroy the nation's unity.

On January 16, 1833, Jackson officially informed Congress of South Carolina's actions, and requested that body to take steps that would "solemnly proclaim that the Constitution and the laws are supreme and the *Union indissoluble.*" He asked for additional

authority to support the tariff act, and to employ the army and navy to overcome any resistance to the enforcement of federal law.

The nationalists in Congress came to Jackson's support with the introduction of the so-called Force Bill. This measure authorized the President to employ his authority in support of federal law against any obstruction, civil or military, even if the obstruction be made by authority of a state. The President might also close ports of entry or alter collection districts, were such steps necessary to the collection of customs duties. The bill thus asserted the supreme sovereignty of the national government and its right to enforce its statutes directly upon individuals by force if necessary. It constituted an effective denial of the whole of Calhoun's constitutional theories.

While the national government prepared to use force against nullification if necessary, South Carolina's position was weakened by the failure of the other states to come to her support. The northern and western states generally condemned nullification as unconstitutional and revolutionary, as did North Carolina, Alabama, and Mississippi in the South. The attitude of Georgia and Virginia was especially significant since both of these states had recently talked of resistance to unconstitutional federal legislation. Georgia called a state convention, but this body thwarted the state's nullification sympathizers by condemning nullification as neither peaceful nor constitutional. Virginia's stand was even more disappointing to the South Carolina extremists. The Virginia legislature expressed sympathy with South Carolina's attitude toward the tariff, but deplored the resort to nullification and denied that the Virginia Resolutions of 1798 constituted an adequate precedent for the present nullification doctrine. In reality, there was as yet too little sense of Southern self-consciousness and sectional unity to impel the Southern states to stand together against national authority. South Carolina thus found herself abandoned by those from whom she had hoped for the most.

As the deadline of February 1, 1833, approached, South Carolina felt itself in too weak a position to risk a direct clash with national authority. A compromise tariff measure was before Congress at the moment, and although it seemingly had but little chance of passage, a States' Rights Party convention recommended virtual suspension of nullification until Congress could act on the prospective conces-

sion. The sovereign will of the state was thus set aside by a party conclave, an act which in itself made a virtual farce of state sovereignty, although the nullifiers themselves were apparently undisturbed by this irregularity.

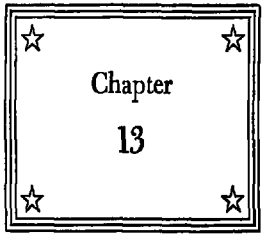
Meanwhile events in Congress moved toward compromise. When it had become evident that the Force Bill would pass, Henry Clay introduced a compromise tariff bill providing for a slow and gradual abandonment of protectionism through a progressive reduction in duties to a 20 per cent maximum in 1842. This measure became law early in March, and Congress enacted the Force Bill at the same time. In both houses Northerners were practically unanimous in support of the Force Bill, while almost half of the Southern congressmen also voted for the measure. The new tariff act provided South Carolina with a face saver, but it was evident that a large majority in Congress were prepared to defend national sovereignty by force if necessary.

The South Carolina convention reassembled on March 11. Accepting the Compromise Tariff Act as a victory, it rescinded the ordinance of nullification against the tariff, but adopted another ordinance nullifying the Force Act. This latter action was of no practical meaning, however, since the Force Act would not be invoked unless the state attempted to interfere with some positive federal function, such as collection of the customs.

Although South Carolina obtained a moderately favorable readjustment of the tariff, nullification had failed decisively as a reliable and peaceable device for settling constitutional disputes between the states and the national government. Most Southerners became convinced that if a "sovereign" state's remonstrances against an objectionable federal policy proved unavailing, the only alternatives were to submit or to secede. Hence secession now tended to become the constitutional refuge of those Southerners who believed that their fundamental rights and liberties were endangered by the exercise of questionable national authority.

On the other hand, the effect of the nullification episode upon the Northern people was to emphasize the necessity of maintaining at all hazards the federal Union and the constitutional authority of the national government. In a more limited way, the same popular reaction occurred in the border slave states and in certain Unionist sections of the lower South. The challenge of Calhoun and his

theories led such legalistic spokesmen for Northern economic interests as Webster and Story to assert with renewed vigor the claims of the Supreme Court as the final interpreter of the Constitution. Most Northerners, however, were impressed not so much with the Court's increased prestige as with the determination of the President and Congress to enforce the supreme law of the land in a state which had prepared to resist by force of arms. Jackson's determined stand in 1833 provided the national government with a powerful precedent in 1861.



Democracy and Jacksonianism

FOR MORE than a century the American people have regarded their constitutional system as the foundation of the world's greatest political democracy. As has been observed in earlier chapters, the Constitution as drafted in 1787 was democratic only to a degree. It gave the people a direct role only in the election of members of the House of Representatives and even in that case it adopted the suffrage restrictions of the various states. But certainly the Constitution was enlightened and liberal for its day, and it was so constructed as to make possible the subsequent growth of democratic political institutions. At the time the Constitution was adopted, there were already some evidences of the growth of democratic institutions within the states, and the process was accelerated by the development of Jefferson's party organization and by the impact of the French Revolution upon American political ideas. By 1830 the transition to a democratic political and constitutional system was well advanced, and by 1850 the development was almost complete. At that date the United States could fairly be described as a constitutional democracy, even though some limitations, such as the exclusion of women and Negroes from the suffrage, still remained.

Perhaps the most fundamental cause of the growth of democracy

in the United States was the dynamic expansion of the American economic and social order. The tremendous rate of western settlement, the terrific growth of population, commerce, and industry, and the rapid urbanization of the eastern seaboard all tended to shatter older established class distinctions and to create new economic aristocracies that had but little pretension to superiority through birth or heritage.

The breaking down of class distinction was perhaps most evident on the western frontier, where a combination of circumstances favored the growth of social democracy with its resultant effect upon political institutions. The great western domain lay open to exploitation, inviting every man who had courage, initiative, and reasonably good fortune to make a place for himself regardless of his social antecedents. The federal government offered farmers eighty acres of fertile virgin land for the modest sum of one hundred dollars, while some states were even more generous with their public lands. The result was an extraordinary equality of opportunity for a man to win fortune and success through his own skill and industry. The resultant atmosphere was not necessarily productive of pure equalitarianism; in fact the West tended to recognize the superior prestige of those who were skillful, fortunate, or unscrupulous enough to win economic success. Nonetheless the West did cast aside the class restrictions of the earlier colonial society. Family and social background counted for little or nothing, and westerners generally insisted that every man must have a fair and equal chance in the great struggle with the wilderness.

The older and more populous East also reacted to the pulse of democracy. The growth of democracy in the older states was quickened by the impact of the frontier upon the East through the spread of political and social ideas. In the Northeast, the frontier between 1790 and 1830 lay in upper New England and upstate New York, and its proximity to the older, more settled community had a perceptible effect upon the institutions of that section. And throughout the East the frontier offered an alternate economic and social opportunity to the dissatisfied common man, and so forced the older established commercial and landed aristocracies to make concessions to political democracy in order to check the vast wave of westward migration, a movement which between 1810 and 1830 threatened to check eastern economic development and to leave this region

behind in the growth of population and the race for national political control.

But the East was also dynamic in its own right. The rapid growth of seaboard cities and the steady expansion of industry and commerce both created new opportunities for ambitious, strong, and even ruthless men to push ahead, to seize new economic opportunities, and to win fame and fortune. In the East, just as on the frontier, established systems of privilege and class tended to disintegrate under the impact of new economic opportunity. Here again the result was not altogether democratic in the long run, for the ultimate result of eastern expansion was the creation of new inequalities based on wealth and power. Yet the process of terrific expansion created a fluid social order, a greater common economic opportunity for all men, and engendered a spirit of political democracy. In 1831 the aristocratic Frenchman Alexis de Tocqueville, who traveled widely throughout the country, was greatly impressed with the general belief then prevalent that the United States had a special world mission as the champion of democracy and equality.[1]

The new democratic spirit resulted in a steady growth of democratic political institutions, in both state and national government. Notable constitutional developments within the states were the general adoption of white manhood suffrage, the reduction of religious and property qualifications for office, and the establishment of more direct popular control of state and local government. The democratic ideal also affected the national political scene; it made possible the election to the presidency in 1828 of Andrew Jackson, and he made the presidential office a kind of tribune of the people. Even the Supreme Court, remote though it was from popular control, after 1835 recognized more frequently the popular will as expressed through Congress and the various state legislatures than it had during Marshall's ascendancy.

BROADENING THE BASE OF STATE GOVERNMENT

Motivated by the democratic impulse, most of the states rewrote their constitutions between 1815 and 1850 to make them more responsive to the popular will. The favorite medium of constitutional reform was the constitutional convention, an institution which in

[1] De Tocqueville's *Democracy in America* was first published in France in 1835 and in the United States in 1838. A recent American edition was published in 1945.

the first half of the nineteenth century came to be generally accepted as a kind of grand committee of the people chosen and authorized to submit a plan of government for acceptance or rejection. Between 1800 and 1865 every state in the Union held such a convention and adopted a new constitution or added important amendments to the old. During these years some states adopted two or even three constitutions, the new instruments often involving drastic changes in their systems of government. The general effect of the new constitutions was to develop a much wider and more popular participation in government.

Extension of the franchise and removal of the restrictions upon office holding were the most significant trends in the new constitutions. Even before 1800 certain of the eastern states had reduced voting qualifications to the payment of a public tax, and after 1800 the democratic forces strove to establish white manhood suffrage throughout the seaboard states, but with varying results. A few eastern states dropped both property and tax qualifications for voting before 1815, but most of those states retained such qualifications longer and abandoned them only after a bitter struggle between democratic and conservative forces. Generally they were even more reluctant to remove restrictions upon office holding.

Meanwhile the new western states were unanimous in opening the suffrage and office holding to all white adult males, although in other respects western state constitutions followed closely the pattern of eastern constitutions. Between 1816 and 1821, Indiana, Illinois, Mississippi, Alabama, and Missouri, in adopting their first constitutions, all provided for universal white manhood suffrage, and made the entire electorate eligible for election to political office. Western states subsequently entering the Union also adopted these democratic provisions in every case and without serious opposition.

In some eastern states conservative forces, which retained their faith in government by the few, were partially successful for a time in retaining the older restrictions upon the suffrage and office holding. In 1820 a Massachusetts constitutional convention, after a hard struggle, substituted taxpaying for property ownership as a qualification for the franchise. However, until as late as 1891 the conservatives succeeded in retaining the new provision, while the requirement that the governor be possessed of a substantial freehold was also retained until near the end of the nineteenth century. The

new constitutions of Rhode Island (1842), Pennsylvania (1838), and Virginia (1830) also retained property or tax qualifications for the suffrage and office holding.

In other eastern states the champions of property were less successful. The New York convention of 1821 was typical of the conservative breakdown. Here Chancellor James Kent led the defenders of the old regime, mostly former Federalists, in a futile attempt to retain property qualifications for the right to vote for state senators. When a majority of delegates proposed only a taxpaying or militia-serving requirement, he condemned it as universal suffrage in disguise. "The tendency of universal suffrage," he declared, "is to jeopardize the rights of property, and the principles of liberty." Society, he said, "is an association for the protection of property as well as of life," and he argued that "the individual who contributes only one cent to the common stock, ought not to have the same power and influence in directing the property concerns of the partnership, as he who contributes his thousands." But Daniel Tompkins, president of the convention and Vice-President of the United States, spoke for the democratic majority when he appealed to the Declaration of Independence and declared that life, liberty and the pursuit of happiness, not property, were the important objects of civil society, and this sentiment carried the day.

In the southeastern states the popular demand for political equality led to a series of struggles for the reapportionment of state legislatures. The early constitution-makers had continued the colonial practice of allotting to the older tidewater areas a disproportionately large share of representatives at the expense of the new western counties. Since the tidewater was dominated by slave-holding planters while the upland was more largely populated by non-slave-holding small farmers, the contests over reapportionment took on a distinctly conservative-liberal character. In the Virginia convention of 1829–30 there occurred a notable instance of such a struggle, during which the conservative easterners succeeded in incorporating elaborate provisions in the new constitution for the continuation of their political control. About 1850, however, most of the southeastern states made constitutional changes granting greater representation to the western regions, although as long as slavery remained, entire equality of representation proved unattainable.

The removal of state constitutional restrictions upon voting, to-

gether with other factors, greatly increased the extent of popular participation in elections and government. Until the 1820's less than 5 per cent of the people customarily voted even in important elections. Thereafter the electorate increased rapidly, and by 1840, 17 per cent of the people, approximately half of the white adult males, ordinarily voted. This enlargement of the electorate meant a rapid increase in the number of inexperienced and ill-informed voters and the growth of new political organizations and techniques designed to influence and direct them.

THE GROWTH OF DIRECT POPULAR CONTROL IN STATE GOVERNMENT

The new constitutions drafted between 1820 and 1850 reflected also the current demand for increased restrictions upon the power and discretion of the state legislatures. Earlier constitutions embodied the assumption that the legislature was the sovereign voice of the free people, and they had placed but few constitutional checks upon legislative authority. The extravagant state banking laws and internal improvement schemes of the generation after 1815 led to a growing popular distrust of the integrity and capacity of state legislators, a distrust that greatly increased after the financial collapse of many of the states following the Panic of 1837.

As a result, the constitutions drafted in the 1840's imposed substantial limitations upon legislative discretion. Generally they placed limitations upon the time, frequency, and expense of legislative sessions, abolished the legislature's right to enact special legislation benefiting individuals or corporations, required a two-thirds vote or popular approval for the creation of state banks or public works projects, and limited the amount of the state debt and the objects for which it could be contracted. Many of the constitutions contained lengthy provisions which were legislative in character rather than organic, an additional indication of unwillingness to trust legislative discretion completely.

While legislative authority declined, the power of the governor was increased. The earlier constitutions had in general given the governor no veto or had permitted the legislature to override a veto by a majority vote, while the new documents usually granted the executive a more effective veto power. The new constitutions also granted the governor much of the appointive power hitherto lodged

in the legislature. These provisions reflected growing recognition of the governor as an influential political and executive leader and a valuable constitutional check upon the legislature rather than as a mere ceremonial head of the state.

Generally the new constitutions also provided for the popular election of nearly all state and county administrative officials, whereas formerly most of these offices had been filled by appointment. The prevailing insistence on popular sovereignty now led to the attitude that even minor administrative officials ought to be directly responsible to the popular will. While the practice was in line with the trend toward a more democratic government, it nonetheless had, in the long run, unfortunate effects upon state and local government. It multiplied the responsibilities of the electorate to the point where it often became impossible for the most intelligent voters to know the qualifications of most candidates, and it tended to inject political considerations into offices that should have been purely administrative in character. The election of a half dozen or more of the principal state administrative officers also reduced the governor's capacity to control his subordinates, led to divided responsibility, and weakened executive policy. However, these evils were mitigated to some extent by the unifying force that resulted from the growth of strong political parties.

Highly controversial were the provisions in several state constitutions for popular election of the judiciary. A few of the constitutions adopted in the 1820's provided for the popular election of judges of inferior courts, and the Mississippi constitution of 1832 carried a far more radical provision that called for the choice of supreme court judges by the electorate. For a time no other state followed Mississippi in this procedure, but in 1846 New York wrote a similar provision into her new constitution. Conservatives and even many moderates fought hard against such radicalism, but they were unable to stem the tide. Within a few years nearly all the western states framed constitutions incorporating the principle of an elective judiciary, and many of the eastern states did likewise. To guarantee popular control of the judiciary still further, many of the new constitutions empowered the legislature to remove any judge simply by a majority vote.

It is difficult to overestimate the importance of the local courts in the development of American democracy. Equality before the law

was basic, and the people strove to guarantee that equality by providing for laws made by their own representatives and applied by judges of their own choice. The courts were open on an equal basis to high and low, to rich and poor. Thus in an agrarian age the county courthouse became the almost universally recognized symbol of justice, equality, and security.

The new constitutions reflected also an increasing popular demand for a variety of new governmental services. People were slowly losing their fear of government, and the eighteenth-century attitude that all government was at best a necessary evil was gradually disappearing. At the same time the rising spirit of nineteenth-century humanitarianism, very much a part of the age of Liberalism in both Europe and America, made the public aware of a variety of social problems arising from the prevailing archaic and barbarous institutions for handling criminals, the insane, the handicapped, and the poor. The resultant demand for state social legislation led to the incorporation in the new constitutions of numerous provisions obligating state legislatures to establish public institutions for the care and treatment of the outcast and unfortunate members of society. In some of the free states antislavery leaders strove also to obtain more civil and political rights for the Negroes; but the constitutional conventions, made exceedingly cautious by the raging slavery controversy, actually did little to improve the lot of the colored race. In fact, some of the new constitutions definitely prohibited the migration or settlement of free Negroes in the state.

Further, most of the new constitutions provided for the establishment of public school systems. Although there was considerable variation in these provisions, the western states in particular created state educational administrative offices and provided for the use of public funds or public lands for the support of education. Although public school systems materialized slowly, public education and democracy were henceforth considered inseparable.

The new public temper was well exemplified in the treatment of property rights. Since this was a period of rapid and varied economic expansion, the average American expected to become a man of property, and very often he did. Therefore the new democratic constitutions provided protection for private property that was honestly and equitably acquired, especially through a clause prohibiting the legislature from passing any law impairing the obligation of

contracts. Such a clause was widely regarded as a protection of a fundamental, natural right against the dangers of legislative encroachment, and hence it was usually included in the bills of rights of state constitutions.

On the other hand, the prevailing sentiment opposed monopoly and special privilege and favored an improved status for debtors and for women. Many of the new constitutions definitely prohibited the state from establishing monopolies, from creating corporations by special legislative acts, and from using its credit to aid any person or corporation. There was a strong tendency in the new constitutions to protect debtors from complete loss of equity and property to creditors and speculators. This was generally accomplished by exempting a specific amount of a citizen's property, usually a small homestead, from forced sale for payment of debts. In the same spirit some of the new constitutions for the first time granted married women the legal right to the independent control of their own property. These and similar provisions definitely indicated that the new democratic philosophy was modifying the economic and legal conservatism of Marshall, Story, and Kent. At long last the common man was legally as well as socially coming into his own.

DEMOCRACY AND THE FEDERAL CONSTITUTIONAL SYSTEM

The steady growth of democracy was bound to make a deep impression upon the federal constitutional system. The great mass of common people were determined that the national government should function more effectively in their interest through men of their own choice and viewpoint. Many believed that all three departments of the government were too unresponsive to popular wishes, and that federal officials were too remote from the people. Accordingly there arose a widespread popular demand for the democratization of the federal government.

This demand took in part the form of proposals to amend the Constitution. Most Americans accepted the Jeffersonian principle that each generation should amend the Constitution to make it expressive of the popular will. Several states on various occasions requested that Congress call a national constitutional convention to propose amendments, but the number of such requests never reached the two-thirds required by Article V for the calling of a convention. Between the years 1804 and 1860, however, over four hun-

dred proposed amendments were submitted to Congress. Many of these proposals would have required the election of representatives by districts in order to prohibit the practice of some states of electing them on a general ticket. On three occasions the House refused to agree to such proposals, although they had been passed by the Senate; but the same objective was reached by the Congressional Apportionment Act of June 25, 1842, which made mandatory the election of representatives by districts. Another important proposal was that of 1826, which stipulated that the election of senators be by popular vote in each state instead of by the legislature. Although at the time this proposal also failed of adoption, almost a century later a similar proposal was to become the Seventeenth Amendment.

The most numerous and most significant of the proposed amendments were those designed to give the people a more direct and important part in the choice of the President. Many people believed that the indirect electoral college system, which left the method of choosing electors to the state legislatures, was inconsistent with the new democratic spirit. Members of Congress, therefore, repeatedly proposed amendments requiring all states to provide for the choice of electors by districts, and four times such a proposal passed the Senate but failed in the House. Following the presidential election of 1825, when Andrew Jackson was defeated in the House, his supporters concentrated on proposals to have the President chosen by a direct vote of the people. After he became President in 1829, Jackson repeatedly recommended the adoption of such an amendment, but his supporters in Congress were unable to secure its passage.

The only proposed amendment actually adopted by both houses of Congress and submitted to the states was the relatively unimportant proposition of 1810, which would have abrogated the citizenship of any American who accepted any title of nobility or honor from a foreign power. The proposal lacked the vote of only one state for adoption, and for many years the general public erroneously supposed that it had been ratified and was the thirteenth amendment to the Constitution.

The failure of all these proposals demonstrated the practical difficulty of democratizing the Constitution through amendments. Conflicting sectional, party, or class interests made it almost impos-

sible to obtain a two-thirds vote in both houses of Congress and the approval of the three-fourths of the state legislatures. The opponents of a proposed amendment had too great a constitutional advantage to be overcome except under the most extraordinary circumstances. Consequently the champions of democracy turned to constitutional construction and extraconstitutional methods to advance their cause.

THE ROLE OF POLITICAL PARTIES IN THE DEVELOPMENT OF DEMOCRACY

Very effective as instruments for democratizing the federal constitutional system were the new political parties that emerged after 1824 from the ruins of the old Jeffersonian party organization. Without definite political organization it would have been practically impossible for the great mass of new voters to work out a common legislative program for the welfare of the nation. Parties also provided a means whereby the voters could elevate men of their choice to office, from the local justice of the peace to the Chief Executive of the nation. It is significant that the political organizations and techniques of this period built the road upon which Abraham Lincoln traveled from his humble origin to a position of enormous power and prestige. Of course political parties, like all human institutions, are susceptible to corruption and manipulation for selfish advantage, but these evils are subject to remedy by an enlightened and vigilant electorate. More than a century of experience has not produced a more effective instrument of democratic government.

The early Federalist and Jeffersonian parties had been almost entirely instruments of the party leaders. The general policies and principles of these men constituted the party platform. They subsidized and even wrote editorials for the few party newspapers. They largely chose from among themselves the party candidates for legislative and executive offices through legislative and congressional caucuses. The voters were then asked to support the party program.

Although there had been local and scattered efforts earlier to make political organizations more democratic, it was the Jackson men of the 1820's who first built a nationwide organization from the ground up. Believing that their hero had been cheated out of

the presidency in 1825 through obsolete and undemocratic election machinery, they set out to inaugurate a more democratic method. While they hoped to be able ultimately to amend the Constitution, they also moved to achieve their objective through extraconstitutional means.

First they condemned presidential nominations made by congressmen and insisted that nominations must come directly from the people. They claimed that a class of professional officeholders and politicians composed of wealthy business and professional men dominated the national government through the congressional caucus and similar devices. As a more democratic method of nomination, Jackson's followers at first put their man forward through popular meetings, local newspapers, and state legislatures. This meant the death of "King Caucus," a caucus of a party's members of Congress, which had been the presidential nominating device in use during the first thirty years of our national history.

As a more democratic and enduring method of selecting candidates, the Jacksonians developed the nominating convention, which both major parties used to nominate presidential candidates for the first time in the election of 1832. Eventually a whole series of extraconstitutional party conventions, extending from the local meeting and the state meeting to the national conclave, presented the party's nominees for office. Replacing the caucus system entirely, the convention prevailed as almost the sole nominating device until the coming of the direct primary in the twentieth century. As the reader is aware, the convention is used today in nominating presidential candidates as well as officers within many states.

Jackson's party also developed the principle of party uniformity on national issues, both through the party platform and through emphasis upon fairly well recognized party principles. This was vitally necessary to the party's success on a national scale; for if its followers were to work together in Congress, agree upon a candidate for the presidency, and support an administration in power, they were of necessity obliged to compromise or suppress sectional differences and present at least an appearance of national harmony. The opposition party, the Whigs, was at first composed of a variety of groups representing sectional interests, unified to some extent by their opposition to Jackson's forces; but as time went on they also developed a certain degree of national coherence.

Thus by 1840 elementary party principles could be set forth by both of the two major political groups.

Party solidarity on principles and leadership had a powerful nationalistic effect on political life and went far to counteract the prevailing tendencies toward sectionalism and decentralization. Parties were living symbols of national political unity as well as powerful instruments for the reconciliation of sectional differences. It is highly significant that as long as two nationwide political parties existed, the threatened disruption of the Union in the slavery crisis was averted by compromise.

Carrying Jefferson's philosophy to its logical conclusion, the Jacksonians attacked all forms of aristocracy and special privilege and demanded the right of all men to participate in government on an equal basis. Whereas Jeffersonian Democracy had been based upon large and small landholders, Jacksonian Democracy was based upon the common man whether propertied or unpropertied. While Jefferson had preferred government administered by men of talent and experience, Jackson acted on the expressed belief that frequent appointments from the rank and file produced more honest, efficient, and responsive government than did long tenure by the talented few. Whereas the Jeffersonians had emphasized legislative deliberation and the representative character of government, the Jacksonians stressed the imperative character of the direct demands and decisions of the people.

The Democratic Party officially placed its trust "in a clear reliance upon the intelligence, patriotism, and the discriminating justice of the American people." Jackson maintained that the right of the popular majority to govern was "the first principle of our system." Most Democrats insisted upon the people's right to "instruct" their legislators on important matters, and upon the right of the various state legislatures to "instruct" their senators and to "request" their congressmen on national issues.

It was only natural, therefore, that the Jacksonians received the support of the overwhelming majority of men who had not previously participated in public affairs. Most Whigs also professed a belief in democracy, and so avoided the aristocratic pitfall that had swallowed up the Federalists; but the Whigs were never as universally or as consistently the champions of the mudsills of society as was "Old Hickory's" party.

POLITICAL PARTIES AND CONGRESSIONAL POWERS

For a decade or more prior to Jackson's taking office in 1829, sectional interests rather than political parties had dominated questions of constitutional interpretation. During the 1830's, however, the growth of two nationwide parties led to a general realignment of broad constructionists and strict constructionists along partisan lines. Jackson came into office over the opposition of John Quincy Adams and Henry Clay, both broad constructionists, and he therefore had the support of most strict constructionists. His previous record and his inaugural address indicated, however, that he was essentially a moderate in the matter of interpreting the powers of the federal government. He accepted national sovereignty but believed that the amending process rather than loose construction was the proper way for Congress to obtain additional needed powers.

The first important constitutional issue on which President Jackson was compelled to take a definite stand was that of federal appropriations for internal improvements. It will be recalled that during the Adams administration Congress had adopted the policy of appropriating federal funds for a large number of state and local transportation and navigation projects. In 1830 Jackson applied the brakes to this policy by vetoing four improvement bills, the most notable being the so-called Maysville Road Bill. He did not adopt the narrow Madisonian constitutional position, but he did insist that federal revenue could be constitutionally expended only for projects of a national character, not for those of purely state or local benefit.

This position strengthened Jackson with strict constructionists, but it tended to drive supporters of federal improvements or appropriations into the ranks of the opposition, led by Clay. For the presidential campaign of 1832 the latter group organized under the appropriate name of "National Republicans" and officially declared in favor of "a uniform system of internal improvements, sustained and supported by the general government." Jackson was re-elected and continued as a general policy to check congressional inclinations to grant financial support for local roads and canals. He was not, however, entirely consistent in this stand, for he approved aid for certain river and harbor improvements that were only remotely

national in scope. Meanwhile many states launched more or less elaborate internal improvement systems of their own.

For a time following the Panic of 1837 the issue lost importance, but with the return of prosperity in the middle forties, the advocates of federal improvements again became active. In July 1846 Congress, by bipartisan "log-rolling" methods, passed a bill making appropriations for improving more than forty rivers and harbors in various parts of the country. President James Polk, a southern Democrat, vetoed the bill. He adopted the extreme Madisonian argument that Congress lacked constitutional authority either to construct or to appropriate money for internal improvements and warned that the policy embodied in the bill would lead to a dangerous and unconstitutional "consolidation of power in the Federal Government at the expense of the rightful authority of the States." This veto again put the issue to rest for a time, though before long the federal government was to inaugurate a policy of making huge grants to railroad corporations in the form of public lands.

Another constitutional controversy that arose during Jackson's administration developed when it became apparent that there would be a surplus in the federal treasury. The War of 1812 had left the United States with a national debt of above $200,000,000, but years of peace and rising federal revenues from the tariff and from land sales brought about its steady reduction. After 1830 a speculative boom in western lands developed, revenue from public land sales reached unprecedented heights, and the national debt approached actual extinction. The federal government was thus faced with the imminent prospect of a heavy treasury surplus, and accordingly the question arose as to its proper disposition.

The two parties gradually evolved conflicting solutions for the problem of the surplus. The Whigs, led by Clay, advocated the distribution of proceeds of land sales among the states in accordance with their congressional representation, the funds to be applied to education, internal improvements, or the reduction of state taxes. Clay based his arguments for distribution upon the need for a strong and active national government. He held that the public domain was a great national heritage and should be used by Congress for the benefit of all the people. Under the program he advocated, he said, "the States will feel and recognize the operation of the General Government, not merely in power and burdens but in benefac-

tions and blessings." Clay's proposal made the reduction of the high tariff unnecessary and also enabled the government to maintain the current price of public lands, two considerations which made his stand attractive to his party's eastern supporters.

On the other hand, most Democrats favored a reduction in the price of public lands and the ultimate disposal of the problem by ceding all public lands to the states in which they lay. This program was calculated to appeal to westerners, hungry for cheap public lands, and to states' rights Democrats, who were apprehensive of the growth of federal power and prestige, which they believed was based in part upon the national government's control of the public domain. Jackson's supporters in Congress opposed Clay's distribution scheme largely for the same reason—it could give the federal government a potent weapon for forcing the citadel of states' rights through the persuasive power of the purse.

In 1833 Jackson killed a distribution bill with a pocket veto; but actual extinction of the national debt in 1835, the unwillingness of eastern congressmen to vote any reduction in the price of public lands, and the fact that tariff rates could not be further reduced without disturbing the Compromise of 1833 [2] brought the issue to the fore once more. In 1836 Calhoun, acting as an independent Democrat, suggested a method of distribution calculated to relieve the fears of the states' rights faction. He proposed that most of the federal surplus, then amounting to some thirty million dollars, be "deposited" on account with the states in quarterly installments. The Democrats strongly insisted upon a constitutional distinction between merely depositing the money and making an outright gift, but nearly everyone realized full well that the "deposits" would never be recalled. The deposit bill passed in June 1836 and three installments were paid the states before the Panic of 1837 eliminated the surplus. The "deposits" have remained with the states ever since.

THE BANK AND THE TRIUMPH OF STRICT CONSTRUCTION

The constitutional issue of the 1830's that divided Democrats and Whigs most sharply was the old question of the United States Bank. Banking methods and credit facilities affected people in all walks of life, and many people distrusted all banks. When Jackson

[2] The constitutional issues involved in the tariff controversy of 1832 are discussed in Chapter 12.

entered the presidency the national bank's prestige and influence had again risen, and most people apparently now accepted the bank's constitutionality. But the institution was still unpopular in the West and South.

In December 1829 Jackson revived the issue of the bank's constitutionality in his first annual message, but at that time the institution's charter still had several years to run, and Congress therefore took no action. In January 1832, however, the bank's officers decided to seek a renewal of its charter, and Henry Clay introduced a bill in the Senate for this purpose. A protracted debate thereupon ensued. The bill's enemies generally accepted the bank's constitutionality, but they sought to attach amendments to the bill requiring the consent of any state within which a branch was to be established and granting the states the right to tax such branches. In reply, the Whigs pointed out that Marshall in *McCulloch v. Maryland* had held that the states could neither exclude the bank's branches nor subject them to taxation. States' rights Democrats answered that Congress conceivably could bestow these rights upon the states, while Senator George Bibb of Kentucky went so far as to declare flatly that the Supreme Court had "erred" in the McCulloch case and that Congress ought to ignore its opinion. Congress finally passed Clay's bill in early July in substantially its original form.

Jackson vetoed the bank bill as unconstitutional and as bad public policy. It invaded the powers of the states, he declared, and was not a necessary and proper exercise of the federal fiscal power. Since the Supreme Court in *McCulloch v. Maryland* had already accepted the bank's constitutionality, Jackson supported his stand with the argument that the Supreme Court was not the final arbiter of constitutional questions and that the President had the right to exercise an independent judgment on both constitutional issues and matters of policy. In Congress the Whigs made a bitter attack upon Jackson's constitutional theories, but they were unable to override his veto.

Jackson's re-election in November 1832 doomed the bank. The following year he virtually severed the government's connection with the institution by withdrawing federal funds from its vaults and depositing them with various state banks. In 1837 the bank's charter expired without renewal. As a substitute agency to receive, transfer, and pay out federal funds the Democrats, beginning in

1837, sponsored the creation of a subtreasury system, an idea which finally became law in 1840. President Martin Van Buren explained the underlying constitutional philosophy of the scheme when he declared that the federal government had no constitutional authority to associate itself in any way with private banking activities or business pursuits and that it was therefore obliged to provide for the deposit, transfer, and payment of government funds without the assistance of private institutions.

Another attempt to recharter a national bank—the last for many years—came in 1841, after the Whigs had gained control of Congress and had elected William Henry Harrison to the presidency in 1840. Under Clay's imperious leadership they repealed the Sub-Treasury Act and passed a bill to create "the Fiscal Bank of the United States," with headquarters in the District of Columbia. President John Tyler, who had taken office upon Harrison's death in April 1841, was a states' rights Virginian and strict constructionist, and he favored a provision requiring the assent of the states for the establishment of branches therein. But the Whig leaders disregarded Tyler's wishes and asserted that the question of congressional power to establish branch banks within the various states had already been settled affirmatively by the Supreme Court. They did, however, include a provision which "presumed" a state's assent unless its legislature promptly and "unconditionally" dissented.

Tyler vetoed the bill on the ground that Congress had no constitutional power "to create a national bank to operate *per se* over the Union." Admitting that Congresses and Presidents had often differed over the question of constitutionality, he reminded Congress of his own oft-expressed opinion that no such power existed. He insisted that the bill's provision for the protection of the rights of the states was entirely inadequate and hence that the bill was unconstitutional. The Whig majority in Congress now made a half-hearted attempt to meet Tyler's objections. In September they passed another bank bill, but they refused to meet his repeated request that the establishment of the bank's branches be made dependent upon positive state consent. Tyler vetoed this bill also, declaring that it was a disguised attempt on Congress' part to exercise an "assumed" power to establish a real national bank. "The question of power remains unchanged," he asserted, and concluded that the bill was unconstitutional.

The Whigs now broke completely with Tyler and never again had an opportunity to establish a national bank. In 1846 the Democrats, following President Polk's recommendation, re-established the independent treasury system and left banking to the control of the states. Not until the Civil War was a new national banking system created.

Thus by the mid-forties the strict-constructionist Democrats had defeated the nationalistic Whigs on every important constitutional issue of the day. The Democratic program was doubtless more in harmony with prevailing social and economic conditions. The Whig program was geared primarily to the capitalistic interests of conservative easterners, while Democratic policies appealed more to individualistic and democratic westerners and to agrarian states' rights southerners, and these latter groups were still in a majority in the Union. Perhaps a more positively nationalistic program would have been of greater ultimate benefit to the nation, but at the time most Americans did not think so. The Democratic Party was nationalistic in the sense that most of its members still strongly opposed any development that would disrupt the Union, but they also believed that preservation of the Union depended upon strict construction of federal powers and the preservation of the rights and autonomy of the states.

ANDREW JACKSON AND THE NEW PRESIDENCY

Even more than Washington, Jackson laid the foundations for the modern presidential office. He sharply reversed the twenty-year old trend toward a weak executive, and in his two terms in office he evolved a new conception of presidential authority and new instruments of power which were ultimately incorporated permanently into the executive.

Jackson's determination to play a powerful role in the government rested mainly on his conception of himself as a national champion of the people. There were strong grounds for this attitude: he was the first President nominated and elected almost entirely by democratic processes, and he was also the leader of a political party which championed popular sovereignty. His naturally strong-willed temperament and his experience as a military commander no doubt strengthened his capacity for leadership and his willingness to assert presidential prerogative.

As a popular champion, Jackson was determined to play an independent role in the formulation of national policy. To this end he willingly defied both Congress and the Supreme Court when it became necessary for him to do so. Nor were instruments of presidential power wanting, even though they had long lain dormant. Jackson ultimately made use of three of these instruments of power —the veto power, his power over appointments and removals, and his extraconstitutional position as a party leader.

It was Jackson's bank veto which first led him to assert comprehensively his ideas on executive independence. His veto message set forth two fairly distinct constitutional concepts, both of which infuriated the Whigs—that the Supreme Court was not the final arbiter of all constitutional questions, and that the President could exercise a judgment independent of Congress upon matters of policy, presumably even where constitutional issues were not involved.

Constitutional questions, Jackson said, could not be regarded as settled merely because the Supreme Court had passed upon them. "The Congress, the Executive, and the Court," he asserted, "must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both."

Jackson's argument was theoretically sound, however strange it may seem today. The three departments of the government were established on a coequal basis, and there is nothing in the written Constitution which implies that the opinions of the Supreme Court upon constitutional questions have any primacy or superiority over those of Congress and the President. Indeed, one of the basic postulates of judicial review formulated in the early history of the Supreme Court was the independence of the judiciary and its consequent right to exercise its own judgment, apart from Congress and

the President, upon constitutional questions. That same independence can without doubt be postulated for executive and legislature, and, if admitted in the judiciary, can hardly be denied them with any consistency.

The difficulty with Jackson's position was in part historical, in part practical. For years before 1832 the idea that the Supreme Court had the power to pass upon constitutional questions and that its decisions were final and binding upon the other two departments of government had been asserted in Congress, first by the Federalists and later by a substantial number of Republicans. So widely accepted was this conception of the Supreme Court as the final arbiter of the constitutional system that Webster and Clay in Congress now attacked Jackson's stand as utterly unsound and revolutionary. Asserting that Jackson's message denied "first principles," Webster insisted that the judiciary alone possessed the power to pass on the constitutionality of legislation and that its opinions were binding upon the other departments of government. In fact, Jackson's theory was already largely obsolete at the time he advanced it, since most statesmen and jurists had already accepted the idea that the Supreme Court was the final arbiter of the Constitution.

Jackson's theory also lacked practicality. Although he denied to the Court the right to decide constitutional issues definitively, he advanced no alternative method for settling constitutional controversies with any finality. Apparently he believed somewhat vaguely that constitutional questions might be regarded as disposed of when President, Congress, and Court were in substantial agreement on a matter and were supported by a general concurrence of popular will. As opposed to this vague formula, acceptance of the Court's authority had an obvious advantage in that it solved definitively the problem of where the final power to interpret the constitutional system lay, greatly reduced the possibility of conflict over constitutional questions, and contributed a stability to constitutional interpretation that it would not possess otherwise.

Despite these difficulties, Jackson's theory has received some recognition in recent times. President Franklin D. Roosevelt, over a hundred years after Jackson's bank veto, directly challenged the finality of the Supreme Court's interpretation of the Guffey Coal Act and had the satisfaction of seeing his position on this measure

ultimately sustained by the Court itself. Even today, when "the Constitution is what the Court says it is," the Court does not always have the final word in constitutional law.

One part of Jackson's message was open to serious theoretical criticism—he seemed to imply that the executive was not obligated to recognize the validity of judicial decisions even as between the parties to the case at hand. It is undeniably true, as Webster pointed out, that the decision of the Supreme Court in cases lying within the jurisdiction of the federal judiciary is final and binding as between the parties and that in this respect the executive is as much bound to recognize the Court's decision as any other individual; otherwise the very judicial capacity of the Court itself is invaded and destroyed. Prior to his veto message Jackson had given some grounds for concern in this matter by his refusal to uphold the Supreme Court's decision in *Worcester v. Georgia.*[3] Webster's contention, although correct on the larger issue, had little relevance to Jackson's bank veto. In vetoing the recharter bill, Jackson was exercising his right of separate judgment upon both the wisdom and the constitutionality of a proposed law, and he was not refusing to give effect to a specific Court decision. Webster and Clay argued that in effect he was, since the bank bill would have continued the charter validated in *McCulloch v. Maryland;* but the argument seems tenuous at best.

In his message, Jackson had also defended the veto as an instrument of legislative policy and had contended that the President had a separate and independent right to review the wisdom and merits of proposed legislation even after a bill had been passed by Congress. This stand the Whigs condemned as smacking of monarchy and despotism. Clay insisted that the veto was intended only for those occasions when Congress had obviously overstepped its constitutional authority, and that the President could not veto a bill merely because he thought it bad policy. To veto a bill as bad policy, he said, made the veto "royal prerogative," and totally irreconcilable with "the genius of representative government."

The Constitution does not support Clay's contention. Jackson's predecessors had used the veto very sparingly, but the fact remains that the Convention had purposely lodged the veto power in the President in order that he might check unwise legislation as well as

[3] See p. 303.

legislation which he thought to be unconstitutional. Since Jackson's time, most Presidents have acted upon this assumption, and Jackson's position would not be seriously challenged today. Clay really objected more to Jackson's success in killing a pet legislative measure than he did to the theory behind the President's use of the veto.

The fight between Jackson and Congress reached its climax in 1833 in a bitter quarrel over the President's removal power. It will be recalled that Jackson in 1833 had decided to transfer federal deposits from the United States Bank. The bank's charter provided that this might be done by the Secretary of the Treasury if he thought it wise and if he submitted his reasons to Congress. In September 1833 Jackson ordered Secretary W. J. Duane to remove the deposits, but Duane refused to do so.

Accordingly, the President now read to the Cabinet a skillfully drawn essay prepared by Attorney General Roger B. Taney defending the President's right to impose his will upon his subordinates. The President had been chosen by the people, he contended, to see that the laws were faithfully executed; the full responsibility for the conduct of the executive department was his alone, and it was "his undoubted right to express to those whom the laws and his own choice have made his associates in the administration of the Government his opinion of their duties under circumstances as they arise." He assured the Cabinet that he would take full responsibility for the removal of the deposits. Notwithstanding this virtual ultimatum, Duane still refused to obey the President's order, whereupon Jackson removed him from office and appointed Taney to the vacated position. Taney promptly ordered the deposits transferred and submitted his reasons to Congress.

In December 1833 the Whig-controlled Senate by a strict party vote adopted a resolution drawn by Clay asking the President to communicate to the Senate a copy of his Cabinet paper on executive responsibility. Jackson refused to comply on the ground that compliance with the Senate's request would constitute an improper encroachment on the constitutional rights of the executive. "The executive," he declared, "is a co-ordinate and independent branch of the Government equally with the Senate, and I have yet to learn under what constitutional authority that branch of the Legislature has a right to require of me an account of any communication, either verbally or in writing, made to the heads of Departments

acting as a Cabinet council." He then appealed to the American people, expressing his responsibility to them and his willingness to explain his conduct to them.

The basic issue in this controversy was whether the President, through his constitutionally implied power of dismissal, could dictate to the Secretary of the Treasury how he should exercise the discretionary power vested exclusively in him by Congress. The Whigs argued that the Constitution specifically granted Congress control over public funds, and that Congress in 1789 had purposely placed the Treasury Department under congressional rather than executive control. Therefore the President had no constitutional right either to dismiss Secretary Duane or to force removal of the public deposits under presidential authority. After reiterating arguments of this kind for three months, the Senate majority adopted Clay's famous resolution of censure: "That the President, in the late Executive proceedings in relation to the public revenue, has assumed upon himself authority and power not conferred by the Constitution and laws, but in derogation of both."

Although Democratic senators defended the President's constitutional position, Jackson presented his own case by sending to the Senate an elaborate "Protest" against the resolution of censure. He effectively summarized his position when he declared that it was "settled by the Constitution, the laws, and the whole practice of the Government, that the entire executive power is vested in the President of the United States; that as incident to that power the right of appointing and removing those officers who are to aid him in the execution of the laws, with such restrictions only as the Constitution prescribes, is vested in the President; that the Secretary of the Treasury is one of those officers; that the custody of the public property and money is an Executive function, which, in relation to the money, has always been exercised through the Secretary of the Treasury and his subordinates; that in the performance of these duties he is subject to the supervision and control of the President, and in all important measures having relation to them consults the Chief Magistrate and obtains his approval and sanction; that the law establishing the bank did not, as it could not, change the relation between the President and the Secretary—did not release the former from his obligation to see the law faithfully executed nor the latter from the President's supervision and control."

Jackson's argument was in the main a sound one. The Constitution provides for a unified executive, with ultimate responsibility vested in the President to see that the laws are faithfully executed. Jackson was following the Hamiltonian view in maintaining that the power of removal, like that of appointment, was inherent in executive power and subject only to specific constitutional limitations. The President was unquestionably correct when he insisted that he must have the right to discharge subordinates "when he is no longer willing to be responsible for their acts."

The only alternatives to Jackson's concept of executive authority are the parliamentary system and the decentralization of executive power that exists in many state governments. In the twentieth century Congress has actually succeeded in decentralizing the executive office to some extent and placing parts of it beyond the President's removal power. The office of Comptroller General, created in 1921, is virtually independent of all responsibility to the President. Many of the principal executive commissions, the Interstate Commerce and Federal Trade commissions among them, are at least partially free from executive control. Significantly in this connection, the Supreme Court in *Humphrey's Executor v. United States* (1935) ultimately held that the President could not remove a member of the Federal Trade Commission without senatorial consent, although not on grounds which would apply to Cabinet members.[4]

Despite the frantic Whig protests that Jackson's policies would subvert the republican nature of the government and give rise to an elective monarchy, the President was able to defend his conception of executive authority successfully, mainly because his conviction that the awakening masses viewed him rather than Congress as their leader was based upon sound reality. Jackson's successors, though often less able and aggressive, also were for the most part successful in maintaining his conception of the President as a national leader and a powerful force in legislative policy. When the Whigs came into power in 1841, Clay and other party leaders expected to re-establish presidential subserviency to Congress, but President Tyler's vetoes of Whig legislation and his refusal to be dictated to by Congress preserved executive independence. In a quieter fashion Presidents Polk, Taylor, and Fillmore also refused to accept the doctrine of legislative supremacy and insisted that the

[4] For later controversies involving the removal power see pp. 471–477, 708–711, and 737.

executive was an equal and co-ordinate branch of the government. Lincoln was to call upon these precedents in the crisis of 1861 to establish executive control and direction of the Civil War.

THE JACKSONIAN JUDICIARY AND CHIEF JUSTICE TANEY

As in every period of American history, the dominant political ideas of Jackson's time worked their way into the opinions of the Supreme Court, in part through the appointment of justices who were in sympathy with new concepts and in part because older judges yielded somewhat to the new atmosphere. There was, indeed, no sharp break in constitutional interpretation between the opinions of Marshall's heyday and those after 1830; in fact, most of the newer doctrines in constitutional law could be reconciled with those of the great Virginia Federalist. The oft-repeated statement that the Supreme Court after 1835 underwrote radical agrarian equalitarianism and the doctrine of state sovereignty is entirely unjustified.[5]

A new spirit was nonetheless apparent. The Court after 1835 was somewhat more inclined to recognize the rights of popular majorities as against private property rights. To a certain extent also the new Court recognized the limited retreat from nationalism then under way. Between 1835 and 1855 there were no more great decisions defending national supremacy as against the states, and during the same period the Court often recognized as legitimate certain state powers and functions which Marshall might well have argued intruded upon federal authority.

The dominant personality on the new Court was Chief Justice Roger B. Taney, a Maryland planter, lawyer, and Cabinet officer appointed to the bench upon Marshall's death in 1835. A man of strong character and great ability, Taney had once been a strong Federalist, but after the death of his old party he became an ardent supporter of Andrew Jackson. As Jackson's Attorney General he helped draft the bank veto and the President's Cabinet message on the veto power, and as Secretary of the Treasury he willingly removed the deposits of the United States Bank, a step which he had

[5] See, for example, the characterization of the Court under Chief Justice Taney in Charles and Mary Beard, *The Rise of American Civilization* (New York, 1927), I, 689.

in fact long advocated. The Senate rejected his nomination as an associate justice in 1835 and confirmed his nomination as Chief Justice the following year only after several weeks of embittered debate.

Once on the bench, Taney proved to be a liberal in his defense of majority rights against corporate property rights, but throughout his career he remained a staunch defender of property rights in land and slaves. While many of his opinions were sympathetic toward the maintenance of state authority as against private rights or federal power, he nonetheless did not break sharply with Marshall's nationalism. He was at most a moderate dual federalist, believing that both the federal government and the states possessed exclusive spheres of authority in which each was supreme. Indeed, his opinion in *Ableman v. Booth* (1859) was a ringing defense of national supremacy and the Court's right to control state judiciaries in matters of constitutional interpretation.[6] The general intellectual quality of his opinions was very high—perhaps as high as Marshall's. After his death his reputation was long beclouded, mainly because of the resentment that Northern-minded historians felt toward his opinion in the Dred Scott case; but he is now generally recognized as one of America's greatest jurists.

Most of Taney's colleagues were also agrarian Democrats in background. After 1835, only Story and Thompson remained from the great days of John Marshall. However, two of Jackson's appointees, John McLean of Ohio and James Wayne of Georgia, especially the latter, generally upheld national authority on important issues. In 1837, Congress was instrumental in further reducing the influence of the nationalistic minority by enlarging the Court from seven to nine members. The new justices, John McKinley of Alabama and Philip Barbour (and his successor in 1841, Peter V. Daniel) of Virginia, were particularly strong states' rights men, while John Catron of Tennessee adopted a moderate position.

An early indication of the Court's changing constitutional philosophy appeared in *Briscoe v. The Bank of Kentucky* (1837), a case involving the constitutional status of state bills of credit. In 1830, in *Craig v. Missouri*, the Court had invalidated a Missouri law which had provided for state interest-bearing certificates. Although these certificates would not have been actual legal tender, they

[6] See pp. 379–380.

would have been receivable for taxes and backed by certain state property. In the Briscoe decision, however, the Court took away much of the force of the Craig opinion by holding valid a Kentucky statute establishing a state-owned and state-controlled bank authorized to issue notes for public circulation. The decision hinged on the definition of a bill of credit. "To constitute a bill of credit within the Constitution," said Justice McLean for the Court, "it must be issued by a State, on the faith of the State, and be designed to circulate as money." The Kentucky act did not pledge the faith of the state for redemption of the notes; instead it established a corporation that could sue and be sued. Therefore, the Court held, state bank notes were not bills of credit within the meaning of the federal Constitution and were allowable.

The Briscoe decision, coupled with the simultaneous overthrow of the national bank by the Democrats, went far to destroy the effectiveness of the Constitution's limitations upon state issuance of currency. Justice Story in his dissent argued that the Court had in effect overturned the Craig opinion. Technically this was not true, since it is possible to distinguish between state issues and issues of a public corporation; yet Story's contention that Marshall's Court would have invalidated the Kentucky statute was no doubt correct. A new generation of jurists had arisen, freed from the old post-Revolutionary conservative fear of state currency issues and hence inclined to be more lenient toward state currency and banking activities. In any event, the states were now practically free to regulate banking and currency matters as they wished, and in fact they continued to do so until the Civil War brought about a new era of federal monetary regulation.

THE CONTRACT CLAUSE AND CORPORATE POWER

No opinion revealed more effectively the differences in the Supreme Court's complexion between Marshall's and Taney's time than did *Charles River Bridge v. Warren Bridge* (1837), a case that resulted in a substantial modification of Marshall's earlier contract doctrines.

In 1785 the Massachusetts legislature had incorporated the Charles River Bridge Company for a period of forty years, and had empowered it to erect a bridge over the Charles River and to collect tolls for passage over the bridge. In 1792 the life of the original

charter was extended to seventy years. Before the expiration of the charter, however, the legislature authorized another corporation, the Warren Bridge Company, to erect another bridge over the Charles River at a point less than three hundred yards from the earlier bridge. By the terms of its charter, the new corporation was to turn its bridge over to the state as soon as its expenses of construction were paid; it was therefore potentially toll-free and threatened to destroy almost entirely the value of the earlier bridge. Accordingly, in 1829 the Charles River Bridge Company sought an injunction against the construction of the new bridge, on the grounds that its charter by implication gave it sole and exclusive right to operate a bridge at the point in question during the life of its charter and that the second charter therefore constituted an impairment of the obligation of contracts.

Chief Justice Taney, delivering his first opinion on a constitutional question, held that a charter grant must always be construed narrowly, that no implied right could be assumed, and that ambiguities must be construed in favor of the state. The doctrine of vested rights, upon which the plaintiff had placed considerable reliance, he brushed aside as irrelevant. Taney rested his legal position upon English precedent and earlier American cases, but Jacksonian social philosophy protruded all through his reasoning: "The object and end of all government," he said, "is to promote the happiness and prosperity of the community by which it is established, and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created." The Court could not consent, he said, to strip away "the rights reserved to the States," and by "mere technical reasoning take away from them any portion of that power over their own internal police and improvement, which is so necessary to their well being and prosperity."

Taney's doctrine limited somewhat the earlier Marshall attitude toward the inviolability of contracts and was more progressive and realistic than the earlier position. Corporations were becoming numerous in the fields of banking and transportation, and they required close state supervision if the public interest was to be protected. A rapidly expanding country in search of improved means of transportation would have been greatly handicapped had the older turnpike and canal corporations been enabled to establish

monopolies by mere presumption or ambiguous clauses and thus prevent the construction of parallel railroad lines. The Charles River Bridge decision did not forsake Marshall's doctrine laid down in the Dartmouth College decision, that a state-granted charter is a contract protected under the contract clause; the new decision merely restricted the contract to the actual provisions of the charter. Therefore the new constitutional law proved to be a good balance between the security of property rights and the state's power to provide for the public welfare.

To Story, Webster, Kent, and other conservatives who shared Marshall's philosophy, however, Taney's position seemed to spell the destruction of "a great principle of constitutional morality." Story's dissenting opinion now seems almost pathetic in its appeal to old interpretations of English common law in support of the proposition that the state could be bound by implied contracts with individuals and corporations. What he really feared was the abandonment of the whole doctrine of judicial review, an institution which he viewed as the principal means of protecting property rights against legislative encroachment.

In reality, however, Taney's contract position was not so revolutionary as conservatives feared. It circumscribed but did not abandon Marshall's Dartmouth doctrine that a charter is a contract, protected from state impairment by the Constitution. In any event, it soon became common practice for states granting corporate charters to reserve therein the specific right to alter or terminate them in the interests of the public welfare. This policy, together with the Charles River Bridge opinion, tended to curtail appeals to the courts under the contract clause, but it did not cut off the right of corporations to secure judicial review of their grants.

In spite of their sensitivity to popular welfare, Taney and his associates proved to be little inclined to disturb Marshall's doctrines concerning the relationship between state legislation and private contractual rights between individuals. In part this was because much current legislation of this kind, especially the debtor-relief legislation arising out of the long depression following the Panic of 1837, concerned property rights in land and mortgages, toward which most of the justices were more sympathetic than they were toward corporate property. In the outstanding case of this kind, ***Bronson v. Kinzie*** (1843), the Court declared invalid as an impair-

ment of the obligation of contracts two Illinois laws restricting foreclosure sales and giving debtors certain broad rights to repurchase foreclosed property. Most state bankruptcy statutes of the day were not as radical as these, however; they seldom attempted to reduce or modify the debt, but instead contented themselves with softening the methods of execution by permitting installment payments, extending redemption dates, and the like. The Court customarily upheld this type of law under the doctrine advanced by Marshall in *Sturgis v. Crowninshield* that the state rightfully could modify the legal "remedy" or method of enforcing a contract as long as it did not impair the terms of the contract itself.

Closely related to a state's control over its chartered corporations was the question of its power to exclude corporations created by other states. This matter came before the Supreme Court in the so-called Comity Cases of 1839, the chief of which was *Bank of Augusta v. Earle*. An Alabama citizen refused to pay the bills of exchange of a Georgia bank on the ground that a "foreign" corporation had no legal right to make a contract within a "sovereign" state. Counsel for the bank argued that a corporation, like a citizen, could enter another state and engage in business there under the protection of the privileges and immunities clause of the federal Constitution.

The Court's decision, rendered by the Chief Justice, recognized the general right of a corporation to do business under interstate comity within other states, but it also recognized the right of the various states to exclude foreign corporations by positive action if they so desired. Taney also refused to recognize corporations as possessing all the legal rights guaranteed to natural persons under the Constitution. Accordingly, he held that a corporation could have legal existence only in the state creating it, and that it could not migrate to another state by virtue of any right bestowed in the privileges and immunities clause, though it might do business in other states if they consented.[7] The immediate question was whether this consent must be expressed or merely implied. Taney maintained that "the silence of the state authorities" in face of extensive activi-

[7] Gerald C. Henderson, *The Position of Foreign Corporations in American Constitutional Law*, (Cambridge, 1918), holds that Taney had ample precedents available for deciding that corporations were persons within the meaning of the privileges and immunities clause but chose to ignore them.

ties by outside corporations gave presumption of the state's acquiescence. As Alabama law did not expressly prohibit foreign corporations from selling bills of exchange, the activities of the Bank of Augusta were held to be legal.

Since this opinion definitely upheld the right of a state to exclude a foreign corporation or impose limits upon its entrance, it led many states to enact prohibitory or regulatory statutes upon foreign corporations seeking to do business within their limits. Such statutes often led to confusion, but on the whole they proved to be socially beneficial, since there was as yet practically no federal regulation of interstate commerce. Ultimately the Supreme Court, beginning in 1877, sapped the vitality of the Earle case by holding that a state could not unduly burden corporations doing business in interstate commerce, while the Court's assumption after 1880 that corporations were legal persons within the meaning of the Fourteenth Amendment still further weakened the Taney precedent.

THE COMMERCE POWER AND STATES' RIGHTS

As in Marshall's day, most of the cases touching upon interstate commerce which came before the Court over which Taney presided involved the validity of state legislation having some effect upon interstate commerce. There was as yet very little positive federal regulation of interstate commerce, and the critical issue was the scope of state power as against the commerce clause, rather than the extent of federal authority under it.

Taney's opinions did not break sharply with Marshall's ideas, but they did give a somewhat different scope and significance to the commerce power. Taney never had occasion to quarrel with the broad scope of the commerce clause as Marshall had interpreted it in *Gibbons v. Ogden;*[8] rather by implication he acquiesced in that opinion. It will be recalled that Marshall had almost, though not quite, held that the federal commerce power was exclusive, and that state legislation which touched upon interstate commerce was void. It was this implication that Taney's Court vigorously rejected in favor of the presumption that state police legislation was constitutional even though it might have an incidental effect upon interstate commerce, while the Court ultimately even recognized

[8] This decision is discussed in detail on pp. 293–296.

that the states possessed a limited concurrent authority over interstate commerce itself.

The first intimation of this position came in *New York v. Miln* (1837), a case involving the validity of a New York law requiring masters of ships arriving in New York to report certain data on all passengers brought into port. The law had been attacked as an interference with congressional authority over foreign commerce, but Justice Barbour, speaking for five of the seven justices, held the law valid as a legitimate exercise of the state's police power, since the state's internal welfare was the obvious end purpose of the statute. Unlike the act involved in *Gibbons v. Ogden*, he said, the New York law did not come into conflict with any act of Congress so as to raise any question of conflict between state police power and federal commerce power; and he even intimated that since Congress had not asserted authority over the matter involved, the law could also be held valid as a proper regulation of commerce by the state. In a concurring opinion Justice Thompson went further and stated flatly that the states had a certain authority over commerce in the absence of federal regulation—"the mere grant of the power to Congress does not necessarily imply a prohibition of the States to exercise the power until Congress assumes to exercise it." Justice Story alone dissented, on the ground that the law was a regulation of commerce and hence invaded an exclusive sphere of federal authority.

The divergent attitudes revealed in *New York v. Miln* were reinforced in the so-called License Cases (1847). The three cases, argued together, concerned the validity of three statutes of Massachusetts, Rhode Island, and New Hampshire regulating and taxing the sale of alcoholic liquors. The laws were attacked on the ground that in taxing liquor imported from outside the state they in effect imposed unconstitutional regulations upon interstate commerce and so were void. The New Hampshire case was of particular interest, for here the tax had been levied upon liquor still in the "original package," in apparent violation of the dictum in *Brown v. Maryland*.[9] There was considerable difference among the justices about certain legal details—the six justices wrote nine different opinions. But certain propositions stood out clearly amid the welter of legal

[9] See p. 297 for a discussion of *Brown v. Maryland*.

reasoning. The justices were in general agreement that the fact that a state tax law levied for internal police purposes has an incidental effect upon interstate commerce did not thereby make it invalid.

Four justices—Taney, John Catron, Samuel Nelson, and Levi Woodbury—also thought the states had a concurrent right to regulate interstate commerce in the absence of federal action; and it was on this basis that the first three sustained the New Hampshire law. The federal commerce power, Taney maintained, was not exclusive. "It appears to me to be very clear," he said, "that the mere grant of power to the general government cannot, upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject by the States. . . . In my judgment, the State may nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbors, and for its own territory; and such regulations are valid unless they come in conflict with a law of Congress." Taney admitted the validity of the original package doctrine but distinguished the present case from *Brown v. Maryland* on the ground that that case involved a direct conflict between a state act and a congressional law regulating foreign commerce.

In the Passenger Cases (1849) it became clear, however, that the various justices were still far from agreement upon the precise line between the states' internal police power and the commerce power and upon the question of whether the commerce power was exclusive or concurrent. The cases involved the validity of New York and Massachusetts statutes imposing head taxes upon alien passengers arriving in the states' ports. Five justices thought the acts a direct regulation of interstate commerce and so void, McLean flatly declaring that the federal commerce power was lodged exclusively in the federal government and could not be exercised by the states even in the absence of congressional action. The minority of four, headed by Taney, pointed out that the laws were specifically aimed at the prevention of disease and pauperism and accordingly contended that the laws were valid exercises of state police power. Taney also argued once more that the states had a concurrent power over interstate commerce in the absence of federal regulation.

The conflict within the Court as to the character of the commerce power was largely reconciled in *Cooley v. Board of Wardens*

(1851), a case in which the Court upheld a Pennsylvania statute regulating pilotage in the port of Philadelphia. Justice Benjamin Curtis, a Boston Whig lawyer recently appointed to the Court, speaking for six justices, said that the power to regulate commerce involved a vast field, some phases of which were national in character and so demanded congressional action. Here federal power was properly exclusive. Other phases were local in character and demanded a diversity of local regulations; here the states properly had a concurrent power to legislate in the absence of federal action. There was thus a limited concurrent field of state power over interstate commerce, exercisable only where Congress had not yet acted. Pennsylvania's regulation of pilotage came within this power.

This doctrine of "selective exclusiveness," as it has been called, was a more restrained view of state authority over commerce than Taney had formerly assumed; yet the Chief Justice now silently assented to Curtis' position. Why he did so is uncertain; perhaps he thought Curtis' stand a satisfactory compromise of the differences among the justices. Justice Daniel alone protested that state power over local commerce was original and inherent in the states and not subject to federal control. McLean and Wayne dissented outright from the majority decision, contending to the last for the exclusive character of the federal commerce power.

At the same session at which the Cooley case was decided, the Court in *Pennsylvania v. Wheeling Bridge Company* (1851) showed its willingness to respect federal authority over commerce when the exercise of that power came into conflict with that of the states. The state of Pennsylvania had attacked the bridge company's right to construct a bridge over the Ohio River under the supposed authority of Virginia statutes, claiming that the prospective bridge would interrupt interstate river navigation. The case attracted great popular interest because it involved a conflict between rival transportation systems—rivers and railroads—an important economic issue at the time. The Court held, with Justice McLean delivering the opinion, that the bridge was an interference with the federal commerce power as already exercised by Congress in the coasting license acts and that its construction was therefore unlawful.

Taney and Daniel dissented; the Chief Justice's argument was remarkably farsighted in its insistence upon self-limitation of authority by the Court. He argued that, since the Court had never

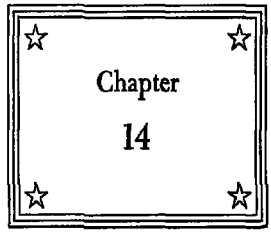
exercised jurisdiction over the construction of bridges over navigable streams and since Congress had "undoubted power over the whole subject," it was within the province of Congress to "adopt regulations by which courts of justice may be guided" in determining whether such a bridge was an interference with interstate commerce. Taney maintained that outright judicial determination of the validity of the bridge would come "too near the confines of legislation." This position soon received the endorsement of Congress through the enactment of a law declaring the bridge to be a lawful structure.

As is evident in these decisions, the Court's treatment of the commerce power in Taney's time hardly exemplified a radical championship of state sovereignty. The doctrine of a selective exclusiveness—of a limited concurrent state power over commerce—was realistic and met with popular approval, since most aspects of commerce were still more susceptible to state than to national regulation. Yet the Court did not challenge the broad construction of the commerce power as laid down by Marshall in *Gibbons v. Ogden*. In fact, a majority of the judges never seriously challenged the doctrine of national supremacy in relation to the commerce power—that is, the assumption that congressional legislation could supersede state controls when the two came into conflict.

The new commerce doctrines actually alarmed extremist champions of states' rights, who feared that the Court might sanction federal interference with the interstate slave trade or with the exclusion of free Negroes by the states. A minority of the justices had raised this question in *Groves v. Slaughter* (1841), a case involving a provision of the Mississippi constitution intended to prevent the purchase of slaves from other states for resale in Mississippi. While the majority of the Court upheld the Mississippi provision without discussing the question of whether the movement of slaves across state lines constituted interstate commerce, Henry Baldwin, Taney, and McLean discussed the relation of Congress' commerce power to the regulation or prohibition of the interstate slave trade. Baldwin stated unequivocally that slaves were "property" as well as "persons" and therefore subject to congressional regulation in interstate commerce like other kinds of property. Taney, on the other hand, declared flatly that the power over the subject of slavery rested "exclusively with the several states," and that the states' regulation of

the introduction or control of slaves within their territories "cannot be controlled by Congress . . . by virtue of its power to regulate commerce." The Chief Justice reiterated this stand in his dissent in the Passenger Cases in 1849, at a time when Southern alarm over the Northern attitude toward the interstate slave traffic was growing steadily. Daniel had the same problem in mind when he declared in the same cases that an "unlimited" federal control over commerce threatened "the safety and independence of the States of this confederacy."

The fashion in which federal authority over interstate commerce gradually became involved in the slavery question was typical of the manner in which virtually all political and constitutional questions ultimately became engulfed in the great maelstrom of the slavery controversy. So far Congress, the Court, and the President had succeeded moderately well in adjusting constitutional growth to the changing requirements of successive economic and social developments. But the slavery controversy was not to be solved by congressional compromise or judicial arbitrament; instead the constitutional crisis it precipitated had to be settled on the field of battle.



The Slavery Controversy and Sectional Conflict

JACKSONIAN DEMOCRACY partially obscured but could not obliterate the steady current of sectional conflict in national politics. Before 1840, however, national controversies seldom produced a clear alignment of one half of the nation against the other half; even South Carolina's stand on the tariff had not united the South against the North. Political issues usually involved a variety of combinations between the Northeast, the middle states, the South, and the West upon matters relating to the tariff, land, bank, and internal improvements. No one section stood permanently arrayed as a hostile minority against the rest of the nation.

It was the renewal of the slavery question which gradually created a clear-cut deeply rooted sectional division between North and South. Conflict over slavery had first become serious at the time of the Missouri question, but the achievement of compromise in 1820 quieted controversy over the issue for a time. In the 1830's, however, it broke out anew, inspired by the growth of an impassioned abolitionist movement in the North and by a substantial change in the South's attitude toward slavery. The new abolition-

ism was essentially but one phase of a great wave of humanitarianism which swept the North between 1820 and 1860, and which expressed itself in demands for prison reform, world peace, women's rights, prohibition, and economic utopianism as well as in attacks upon slavery. Ultimately the attack upon slavery absorbed more and more of the energies of reformers until the abolitionist movement dwarfed all other phases of reformism. The new antislavery leaders, William Lloyd Garrison, Elisha Lovejoy, James Birney, Theodore Parker, and their fellows, condemned slavery as utterly immoral and, unlike earlier opponents of the institution, demanded immediate and total emancipation.

The Southern attitude toward slavery had also altered. By 1830 the former apologist sentiment had disappeared and had been replaced by a growing belief that slavery was not only a positive good but was necessary to the South's very survival. Cotton was enjoying a new boom in the lands of the Gulf states and Southwest, and here as well as in South Carolina abolitionist attacks upon slavery produced violent resentment and alarm.

Thus inspired, the slavery controversy broke out anew in Congress shortly after 1835. At first it lacked the character of a major sectional conflict, but it gradually grew in bitterness and intensity until it forced all other sectional differences into the background.

THE RENEWAL OF CONGRESSIONAL CONTROVERSY

The abolitionists early adopted the device of flooding the mails with quantities of pamphlets, newspapers, and circulars addressed to Southerners and in some instances to slaves themselves. Southerners, not unnaturally, hotly resented this practice as an attempt to stir up servile insurrection, and postmasters in the South often took it upon themselves, without formal legal sanction, to destroy such material. President Jackson sympathized with the Southern attitude in this matter, and in December 1835 he recommended the passage of a federal censorship law.

Calhoun and other Southerners, however, feared the nationalistic effects of federal postal censorship, and they therefore opposed Jackson's suggestion. Instead, in February 1836, a Senate committee under Calhoun's chairmanship reported a bill providing that it should be unlawful for any deputy postmaster knowingly to receive and mail any matter "touching the subject of slavery, directed

to any person or post-office in any state where by the laws thereof their circulation is prohibited."

This bill posed a serious constitutional question. It evidently proposed to lend federal assistance to the enforcement of state law, and moreover made a federal statute dependent upon state law for validity and interpretation. Several senators, notably Henry Clay of Kentucky and Daniel Webster of Massachusetts, attacked the bill on this ground, holding that the Constitution nowhere authorized federal enforcement of state law. Calhoun replied that the federal government as the agent of the states had an inherent right to enact legislation to assist the states in the enforcement of their own laws and in the protection of their domestic institutions, a very different kind of implied federal power from that which Hamilton and Marshall had discussed in expounding the doctrine of broad construction of the powers of Congress.[1]

So far had the prevailing doctrine of strict construction progressed that a majority of the Senate believed Calhoun's bill unconstitutional on the ground that the postal power could not be construed to imply any power whatsoever over matter moving through the mails. Even the nationalistic Webster thought that control would constitute a federal censorship and so violate the First Amendment. These scruples led to the defeat of Calhoun's bill in the Senate, by a vote of 25 to 19. The censorship did not thereafter become important, mainly because successive administrations in Washington closed their eyes and assented to the practice whereby local postmasters removed objectionable materials from the mail, without authority.

In the same session of Congress in which Calhoun introduced his postal bill, a crisis developed over abolitionist petitions and memorials asking Congress to abolish slavery in the District of Columbia. Since the federal government presumably had full police power in the District, the petitions had a plausible constitutional foundation, but they infuriated Southern congressmen, who not without reason regarded them as attempts to drive a wedge into the institution of slavery. In any event, they said, Congress had no law-

[1] Calhoun's contention that the federal government could lawfully act as an agent of the states has been put into practice in the twentieth century. The Webb-Kenyon Act of 1913 used the interstate commerce power to assist the states in the enforcement of their various prohibition laws, and the same principle was incorporated in the so-called "Hot Oil" Section of the National Industrial Recovery Act of 1933.

ful authority to interfere with slavery in the District, for the institution was protected by a federal contract with the states of Virginia and Maryland. This contract had been incorporated in the Act of 1802, which organized government in the District and by which Congress had promised not to interfere with the domestic institutions and property rights of residents in the ceded areas. Senator Bedford Brown of North Carolina also contended that interference with slavery would destroy property rights and so constitute a violation of the Fifth Amendment, an extraordinary anticipation of Taney's opinion in the Dred Scott case twenty-one years later. Slavery in the District of Columbia continued to be a sore spot between North and South until the Civil War. Not even the Compromise of 1850, which later banned the slave trade but permitted slaveholding, was to be successful in checking the abolitionist memorials.

The right to petition Congress was seemingly protected by the First Amendment, but the steady flow of abolitionist petitions in Congress nevertheless inspired Southern congressmen to find some means of banning them. Southerners contended that the First Amendment guaranteed the right of petition only upon subjects within the constitutional competence of Congress, and that Congress was under no obligation to receive petitions upon matters beyond its lawful concern. Slavery, they pointed out, was a domestic institution of the states over which Congress had no authority; hence petitions on slavery could be lawfully rejected. Many Northern delegates in Congress, anxious to suppress antislavery agitation, were sympathetic with this attitude, although others thought that any house rule barring petitions would violate the Constitution.

After some months of intermittent debate, the House of Representatives in May 1836 adopted a "gag rule" intended to bar abolitionist petitions entirely. The rule, drawn by Representative Henry Pinckney of South Carolina, stated that "all petitions, memorials, resolutions, propositions, or papers relating in any way, or to any extent whatsoever, to the subject of slavery, or the abolition of slavery, shall, without being either printed or referred, be laid upon the table, and no further action whatever shall be had thereon." The resolution passed, 117 to 68, over the bitter protests of John Quincy Adams of Massachusetts, who denounced the proposal as "a direct violation of the constitution of the United States, the rules of this

House, and the rights of my constituents." In spite of Adams' continued opposition, the House strengthened the rule in 1840 to ban outright any attempt to introduce petitions on slavery. This was a more extreme prohibition than that of 1836, which had merely established a uniform rule for disposing of memorials.

Adams made the repeal of the House gag rule a *cause célèbre*, which he carried on for years, much to the displeasure of his colleagues. He was finally successful in obtaining repeal in 1844, largely because the growth of Northern antislavery sentiment had convinced most Northern congressmen that it would be politically unwise to support the rule longer.

Very early many abolitionists seized upon the federal power over interstate commerce as a possible device by which Congress could strike a blow at slavery, and antislavery memorials very often asked Congress to prohibit the interstate slave trade entirely. Such demands received but little support, even from antislavery congressmen. Two Madisonian theories of the commerce power were popular at the time: first, that the federal power over commerce was a protective and conservative one, that the federal government could regulate commerce in order to advance or protect it but could not destroy any phase of commerce through outright prohibition; and second, that while federal power over foreign commerce was admittedly all-inclusive and complete, authority over domestic commerce was not as extensive and was perhaps only negative in character. Thus an embargo on foreign commerce would be constitutional, while an embargo on domestic commerce would not. Outlining this argument in a lengthy Senate speech in 1839, Henry Clay contended that the use of the commerce power to attack slavery would in reality amount to a perversion of the Constitution. Apparently most of his colleagues agreed with him.

In *Groves v. Slaughter* the Supreme Court had occasion to discuss the relation of the slave trade to the commerce power. The question at issue was whether or not the Mississippi provision violated the federal constitution by invading the commerce power. The Court dodged a formal ruling on the question by holding the Mississippi provision inoperative, but several justices discussed the disputed matter in concurring opinions. Taney thought that neither the states nor Congress could interfere with the introduction of slaves into a state. Justice McLean, an antislavery man, considered

slaves to be persons rather than property and therefore outside the commerce power; hence he was of the opinion that a state could prohibit their importation. Justice Baldwin thought that the federal government might prohibit the interstate slave trade, but that a state might nevertheless ban the entry of Negroes if state law made them persons rather than articles of commerce—an ideal position from an antislavery viewpoint.

SLAVERY AND INTERSTATE COMITY

Certain aspects of the slavery question involved matters of interstate comity as well as congressional power. Into this category fell the disputes over fugitive slaves, slaves who were sojourners in other states, and the status of free Negroes.

Article IV, Section 2, of the Constitution provided that persons "held to Service or Labour" in one state who escaped into another state were not thereby to be "discharged from Service" but were to be "delivered up on Claim of the Party to whom such Service or Labour shall be due." The precise meaning of this section was vague in that it did not make clear what agency, state or federal, was charged with its execution. Article IV of the Constitution dealt with various matters of interstate comity, and from this it might have been assumed that the mutual return of fugitive slaves was an obligation imposed upon the states rather than the federal government. This supposition was strengthened by the fact that power to enact a fugitive slave law was not among the enumerated powers of Congress.

In spite of this ambiguity, Congress in 1793 enacted a fugitive slave law. This statute provided that fugitives escaping from one state into another might be seized by the master or his agent, brought before any federal or state court within the state, and returned under warrant upon proof of identity. The act thus put the responsibility for the return of fugitives upon both federal and state courts, and so made state officials agents for the enforcement of a federal statute. Various states, North and South, also enacted fugitive slave laws which provided legal processes for the seizure, detention, and return of fugitives through state police officers and courts. This system of joint federal-state responsibility worked well enough for a long time, and no one thought to challenge its constitutionality.

With the rise of Northern antislavery feeling, however, the return of fugitive slaves speedily became a sore point between North and South. Beginning in 1824, several Northern states enacted so-called "personal liberty laws," the object of which was to throw certain safeguards around alleged fugitives and to protect free Negroes from kidnaping. Pennsylvania's statute, enacted in 1826, contained a prohibition practically banning all seizure of Negroes with intent to return the victim to slavery. Other provisions of the Pennsylvania law prohibited lower state magistrates from taking cognizance of fugitive slave cases under the federal statute. Connecticut also imposed this latter restriction on state officials and together with Indiana, New York, and Vermont guaranteed fugitives a jury trial in the state courts.

In *Prigg v. Pennsylvania* (1842) the constitutionality of such legislation and of the federal fugitive slave law came before the Supreme Court. Edward Prigg, a slaveholders' agent from Maryland, had seized a runaway in Pennsylvania, and upon being denied a warrant in the state courts, had forcibly carried the slave back to Maryland without benefit of further legal proceedings. Returning to Pennsylvania, he was indicted and convicted of violating the kidnaping clause in the act of 1826. This verdict was sustained by the Pennsylvania Supreme Court, and an appeal was thereupon taken to the United States Supreme Court.

Justice Story, who delivered the majority opinion of a divided Court, held, first, that the Pennsylvania provision banning forcible seizure and removal of a fugitive was unconstitutional. The true intent of the fugitive slave clause in the federal Constitution, he said, was to expedite the return of runaways in every possible fashion, and any state law interfering with that right was void. Secondly, Story held that execution of the fugitive slave clause in the federal Constitution was exclusively a federal power. Answering those who argued that the Constitution seemingly established a system of interstate comity, Story said that in the interest of uniform enforcement a federal act was imperative, that there were other federal powers than those listed in Article I, Section 8, and that in any event the principle of federal legislation had now stood too long to be challenged successfully. The act of 1793 was thus held to be constitutional in all its main provisions.

Story held incidentally, however, that Pennsylvania was within

its rights in prohibiting its own magistrates from enforcing the federal fugitive slave law, since there was, he said, no state obligation to undertake the enforcement of federal law. This ruling opened the way for further Northern interference with the return of fugitives, and several Northern states now passed statutes prohibiting their courts and police officers from assisting in any way in the return of fugitives. Liberty laws of this kind were a further source of irritation between North and South.

The Court's opinion in the Prigg case did not win general acceptance among lawyers and statesmen in either North or South. Many Southern statesmen continued to insist that the return of fugitives was a mutual obligation of the several states rather than of the federal government, and that Northern acts prohibiting state officials from assisting in the return of fugitives were therefore void. On the other hand, certain Northern statesmen, Daniel Webster among them, often admitted that return of fugitives was properly a matter of interstate comity, but they threw emphasis upon the fact that the federal statute was thereby void, notwithstanding the Prigg opinion. By 1850 Northern violations of the Fugitive Slave Law constituted an important Southern grievance promoting the congressional crisis of that year.

Southerners visiting the North for business or pleasure often found occasion to bring their slaves with them as personal servants. The question early arose whether or not the sojourner-slave in a free state thereby became free. Most Northern states, either by statute or by court opinion, had long recognized the sojourner slave as a special case and provided by law that slaves in transit or temporarily in the state in the company of their masters did not thereby become free. The right does not seem to have been regarded generally as based on any constitutional obligation, although in *Groves v. Slaughter* Justice Baldwin had stated that the Constitution guaranteed all citizens a right of transit with all property including slaves, across any state, free or slave.

After 1830 the attitude of the Northern courts toward the sojourner-slave changed rapidly under the impact of antislavery agitation. In 1836 the Massachusetts Supreme Court, for example, held in *Commonwealth v. Ames* that slavery was contrary to the state constitution and to natural law, and that any attempt to bring a slave into the state automatically freed the slave. The court held

the idea of sojourners' rights to be "wholly repugnant to our laws, entirely inconsistent with our policy and our fundamental principles," and "therefore inadmissable." Similar rulings were soon forthcoming in several other Northern courts, while most liberty laws enacted after 1840 formally withdrew all sojourners' rights.

The Southern states, indignant at the new policy toward sojourners, contended that the federal Constitution recognized slavery, and that Northern refusal to grant sojourners' rights to the slaveholder violated the privileges and immunities clause as well as the spirit of the Constitution. The issue was never decided by the Supreme Court. In theory, however, if slavery were purely a domestic institution as Southerners claimed, there could be little objection to the legality of the denial of sojourners' rights, since no state was obliged under the Constitution to extend to the citizens of other states privileges which it denied to its own citizens.

A somewhat related problem in comity arose out of South Carolina's treatment of free Negro sailors. In 1822, South Carolina passed a law that all free Negroes who came as sailors into the ports of the state should be arrested by the local sheriff and held in jail until the ship was ready to sail. Free Negroes were very often citizens of the various Northern states, and hence by implication at least, citizens of the United States. Others were British nationals. Several Northern states immediately protested that the South Carolina law violated the privileges and immunities of citizens of the United States, while Prime Minister George Canning protested that the act violated the existing commercial treaty with Great Britain.

Attorney General William Wirt shortly issued an opinion that the South Carolina law violated the Constitution's privileges and immunities clause, and in 1823 a federal district court in South Carolina also held the act void on the ground that it invaded the federal commerce power. South Carolina thereupon ceased to enforce the statute as against British Negroes but continued to do so against those from Northern states. Further, many Southern states continued to enforce laws against the entry of free Negroes, even though the latter were conceivably citizens of the United States and entitled to the benefits of the privileges and immunities clause. This practice furnished antislavery leaders with a countercharge to Southern complaints against the Northern personal liberty laws.

THE PROSLAVERY LEADERS ADOPT STATE SOVEREIGNTY

In all this early controversy, the underlying fear of Southern statesmen was that the North would eventually use its growing political power to make a direct attack upon the institution of slavery within the Southern states. Before 1845 there seemed little immediate danger of this. Abolitionists were not popular in the North; few Northern congressmen showed any inclination to adopt abolitionist arguments, or even to press for the abolition of slavery in the District of Columbia. Besides, until 1850 the slave states controlled half the Senate and two-fifths of the votes in the House, while a Southern President occupied the White House for all but eight years between 1801 and 1850. In these circumstances there seemed little prospect that national legislation unfavorable to slavery would be adopted.

Yet certain Southern statesmen, notably Calhoun, looking to the future, foresaw a far different situation. While comparatively few Northerners were abolitionists, antislavery sentiment in the North was indubitably growing. In time, most Northern congressmen might swing to the abolitionist position. Moreover, the free-state population was outstripping that of the South at an alarming rate. The North already controlled the House, and if new free states were admitted from the great trans-Mississippi Northwest, it would eventually control the Senate as well. A Congress dominated by antislavery sentiment might then repeal the fugitive slave law, abolish slavery in the District of Columbia, and prohibit the interstate slave trade. Ultimately, it might attack slavery within the Southern states, either illegally or through a constitutional amendment.

To some degree, Southern leaders could meet this situation, should it develop, by resort to strict-constructionist arguments upon federal power over slavery, and they did so. Yet Calhoun thought this remedy insufficient. Ultimately the North, already growing more and more nationalistic, might override strict construction and impose its own constitutional viewpoint on the South. What the South desired was, first, assurance that the North could not legally use national power to interfere with slavery; and second, assurance that if the North ever did so, the South could leave the Union.

An answer to the South's problem lay in the doctrines of state sovereignty and secession, already formulated by Calhoun and his

fellow Carolinians in the nullification controversy. The South Carolina doctrine, holding as it did that the Union was a mere league of sovereign states and that the central government was not a separate sovereignty but only an agent of the several states, fitted the needs of the proslavery faction exactly. If the central government were an agent of the sovereign states, then it could never attack the institution of slavery in however remote or indirect a manner, since to do so would be an act of the agent against his principal's interest. Moreover, were the Union viewed as a compact among sovereign states mutually guaranteeing one another's institutions, the Southern states could with some plausibility call those in the North to account, should the latter permit any attack upon slavery. Finally, should the South's position in the Union become too difficult, Calhoun's theories made available the right of secession.

It was Calhoun himself who first realized how appropriate were his earlier ideas to the South's interests in the growing controversy over slavery. In December 1837, he introduced a series of six resolutions into the Senate, applying his constitutional theories directly to the slavery controversy. The resolutions held that the several states had voluntarily entered the Union as independent and sovereign states, retaining "sole and exclusive" control of their domestic institutions, and that the federal government was a common agent of the several states and therefore "bound so to exercise its powers as to give . . . increased stability and security to the domestic institutions of the states that compose the union." It was therefore "the solemn duty of the government to resist all attempts by one portion of the Union to use it as an instrument to attack the domestic institutions of the other states." The resolutions added that "domestic slavery, as it exists in the Southern and Western states of this Union composes an important part of their domestic institutions," and warned that all attacks against it on the part of other states of the Union, including even attempts to abolish slavery in the District of Columbia or the territories, were "a violation of the mutual and solemn pledge given to protect and defend each other" when the states adopted the Constitution. The resolutions ended with an implied threat of secession were Southern rights denied and the equality of the Union thereby destroyed. All but the last of these resolutions passed the Senate by large majorities, partly because they involved no specific political interest of the moment and partly be-

cause certain senators found it expedient to conciliate Calhoun. However, Calhoun's main argument on the nature of the Union went unchallenged in debate, so far had the conception of national sovereignty evidently disintegrated since 1789.

Calhoun's resolutions marked the firm union of the proslavery and state-sovereignty arguments. As Calhoun put it in debate, the resolutions were aimed directly at the proposition that the United States was "one great Republic." Such a doctrine, he said, would strengthen the abolitionists and prepare the ground for an attack on slavery in the Southern states through the medium of the national government. From this time onward, Calhoun invariably called forth the logic of his resolutions in support of Southern interests in the slavery debate, and other Southern statesmen were quick to see the advantage and do the same. The resolutions thus became the basis of the main Southern argument concerning slavery in the territories as developed in the great debate preceding the Compromise of 1850.

THE WILMOT PROVISO AND REVIVAL OF THE SLAVERY-EXTENSION CONTROVERSY

The foregoing difficulties were of little moment compared with the bitter dispute over the westward extension of slavery which broke out once more after 1845, inspired by the annexation of Texas and the prospect of vast new territorial acquisitions from Mexico.

Many antislavery-minded Northerners watched the aggressive foreign policies of Tyler and Polk with growing resentment. They looked upon the annexation of Texas, consummated in 1845 by Tyler and Calhoun, as a bold-faced attempt to increase the "slavocracy's" influence in the Union. They denounced as grossly unconstitutional the annexation of Texas by joint resolution of Congress, a device resorted to when ratification by the required two-thirds majority of the Senate appeared to be impossible of attainment. Texas, they said, was a foreign state and could be dealt with only by treaty. They denounced as a mere sophistry the administration argument that since Texas was admitted as a state Congress possessed the requisite power to act. The constitutional objection to annexation of a foreign state by joint resolution had some theoretical merit. To have complied with every constitutional technical-

ity, annexation should have been preceded by a treaty with Texas as a foreign nation followed by an enabling act and a subsequent joint resolution admitting the state of Texas to the Union. Yet annexation by joint resolution hardly had the character of a *coup d'état*, even though the device was in fact a technique for avoiding the two-thirds majority required for the ratification of treaties. The same procedure was to be employed in 1898 for the annexation of Hawaii.

The Mexican War aroused even more deep-seated resentment in the North than had the annexation of Texas. A large minority of Northerners regarded the war, begun in May 1846, as one of conquest waged for the sole purpose of gaining more slave territory. Many public figures in the North openly adopted attitudes that, if expressed in a twentieth-century war, might have led to arrest for sedition. Abraham Lincoln, for example, then a young Whig congressman serving a lone term in the House, early in 1848 introduced his so-called "Spot Resolutions," which plainly suggested that the United States rather than Mexico had been the aggressor in the border dispute prior to hostilities.

In Congress, the Northern attitude toward the war led David Wilmot, a comparatively unknown Pennsylvania congressman, to introduce the famous proviso bearing his name. When in August 1846 Polk asked Congress for $2,000,000 for diplomatic expenses, Wilmot offered the following as an amendment to the resultant appropriation bill:

> Provided that, as an express and fundamental condition to the acquisition of any territory from the Republic of Mexico by the United States, between them, and to the use by the executive of the moneys therein appropriated, neither slavery nor involuntary servitude shall ever exist in any part of said territory, except for crime, whereof the party shall first be duly convicted.

In explaining his motion, Wilmot stated plainly that he thought Polk sought the appropriation in order to secure more slave territory without the consent of Congress, a sentiment in which John Quincy Adams and other Northern Whigs immediately concurred. The House presently adopted the proviso in a straight sectional vote revealing

how much progress antislavery sentiment had made in the North. Not a single Northern Whig voted against the proviso, while not a single Southern representative in either party voted in favor of it. The Senate shortly adjourned without acting on the appropriation bill, so that the issue carried over to the next session.

The Wilmot Proviso signaled the beginning of a four-year congressional debate on the slavery-extension question, a debate carried on with ever increasing bitterness as the prospect of territorial annexation developed into a reality. Northern congressmen, led by Senators John Parker Hale of New Hampshire and Daniel Webster of Massachusetts, and Representatives David Wilmot of Pennsylvania, John A. King of New York, Joshua Giddings of Ohio, and John Quincy Adams of Massachusetts, took the stand that the North would not tolerate further extension of slavery in the territories. After the acquisition of the Southwest from Mexico in 1848, they met every attempt to organize California and New Mexico as territories by moving the Wilmot Proviso as an amendment. That public opinion in the North was strongly behind this attitude is evidenced by the fact that between 1846 and 1848 eleven Northern states adopted resolutions condemning any further extension of slavery and instructing their congressmen to support the proviso.

On the other hand, Southern congressmen rallied against the Proviso, aroused by this issue as they had not been since the days of the Missouri Compromise controversy. Led by Senators John C. Calhoun and Andrew Butler of South Carolina, John M. Berrien of Georgia, David L. Yulee of Florida, and Henry S. Foote of Mississippi, and Representatives Barnwell Rhett of South Carolina, and Alexander H. Stephens and Howell Cobb of Georgia, they held that the Proviso was a flagrantly unconstitutional attempt to deprive the South of its equal rights in the territories and an attack upon slavery itself so serious as to be resisted even by secession if necessary. In this stand they had the support of public opinion in their section. The Virginia legislature, for example, resolved that the Proviso's adoption would leave the South only the choice between "abject submission to aggression and outrage on the one hand, and determined resistance on the other." Other Southern states adopted similar resolutions.

CONSTITUTIONAL THEORIES ON SLAVERY IN THE TERRITORIES

A great variety of constitutional arguments concerning slavery in the territories made their appearance during the four-year controversy. The most frequently adopted Northern position was that Congress had full sovereignty over the territories by virtue of the territory clause and federal treaty and war powers. It could therefore protect, limit, or abolish slavery in the territories as it wished. This conclusion, they pointed out, coincided with actual practice, for since the founding of the government in 1789, Congress had repeatedly exercised the right to establish freedom or slavery in its western domains.

A few Northern extremists early insisted that it was not only the right but the duty of Congress to prohibit slavery in the territories. Slavery, they said, could exist only by virtue of positive municipal law and in the absence of such legislation had no rightful status. The territories acquired from Mexico, in particular, had been free under Mexican law, and according to international law would remain free in the absence of positive legislation establishing slavery. The normal condition of the territories was therefore freedom. The territories clause did not give Congress the authority to legislate upon purely local matters, even within the territories, and Congress hence could not legalize slavery within any territory.

The most extreme Northern position was the so-called "higher law" theory advanced by Senator William H. Seward of New York during the critical debates of 1850. Seward admitted that the Constitution countenanced slavery, but added that in his opinion there was a higher law than the Constitution. Seward thus hearkened back to Locke's proposition, well known during the American Revolution, that natural law was superior to all man-made law and that positive law in conflict with natural right was void. Since natural law did not countenance slavery, it followed that the institution could have no rightful existence in the territories even in the face of legislation establishing it. Seward's argument would have had more force had he used it in conjunction with the Constitution rather than in opposition to it. Later the Republican Party was to do precisely that, when it invoked the due process clause of the

Fifth Amendment as a specific prohibition against slavery in all areas under federal control.

The doctrine of popular sovereignty, sometimes less elegantly dubbed "squatter sovereignty," was essentially a compromise theory. It first became prominent in December 1847, when Senator Lewis Cass of Michigan, the prospective Democratic presidential nominee, outlined the theory in his so-called "Nicholson Letter." Construing the Constitution's clause on the territories very narrowly, Cass held that the federal government had no right to legislate upon the domestic concerns of the territories. The territories had certain inherent rights of self-government, among them the right to decide the local status of slavery without interference from Congress. The theory's seeming effect if adopted would have been to transfer the whole slavery-extension question from the halls of Congress to several remote territorial legislatures, where it would cease to menace party organization and national unity, and it was therefore eagerly embraced by conciliatory Northern Democrats who wished to forestall the current crisis.

Certain Southerners advanced their own version of the doctrine of squatter sovereignty, although their conclusions were very different from those of Cass. They agreed that the territories clause did not give Congress full sovereignty over the territories, but added also that a territorial legislature, the mere creature of Congress, could not be endowed with full sovereign rights not possessed by its creator, and hence could not exclude slavery by law any more than could Congress. The slaveholder therefore had an unqualified right to bring his slaves into any territory without legal hindrance, subject only to the admitted right of the territory to ban slavery upon admission to statehood.

The most frequently espoused Southern argument on slavery in the territories was that advanced by Calhoun. As already observed, it rested upon his theories of state sovereignty and federal agency. The federal government, common agent of the sovereign states, had no right to act against the property interests of any of the partner-sovereignties. The territories were the common property of the states, held in trust for them by their agent, the federal government. The agent could not administer the common properties against the interests of any of its principals; hence it could not ban slavery

in the territories, an act construed as against slave-state rights in the common property.

Another Southern argument rested upon the Fifth Amendment. Occasionally advanced in Congress after 1835, it became important when Senator Jefferson Davis of Mississippi, now rapidly moving forward as a champion of Southern rights, made the argument his own. Slaves were property, the argument ran, and property was protected under the amendment against legislative confiscation. Since abolitionist legislation destroyed property rights without compensation, it therefore violated due process. Chief Justice Taney was to adopt this argument in the Dred Scott case. Superficially convincing, it nonetheless perverted the historical meaning of due process of law, which for centuries had been considered merely a guarantee of a fair trial for accused persons in criminal cases.

CRISIS AND COMPROMISE

The debate over slavery in the territories could terminate only when Congress had provided territorial government for the southwestern regions in dispute and had made some provision settling the status of slavery within them. For a long time, however, there seemed but little prospect of settling the controversy at all, for neither South nor North could carry its will through both houses of Congress. Northern Whigs and antislavery Democrats forced the Wilmot Proviso through the House for a second time early in 1847, but the Senate, where the South was stronger, refused to adopt it, and Polk finally obtained his diplomatic appropriation without it.

Two important attempts at compromise failed in 1848. An eight-man Senate committee headed by John Clayton of Delaware proposed the organization of California and New Mexico as separate territories with the status of slavery within them to be determined by the opinion of the territorial supreme court, from which there was to be a right of appeal to the Supreme Court of the United States. As a nominal concession to the North, Oregon was to be organized as a free territory. This ingenious attempt at a judicial settlement passed the Senate but failed when the House refused to concur. A proposal by Senator Stephen A. Douglas of Illinois to extend the Missouri Compromise line through the new territories to the Pacific also passed the Senate only to die in the House as North-

ern Congressmen stood almost to a man against surrendering the Wilmot Proviso.

The nation was now dangerously close to disunion. In South Carolina, the secessionist faction, led by Calhoun, Barnwell Rhett and Langdon Cheves, was clearly in the ascendancy over the state's Unionist Party. In Georgia, the state's great triumvirate of Alexander H. Stephens, Robert Toombs, and Howell Cobb advocated much the same policy. The extremists were still further strengthened in January 1849, when Calhoun persuaded the Southern delegates in Congress to meet and adopt an *Address to the People of the Southern States*. The address set forth Calhoun's theory of the Union, recited Northern attacks upon the South's "internal institutions," asserted that slavery was the foundation of the Union and that the Union would therefore collapse were this foundation disturbed.

When Congress during 1849 accomplished nothing but further embittered debate, the Southern extremists began to call for concerted Southern action to protect Southern rights. This attitude found expression in October, when the Mississippi legislature called for a convention of the Southern states to meet at Nashville in June 1850 and "adopt some mode of resistance" to Northern aggression. The resolution pledged Mississippi to stand by her "sister states" in whatever common measures were devised.

That the Union was not disrupted at this time was due largely to the last-minute success of Congress in achieving the settlement since known as the Compromise of 1850. Henry Clay first advocated the substance of the Compromise, while Daniel Webster, Stephen A. Douglas, and certain Southern Whigs were mainly responsible for its adoption.

The December 1849 session of Congress began most inauspiciously. The deadlock between North and South forced the House to spend three weeks electing a speaker, and threats of secession filled the air. Many members went armed and several brawls marked the proceedings in the two chambers. To make matters worse, the slavery question was now complicated by the highly irregular action of California's new settlers, who, without benefit of prior territorial status or any enabling act, had called a constitutional convention, drafted a constitution banning slavery, and were now asking for California's admission to the Union as a free state. It was not likely that Southerners would grant this without some

concessions on the territory question; yet President Zachary Taylor made any such compromise exceedingly difficult, for although himself a Louisiana slaveholder, he favored California's immediate admission on her own terms and was known to oppose the formation of any more new slave territories, in the Southwest or elsewhere. A quarrel had also arisen between the Taylor administration and the state of Texas over the boundary line between the state and the Mexican cession, while an ever growing crisis over the Fugitive Slave Law and Northern demands for the abolition of slavery in the District of Columbia added fuel to the flames of discord.

The first important step toward compromise came on February 8, when Henry Clay submitted an elaborate eight-point plan for the Senate's consideration. By the first resolution, California was to be admitted to the Union at once without any restrictions upon her right to exclude or include slaves. In effect this meant California's admission as a free state. Second, the New Mexico Territory was to be organized without any restrictions or limitations upon the status of slavery. This gave a kind of limited recognition to the doctrine of squatter sovereignty. Clay's third and fourth resolutions fixed the western Texan boundary so as to deprive the state of the disputed region between the Del Norte and the Rio Grande rivers but proposed to compensate Texas by the assumption by the federal government of the state's pre-annexation public debt. The fifth resolution submitted that it was "inexpedient" to abolish slavery in the District of Columbia, but the sixth proposed that the trade in imported and exported slaves be banned in the District. The seventh resolution asked for a more effective fugitive slave law, while the eighth stated merely that Congress had no authority over the interstate slave trade.

Debate on Clay's resolutions shortly became the order of the day in the Senate. Calhoun brilliantly summed up the extreme Southern attitude toward them in a lengthy speech of March 4, read for him by Senator Mason of Virginia because of the great Carolinian's feebleness. Calhoun's fundamental argument was that the growth of Northern population had combined with a subtle increase in the authority of the federal government to destroy the original balanced and limited character of the constitutional system. The result had placed Southern institutions at the mercy of a powerful national government controlled more and more by the

North. Unless this tendency were checked, he said, the Southern states would be forced to secede. To this end, the North must agree to stop agitating the slavery question, the South must be granted equal rights in the territories, the fugitive slave clause must be enforced, and a constitutional amendment must be adopted to restore the original political equilibrium between the two sections. Here Calhoun apparently had in mind the creation of a dual presidency, one executive to be chosen from each section, so that either North or South could exercise an absolute veto upon all congressional measures.

The great Southern champion was at once utterly realistic and impractical. He recognized the full significance of Northern power and the reality of growing nationalism; yet his counterproposals were a pathetic, ineffectual attempt to escape the plain implications of those facts. He had read the handwriting on the wall; yet he could not, he would not, draw the final conclusion—that the growth of Northern nationalism probably doomed slavery to ultimate extinction and that if the South chose to fight rather than submit it would probably be defeated.

Three days later Webster held out the olive branch to the South in his great Seventh of March speech. He differed sharply with Calhoun as to the origins and implications of the present crisis, but he nonetheless indicated his willingness to compromise the principal issues of the moment. He was against the extension of slavery; yet he would not vote for the Wilmot Proviso merely to taunt the South, when in any event the laws of climate and geography effectively excluded slavery from New Mexico and California. Moreover, he said, the South had a legitimate grievance in Northern violations of the Fugitive Slave Law, and a more effective statute should be enacted. Webster then deprecated extremism in both North and South. The abolitionists, he said, were honest and sincere men, but they had produced nothing good or valuable, and were responsible for the present inflamed state of opinion on the slavery question. Webster ended by deploring the talk of secession, invoking the majesty and greatness of the Union, and prophesying the glorious future it would have as a united nation.

Webster's speech was an extremely clever and successful attempt at compromise, which took the ground from beneath extremists in both North and South. The abolitionists attacked Webster as a

traitor to liberty, but more conservative interests hailed him again as "The God-Like"; and an apparent majority of Northern congressmen rallied behind his position. His assurances of moderation and compromise also gave the Southern moderates a powerful new talking point, for they could now plead that moderate men really predominated in the North. Even Calhoun was obliged to admit that Webster had made very large concessions to the South.

Webster's speech thus marked the beginning of a new ascendancy of Union spirit and compromise in both sections. Calhoun, the very embodiment of Southern sectionalism, died in April, and President Taylor, who had favored California's admission as a free state without compromise, died in July. The new President, Millard Fillmore of New York, supported compromise. The Nashville Convention met in June and disappointed the Southern extremists by taking no action beyond a series of strong resolutions outlining the Southern position. Meanwhile a Senate compromise committee of thirteen reported out the substance of Clay's resolutions in a single measure known as the "Omnibus Bill." When it became clear that the Omnibus Bill could not pass as a single measure, Senator Stephen A. Douglas of Illinois took the lead in breaking the bill up and moving it through the final enactment in September as a series of five statutes.

The New Mexico and Utah Acts, the first of these measures, both enacted September 9, 1850, created two new territories in the area lying between Texas and California and gave a certain limited recognition to the doctrine of popular sovereignty. Neither act specifically banned or authorized slavery in either territory, and the territorial legislatures' authority was ambiguously defined as "extending to all rightful subjects of legislation consistent with the Constitution of the United States." States formed from any portion of the territories were to be admitted to the Union with or without slavery as their constitutions might provide at the time of admission. The two acts also incorporated provisions for an attempted judicial settlement of the status of slavery in the territories borrowed from the abortive Clayton Compromise of 1848. In all cases involving title to slaves, writs of error were to be allowed from the territorial district court direct to the Supreme Court of the United States. Like appeals might be taken from the district court upon writs of habeas corpus involving the question of personal freedom. In actuality no appeals involving the status of slavery

in either territory ever reached the Supreme Court. Almost no slaves were taken to either territory.

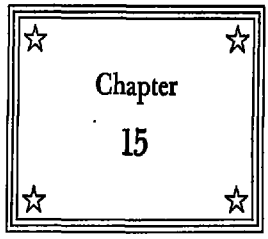
The new Fugitive Slave Act, which became law September 18, 1850, put responsibility for runaway slaves upon United States marshals, allowed masters of slaves to "pursue and reclaim" with the marshal's assistance, permitted recovery upon affidavit before federal judges, and made any interference with enforcement of the act a felony. The fugitive slave was not allowed to testify in his own behalf. A fourth act of September 9 admitted California as a free state, and a fifth, adopted September 20, abolished the slave trade in the District of Columbia. The Texan boundary and debt settlement was incorporated in the New Mexico Act.

Thus by the narrowest of margins, Webster, Douglas, Clay, and the other moderates had averted secession and disruption of the Union. In the crisis, a majority in both North and South had revealed that they loved the Union enough to make substantial sacrifices for its preservation. Party politics also promoted Union sentiment. Most Southern extremists were Democrats, but Southern Whig leaders, notably Alexander H. Stephens and Senator Berrien of Georgia, supported conciliation. Northern Democrats also did much to effect a settlement and block Northern Whig extremism.

In achieving the Compromise of 1850, Congress played its most important role as an agency for the settlement of constitutional and political controversy. The day of Congress as the arbiter of constitutional questions was in fact drawing to a close. Within the decade the center of authority on constitutional issues shifted decisively to the Supreme Court, as the interest in the Dred Scott case was to show. Congressional interpretation lacked the myth of political impartiality that was later to be accorded to the Court's opinions. The decline of congressional interpretation was no doubt due also to the death of the political giants of the years between 1815 and 1850. The words of Webster, Clay, and Calhoun on constitutional matters had long carried more weight than that of the Supreme Court. No men of comparable stature replaced them. Except for a brief period in Reconstruction days, the Court rather than Congress was henceforth regarded as the guardian and final interpreter of the Constitution.

While the Compromise of 1850 failed to prevent ultimate secession and civil war, it can still be considered a triumph for national

unity. Between 1850 and 1860 the balance of economic power and population growth shifted ever more decidedly northward. Northern nationalism and solidarity also grew steadily stronger in the ten-year interval. The economic and sectional interests of the northwestern states shifted away to some extent from the lower Mississippi Valley and drew closer to the Northeast. As a result, the North entered the Civil War both relatively and absolutely more powerful and united than it had been ten years previously. The ten years gained by the compromise of 1850 may well have been decisive in securing the ultimate triumph of Northern arms and the preservation of the Union.



Crisis and Secession—1851–1861

In the months following the achievement of compromise, an extraordinary calm settled upon the political scene. The entire slavery controversy receded temporarily into the background. In the North, the Free Soil Party almost disappeared, and the abolitionists became more unpopular than ever. In the South the failure of the Nashville Convention and the triumph of Union leaders in Georgia, Mississippi, and South Carolina indicated that most Southerners still cherished the Union and regarded the Compromise of 1850 as satisfactory. Party leaders were almost unanimous in their efforts to keep the slavery issue under cover, and both the Whig and Democratic platforms in 1852 treated the slavery issue as settled. The years between 1851 and 1853 saw an extraordinary burst of nationalism, a sentiment strengthened by the prevailing economic prosperity. In short, it appeared that the slavery crisis had been dissipated.

Indeed, there seemed no valid reason to quarrel further about the constitutional status of slavery in the territories, for in nearly all of them the future of the institution had been settled by congressional law. The Missouri Compromise Act was still in effect in all the lands of the Louisiana Purchase yet unorganized, and the acts organizing the territories of Utah and New Mexico in the lands recently

acquired from Mexico incorporated the doctrine of popular sovereignty. Slavery in the territories was thus a closed issue, should the *status quo* be accepted as permanent.

There were ominous signs, however, that the slavery issue was not buried as deeply as it seemed to be. The instantaneous and tremendous success of Harriet Beecher Stowe's *Uncle Tom's Cabin*, a romanticized and distorted portrayal of slavery which appeared in 1852, revealed clearly that the average Northerner was still deeply concerned over the moral issue involved in slavery. Equally foreboding was the following retained by William L. Yancey, the Alabama "fire-eater," Senator Robert Toombs of Georgia, and other Southern extremists on the slavery question. The partial disintegration of the Whig Party, painfully apparent in the presidential election of 1852, when Southerners refused to vote for Winfield Scott because of his unsatisfactory record on the slavery issue, also heralded the demise of an important remaining bond of national unity.

THE FUGITIVE SLAVE LAW

The most vexing constitutional issue disturbing the post-compromise calm was the Fugitive Slave Law. Antislavery leaders in Congress, notably Senator Charles Sumner of Massachusetts, charged that the act's provisions for summary hearing, which permitted the master to reclaim a fugitive through *ex parte* evidence [1] and which banned the fugitive's testimony in his own defense, violated the procedural guarantees of the Fifth, Sixth, and Seventh Amendments associated with an impartial jury trial. In addition, they denounced the prohibition against any judicial interference with the fugitive's removal as a violation of the guarantee of habeas corpus in Article I, Section 9, of the Constitution.

To this argument the law's apologists replied that the constitutional guarantees cited were not relevant since the hearing was not properly a criminal trial. The slave was not an accused person, and the hearing involved no jeopardy, since it led to no sentence to be executed upon the slave. The true analogy to the hearing, Southerners said, was a hearing in extradition proceedings. Here, also, the fugitive could be surrendered on executive order without trial. The proper place for the fugitive to defend himself, both in crim-

[1] Evidence bearing upon only one side of the case.

inal cases and in those involving fugitive slaves, was in the courts of the state to which he had been returned. The law's defenders also asserted that constitutional guarantees did not apply to slaves, who were mere property and therefore outside the protection of the Bill of Rights, a contention anticipating Taney's statement in the Dred Scott case that the Constitution's benefits extended only to white men.

Antislavery advocates attacked also the provision in the Fugitive Slave Law authorizing United States commissioners and other deputies appointed by the courts to hold the necessary hearings, contending that this constituted an improper delegation of judicial power to a nonjudicial agency. This argument had some plausibility at the time, but in the light of the more recent practice of delegating quasi-judicial powers to executive and judicial commissioners it now appears to have had little validity.

Several Northern states came close to outright nullification in their attempts to block enforcement of the Fugitive Slave Act through new "Personal Liberty Laws." Thus Massachusetts and Wisconsin statutes, in direct defiance of the federal act, instructed state courts to issue writs of habeas corpus against any person detaining a fugitive, and also authorized a judicial hearing on the fugitive's status, in which the complete burden of proof was to be upon the claimant.

In Wisconsin, conflict over the Fugitive Slave Law led to outright defiance of the United States Supreme Court by the state judiciary. The case, later known as *Ableman v. Booth*, arose in 1854 when one Sherman Booth, having forcibly assisted in the escape of a fugitive slave, was convicted in district federal court of violating the Fugitive Slave Law and was fined $1,000. The state supreme court then issued a writ of habeas corpus, and on hearing, freed Booth, holding his conviction illegal and the Fugitive Slave Law void. United States District Marshal Ableman then sought and obtained a writ of error in the United States Supreme Court, to review the Wisconsin court's finding. The Wisconsin Supreme Court, however, refused to receive notice of the United States Supreme Court's writ, and indeed ignored the subsequent review completely.

Chief Justice Taney's opinion in *Ableman v. Booth* (1859) was a masterly analysis of the conceptions of divided sovereignty and national supremacy. The Court denied the right of the state ju-

diciary to interfere in federal cases, upheld the supremacy of the federal Constitution, and defended the role of the federal judiciary as the final tribunal to decide constitutional issues. At the close of the opinion Taney ruled briefly that the Fugitive Slave Law was constitutional, though he did not elaborate on this observation.

The new Personal Liberty Laws enacted by the various Northern states made a tremendous impression in the South, where they were viewed as a violation of the "compact between the states." Many Southern theorists held that they justified secession, since they evidenced Northern unwillingness to live up to the obligations of the Constitution.

REPEAL OF THE MISSOURI COMPROMISE: THE KANSAS-NEBRASKA BILL

Early in 1854 the precarious political calm was abruptly shattered when an apparently innocuous bill to organize the Nebraska Territory led to the repeal of the Missouri Compromise and the reopening of the slavery-extension issue.

Senator Stephen A. Douglas of Illinois had been trying since 1845 to secure the territorial organization of "Nebraska," the remaining unorganized portion of the Louisiana Purchase lying north of the Indian Territory. A western expansionist, Douglas had for some years been interested in a projected transcontinental railroad from Illinois to the Pacific coast. Were such a road to be successful, it would have to pass through populated territory, and to this end, it was desirable that "Nebraska" be organized and opened for settlement. Such a program would provide the Democratic Party with an important national issue, enhance Douglas' stature as a national political figure, and even make him a logical Democratic choice for the presidency. It was by no means certain, however, that Douglas would be able to secure support in Congress for his plans. Many influential Southern statesmen, among them Jefferson Davis, the Secretary of War, were seeking to promote a Pacific railway with an eastern terminus in the South, and they were therefore indifferent to Douglas' attempts to organize Nebraska.

In December 1853, Senator Augustus C. Dodge of Iowa, another railroad promoter, introduced a bill to organize the Nebraska Territory. The bill was presently referred to the Senate Committee on Territories, of which Douglas was chairman. Douglas, who was

little interested in the slavery question, now attempted to win a measure of Southern support for the bill, which might readily be construed as against Southern interests. Accordingly his committee incorporated a provision, borrowed directly from the acts organizing the Utah and New Mexico Territories, stipulating that Nebraska might ultimately be formed into states and admitted to the Union "with or without slavery, as their constitutions might prescribe at the time of their admission." Another clause provided that all questions involving title to slaves in the Territory should be tried in the Territory's courts, subject to the right of appeal to the United States Supreme Court. When these provisions evoked only mild Southern support, the bill was called back into committee and a further concession to Southern interest was made through the insertion of a provision specifically declaring the Missouri Compromise inoperative and void. The bill was also altered to provide for the erection of two territories, Kansas and Nebraska, instead of one. The plain implication of the bill now was that either Kansas or Nebraska might well be developed as slave territory. In this form the bill had the active support of President Franklin Pierce and the enthusiastic backing of the Southern delegation in Congress.

The revised Nebraska Bill at once provoked a tremendous storm, in which all the suppressed bitterness and passion of the slavery controversy burst into the open. Senators Salmon P. Chase of Ohio, William H. Seward of New York, Charles Sumner of Massachusetts, and other antislavery men in the upper house attacked the measure as a betrayal of the Missouri Compromise and an insidious conspiracy to extend slavery over the entire nation. They accused Douglas of selling out Northern interests to the "slave power" in order to gain Southern support in future presidential campaigns.

Douglas and his followers in reply asserted that the Missouri Compromise ought to be repealed, that it was in fact unconstitutional, since the federal government had no power to prohibit slavery in the territories. Southern senators used Calhoun's old argument to defend the proposition that the territories were the common property of all the states, and that the federal government was a mere agent administering them and could not administer them against the interests of the people of any state. Northern followers of Douglas, notably Lewis Cass of Michigan, resorted to the doctrine of popular sovereignty: that federal power over the territories

was limited to mere administrative contracts—land sales, provisions for government and courts, and the like—and internal police measures within the territories were therefore void.

The bill's defenders also contended that the Compromise of 1850, embodying squatter sovereignty in the acts organizing the New Mexico and Utah Territories, had discarded the Missouri Compromise as outworn, in fact if not in theory, and had established popular sovereignty in its place.

In reply, antislavery men vehemently denied that the legislation of 1850 had abrogated the Missouri Compromise. The Missouri Compromise, they said, had applied only to the territory of the old Louisiana Purchase and to nothing more. The New Mexico and Utah Territories lay entirely outside this region, and the admission of popular sovereignty here did not affect the 1820 agreement. They also asserted that there was an essential difference between the kind of popular sovereignty provided for in the New Mexico and Utah bills and that in the proposed Nebraska Bill. The former granted the territories the right to choose either slavery or freedom at the time they entered the Union as states. There was nothing very revolutionary in this, since a state, once in the Union, could legalize or abolish slavery anyhow. But the Nebraska Bill gave the people of the territory immediate control over slavery. It established popular sovereignty in the territories, not in the states; and this, said free-soil champions, was a perversion of any true theory of popular sovereignty.

The Kansas-Nebraska Act went through both houses of Congress under terrific administration pressure, and became law in May 1854. As finally drafted, the provision repealing the Missouri Compromise was a declamatory defense of the doctrine of popular sovereignty. It proclaimed the eighth article of the Missouri Compromise Act, establishing the 36°30′ line, "inoperative and void; it being the true intent and meaning of this [Kansas-Nebraska] act not to legislate slavery into any territory or state, nor to exclude it therefrom, but to leave the people thereof perfectly free to form and regulate their domestic institutions in their own way, subject only to the Constitution of the United States."

The attempt to apply the doctrine of popular sovereignty to Kansas and Nebraska reopened the entire slavery-extension controversy once more. In both North and South, moderate men found

their positions undermined and destroyed, while extremists steadily gained power. The constitutional issue was perhaps, as Douglas and other moderates insisted, an abstract one, since in any event climate and geography barred slavery from most of the West. Nonetheless, after 1854 more and more men on both sides plunged into the struggle, until the final result was secession and civil war.

In the North, the growth of extremist antislavery sentiment resulted in the birth of the Republican Party, which adopted an attitude of uncompromising hostility toward all extension of slavery in the territories. The Republicans absorbed the Northern Whigs almost completely, while many important antislavery Democrats, including such outstanding figures as Lyman Trumbull of Illinois and Salmon P. Chase of Ohio, also shifted to the Republican camp.

In their first national convention, held at Philadelphia in 1856, the Republicans adopted a platform announcing that it was the constitutional duty of Congress to exclude slavery from all federal territories. The platform cited the provision in the Fifth Amendment that no person shall "be deprived of life, liberty, or property, without due process of law." Since slavery denied persons their liberty without due process, it was therefore illegal in the territories, where the federal government had full sovereignty. Strangely enough, this argument was not unlike the Southern interpretation of due process in that it rested upon a substantive interpretation of the due process clause, but it drew precisely the opposite conclusion. Jefferson Davis and other Southerners contended that due process prevented any interference with the slaveholder's right to hold property in human beings. The Republicans now held that due process prevented any interference with the Negro's right to freedom.

In the South, the Democrats turned increasingly to the leadership of the proslavery extremists—W. L. Yancey, Robert Toombs, and Jefferson Davis. The more moderate Whigs disintegrated in the lower South, although in the upper South they retained their organization and in 1860 appeared nationally as the Constitutional Union Party.

The failure of popular sovereignty to function peacefully in Kansas also contributed to the growth of extremism. Following a mad rush of settlers from both North and South, civil war broke out in June 1856 between the proslavery territorial government at

Shawnee, recognized in Washington as the legal government, and the rival antislavery government at Topeka. "Bleeding Kansas" greatly strengthened Northern antislavery sentiment and gave the Republicans a strong issue in the presidential election in November. Only with some difficulty did Pierce restore order and thus assure James Buchanan of victory over John C. Fremont, the Republican candidate.

The subsequent attempt of the Buchanan administration to force Kansas into the Union as a slave state placed Douglas at odds with the administration and the Southern Democrats, and still further encouraged extremists on both sides of the Mason-Dixon line. More Northern Democrats, dissatisfied with popular sovereignty and with the party's domination by Southern leaders, shifted to Republican ranks. Southern Democrats also abandoned the doctrine of popular sovereignty as inacceptable and turned instead to Taney's dictum in the Dred Scott case, which offered the South a complete constitutional victory on the territorial question.

THE DRED SCOTT CASE

Many statesmen had long held that the proper method of settling the constitutional dispute over the legal status of slavery in the territories was to have the Supreme Court rule on the issue. In March 1857, in the midst of the bitter excitement over Kansas, the Court announced its opinion in *Dred Scott v. Sandford,* wherein the Court discussed at length the federal power over slavery in the territories.

Dred Scott was a Negro slave, formerly the property of one Dr. Emerson, a surgeon in the United States Army. In 1834, Emerson took Scott to the free state of Illinois, and thence in 1836 to Fort Snelling, in what was then the Wisconsin Territory, free soil under the Missouri Compromise and the act of 1836 organizing Wisconsin's territorial government. Eventually Emerson returned to Missouri, taking Scott with him. The surgeon died shortly thereafter, and title to Scott eventually passed to John A. Sandford, a citizen of New York.

In 1846 Scott brought suit in the Missouri state courts for his freedom. At the time this action apparently had no political import. Though Scott won a favorable decision in the lower courts, the Missouri Supreme Court eventually rejected his plea, on the grounds

that the laws of Illinois and of free territory did not have extraterritorial status in Missouri and could not affect his status as a slave after his return.

Scott's attorney then began, in 1854, a new suit against Sandford in the United States Circuit Court for Missouri. The case was now frankly political in character, and both sides pressed it through to a conclusion in order to obtain a judicial opinion upon slavery in the territories.

Scott's right to sue Sandford in a federal court rested upon his contention that he was a citizen of the state of Missouri, and that the case involved a suit between citizens of different states. Sandford replied to Scott's suit with a plea in abatement, that is, a demand that the court dismiss the case for want of jurisdiction, on the ground that since Scott was a Negro he was not a citizen of Missouri. To this plea, Scott demurred. The circuit court sustained the demurrer (thereby implying that Scott might be a citizen), but it then returned a verdict in favor of Sandford. Scott now appealed to the Supreme Court of the United States on a writ of error.

The Supreme Court first heard argument on the case in February 1856, at the height of the Kansas furor. Apparently most of the justices were at first inclined to dismiss the case for want of jurisdiction. A clear and recent precedent for such a decision was available, for in 1850, in *Strader v. Graham*, the Court without dissent had refused to consider the argument that a slave automatically became free through residence in a free state, and had held instead that the decision of the state courts was final in determining the slave status of a Negro. A majority of seven justices apparently now believed this precedent to be a decisive one, and in accordance with their wishes Justice Samuel Nelson actually prepared an opinion for the Court based on *Strader v. Graham*, a course avoiding all discussion of slavery in the territories.

However, the majority attempt to settle the case in this way, without reference to the status of slavery in the territories, broke down when John McLean and Benjamin Curtis, the two antislavery justices, announced that they were preparing dissenting opinions discussing the status of slavery in the territories. The majority judges, with the exception of Justice Nelson, then determined also to prepare an opinion that took into account this phase of the question. Nelson alone adhered to his original opinion. All the justices were

under tremendous pressure to "solve" the constitutional controversy then raging, and apparently even the majority came to believe that a clear opinion might lessen the tension.

In February, Justice John Catron notified Buchanan, then preparing his inaugural address, that the Court would shortly pass upon the constitutionality of the Missouri Compromise. Buchanan was thus enabled to refer to the forthcoming opinion in his inaugural address, and to assert that the Court would presently settle the much-disputed territorial question. Buchanan's foreknowledge of the opinion later caused Lincoln and other Republican leaders to charge Buchanan and the Court with conspiracy. Historians now consider this charge unwarranted, although by present-day judicial standards the Court was guilty of highly unethical conduct in informing Buchanan in advance of its opinion so that he might use it for political purposes.

The Court finally delivered its long-awaited decision on March 6, 1857. Each of the nine justices, seven majority and two minority, wrote a separate opinion. In no two cases was the reasoning precisely alike; however, Chief Justice Taney's opinion was thereafter most discussed and debated.

In Taney's opinion, Scott could not sue because he was not a citizen of the United States. There were two reasons why Scott was not a citizen: first, because he was a Negro, and second, because he was a slave. Taney supported his claim that no Negro, not even a freeman, could be a citizen, by citing the Negro's long-established servile position, the slave codes, and other evidence proving that as of 1787 the states had excluded Negroes from citizenship. Hence, Negroes were not citizens of the United States within the meaning of the Constitution.

There was a weakness in the theory on which this argument was based: Since the establishment of independence certain Northern states had extended political rights to free Negroes. If a state could properly confer citizenship, as the Constitution implied, then a Negro might thus conceivably be a citizen of a state and entitled to sue in the federal courts.

Taney avoided this difficulty by drawing a distinction between state citizenship and national citizenship; that is, by evoking the doctrine of dual citizenship. The Constitution, he observed, gave Congress power to establish a uniform rule of naturalization; hence,

federal citizenship was a matter specifically reserved to Congress by the Constitution and could not be conferred by a state. A state, he admitted, could confer political privileges upon its inhabitants as it saw fit, but this would not make the recipient "a citizen of the United States within the meaning of the Constitution," nor even entitle the person to the privileges and immunities conferred by the federal Constitution upon citizens of the several states.

The doctrine of dual citizenship in a federal state was a plausible one. But Taney's contention that the naturalization clause gave the federal government an exclusive right to define all the privileges of citizenship, even that of "citizens of different states" under the Constitution, was of questionable validity. The Fourteenth Amendment later made national citizenship primary and state citizenship dependent upon it, but it is at least doubtful whether before the amendment was passed a state could not have defined state citizenship within the meaning of the Constitution.

Taney had given as a second reason why Scott was not a citizen the fact that Scott was a slave. The Chief Justice might have made this point simply by citing the opinion of the lower Missouri courts on this point as conclusive, with a reference to *Strader v. Graham* as precedent. Instead he proceeded to consider the effect of Scott's residence on free soil, a matter enabling him to discuss the constitutional status of slavery in the territories. This fact caused many Republican opponents of the Court, notably Abraham Lincoln, to hold that the entire latter portion of Taney's opinion constituted a highly unwarranted *obiter dictum*, injected into the case for political purposes.

While many scholars have accepted this charge, it does Taney some injustice. The case was before the Court on a writ of error, and prevailing practice permitted the Court to consider all phases of an opinion taken from the lower courts on a writ of error, even though a decision on any one point might be sufficient to dispose of the case. In addition, were the Court to find that Scott was a slave, it would bulwark the conclusion that the plaintiff was not a citizen, whatever the status of a free Negro. Hence, while the Court could well have avoided the territorial question, Taney's inquiry into the effect of Scott's residence on free soil was not altogether immaterial to his first conclusion. Finally, it may be pointed out that Justices McLean and Curtis, by insisting upon introducing

this question into their dissenting opinions, had put great pressure upon the majority justices to do likewise.

Taney began his argument on the effects of Scott's residence on free soil with the contention that federal authority over the territories was derived from the power to create new states and the power to acquire territory by treaty and not from the clause empowering Congress to make necessary rules and regulations for governing the territories. The latter clause, he said, was a mere emergency provision applying only to lands ceded by the original states to the Confederation. It did not validate federal authority in territories acquired after 1789.

It followed, Taney said, that the federal government had no general sovereignty over the territories at all. Congress had only those powers reasonably associated with the right to acquire territory and prepare it for statehood. This did not imply a general internal police power, and the people of a territory could not "be ruled as mere colonists." While Congress might organize local territorial government, it could not "infringe upon local rights of person or rights of property." Hence Congress could not prohibit slavery in the territories, since the right to hold slaves was a local property right.

This argument had been presented in Congress for some years by Cass, Douglas, and other champions of popular sovereignty. Calhoun had also denied congressional right to restrict slavery in the territories, though his argument had rested on a different premise—that the federal government was the agent of the states and hence could not act contrary to the interests of any of the states in the territories. Historically, however, Taney's contention was exceedingly doubtful, for Congress had long exercised a general police power in the territories comparable to that exercised by the states within their own boundaries.

Taney then passed almost imperceptibly to an altogether distinct argument—the doctrine of vested interest. Federal authority in the territories, he observed, was certainly limited by the various provisions in the federal Bill of Rights, among them that in the Fifth Amendment guaranteeing due process of law. "And an act of Congress," said the Chief Justice, "which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the

United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law." Taney thus evoked the doctrine of vested interests, tied it to the due process clause in the Fifth Amendment, and applied it to property in slaves.

Taney's association of vested rights with due process of law, while not entirely without precedent, constituted a new and questionable interpretation of the meaning and intent of the Fifth Amendment. Due process of law had for centuries been accepted as a mere procedural guarantee, extending to accused persons all the safeguards of a fair and impartial trial. Until a short time before it had never been assumed that it was an absolute limitation upon the right of a legislature to restrict property rights in the interest of the public welfare. The New York courts, however, had recently associated due process and vested interest. In 1856, in *Wynehamer v. New York*, a New York court had declared void a state prohibition law destroying certain property rights in liquor, on the ground that the act violated due process of law. It is highly probable that Taney knew of this association and was influenced by it in applying substantive due process to slavery in the territories.

Taney then concluded that the Missouri Compromise Act provision prohibiting slavery north of the line "therein mentioned" was "not warranted by the Constitution" and was therefore void. The federal government, in short, could not lawfully exclude slavery from any of the federal territories. Hence Dred Scott's residence on "free" soil had not made him a free man, since slavery actually had not lawfully been excluded from the Wisconsin Territory.

Justices Nelson, Daniel, Campbell, Catron, Wayne, and Grier all concurred in Taney's conclusion that Scott was a slave, although they arrived at this finding by varying routes. Nelson entered the opinion originally prepared for the seven majority justices, deciding the case on the authority of *Strader v. Graham*. Daniel merely restated Calhoun's doctrine of federal agency as prohibiting any interference with slavery. Campbell admitted the efficacy of the territories clause, but thought strict construction properly limited federal authority to mere administrative and conservatory acts, and to the enumerated powers of Congress. Catron thought the Louisiana Purchase treaty, which had guaranteed existing property rights in the territory, had made illegal any restriction on property rights

in slaves within the confines of the original purchase. Wayne and Grier indicated more or less complete assent to Taney's opinion.

Curtis and McLean dissented from the majority opinions both on Scott's status and on the validity of the Missouri Compromise. Curtis, a native of Massachusetts, had never been an antislavery man; yet he now wrote an elaborate exposition of antislavery constitutional arguments. First, he rejected the contention that because Dred Scott was a Negro he was not a citizen. Free Negroes, he pointed out, actually had been accepted as citizens in several states as of 1787. Curtis further contended that a state could properly confer citizenship of the United States. Since there was no federal citizenship clause in the Constitution except that relating to naturalization of foreigners, state citizenship was therefore primary and citizens of the various states were thus automatically citizens of the United States.

Curtis then argued that Scott's residence in Illinois and the Wisconsin Territory had made him a free man. He observed first that in Britain slaves entering England automatically became free, and that the Northern states, including Illinois, had had similar laws, excepting only fugitive slaves and temporary sojourners as distinct from those who became domiciled. Dred Scott had lived in Illinois and Wisconsin Territory several years; he had certainly been domiciled and was therefore free. International comity and the Constitution also required Missouri to recognize Illinois law and the law of free territory in its effect on Scott, and the Missouri courts had therefore ruled improperly in holding that Scott was a slave.

Curtis next turned to the majority contention that federal authority in the territories was not complete and that the Missouri Compromise was unconstitutional. He cited Marshall's opinion in *American Insurance Company v. Canter* (1828), where the Court had held that federal power over the territories was derived from the territories clause as well as from the power to acquire territory, and then presented no less than fourteen specific instances since 1789 in which Congress had legislated upon slavery in the territories. Curtis therefore concluded that the Missouri Compromise was valid and that Scott's residence on free soil either in Illinois or in upper Louisiana had made him a free man.

The Dred Scott Case was on the whole a sorry episode in Supreme Court history. Both majority and minority opinions betrayed

a clear attempt to interfere in a political controversy to extend aid and comfort to one side or the other in the slavery controversy. Taney's reasoning was questionable on several points. His argument that Congress had no general police power in the territories ignored historical realities, while his attempt to draw a substantive limitation upon congressional power from the due process clause of the Fifth Amendment and his assertion that a state could not define even state citizenship within the meaning of the Constitution were at least open to dispute.

Nor were the minority opinions free from logical difficulties. The refusal of Curtis and McLean to recognize that by established precedent the Missouri Supreme Court's ruling upon Scott's status was final and their determination to embark on a discussion of the status of slavery in the territories was largely responsible for the majority's equally unwarranted discussion of this question.

THE LINCOLN-DOUGLAS DEBATES

The Dred Scott opinion was a source of embarrassment for both major parties. The doctrine enunciated there, if accepted, almost destroyed the supposed reasons for the Republican Party's existence, since the demand that slavery be excluded by Congress from the territories was now legally untenable. Republican leaders availed themselves of several avenues of escape from this dilemma. They argued, first, that the Court's opinion on slavery in the territories was mere *obiter dictum* and therefore had no final binding character as constitutional law. Second, they appealed to the precedent of Jackson's attitude toward the Court, and contended that the other two departments of the government were not bound by the Court's opinion on constitutional questions. Third, they pointed out that the opinion could well be reversed by some future Court. This might be achieved should the Republicans win control of Congress and the Presidency, and then fill vacancies on the bench with loyal party men. The Court might even be "reformed," new justiceships being created if necessary. Lincoln hinted at this solution, while several Republican congressmen, including Ben Wade and Roscoe Conkling, bluntly demanded "Court packing."

While the Dred Scott Case embarrassed the Republicans, it ultimately proved a major catastrophe to the Democrats. The Southern wing of the party, led by Jefferson Davis, Robert Toombs,

W. L. Yancey, and Howell Cobb, embraced Taney's dictum with enthusiasm, and called upon their party allies in the North to take the same position. The Northern Democrats, however, proved unwilling to adopt the opinion unreservedly, and instead attempted to reconcile popular sovereignty with the Court's position. This stand was furiously resented by Southern Democrats, already angered by the refusal of Douglas to support the administration's attempts to bring Kansas into the Union as a slave state, and ultimately it completed the division of the Democratic party into a Northern and a Southern wing.

Douglas made his impressive attempt to reconcile the Dred Scott opinion with popular sovereignty in a series of debates with Abraham Lincoln, his opponent in the Illinois senatorial campaign of 1858.

Defending the Republican attitude toward the Court, Lincoln asserted flatly that judicial opinions on constitutional questions were not binding upon the other two departments of government, and he cited the stand taken by Jefferson and Jackson as precedent for this position. While he did not openly advocate Court-packing, he hinted that the opinion lacked finality and that it might subsequently be overturned. Douglas replied by charging Lincoln with disrespect for the Court and with seeking to overturn the Dred Scott opinion by appealing to the mob.

Of far more significance for the fate of the Democratic Party was the question Lincoln propounded to Douglas in their Freeport debate: "Can the people of a United States Territory, in any lawful way, against the wish of any citizen of the United States, exclude slavery from its limits, prior to the formation of a state constitution?" Put differently, Lincoln's question was, how can you argue that the people of a territory have a lawful right to decide the slavery issue for themselves, when the Court has already held that slavery cannot be barred from any territory?

In reply, Douglas formulated his famous "unfriendly legislation" doctrine. In his opinion, he said, slavery could be lawfully excluded from a territory by a failure to introduce the local police regulations necessary to the protection of slavery. Slavery, in other words, could not exist except with the aid of a slave code favoring the institution, and if a territory wanted to ban slavery, they could do so, practically speaking, merely by refusing to enact such a code.

Douglas' Freeport doctrine was in reality an argument designed to hold Northern antislavery Democrats in the party by hedging against the Dred Scott opinion. The doctrine had a certain plausibility; yet it failed to check the steady exodus of antislavery Democrats to Republican ranks, an exodus which was to assure eventual Republican control of the Northern states and the victory of Abraham Lincoln in the election of 1860. Moreover, the Freeport Doctrine in effect denied to the South the fruits of the Dred Scott opinion, and hence infuriated Southern Democrats, increased the strength of the Southern extremists, and all but completed the growing split in the Democratic Party. To Jefferson Davis and other Southerners, Douglas was a Judas who had betrayed his party, the South, and the nation.

Thus the nation approached the fateful election of 1860 in an atmosphere of bitter excitement boding ill for any possibility of compromise. John Brown's raid on Harper's Ferry in 1859 made a profound impression upon the Southern mind. Many Southerners accepted it as specific evidence that a majority of Northerners sanctioned a direct attack upon the internal institutions of the Southern states, overlooking the fact that nearly all Northerners, Republicans included, strongly condemned Brown's action. The growing power of the Republican Party, the rising crescendo of abolitionism, and the passage of new and more stringent personal liberty laws in several additional Northern states were all ammunition for Southern fire-eaters, who argued that the South must soon make a stand in defense of its constitutional rights or be destroyed by the growing preponderance of Northern population and economic power. Long before November 1860 it was clear that a very large Southern faction would demand secession were a Republican to win the presidency and equally clear that the new party's steadily growing power made that eventuality a distinct possibility.

THE ELECTION OF 1860

The quarrel between Northern and Southern Democrats was presently transferred to the floor of the party's national convention at Charlestown. Here a Southern extremist faction in control of the Convention's Committee on Resolutions submitted resolutions declaring that it was "the duty of the federal government, in all its departments, to protect, when necessary, the rights of persons and

property in the territories." This language was of course intended as a slap in the face to the Douglas faction, and the Northern majority on the floor therefore rejected it and adopted instead a somewhat equivocal statement pledging the party to popular sovereignty and promising to abide by the decisions of the Supreme Court.

Delegates from seven Southern states thereupon bolted the convention. The remaining delegates adjourned to Baltimore and attempted to repair the schism, but reconciliation proved impossible. Ultimately the Northern rump nominated Douglas for the presidency, while the Southerners held a convention of their own at Baltimore and nominated John C. Breckinridge of Kentucky as their candidate.

The Republican convention at Chicago nominated Abraham Lincoln on the third ballot. The party's platform proclaimed that "due process of law," properly interpreted, guaranteed freedom in the territories. It also denounced popular sovereignty as a fraud and condemned as a "dangerous political heresy" the "new dogma" that the Constitution of its own force carried slavery into the territories.

A fourth group, the Constitutional Union Party, in reality the old Whig organization still surviving in the upper South, also entered the field. Nominating John Bell of Tennessee, the party deplored the prevailing agitation on the slavery question and pronounced it "both the part of patriotism and duty to recognize no political principle other than the Constitution of the Country, the Union of the States, and the Enforcement of the Laws." The party's appeal was in reality to moderate men who feared the disastrous results that might follow the election of either Lincoln or Breckinridge.

In the election in November, Lincoln carried every Northern state but New Jersey, winning 180 electoral votes. Douglas won only Missouri and New Jersey, securing but 12 votes. Breckinridge carried eleven Southern states for 72 votes, while Kentucky, Tennessee, and Virginia gave Bell 39 votes. Thus the extremists in both North and South now dominated their respective sections in the electoral college. The vote thus resolved itself into a direct conflict between Northern and Southern extremists for control of the electoral college. Since the more populous North had more electoral

votes than the South, the conflict resulted in Lincoln's election, although but a minority of the popular vote had been cast for him.

SECESSION

The doctrine of secession was not new. It will be recalled that dissident New England Federalists had broached the idea at the time of the Louisiana Purchase and again during the War of 1812. Calhoun had incorporated a "right" of secession in his constitutional theories as the last resort of a state failing to obtain its wishes through nullification. The failure of nullification in the crisis of 1832–33 discredited that doctrine, and Southern extremists thereafter inclined toward secession as the South's ultimate constitutional remedy. There had been a formidable secessionist faction in the South in 1850, as the Nashville convention of that year attested. In the succeeding decade, Senator Jefferson Davis of Mississippi had become the outstanding champion of secessionist constitutional theory.

Like Calhoun before them, the secessionist theorists of 1860 held that the several states retained complete sovereignty, and that the Union was a mere league, from which member states might withdraw at their pleasure. The Constitution was a compact between the states, not (as Lincoln was shortly to argue) between the people of the United States. Sovereignty was indivisible and could be neither divided nor delegated; therefore the federal government had no sovereignty. The Constitution was thus a mere treaty, and the Union a mere league. From this it followed that secession was a self-evident right, since it could hardly be denied that a sovereign state could withdraw from a league at any time it chose to do so.

Jefferson Davis, perhaps the most brilliant secessionist theorist of the times, frequently adduced two additional historical arguments in support of secession. First, he pointed to the fact that the Constitutional Convention had rejected state coercion. If a state could not be coerced, Davis contended, then it was manifestly impossible to prevent it from withdrawing from the Union at will. Davis also pointed to the resolutions adopted by the various state conventions when ratifying the Constitution. The Virginia Convention, in particular, had resolved that "rights granted by the people may be resumed by the people at their pleasure"; while New York and Massachusetts had enacted similar resolutions. Davis interpreted these

resolutions as specifically reserving to the various states the right to withdraw from the compact should they desire to do so.

The conception of extreme state sovereignty was for the most part both historically and logically unsound. The contention that the founding fathers intended the Constitution to be nothing more than a treaty and the new national government a league or loose confederacy was manifestly absurd. As has already been observed, the contention that the national government could not be a sovereignty because it rested upon a compact was in reality a grave misconstruction of late eighteenth-century political theory, which regarded compact as the only possible way to create lawful sovereign government.[2]

Davis' strong emphasis on the Constitutional Convention's rejection of coercion attempted to prove much from very dubious evidence. It will be recalled that the Convention had rejected coercion largely because it would be unnecessary now that the state-agency was being abandoned and a government based directly upon individuals was to be substituted. Coercion of individuals would therefore replace coercion of states. It is true that Madison's language in the Convention on coercion was not altogether conclusive; he did indeed state that coercion would disrupt the Union and lead to war. But it is significant that it was the state sovereignty party in the Convention which clung to coercion, and not the nationalists, who apparently believed it unnecessary and irrelevant. If this interpretation of the problem of coercion in the Convention was correct, it was damning to the secessionist argument, for it supported the idea that individuals in states, citizens of the United States, might be coerced should they resist national authority. It was this theory that Lincoln shortly applied in using military force again the Southern secessionists.

Davis' contention that the Virginia and New York resolutions in the conventions of 1788 had reserved the right of secession was also misleading. Resolutions that rights once granted by the people may be taken back by the people might well be interpreted as no more than an affirmation of the right of revolution, an admitted right in eighteenth-century political philosophy but one not to be confused with a pretended constitutional right of a state legally to

[2] See the discussion of Calhoun's theories of sovereignty, nullification and secession on pp. 306–312.

withdraw from the Union. It was not a right of revolution that most secessionists claimed in 1861; they claimed instead a constitutional right of withdrawal as a privilege of the federal system. Although some Southerners, notably Alexander H. Stephens, thought secession a revolutionary rather than a constitutional right, this viewpoint was exceptional.

Southern champions, on the eve of 1861, commonly cited several existing grievances as justifying immediate secession by the Southern states: (1) Northern violation of the Fugitive Slave Law; (2) the personal liberty laws, which they represented as a violation of the "compact" between the states of a sufficiently serious nature to justify withdrawal; (3) abolitionist agitation in the North, which they held to be an attack upon the internal institutions of the Southern states and hence a clear violation of the spirit of the Constitution, which left each state free to decide its internal institutions for itself; (4) John Brown's raid, which Southerners argued constituted a direct attack by citizens of the Northern states upon the South; (5) Republican attack upon the Dred Scott decision and the concomitant attempt to deny the constitutional rights of the Southern states in the territories, as laid down in the Dred Scott decision.

As early as the election of 1856, Southern leaders in and out of Congress had repeatedly warned the nation that the South would regard a "Black Republican" presidential victory as justifiable cause for secession. This was no idle political threat, for a large number of Southerners were firmly convinced that a Republican administration would not only destroy Southern interests in the territories but would inaugurate a direct attack upon "internal institutions" in the slave states themselves. With Lincoln's election in November 1860, the secessionists prepared to carry their threat into effect.

South Carolina acted first. As soon as the result of the election became known, the state legislature called a constitutional convention which met at Charleston on December 17. Three days later, the convention by unanimous vote adopted an ordinance of secession. The ordinance purported to repeal the ordinance of 1787, whereby the state had ratified the Constitution. The convention also adopted a declaration of the causes of secession, which presented the Southern theory of the Union and the various Southern grievances of the hour. Alabama, Georgia, Florida, Mississippi, Louisiana, and Texas

had also called conventions, all of which met in January and voted for secession by large majorities. Thus all seven states of the lower South had seceded by the end of January.

ATTEMPTS AT COMPROMISE

Meanwhile Buchanan's administration in Washington was involved in a paralyzing dilemma: if it did nothing to check the secessionist movement, the Union would most assuredly be dissolved; on the other hand, if the government used force against the seceding states, a terrible civil war might result. There was no assurance that the North was ready to support such a drastic policy. Moreover, the employment of force would probably precipitate secession in several of the remaining slave states of the upper South, then on the verge of leaving the Union.

Confronted by this quandary, President Buchanan stalled for time and awaited developments. In his annual message in December, he laid the responsibility for the current crisis at the door of the Northern people's "intemperate interference" with slavery. He added, however, that Lincoln's election was not just cause for secession, and he also warned the South that no constitutional right of secession existed, since the Union had been intended to be permanent. He then nullified whatever force these last observations had with the statement that if a state chose to secede, there existed no constitutional remedy against its action, however illegal it might be. Buchanan's constitutionalisms were thus the quintessence of futility. Seward ironically commented that "the message shows conclusively that it is the duty of the President to execute the law—unless someone opposes it; and that no state has the right to go out of the Union—unless it wants to." In justice to Buchanan, however, it must be observed that the political dilemma in which he found himself was a very real one, and that his policy of watchful waiting was precisely the course that Lincoln adopted after his inauguration.

In reality, Buchanan hoped that Congress would again effect some sort of last-minute compromise. Moderate Democrats, both North and South, were working desperately to that end. The House on December 4, 1860, appointed a committee of thirty-three, one member from each state, to consider compromise proposals, and two days later the Senate created a committee of thirteen for the same purpose. The Republicans dominated the House committee, but the

Senate group represented all factions, and included William H. Seward of New York and Ben Wade of Ohio for the Republicans, Stephen A. Douglas of Illinois and John J. Crittenden of Kentucky for the moderate Democrats, and Robert Toombs of Georgia and Jefferson Davis of Mississippi for the secessionists.

The most significant proposals presented were the so-called Crittenden Resolutions, introduced to the Senate and the committees by Senator Crittenden on December 18. In substance, these would comprise an amendment of the Constitution extending the Missouri Compromise line to the Pacific, guaranteeing slavery in the territories south of the line and prohibiting slavery in the territories north of the line. States on either side of the line might be admitted with or without slavery as their constitutions provided. Congress was to have no power to abolish slavery in the District of Columbia, or to interfere with the interstate slave trade. The amendments incorporating these guarantees were to be unamendable, and still another clause prohibited any future constitutional amendment authorizing Congress to abolish or interfere with slavery within the several states.

Although Douglas and Crittenden fought hard for some compromise, their efforts failed, mainly because neither secessionists nor Republicans were inclined to make any important concessions. Senators and representatives from the seceding states were now steadily withdrawing from Congress. They were, in fact, no longer interested in compromise. The Republican attitude was that Lincoln's election did not menace the South and that concessions to the Southern states were therefore unnecessary. In reality Republican politicians could not possibly accept any amendment definitely settling the constitutional status of slavery in the territories, for by such action the party's whole constitutional argument, indeed its principal reason for being, would have been destroyed. The Crittenden proposals therefore were defeated both in committee and on the Senate floor.

In February Congress did belatedly adopt a constitutional amendment guaranteeing slavery within the states in perpetuity against federal interference. "No amendment shall be made to the Constitution," the proposal read, "which will authorize or give to Congress the power to abolish or interfere, within any state, with the domestic institutions thereof, including that of persons held to labor

or service by the laws of said state." Eventually three states, Ohio, Maryland, and Illinois ratified the amendment, but it came too late and conceded too little to influence the course of events.

The "Unionist"-dominated Virginia legislature also sponsored an unsuccessful "Peace Conference." In response to Virginia's call, delegates from twenty-one states assembled at Washington on February 4, under the chairmanship of Ex-President Tyler. The conference got nowhere. The seven seceded states refused to send delegates, while the Northern delegations were for the most part controlled by Republicans determined to make no substantial concessions. Eventually the conference adopted the substance of the Crittenden amendments, with some modifications, as well as a proposed amendment that the United States acquire no new territory except by a four-fifths vote of the Senate, with a majority of both free- and slave-state Senators concurring. When presented in Congress, these proposals were overwhelmingly defeated. Almost all hope of compromise was now gone.

FORMATION OF THE CONFEDERACY

On February 4, 1861, the very day when the futile peace conference met in Washington, delegates from the seven seceded states gathered in Montgomery, Alabama, for the purpose of forming a central government. They shortly adopted a temporary constitution converting themselves into a provisional congress and instructing the congress to elect a provisional president and vice-president. On March 11, the congress adopted a permanent constitution and submitted it to the seceded states for ratification.

The Confederate Constitution closely resembled that of the United States, although it contained a number of interesting differences. Certain provisions underscored state sovereignty. The preamble read, "We the people of the Confederate States, each state acting in its sovereign capacity . . . do ordain and establish this Constitution . . ." This implied that the resultant government arose out of a compact between sovereign states, and not between the people thereof. The right of secession might thereby be inferred. Interestingly enough, however, the Constitution mentioned no such right, and in fact three different proposals guaranteeing the right were killed in convention without reaching the floor.

Other provisions grew directly out of the late slavery controversy. Congress was forbidden to pass any law impairing the right of property in slaves. Citizens with their slaves were granted the right of transit and sojourn in other states, and such sojourn did not thereby impair ownership in such slaves. Negro slavery was specifically recognized in any territories the Confederacy might acquire. The foreign slave trade, however, except with slave-holding states of the United States, was forbidden. The South's long-standing grievance against the protective tariff was reflected in a clause forbidding import duties for the benefit of industry, while congressional appropriations for internal improvements, except those in navigational facilities, were also prohibited.

Substantial changes were made in the executive department. The President and Vice-President were given six-year terms and made ineligible for re-election. The President was specifically granted a separate unconditional removal power over principal officers, and over minor officials for reasons of misconduct or incapacity. This provision evidently reflected the long quarrel over the removal power under the United States Constitution.

The President also had more effective control over money matters than did the President of the United States under the Constitution. He could veto separate items in appropriation bills, while Congress could appropriate money only by two-thirds vote of both houses unless the funds were requested by the executive. Another clause enabled Congress to grant cabinet officers a seat on the floor of either house to discuss matters pertaining to their departments. Such a provision might conceivably have led to the emergence of a parliamentary system of government, although no such tendency appeared during the Confederacy's brief history.

The new government also prepared to treat with the United States to effect a settlement with respect to "common property," the territories, debts, and the like. For this purpose the Confederate Congress accredited two commissioners to Washington. The new government also proceeded to take over certain forts, arsenals, and other United States property lying within the Confederacy. Apparently it expected the government at Washington to offer little resistance to the erection of a new nation.

LINCOLN'S POLICY TOWARD SECESSION

On March 4, 1861, the Buchanan administration expired, and the tremendous responsibilities of the presidential office devolved upon Abraham Lincoln. Lincoln laid down the outlines of his policy toward slavery, secession, and the maintenance of national authority in his inaugural address of March 4. It was a reasoned and powerful address, lucid in its constitutional theorizing, but the President offered no compromise whatever to the South on the territorial question, as many Southern Unionists desired him to do.

Lincoln first reminded the South that he had no constitutional authority to attack slavery within the Southern states, and added that he was willing and even anxious to extend all the constitutional protection possible to the "prosperity, peace and security" of every section of the Union. He sanctioned the constitutional amendment specifically guaranteeing slavery in the states against congressional interference, adding that in any case this was already implied constitutional law.

On the subject of slavery in the territories, however, he suggested that the issue was a matter of policy not adequately covered by the provisions of the written Constitution. In what was obviously an oblique repudiation of the Dred Scott opinion, he added that he could not accept the proposition that opinions of the Supreme Court on constitutional questions bound finally the other two departments of government, who must decide constitutional issues for themselves. Matters of constitutional law not specifically covered by the written constitution, he implied, ought to be settled by the majority will, presumably by the mechanism of presidential and congressional elections. In other words, the constitutional status of slavery in the territories might ultimately be settled by Republican victories in national elections and the translation of party policy into law. The new President obviously intended to abide by the substance of his party's platform and to refuse to sanction any further extension of slavery in the territories.

Moreover, there was in Lincoln's words the strong implication that the South could not secede in peace. The Union of 1789 was intended to be perpetual. Secession he denounced as the "essence of anarchy." It was "legally void," and acts of violence within any

state or states "against the authority of the United States" were "insurrectionary or revolutionary, according to circumstances." He added that he would make no war upon the South, but that he would enforce federal law, collect taxes, and hold possession of federal property.

Lincoln thus saw clearly what Buchanan had not seen—that coercion of a seceding state was technically unnecessary and irrelevant, and that the proper answer to secession was the coercion of individuals resisting federal authority. To anyone accepting the doctrine of national sovereignty Lincoln's position was consistent, clear, and completely convincing.

Lincoln then warned the South to consider well the possible disadvantages involved in resorting to the undoubted right of revolution. Successful secession would solve none of the South's existing problems relating to the North and the Union; the same problems would exist after secession as before. He ended with an attempt to stir Southern sentiment and loyalty for the Union. "The mystic chords of memory stretching from every battlefield and patriot grave to every living heart and hearthstone all over this broad land, will yet swell the chorus of the Union when again touched, as surely they will be, by the better angels of our nature."

Lincoln never wavered in the policy toward secession announced in his inaugural address. He did, however, proceed with great caution in its application. He desired above all else to avoid the charge of deliberately waging war upon the South. Moreover, he believed that a policy of caution might hold the states of the upper South in the Union, while the rash application of force would make their secession certain. The Virginia Unionists, in particular, were pleading with him to make no move, lest it precipitate their state's secession.

The issue of federal authority in the South very shortly focused upon Fort Sumter, in Charleston Harbor. Although the Confederates had taken over nearly all other federal properties, Buchanan had refused to surrender Sumter, and Lincoln continued this policy. When Lincoln notified the governor of South Carolina of his intention to replenish the fort's supplies, Confederate military officials replied, on April 12, 1861, with an attack on the fort. The bombardment ended the agonizing interim between secession and

war. Four more states, Virginia, Tennessee, Arkansas, and North Carolina, shortly seceded. Lincoln called for troops to suppress the "rebellion," and the Civil War had begun.

LINCOLN'S RESPONSIBILITY FOR SECESSION AND WAR

Lincoln's policy before and after his inaugural has been severely criticized by certain historians, who charge him with partial responsibility for the coming of secession and war. First, they assert, Lincoln's coldness toward the Crittenden compromise and his general unwillingness to extend to the South any assurances on the territorial question inspired the remaining six states in the lower South to follow South Carolina out of the Union. Second, Lincoln's critics contend that the policy set forth in his inaugural address made war and further secession inevitable.

It is highly probable that the attitude of Lincoln and other Republican leaders toward the South after November 1860 strengthened the hand of the secessionists and thereby contributed to disunion. When the Republicans confined their assurances to a promise not to interfere with slavery in the Southern states, the secessionists were enabled to argue that the forthcoming administration would ignore Southern constitutional rights in the territories as enunciated in the Dred Scott case. Since the Republicans were willing to treat one set of constitutional rights in so cavalier a manner, the secessionists said, what assurance was there that a Republican administration might not ultimately attack slavery within the states themselves?

It is doubtless true that Lincoln's policy as laid down in his inaugural made war inevitable. It was certain that the attempt to assert federal authority within the limits of the seceded states would lead to armed conflict, for the seceded states must of necessity resist such authority or their pretended status of independence would become absurd. Confederate defiance would in turn provoke federal military action and war would follow automatically.

Yet Lincoln's policy after March 4 not only was constitutionally correct but was the only possible course available if the Union was to be saved. After the formation of the Confederacy, the time for compromise had passed. Submission to the suppression of national authority in the Confederate states would ultimately have con-

stituted a *de facto* recognition of Confederate independence, and would have confirmed disunion.

Lincoln's critics have replied that a conciliatory policy would have averted secession in the slave states yet in the Union, and that the states of the lower South would voluntarily have returned to the Union. This thesis appears highly implausible. Jefferson Davis and other Confederate leaders made it emphatically clear long before Lincoln's inauguration that under no circumstances would their states return to the Union no matter what compromises were offered the South. There was no valid reason, indeed, why the region stretching from South Carolina to Texas, now united by common institutions and political ideals, should not have functioned successfully as a southern nation. It appears probable that the unseceded slave states, forced to choose between the Confederacy and a Union dominated completely by the North, would have left the Union also.

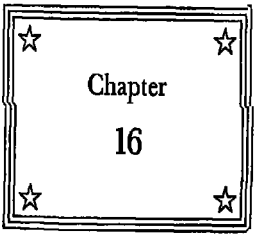
Even if compromise had been extended after March 4 and war had thus been averted and the South brought back into the Union, the price of peace would have been catastrophically high. Secession would then have been established as a successful minority device for wrenching concessions from the national government. The technique, once successful, would have been resorted to on other occasions, and the reality of national sovereignty would have dissolved completely. Horrible as civil war was, it was a preferable alternative to the disintegration of American national unity. After March 4, in fact, state sovereignty and national sovereignty confronted one another in an unavoidable showdown. Force alone could have resolved the conflict unless state sovereignty were to triumph by default.

Lincoln critics in return have maintained that had the Confederate states been brought back by compromise, then the South would ultimately have been converted peaceably to the Northern view of federal sovereignty and national supremacy. In support of this view, they argue that slavery, the economic base of Southern sectionalism, was in reality a dying institution, regardless of any Northern abolitionist pressure. Again the argument seems doubtful. Slavery was hardly a dying institution in 1860; the secessionists themselves assumed the contrary to be true. The number of slaves in the lower South was increasing, the price of Negroes was rising, and there had

recently been a revival of the illicit African slave trade. Moreover, slavery was not the sole economic foundation of Southern sectionalism. The crisis of 1832 had involved a tariff controversy, and it is more than likely that the steady growth of Northern industrialism would have revived this quarrel in some form vitally affecting Southern economic interests.

Finally, Southern constitutional philosophy was too deep-rooted to die out in a short length of time of its own accord. The South's determination to secede in 1861 was merely the final expression given a body of ideas about the nature of the Union which had been gaining ground since 1798. The Virginia and Kentucky Resolutions had contained a partial challenge to national sovereignty, while after 1815 John Taylor and Spencer Roane had taken an even more advanced stand. The metaphysics of state sovereignty as formulated by Calhoun was little less than Holy Writ in the South by 1860; and it seems questionable that it could have died other than a violent death.

At all events, the great constitutional issue underlying much political and sectional controversy since the government had been established in 1789 was now about to be settled in the most terrible and decisive fashion possible.



The Civil War

FROM A constitutional standpoint the Civil War resulted from conflicting doctrines as to the location of sovereignty in the federal Union. The Southern doctrine that the individual state was sovereign culminated in the attempt of eleven states to secede and form an independent confederacy. The Northern people almost unanimously rose to resist secession and to maintain that the United States constituted an indissoluble union, an indivisible nation. In such a conflict the people of the four border slave states of Maryland, Delaware, Kentucky, and Missouri were reluctant to take sides, and when forced to do so by events they divided sharply in their allegiance, although the states officially remained in the Union. To settle this greatest of all American constitutional issues three million men went forth to battle, and more than half a million lost their lives through battle or disease.

While this key issue of the locus of sovereignty was being decided on the battlefield, other important constitutional questions grew out of the unprecedented efforts of the federal government to win the war. Many of these questions arose in large part from the fact that the Constitution had been drafted primarily to meet peacetime situations, and accordingly it contained comparatively brief

and inadequate provisions for the exigencies of war. This fact had been obscured in the public mind by the country's relative geographic security from foreign attack, by the unmilitary character of the American people, and by the ease with which the country had won the recent war with Mexico.

The major constitutional issues raised in connection with the war may be divided into five categories. First, at the very outset conflicts arose as to the legal nature of the war itself, and some of these persisted throughout the war and into the reconstruction struggle. Second, many questions arose as to the proper relations between the loyal states and the federal government in the prosecution of the war, especially in the raising and organizing of troops. Third, there were issues concerned with the nature of the war power and the relative authority of Congress, the President, and the federal judiciary in the exercise of war powers. Fourth, there developed important questions involving the effect of the war upon the authority of the federal government to deal with the highly controversial institution of slavery. And fifth, there was a varied series of controversies involving the right of the government to suspend or restrict the citizens' civil liberties when such a course was considered necessary for the success of the war. Underlying all these issues was the basic question of whether the immature, individualistic American democracy could survive a great civil war.

THE LEGAL NATURE OF THE WAR

Was this gigantic military conflict an insurrection, a rebellion, or an international war? This was an important question, since a variety of legal rights and responsibilities hinged upon the answer. An insurrection is legally construed to be an organized and armed uprising for public political purposes; it may seek to overthrow the government, or it may seek merely to suppress certain laws or to alter administrative practice. A rebellion in general is considered to have a much more highly developed political and military organization than an insurrection; in international law it conveys belligerent status. Generally such belligerent status implies that the belligerent government is attempting by war to free itself from the jurisdiction of the parent state, that it has an organized *de facto* government, that it is in control of at least some territory, and that it has sufficient proportions to render the issue of the conflict in

doubt. An international war, on the other hand, is one between two or more independent states who are recognized members of the family of nations.

In international law the rights of parties to an armed conflict vary greatly with their status. Insurgents have a very limited status; they are not mere pirates or bandits, but their activities do not constitute "war" in the *de jure* sense, and they cannot claim against neutrals the privileges of the laws of war. A full rebellion, on the other hand, is a "war" so far as international law is concerned and the rebel government possesses all the belligerent rights of a fully recognized international state, toward both neutrals and the parent state. Needless to say, a parent state may attempt by force to suppress either an insurrection or a rebellion. In domestic law rebels may be criminals in the eyes of the parent state, and answerable to its courts if their movement fails. Thus under the United States Constitution insurrection and rebellion constitute treason, for which the laws provide severe penalties.

The Southern secessionists took the position that the armed conflict was an international war between the United States and the Confederate States of America. The Confederates believed that secession had been constitutional and that they had not only a *de facto* government entitled to full belligerent rights but also a *de jure* government whose independence and sovereignty should be recognized by foreign powers. In their hope of winning the war the Southerners counted heavily upon the aid and the intervention of foreign nations and they were bitterly disappointed when little aid was forthcoming. Even after the collapse of the Confederacy all true Southerners held that the struggle had been a "War between the States."

The official position of the Union government was that secession was a constitutional impossibility and nullity, and hence that the so-called Confederates were engaged in an insurrection against their lawful government. When the Confederates fired upon Fort Sumter, President Lincoln proclaimed on April 15, 1861, that the execution of federal laws was being obstructed "by combinations too powerful to be suppressed by the ordinary course of judicial proceedings." Therefore he called for militia to suppress the insurrection, in much the same way that Washington had done in the Whisky Rebellion of 1794. Both Congress and Supreme Court later

supported Lincoln's theory of the war, even though the war attained enormous proportions.

In harmony with this insurrection theory the Union government throughout the war was meticulously careful to avoid any act that even suggested official recognition of the Confederacy as a *de jure* independent state. At first the United States attempted to deny that the Confederacy possessed even belligerent status. Thus in 1861 the State Department objected strongly to foreign powers granting belligerent rights to the Confederacy. Throughout the war the Lincoln administration invariably maintained that no peace terms could be considered unless they were premised upon the legal nonexistence of the Confederacy and the complete submission of the "rebels" to Union authority. In theory Union spokesmen commonly insisted that they were dealing only with the "pretended government" of the "so-called Confederate States of America."

In practice, however, the Union government was very soon impelled to concede belligerent rights to the Confederates. The impotency of Buchanan's administration had permitted Southern resistance to federal authority to become too extensive and powerful to be treated as mere insurrection. At the outbreak of hostilities Lincoln proclaimed a blockade of Southern ports, an act which according to international law virtually recognized the belligerency of the Confederacy. Soon afterward the Lincoln administration abandoned its declared purpose of treating Confederate seamen as pirates. Threats of reprisal upon captured Unionists as well as humanitarian considerations induced the government to treat all captives as prisoners of war.

After initial protests the United States acquiesced in the recognition by foreign nations of the belligerent status of the Confederate government. In short, practical considerations led the Union government to treat the Confederates as belligerents, even though it still refused to recognize their belligerency in any direct, formal manner.

Congress agreed fully with the President that the United States could claim against the Confederates both sovereign rights and those rights arising out of the international law of war. This double status greatly influenced federal laws and policies. For example, Congress enacted a new treason law providing severe punishment for all those

found guilty of supporting the rebellion, while other congressional acts held such persons to be public enemies.

The Supreme Court also sustained this dual status for the Confederates. In this connection the most important decision was in the Prize Cases, decided in March 1863, involving the legality of the capture of neutral ships and cargoes. These seizures occurred soon after Lincoln had issued his proclamations of blockade of Confederate ports on April 19 and 27, 1861, and before Congress had formally recognized the existence of war. In upholding the legality of the captures, Justice Robert Grier declared for the Court that it would and must accept the President's decision that the armed insurgents had become so formidable by April 19, 1861, that they must be accorded belligerent status. "A civil war," he asserted, "is never solemnly declared; it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on. . . . It is not the less a civil war, with belligerent parties in hostile array, because it may be called an 'insurrection' by one side, and the insurgents be considered as rebels and traitors." Therefore the Court held that as far as foreign nationals were concerned the conflict was a civil war, fought according to the laws of nations, with both sides possessed of belligerent rights and responsibilities. In subsequent decisions the Court maintained the same position.

While the war from a military standpoint was between belligerents, in constitutional theory the insurrection doctrine remained of great importance during both the war and the reconstruction period. Many war acts and words of the Unionists were based upon the assumption that they were fighting to suppress a gigantic insurrection, even though Union officials often spoke of the war as a rebellion. At the conclusion of the war no peace treaty was drawn up. Instead the subjugated Confederates threw themselves upon the mercy of the Union government, which thus was free to develop a reconstruction program premised upon the insurrection theory.

PUNISHMENT OF TREASON

The Union government's inconsistent rebellion theory is clearly evident in the handling of the questions of treason and confiscation of property. The Constitution defined and limited treason to

levying war against the United States or adhering to their enemies and giving them aid and comfort. Thus any participation in insurrection or rebellion against the federal government constituted treason. Congress was authorized to declare the punishment of treason, but no attainder of treason should work corruption of blood or forfeiture except during the life of the person attainted. Therefore the only constitutional method of procedure against traitors was by judicial conviction under treason statutes passed by Congress. Accordingly, in 1790 Congress had passed a law against treason, providing the death penalty for anyone convicted. Though no one had ever been executed for treason against the United States, this law was still operative in 1861.

The nature and scope of the Civil War soon demonstrated the practical impossibility of enforcing the existing treason law against Confederates. Several million Southern people were adhering to the "rebellion," while hundreds of thousands of them were actually bearing arms against the United States. As explained above, for practical and humanitarian reasons the captured soldiers and sailors had to be treated as prisoners of war. Few civilian Confederates were captured during the early phases of the war, and with sympathetic witnesses and juries the possibility of conviction for treason seemed remote even where the federal courts were open. Moreover, many persons in the border states and in the North were engaging in disloyal activities which did not amount to full treason.

As a consequence Congress enacted special legislation to adapt the punishment of treason to the emergency. The Conspiracies Act of July 31, 1861, provided heavy fine and imprisonment for anyone convicted of conspiring to overthrow the United States government, or to levy war against the United States, or to oppose by force the authority of the government, or to interfere forcibly with the execution of federal laws, or to seize property of the United States. Technically this act dealt with conspiracy and not with treason. Yet critics of the measure were partly right in contending that it nullified existing constitutional law prohibiting "constructive treason." However, they overlooked the fact that new emergencies often call for new statutes or new construction of laws. The act is still on the statute books, but it has been of little consequence during the wars of the twentieth century.

On July 17, 1862, Congress enacted additional legislation, known

as the Treason Act, or more commonly as the Second Confiscation Act. This measure dealt with three important subjects: (1) the punishment of treason and rebellion, (2) the confiscation of enemies' property, and (3) the emancipation of rebels' slaves. For treason the penalty was henceforth to be either death or heavy fine and imprisonment at the discretion of the court. Engaging in or aiding rebellion against the United States was declared to be distinct from the crime of treason with a separate penalty of fine and imprisonment. Reflecting the rising emancipationist sentiment, the act provided also for freeing the slaves of anyone convicted of either treason or rebellion.

The chief political purpose of the new Treason Act was to induce the Lincoln administration to prosecute more vigorously those engaged in rebellion by softening the penalty. In general this purpose was not fulfilled, for the Attorney General and his subordinates pursued a cautious and lenient policy of enforcement. Grand juries brought numerous indictments for treason, especially in the border states, but few cases were prosecuted to completion. Instead, the district attorney usually continued the indictment from one term of court to another and eventually had the case dismissed. It is significant that despite the vast extent of rebellion, the government did not execute a single person for treason or even carry out completely a sentence of fine or imprisonment.

This wide gap between the treason statutes and their enforcement persisted after the cessation of hostilities in 1865. Legally and physically it was then possible to proceed against adherents of the Confederacy, and radical Unionists demanded the punishment of at least a few leading "traitors" as examples. Many Confederates were indicted, and several leaders were placed in confinement, but none was convicted and punished. Even Jefferson Davis, former President of the Confederacy and in the North a veritable symbol of high treason, escaped official punishment, although his "treason" case dragged through the federal courts for more than three years.

From a legal standpoint the Lincoln administration's cautious enforcement policy was open to criticism. Prompt and impartial application of criminal law is fundamental to civil rights. Yet from the standpoint of practical administration the government's policy worked reasonably well under difficult circumstances. Judicial pun-

ishment of treason is necessary and proper in case of a few individuals, but it is impractical when applied to vast numbers in an organized rebellion. Nevertheless the government had to preserve a semblance of enforcement, since much of its war policy was based upon the assumption that it was proceeding against rebellious citizens.

CONFISCATION

Closely interwoven with the punishment of treason was the question of confiscation of private property. Confiscation of enemy property was an ancient war usage, and such outstanding American legal authorities as Marshall, Story, and Kent had maintained that international law sanctioned a nation's right to confiscate. Yet by 1861 Western nations had largely abandoned the practice. Moreover, the United States Constitution provided safeguards for citizens' property rights by prohibiting such devices as bills of attainder and deprivation of property without due process of law.

In practice confiscation soon became an important element in congressional war policy. Following the Confederate enactment of a sequestration law, Congress on August 6, 1861, passed a statute authorizing the confiscation of all property actually used for "insurrectionary purposes" or "in aid of the rebellion." This act, of course, touched only a very small amount of enemy property, and in its enforcement most military and civil officials were careful to respect the individual property rights of Southerners. In a reaction against this lenient policy, which many radicals blamed for early military failure, congressional leaders demanded a more rigorous and comprehensive confiscation law. Such a law they secured in the Second Confiscation Act, which, it will be recalled, provided for the confiscation of property. This act provided for immediate forfeiture to the United States of all property of officials of the Confederate government and a similar forfeiture after sixty days' warning of the property of all other persons supporting the "rebellion." By this means Congress hoped to shorten the war and to make the "rebels" pay much of its cost.

The Second Confiscation Act was of doubtful constitutionality, as its opponents repeatedly pointed out. It was a curious mixture of constitutional and international law; yet it disregarded some of the restrictions ordinarily associated with both. Although the intent

of the measure was to punish rebellious citizens by confiscating their property, there was no provision for the trial and conviction of those accused of rebellion. Instead confiscation was to be a separate and distinct action *in rem*, not against the property of traitors but against the property of enemies. Supporting this position, Senator Lyman Trumbull of Illinois, one of the sponsors of the measure, summarized the majority view of the power of Congress over Confederates with the words, "We may treat them as traitors, and we may treat them as enemies."

President Lincoln believed that certain features of the measure were unconstitutional and prepared a veto message. He said that the combination of punishment of treason and confiscation of property constituted, in effect, forfeiture of property beyond the life of the guilty party. Apparently assuming that the confiscation features were supposed to be based upon constitutional law, he objected also to the forfeiture of property "without a conviction of the supposed criminal, or a personal hearing given him in any proceeding." Congress, in an explanatory joint resolution, removed the President's first objection but not the second. He thereupon reluctantly signed the bill, although he never sympathized with its methods. In practice confiscation never attained the importance that its sponsors had expected; it was limited largely to rebel-owned property located in the loyal states where the federal courts were open.

The Supreme Court did not pass upon the Second Confiscation Act until after the war, and then the justices proved to be as badly divided on the measure's constitutionality as the President and Congress had been. In *Miller v. United States* (1871) a Virginia "rebel" challenged the decree of the federal district court of Michigan, declaring his stock in Michigan railroad corporations forfeited by default. The Court, relying upon the double-status doctrine already affirmed in the Prize Cases, confirmed the right of the United States to confiscate Miller's property as an exercise of the war power. The majority judges admitted that the treason sections of the act were based upon the United States' sovereign right or upon internal or municipal law and that under such law Congress lacked authority to disregard the judicial safeguard of the Constitution and of the Fifth and Sixth Amendments. But the opinion insisted that the confiscation sections of the act were based upon "an undoubted belligerent right," and therefore were constitutional.

The Court's position was open to objection. Three justices dissented, two of them on the ground that the forfeitures were punitive in character, being based upon Congress' municipal power and not on its war power; that accordingly condemnations must depend upon owner's personal guilt; and that therefore a judgment based on mere default amounted to a denial of due process of law. Although this exact issue was not again to come before the Court, the dissenting argument is in essential harmony with recent interpretation of related issues.

The Confiscation Act was Congress' unique manifestation of a natural determination to crush the rebellion by any means within constitutional or international law, or a combination of the two. It was one of those extreme measures which a nation adopts when its very existence hangs in the balance.

FEDERAL CENTRALIZATION OF AUTHORITY

Between 1801 and 1861 an irregular but considerable decentralization of constitutional and political authority had taken place in the United States. During these years population had increased rapidly and had spread over a vast area. The states had more than doubled in number, and their governments, rather than the federal government, had assumed most of the new governmental functions that had evolved. In general during this period all three branches of the federal government had interpreted federal powers somewhat narrowly, with the result that the people looked to the state governments rather than to Washington for the performance of many positive governmental services. Relatively little federal administrative machinery had been developed. States' rights tendencies were strong in the free as well as the slave states. Consequently in 1861 the loyal state governments naturally assumed that they would play important roles in the prosecution of the war.

In 1861 and 1862 the governors and other state officials to a large degree took the lead in mobilizing the nation for war. They not only raised the militia called for initially by the President, but they also directed the recruiting of most of the regiments of federal volunteers. In addition the states often provided the troops with equipment, subsistence, and transportation. Such state governors as John A. Andrew of Massachusetts, Oliver P. Morton of Indiana, and

Richard Yates of Illinois were more energetic and more efficient than Secretary of War Simon Cameron in mobilizing troops. Before Congress met in July 1861, more than a quarter of a million men had been mobilized, largely by state initiative.

Inevitably friction and confusion arose between federal and state authority in these military matters. Federal recruiting officers sometimes clashed with governors over the raising of troops and the appointing of officers. Early in the war some states actually competed with the War Department in the purchase of arms and equipment. The President had the unpleasant task of trying to placate conflicting parties and to co-ordinate their activities. This task was made somewhat easier by the fact that at the time practically all free-state governors were Republicans, but it was made more difficult by the fact that the governors under our federal system are not constitutional subordinates of the President, even in the raising and control of troops. It was conflicting authority of this kind as well as the decline of volunteering which caused Congress and the administration eventually to turn to a national conscription policy.

A different type of controversy arose in April 1861 between the federal government and the border slave states, especially Kentucky and Maryland. Many people, perhaps a majority, in those states accepted the Calhounian doctrine of state sovereignty, yet they wanted neither secession nor war. In Kentucky the governor emphatically refused to supply troops to the federal government and the state senate formally declared that the state would maintain an armed neutrality, neither severing connection with the Union nor taking up arms for either side. This attempt to take a middle position was not only impractical but was also contrary to both the letter and the spirit of the Constitution. The power of neutrality is an integral part of the war-making power, which is specifically and necessarily assigned to the federal government.

At about the same time the state authorities of Maryland sought to prevent the passage of federal troops through the state on the way to the national capital. This action was flagrantly unconstitutional; for, as Marshall had pointed out in *McCulloch v. Maryland*, in matters which belong to the United States federal authority must be supreme and unimpeded by state interference. Within a brief time the Lincoln administration, by employing a waiting policy in

Kentucky and a firm policy in Maryland, was able to maintain federal authority in both states and to secure a considerable degree of co-operation from state authorities.

Another case where national authority definitely won out over states' rights was in the partition of Virginia. The western portion of the state was geographically a part of the Ohio Valley, and for many years before 1861 the people there had disagreed politically and economically with the eastern Virginians. When the Virginia convention adopted an ordinance of secession, the westerners refused to be bound thereby, and in June 1861 organized a new Unionist or "restored" government for Virginia, which was recognized for most purposes by the federal government. This Unionist state government, meeting at Wheeling, authorized the western counties to frame a constitution for a new state of West Virginia; this, in turn, was ratified by the voters. Thus in an irregular and somewhat fictitious manner the "state" of Virginia complied with the constitutional requirement of giving consent to the erection of a new state within its borders.

On December 31, 1862, Congress passed an act providing for the admission of West Virginia as a state as soon as it had provided for the gradual abolition of slavery. During the congressional debate on the subject the Republican majority took the position that the admission would aid in suppressing the rebellion, while conservative opponents contended that the real state of Virginia had not given its consent to partition. Although the Cabinet also was divided over the constitutionality of the act, Lincoln reluctantly signed it, believing then, as he did throughout the war, that the determining consideration should be whether the measure aided or hampered the restoration of the Union. On June 20, 1863, West Virginia officially became a separate state.

The Supreme Court in *Virginia v. West Virginia* (1870) indirectly declared the process of separation to be constitutional by affirming the existence of "a valid agreement between the two States consented to by Congress." Thus did the federal government's policy of broad constitutional construction, in conjunction with what was virtually a revolution within a state, effect the partitioning of one of the oldest and largest states in the Union.

During 1862 Congress and the administration came to realize that greater nationalization of governmental authority was necessary for

the effective prosecution of the war. Two years of unwarranted decentralization and reliance upon state performance of certain war functions had proved unsatisfactory and probably had prolonged the war. Gradually and reluctantly, therefore, the federal government took to itself the performance of truly national functions by adopting nationalizing measures and policies. Thus by 1863 the government of the United States was exercising authority commensurate with that intended by the framers of the Constitution, having regained much that had been dissipated during two generations dominated by states' rights doctrines and practices.

In order to finance the war the federal government had to resume definite control of the important fields of currency and banking, which had been left largely to the states since the 1830's. Between February 1862 and March 1863 Congress authorized the issuance of $450,000,000 in fiat money or greenbacks, which were made legal tender for both public and private debts. Even more significant was the enactment of the National Banking Act of February 25, 1863, with important modifications made by new laws in 1864 and 1865. Although these measures did not create a centralized national bank like those of 1791 and 1817, they did provide for an extensive system of national banking institutions, which under federal supervision could issue banknotes based largely upon United States bonds and guaranteed by the federal government. The 1865 law, which levied a 10 per cent tax on all state banknotes, soon had the intended effect of driving these notes out of existence and leaving a uniform national currency based fundamentally upon the credit of the United States.

After a lapse of some forty years the federal government once more assumed a prominent role in the field of internal improvements and transportation. In pursuance of an act of Congress, the President in May 1862 took official possession of all railroads and directed that all railroad companies and their employees hold themselves in readiness for the transportation of troops and munitions at the order of military authorities. Only in a very few instances did the government take more than nominal control of Northern railroads, but through this act it did obtain effective co-operation from the roads. In the South the federal government, through the military authorities, actually repaired and operated many miles of railroads.

Congress took steps also to sponsor the construction of new rail-

road lines. In March 1863 a select committee of the House, in order to provide more adequately for the transportation of military forces and supplies, recommended that the federal government charter a special railroad line between Washington and New York to which the government would give its patronage and over which it would enjoy priorities and have extensive powers of regulation. Constitutional and political opposition to the federal government taking such a direct part in the railroad business, plus some effective lobbying by competing railroad lines, prevented the enactment of the measure. However, the Pacific Railroad Act of 1862, supplemented by another act in 1864, enabled the federal government to charter two corporations to build a railroad from Omaha to the Pacific and to grant them large tracts of land and extensive loans. This action proved to be only the beginning of the active part that the government was to play in rail transportation after the Civil War.

In general, however, the federal government attempted little or no regulation of private enterprise such as became so important in the war emergencies of the twentieth century. Congress encouraged great industrial and agricultural expansion by the enactment of increasingly high protective tariff rates and by paying high prices for food, clothing, munitions, and other military supplies. But there were no price ceilings, no rationing, and practically no governmental controls over agriculture, commerce, industry, or labor.

COMPULSORY MILITARY SERVICE

The gigantic military task of conquering the Confederacy forced the federal government to resort to conscription for the first time. The Constitution, in Article I, Section 8, gave Congress blanket power "to raise and support armies" and to provide for calling forth, organizing, arming, disciplining, and governing the militia when employed in federal service. By law and precedent three forms of military organization were available in 1861: the regular army, United States volunteers called into service during emergencies for limited periods, and the militia, which was in a degree both a state and a federal organization. In the War of 1812 and the Mexican War all troops had been raised by voluntary recruiting, although in the earlier struggle conscription had been seriously considered by Congress.

In April 1861 Lincoln called for 75,000 militia under the law of 1795, but the great bulk of the army raised in 1861, and in fact throughout the war, consisted of federal volunteers. When the supply of volunteers seemed inadequate, Congress, in July 1862, enacted a new Militia Act, which provided that the militia should include all male citizens between the ages of 18 and 45 and authorized the President to issue regulations to cover any defects in state laws for employment of the militia. With no more specific basis than this provision, the President in August 1862 assigned quotas to the states and ordered a draft through the state governors to fill any unfilled quotas. Under this curious mixture of federal and state authority the first men were conscripted in 1862. The chief constitutional significance of this entire procedure lies in the small amount of statutory law considered necessary to transform the old obligation for militia duty into compulsory federal military service.

The President and Congress soon realized that the militia could not be made into an effective national army and on March 3, 1863, enacted a comprehensive conscription law. All able-bodied male citizens between 20 and 45, and foreigners who had declared their intention to become citizens, were "to constitute the national forces" and were declared liable for military service upon call by the President. No reference was made to the militia, and a complete federal system of enrollment and administration was established. Any person failing to report after due service of notice was to be considered a deserter, and any person convicted of resisting the draft or of aiding or encouraging the same was subject to fine and imprisonment.

Such a drastic departure from previous American experience was bound to encounter serious opposition on constitutional as well as political grounds. In regions where pro-Southern sentiment was strong, resistance to the draft took place in various forms, and federal troops were sometimes needed for enforcement. The Conscription Act was repeatedly denounced as un-American and unconstitutional in Congress, in the courts, in the press, in the public forums, and on the streets. From New York, where violent antidraft riots raged for four days in July 1863, Governor Horatio Seymour wrote to the President, declaring bluntly that conscription was un-

constitutional and requesting its suspension. Except for minor interruptions, however, the draft was applied when necessary to meet quotas.

The constitutionality of the Conscription Act never came before the Supreme Court, but it was challenged in some of the lower courts without decisive results. Of all the constitutional arguments in support of conscription perhaps the most forceful was made by the President himself.[1] In legal logic that was reminiscent of John Marshall at his best, Lincoln declared:

> It is the first instance, I believe, in which the power of Congress to do a thing has ever been questioned in a case when the power is given by the Constitution in express terms. . . .
>
> The case simply is, the Constitution provides that the Congress shall have power to raise and support armies; and by this act the Congress has exercised the power to raise and support armies. This is the whole of it. It is a law made in literal pursuance of this part of the United States Constitution. . . . The Constitution gives Congress the power, but it does not prescribe the mode, or expressly declare who shall prescribe it. In such case Congress must prescribe the mode, or relinquish the power. There is no alternative. . . . If the Constitution had prescribed a mode, Congress could and must follow that mode; but, as it is, the mode necessarily goes to Congress, with the power expressly given. The power is given fully, completely, unconditionally. It is not a power to raise armies if State authorities consent; nor if the men to compose the armies are entirely willing; but it is a power to raise and support armies given to Congress by the Constitution without an if.

Opponents of conscription usually resorted to states' rights and strict-constructionist arguments and emphasized the distinction between the militia and the army. Many believed with Chief Justice Taney that although both federal and state governments exercised sovereign powers over the same territory and the same people at the same time, each was altogether independent of the other within its own sphere of action. They argued that the militia was primarily a state institution, and therefore the extent to which the Conscription Act interfered with this state institution by bringing state militia-

[1] His views, however, were expressed in a paper which was not published until years afterward.

men and state civil officials within the draft constituted a violation of the Constitution.

The preponderance of logic as well as legal and public opinion supported the constitutionality of conscription. The power to raise armies as well as the power to declare war is expressly given to Congress without qualification as to means, and conscription may reasonably be considered a "necessary and proper" means to "carry into effect" these powers. To restrict federal powers within the narrow limits proposed by draft opponents would in effect have denied the United States the assured power to suppress the rebellion. In fact many who opposed conscription also denied that the federal government had the constitutional power to preserve the Union by force of arms. Ironically, the Confederate Constitution copied the federal Constitution exactly in conferring upon Congress powers for raising troops, and the Confederate Congress adopted conscription before the federal Congress did. Thus the experience of the Civil War established a strong precedent for conscription, although its constitutionality was judicially open to question until 1918, when the Supreme Court upheld it unanimously.[2]

LINCOLN'S PRESIDENTIAL DOMINATION

The location, like the nature, of the war power was not established beyond debate by the Constitution. Although Unionists firmly believed that the national government possessed full powers to wage war successfully, they differed sharply among themselves over the relative authority of Congress and the President in the exercise of these powers. The Constitution specifically empowers Congress to declare war, to raise and support armies, to maintain a navy, and to provide for the government and the regulation of the land and naval forces, including militia employed in the United States service. On the other hand, the President is constituted the commander in chief of the national military forces and is vested with the full executive power of the government. Clashes between Congress and President during the War of 1812 and the Mexican War over the exercise of war powers had been neither serious nor conclusive in results. In this respect the Civil War was to be vastly different.

[2] See p. 656.

Circumstances surrounding the outbreak of hostilities in 1861 led to the establishment of a quasi presidential dictatorship. Congress' tragic failure to prevent disunion by means of compromise and the impotence of President Buchanan's policy of watchful waiting seemingly made necessary the assertion of a new kind of power by President Lincoln. In calling on April 15 for 75,000 militia to suppress the insurrection, he also summoned Congress for an extraordinary session but set the convening date far ahead to July 4.

His failure to convene Congress immediately to provide additional legislation to cope with the grave national crisis defies conclusive explanation. His wish that members of Congress should acquaint themselves with the public temper before convening certainly did not justify the delay of eighty days. Undoubtedly Lincoln, like most Northerners, failed to realize how effectively the secessionists had overpowered the unionists in the lower South, and hence he seriously underestimated the task of restoring national authority. Perhaps he also thought, as Professor Corwin suggests,[3] that the current states' rights doctrines had so undermined Congress' power to cope with the emergency that the Union would have to be saved by some as yet largely untested, and hence unembarrassed, source of national authority. This he found in the presidential oath and in the office of commander in chief.

Accordingly Lincoln proceeded rapidly to prepare the nation for war without either aid or new authority from Congress. He not only determined the existence of rebellion and called forth the militia to suppress it, but he also proclaimed a blockade of the ports of the rebel states, an act equivalent legally to a declaration of war. Realizing soon that such steps were inadequate for the emergency, on May 3 he called for 42,034 United States volunteers to serve for three years, and he actually received a much larger number. He also directed that large additions be made to the regular army and to the navy. He had two million dollars paid out of the federal treasury, and he pledged the government's credit for the unprecedented sum of a quarter of a billion dollars, all without statutory authority. He had the privilege of the writ of habeas corpus suspended in certain

[3] Edward S. Corwin, *The President: Office and Powers* (New York, 1940), p. 156. Corwin has an excellent treatment of the whole subject of Lincoln's presidential dictatorship.

places and ordered the arrest and military detention of citizens who were represented to him as being engaged in or contemplating "treasonable practices."

The overwhelming majority of Northern people strongly endorsed the President's course, even when they were uncertain of his constitutional authority. In the nation's greatest crisis the people clamored for more action, not less—in order "to maintain the Union and to preserve the Constitution."

When Congress met in July 1861, Lincoln offered a twofold justification for his extraordinary course. He admitted that the calls for three-year volunteers and for additions to the regular army and navy were of doubtful legality, but he explained that those acts "were ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would readily ratify them." In other words, the President claimed the constitutional right in an emergency to take action which otherwise would be illegal, provided only that it was not "beyond the constitutional competency of Congress." This was indeed a new and remarkable doctrine to present to an American Congress, which could easily have been convened for previous authorization.

Lincoln's second and more significant justification was that the President possessed the war power and had been forced to use it in defense of the government. Thus he contended that his prescribed oath to "preserve, protect, and defend the Constitution" empowered and even obligated him in an emergency to resort to practically any action necessary to maintain the Union. This obligation stemming from the presidential oath was confirmed by a legal opinion of Attorney General Edward Bates, who held that it was the President's particular duty to suppress the rebellion, since the courts lacked the strength to do so. Lincoln therefore took the position that he might constitutionally disregard the guarantee of the habeas corpus privilege or any single law if he considered such a step necessary to preserve the government. Buttressing this contention was his fundamental concept of the nation as older than either the Constitution or the states, and therefore superior to both. In short, he held that the President's oath and his position as commander in chief constituted him a virtual dictator, like those of the ancient Roman Republic, to save the life of the nation.

CONGRESSIONAL AND JUDICIAL REACTIONS

The great majority of the members of Congress—those from the Confederate states having withdrawn or having been expelled —approved the President's course, but they divided sharply over the constitutional justification of his actions. Intermittently throughout the special session of 1861 the Senate debated a proposed joint resolution which enumerated, approved, and validated the President's extraordinary acts, proclamations, and orders. The resolution had the support of the vast majority of Republicans, including some who, like Timothy Howe of Wisconsin, assumed that certain of the President's acts were illegal when performed. Other Republicans, while approving the President's course, questioned the proposed method of validating his suspension of the writ of habeas corpus and his proclamation of a blockade. Owing to this disagreement the resolution never came to a vote. Instead a less specific and less comprehensive validating clause was attached as a rider to an act to increase the pay of privates and on the last two days of the session was rushed through both houses, with only five Democratic senators from border slave states recorded in opposition. By this law all of the President's acts, proclamations, and orders respecting the army, navy, militia, and volunteers were approved and "in all respects legalized and made valid, to the same intent and with the same effect as if they had been issued and done under the previous express authority and direction of the Congress." This congressional ratification of part of the President's extraordinary acts left the blockade and the suspension of the privilege of habeas corpus resting entirely upon presidential authority.

Congress' action revealed little appreciation of the need for continual co-operation between the legislative and executive departments, a co-operation which upon the outbreak of war in 1917 and 1941 was to be taken largely for granted. After spending a month authorizing military and naval forces of unprecedented size and providing for their equipment and supply, Congress adjourned. Most members seemed to be scarcely aware that the gigantic efforts necessary to win the war would create many legal and constitutional problems requiring congressional attention. This unrealistic attitude tended to confirm Lincoln in his belief that the prosecution of the war in its myriad aspects was essentially an executive function.

By the time Congress reassembled in December 1861, members could see more clearly the critical nature of the war and consequently the need for the exercise of more comprehensive war powers. The relative authority of the President and of Congress in the exercise of the "rights of war" was debated repeatedly, especially in the Senate. Senator Orville Browning of Illinois, a close friend of Lincoln, contended that the rights of war were executive, not legislative, and that questions of military necessity, by their very nature, must be decided by military commanders acting under the authority of the President as commander in chief. On the other hand, Senator Charles Sumner of Massachusetts, among others, contended that Congress' constitutional power to declare war encompassed full belligerent rights against the enemy, and hence that Congress possessed complete powers of sovereignty in the conduct of war.

This contest over constitutional prerogative was heightened by differences between the President and the Republican congressional majority over the policy, methods, and personnel employed in the prosecution of the war. Lincoln appointed Democrats as well as Republicans to high military positions, particularly General George B. McClellan as general in chief of the army. These Democratic generals adhered rigidly to Lincoln's early cautious policy of prosecuting the war solely to save the Union and of not interfering with slavery except as military necessity required. Indeed, McClellan favored winning military victories as a means of reconciling the Confederates with restored Union authority rather than a complete subjugation of the Confederates and the destruction of the slavery system. When the war progressed more slowly than congressional leaders had anticipated, they attributed the slowness to a lack of determination on the part of these conservative generals and to their proslavery policies. Consequently the more radical Republicans, or Radicals as they came to be called, demanded that Congress assert its full constitutional power in order to secure a more vigorous and successful prosecution of the war.

Congress' most serious attempt to exercise the war power more effectively was the creation, in December 1861, of the Joint Committee on the Conduct of War. Originally proposed as an investigation into certain military failures, the committee was finally empowered to inquire into the general conduct of the war. Headed by

Radical Senator Benjamin F. Wade of Ohio and dominated by Radicals, the committee traveled extensively, conducted many investigations, and published voluminous reports of its findings. Both the inquiries and the reports were excessively critical of Democratic or conservative military leaders and partial to antislavery generals. Committee members considered themselves empowered to supervise the plans of commanders in the field, to make military suggestions, and to dictate military appointments. At first the joint committee co-operated with the new Secretary of War, Edwin M. Stanton, himself a Radical, but later the committee tended to interfere with the President and with General in Chief Henry Halleck in their conduct of the war. After the tide of war turned definitely in favor of the Union in July 1863 and the main armies came under the command of such successful and distinctly nonpolitical generals as Grant and Sherman, the committee played a much less important role in military affairs.

Although the joint committee was a natural outgrowth of highly controversial war policies, it hardly represented Congress' proper constitutional role in the prosecution of the war. The Constitution specifically empowers Congress to make the rules and regulations for the conduct of war, but it just as definitely entrusts the actual conduct of war to the President as commander in chief. Thus the joint committee seriously infringed upon the President's prerogatives, while Congress only partially performed its own war-making duties.

The Supreme Court, like Congress, was divided over the constitutionality of Lincoln's assumption of broad war powers, but a majority of the justices upheld his position. In the Prize Cases (1863) Justice Robert Grier declared for the majority that, although the President did not have power to initiate war, when it was begun by insurrection he was "bound to accept the challenge without waiting for any special legislative authority." Grier concluded:

> Whether the President in fulfilling his duties, as Commander-in-Chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this court must be governed by the decisions and acts of the Political Department of the govern-

ment to which this power was intrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is, itself, official and conclusive evidence to the court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case.

A minority of four justices insisted that the basic war power belonged to Congress and not to the President. Justice Samuel Nelson summarized the minority position when he declared:

. . . The President does not possess the power under the Constitution to declare war or recognize its existence within the meaning of the law of nations, which carries with it belligerent rights, and thus change the country and all its citizens from a state of peace to a state of war; that this power belongs exclusively to the Congress of the United States and, consequently, that the President had no power to set on foot a blockade under the law of nations.

PRESIDENTIAL ASCENDANCY CONTINUED

Under these circumstances President Lincoln continued to formulate as well as to execute most of the essential war policies. In 1862 the War Department commissioned Professor Francis Lieber, a German immigrant and an authority on international law, to codify for the first time in America the rules and regulations for the conduct of armies in the field. The result, General Orders No. 100, was promulgated in April 1863 as the laws of war for the Union armies. All this was done without congressional authorization, despite the fact that the Constitution specifically grants this power and responsibility to Congress. On the other hand, Congress on July 17, 1862, did make a thorough revision of the Articles for the Government of the Navy. Both sets of regulations, extensively revised, are still in use.

In such other important fields as emancipation, reconstruction, and the impairment of civil rights, the President largely determined governmental policy, either in the absence of congressional action or in virtual disregard of it. In September 1862 he disregarded the emancipation section of the Second Confiscation Act and based his preliminary Emancipation Proclamation upon his power as commander in chief. In December 1863 he merely announced to the new

Congress his own reconstruction program, and when Congress formulated a sterner plan in the Wade-Davis Bill he killed it with a pocket veto.[4]

For almost two years after the outbreak of hostilities Lincoln continued to suspend the habeas corpus privilege on his own authority. Both Republicans and Democrats repeatedly challenged his constitutional authority on the ground that the clause of the Constitution authorizing suspension was in Article I, Section 9, which deals with the powers of Congress and not those of the President. Nevertheless, in September 1862 he issued a proclamation subjecting broad categories of "disloyal" persons to martial law and suspending the privilege of habeas corpus in all cases involving such persons.

At its next session Congress, on March 3, 1863, finally passed the Habeas Corpus Act, by which the President, during the rebellion, was "authorized to suspend" the privilege of the writ in all cases in which he thought the public safety might require it. The phraseology was intentionally ambiguous, designed to win the support of those who believed that Congress was recognizing an existing presidential power as well as of those who believed that Congress was thereby conferring the power upon the President. Lincoln did not issue a fresh proclamation invoking this new authority until six months later, nor did the administration later materially alter its policy in making arbitrary arrests.

Although the Supreme Court never rendered a decision directly involving the location of the suspending powers, in the Prize Cases it did give indirect approval to the President's action in suspending the habeas corpus privilege. The suspension of the writ was not directly involved, but the Court held that when war was forced upon the United States the President was obligated to take all appropriate steps to meet it "without waiting for any special legislative authority."

Thus precedent was established. During the Civil War the President did suspend the habeas corpus privilege without having been restrained in so doing by either Congress or the Supreme Court. It may well be argued that the uncertain location of the suspending power is in practice advantageous, since in time of war Congress will usually confer the power upon the President, while if in a

[4] See pp. 451–452.

great emergency time does not permit such action he may fall back upon the Lincoln precedent and assume the power.

In other respects also Lincoln continued his presidential domination to the end of his administration. The mounting success of Union arms, the favorable turn of international affairs, Lincoln's staunch adherence to his emancipation policy, all enhanced greatly the President's prestige and influence with Republican, independent, and even Democratic citizens. Lincoln's remarkable ability to speak to and for the great mass of people through private conversations, public addresses, and open letters published in the newspapers tended to make him a grand tribune of the people.

Under such circumstances the Republicans in Congress after 1863 attempted less frequently and less successfully than before to challenge the President's assumed constitutional position. Some Democrats or so-called Copperheads continued to denounce his position as tyrannical and unconstitutional, but what they really opposed was the government's basic policy of restoring the Union by military force. Most congressmen, however, were willing to support the President's effective leadership, particularly after his re-election in November 1864. This acquiescence in presidential control was well illustrated early in 1865, when a majority of Congress declined to revive the Radicals' reconstruction program, which had been blocked by Lincoln's pocket veto of the Wade-Davis Bill. It is significant that at no time during the war did Congress pass a law placing important restrictions upon the enormous powers exercised by the President.

The Civil War experience failed to provide a permanently satisfactory solution for the problem of wartime legislative-executive relationships. That Lincoln's assumption of broad powers as Chief Executive and commander in chief did not seriously and irretrievably pervert the constitutional relationship between President and Congress has been due to at least three important factors. First, in times of great stress the people want strong leadership. Presidential domination from 1861 to 1865 was generally approved because of the great emergency of a civil war that shook the nation to its very foundations. The outcome of the war fairly guaranteed the nation against a recurrence of that experience. Second, in times of peace presidential domination is possible only with an exceptionally strong president and a relatively weak, divided, or discredited

Congress. For a generation after Lincoln, Congress was relatively stronger than the Chief Executive and thus dominated national policy. Both of these factors became operative almost immediately upon Andrew Johnson's accession to the Presidency in 1865. Third, in the war emergencies of 1917 and 1941 , Presidents Wilson and Roosevelt had already established themselves as unquestioned leaders of their party and were promptly granted by Congress ample authority to cope with any foreseeable contingency. In retrospect it is easy to see that such co-operation should have prevailed in April 1861. At the time, however, Lincoln seriously underestimated the advantage of real congressional participation in the prosecution of the war, and many congressmen considered Lincoln neither an able Chief Executive nor the real leader of his party.

EMANCIPATION

The most revolutionary result of the Civil War, and one of the most significant, was the emancipation of Negro slaves. Emancipation was not one of the original war issues, and it only gradually became a major issue. In 1860 very few Northern people believed that the federal government had the constitutional authority to abolish or even to interfere with slavery in the Southern states. Some abolitionists in fact denounced the Constitution because it protected the institution of slavery. Although the Republican party was organized to prevent the spread of slavery into new territory, its national platform and leaders expressly denied either the intent or the federal power to interfere with slavery in the states. Moreover, most authorities on international law held that even during time of war a belligerent did not possess the legal right to emancipate the enemy's slaves except as they were used for military purposes.

As the preceding chapter has explained, Northern congressmen in the early months of 1861 had repeatedly tried to reassure the Southerners that Congress would not and legally could not interfere with slavery where it then existed. It will be recalled that in February of that year Congress had actually adopted and submitted to the states a proposed constitutional amendment which would have prohibited Congress from ever having the power, even by future amendment, to abolish or to interfere with slavery within the states. Legally this was the ultimate in congressional self-denial on the subject, and it was proposed in a futile attempt to prevent

the disruption of the Union by secession. Even as late as July 1861 Congress had adopted almost unanimously the Crittenden and Johnson Resolutions, which declared that the war was not waged for any purpose of conquest or subjugation or of overthrowing or interfering with slavery or other rights of the states.

Until well after the outbreak of war, Lincoln, despite his famous "house divided" doctrine, persistently denied that he had any intention of interfering with slavery in the South. In his inaugural address he took special pains to reassure Southern and border-state slaveholders on this point. Even after Fort Sumter the President called the nation to arms in order to preserve the Union and maintain national authority, and not to interfere with slavery. Largely to bolster the strength of unionists in both the South and the border states Lincoln was careful to keep antislavery political and military leaders from using the war to strike directly at slavery.

The magnitude and bitterness of the war, however, soon produced drastic changes in the attitude of the Northern people toward slavery. Led by the antislavery forces, more and more people came to believe that slavery was the real cause of secession and disunion and therefore that it must be destroyed before a peaceful Union could be re-established. Thus to both the people and the government the abolition of slavery gradually became an integral part of the Northern war program to preserve the Union.

In general, the Republican majority in Congress was more anxious than the President to undermine the constitutional position of slavery. In April 1862 Congress abolished slavery in the District of Columbia, with compensation for loyal owners, and in June it abolished slavery in all the territories without compensating slaveholders. Thus did the first Republican Congress repudiate the Dred Scott doctrine and assert its authority in two previously debatable fields.

Congress' first serious effort to strike at the heart of slavery—to destroy the institution of slavery in slaveholding states—was the emancipation section of the second Confiscation Act of July 1862. This provided that all slaves of persons engaged in rebellion or in any way giving aid thereto, who should be captured or escape to the Union lines, "shall be deemed captives of war, and shall be forever free of their servitude, and not again held as slaves." Although this emancipation feature was considered an important

part of the Radical program for a more vigorous prosecution of the war, there were no provisions whatever for making it effective. To determine the facts regarding which slaves should be freed would be essentially a judicial function, for which no provision was made. The President made no serious effort to enforce this section, largely because he was then developing his own program of emancipation.

Lincoln's favorite plan for the permanent solution of the slavery problem was the gradual emancipation of slaves by voluntary action of the states, with federal compensation to slaveholders, and possibly with voluntary colonization of freedmen outside the United States. He strongly believed that this program fairly recognized the constitutional rights of states and the property rights of slaveholders, and that because it was a comparatively reasonable plan it might appeal to the South and thus provide a means of shortening the war, even to such an extent as to provide an actual financial saving for the federal government.

Upon the President's recommendation Congress in April 1862 passed a joint resolution declaring that "the United States ought to co-operate with any State which may adopt gradual abolishment of slavery, giving to such State pecuniary aid" for compensation. Lincoln strongly urged the representatives from the border slave states to take the lead in adopting compensated emancipation, but without success. In his annual message to Congress in December 1862, after he had issued his preliminary emancipation proclamation, he again discussed compensated emancipation in all its aspects and eloquently argued for its prompt adoption. Early in 1863 each house of Congress passed a different bill providing compensation for the loyal slaveholders of Missouri upon emancipation of their slaves, but the bills were never harmonized and Congress never again seriously considered the proposition. Lincoln, however, did not abandon his hope for compensated emancipation, even after events had propelled more drastic solutions into the forefront.

In his capacity of commander in chief, Lincoln on September 22, 1862, issued a preliminary proclamation of emancipation. He proclaimed that the war would continue to be prosecuted for the restoration of the Union but that in all areas where the people were still in rebellion on January 1, 1863, slavery would be abolished immediately and completely.

Since the Confederates continued in rebellion, Lincoln on January 1 issued his definitive proclamation, "sincerely believed to be an act of justice, warranted by the Constitution upon military necessity." It designated the states and parts of states which were still in rebellion and declared that all persons held as slaves therein "are, and henceforth shall be, free; and that the Executive Government of the United States, including the military and naval authorities thereof, will recognize and maintain the freedom of said persons." The freedmen were also declared to be acceptable for certain types of military duty.

An extensive controversy raged at the time over the constitutionality and the legal effect of the proclamation, and no complete agreement has ever been reached. Opponents of emancipation, North and South, condemned the proclamation as entirely unconstitutional and as a gross usurpation of power on the part of the President. They argued that the federal government had no authority over slavery in the states under any circumstances and that the laws of war did not warrant such a blanket destruction of private property.

Lincoln and his supporters fully realized that the only constitutional justification of the proclamation was in the war powers of the President. He considered liberation of the enemy's slaves an appropriate and necessary military measure coming within the laws of war. "I felt that measures otherwise unconstitutional," he later declared, "might become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the nation."

It is difficult today to reach a definitive conclusion on this issue. There is no real parallel in the more recent experiences of Western nations. The Supreme Court never rendered a decision involving the proclamation's legality, although some believed that the Court's upholding of Lincoln's proclamation of blockade in the Prize Cases gave support by implication. At least it is certain that the Emancipation Proclamation was part and parcel of the expansiveness of Lincoln's theory of the presidential war power and of his belief that his primary duty was to preserve the Union by any means at his disposal.

The Emancipation Proclamation was followed by a period of doubt and confusion regarding the legal status of the freed Negroes.

In practice most Negroes continued as slaves until their regions were conquered by Union armies. Since slavery existed on the basis of state law, new laws were needed to define the new status of Negroes. Moreover, the proclamation did not apply to the border states or to those areas of Confederate states already conquered. The antislavery men in these states were soon working for emancipation by state action, and by early 1865 Missouri, Maryland, and Tennessee had abolished slavery.

THE THIRTEENTH AMENDMENT

To make emancipation uniform throughout the nation and to eliminate all doubts as to its constitutionality, the emancipationists advocated an amendment to the federal Constitution. The Senate adopted the proposed Thirteenth Amendment on April 8, 1864, but it was not until January 31, 1865, that the required two-thirds vote could be mustered in the House. As submitted to the states, the amendment prohibited slavery and involuntary servitude, except as a punishment for crime, within the United States or any place subject to their jurisdiction, and empowered Congress to enforce it.

The constitutionality as well as the wisdom of the amendment was elaborately discussed. It was the first example of the use of the amending process to accomplish a nationwide substantive reform, as distinguished from procedural reform or limitations upon federal power. Opponents of emancipation argued that the amending power did not extend to interference in the domestic institutions of the states. For the central government thus to invade the field unquestionably reserved by the Constitution to the states would produce a revolutionary alteration of the basic American federal system. It would be equivalent to the adoption of a new constitution, for which the unanimous consent of the states would be necessary, not merely the three-fourths required for an amendment.

Though plausible, this argument is untenable. Article V, containing the amending process, is an integral part of the Constitution, agreed to by all the states at the time of ratification. Except for the restriction concerning the equal vote of the states in the Senate, all parts of the Constitution are subject to the amending power. The Constitution expressly declares that an amendment properly made becomes "valid to all Intents and Purposes, as Part

of this Constitution," and has as much force as any other provision. Therefore, the amending power is equivalent to the constitution-making power and as such is above the authority of the federal government or the individual states.

The validity of the ratification of the Thirteenth Amendment was open to challenge. The votes of 27 of the 36 states were required for ratification; yet there were only 25 states aside from the former Confederate states, of which Kentucky and Delaware, which still had slavery, rejected the amendment. Hence four "seceded" states were necessary for ratification, and eight were actually counted in the official proclamation of December 18, 1865, which declared the amendment in force. These Southern ratifications were made by provisional governments set up under President Johnson's plan of reconstruction, which Congress later refused to recognize as valid governments within the Union. Yet Congress was willing to consider them competent for ratification of the Constitution, one of the many anomalies of reconstruction. In any event the Thirteenth Amendment definitely ended the institution of slavery, which had affected so seriously the previous constitutional development of the United States.

IMPAIRMENT OF CIVIL RIGHTS

One of the major constitutional issues of the war was the government's authority to impair civil rights in wartime. Two basic factors made this issue particularly prominent. First was the prevailing Anglo-American concept of the "rule of law"—that the officers of government are always subject to the law and prohibited from exercising arbitrary authority over citizens. The peaceful conditions which had prevailed except for a few brief periods since the adoption of the Constitution had accustomed the American people to a policy of noninterference with civil rights by the federal government. There had been very few occasions for suspension of the habeas corpus privilege, censorship of the press, or the establishment of martial law. There was in America no tradition or important precedent for military rule or summary procedure even for a war emergency.

The second factor was the extensive disloyalty that prevailed in the Union states, especially in the border states. Many disloyal citizens positively sympathized with the Southerners and were eager

to aid their cause. Most of their activities were designed to bring about Union defeat. These included spying, sabotage, recruiting for the enemy, stealing military supplies for potential Confederate invasions of the North, carrying treasonable correspondence, plotting to split the remaining Union states, and otherwise aiding the enemy. A larger number of disloyal citizens professed loyalty to the Union but openly opposed the government's fundamental policy of suppressing the rebellion by a complete subjugation of the Confederacy. They claimed, unrealistically, that the Union could be restored peaceably by negotiation and blamed the Republican Party for the war. Their activities were generally confined to such actions as discouraging enlistments, aiding desertion, circulating disloyal literature, and denouncing the Lincoln administration and Republicans in general.

Upon the outbreak of hostilities Lincoln decided that existing laws and judicial procedures were inadequate for controlling such extensive disloyal activities. Although the old treason law was broadened by the Conspiracies Act of July 1861 and the new Treason Act of July 1862, the administration made only slight use of treason or conspiracy prosecutions. With a pro-Southern or lukewarm jury, conviction in such a technical judicial proceeding as treason would generally be difficult to obtain. Moreover, many of the disloyal activities could not legally be construed as treason. In the North grand juries often brought indictments for treason or conspiracy, but the usual practice was to keep them on the docket from term to term and eventually to drop them. The district attorneys followed the wishes of the President and the Attorney General in not pressing cases of this kind. Naturally, convictions were very few, and these sentences were seldom if ever fully carried out.

Instead of rigidly enforcing treason statutes, the Lincoln administration developed a policy of dealing with suspected persons through military arrests and the suspension of the privilege of habeas corpus. In the early part of the war this policy was restricted to definite localities specified in presidential proclamations. Its operation was entrusted to the State Department, which directed arrests through an elaborate secret service as well as through federal marshals and military authorities. The national situation was very critical at the time and hundreds of arrests were made. Prisoners were not told why they were arrested, and often the authorities acted

without sufficient investigation or evidence to provide a reasonable basis for definite charges. With the habeas corpus privilege suspended, prisoners were held without legal action until the emergency which had led to their arrest had passed. Judges often sought to secure the release of such prisoners, but provost marshals and other military officers were usually under orders to disregard judicial mandates and to resist the execution of writs. This procedure resulted in numerous conflicts between civil and military authorities, with the latter naturally controlling action.

In 1862 the administration both modified and extended its policy. In February the control of arbitrary arrests was transferred to the War Department and the policy was mitigated by establishing a commission to provide for the examination and release of political prisoners. On September 24, however, the President issued a sweeping proclamation declaring that all persons discouraging enlistments, resisting the draft, or "guilty of any disloyal practice affording aid and comfort to rebels . . . shall be subject to martial law, and liable to trial and punishment by courts-martial or military commissions." Further, the habeas corpus privilege was suspended for all persons arrested or already imprisoned on such charges. Thereafter thousands of citizens suspected of disloyalty were summarily arrested and imprisoned in all parts of the country.

In the actual use of such extraordinary powers the Lincoln administration generally manifested considerable circumspection and leniency. The broad prerogatives assumed and announced in proclamations were not always exercised. Since arrests were often precautionary, designed to prevent violence or interference with military or other governmental activities, many prisoners were released within a short time. Those detained were usually treated without undue harshness.

Lincoln's policy of suspending the privilege of habeas corpus encountered considerable criticism from the bench, including that of Chief Justice Taney in *Ex parte Merryman* (1861). John Merryman, an officer of a Maryland secessionist military organization which had destroyed some railroad bridges, was arrested in May 1861 by order of General Cadwalader, commander of the district, and imprisoned in Fort McHenry. Merryman's petition for a writ of habeas corpus was presented to Taney, who seems to have gone to Baltimore chiefly for the purpose of receiving it in his capacity

of circuit judge. Taney issued a writ of habeas corpus directing Cadwalader to produce Merryman in court so that the cause of his imprisonment could be judicially examined. In accordance with his military instructions, the general refused to comply but sent a respectful reply indicating the cause of Merryman's arrest and citing the President's suspension of the writ. Taney then attempted to have Cadwalader himself brought into court but without success.

Having failed to secure compliance with the writ, the aged Chief Justice read an opinion vigorously denying the President's right to suspend the writ, and had a copy of it transmitted to the latter. The President's action in the Merryman case and many similar cases, said Taney, was without legal warrant, since the privilege of the writ of habeas corpus could be suspended constitutionally only by act of Congress. Taney argued for exclusive congressional control of suspension of the writ from Marshall's opinion at the time of the Burr conspiracy as well as from the fact that the habeas corpus clause occurs in Article I, Section 9, which deals with the legislative power. The President's only power where the rights of citizens are involved is to take care that the laws "be faithfully carried into execution as they are expounded and adjudged by the co-ordinate branch of the government, to which that duty is assigned by the Constitution." Instead of performing his constitutional duty of assisting the judiciary in enforcing its judgments, the Chief Executive in this case had actually thrust aside the judicial authorities and substituted military government. If such military usurpation was to be permitted, Taney concluded, "the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found."

Although Taney's views were hailed by Southern sympathizers as a sound defense of American civil liberties, they were disapproved by most unionists and refuted by the Lincoln administration. The President in his message to Congress in July 1861 justified the arrest and detention of certain individuals deemed "dangerous to the public safety" because of the inability of the courts to deal adequately with organized rebellion. He answered Taney's challenge for a faithful execution of the laws by arguing that it would be better for the President to violate a single law "to a very limited extent" than to have all laws go unexecuted and "the Government

itself to go to pieces" through failure to suppress the rebellion. Lincoln denied, however, that he had violated any law, arguing that since the Constitution permits suspension of the writ of habeas corpus during a rebellion and does not specify which branch of the government is to exercise the suspending power, the President in an emergency must be allowed to use his discretion in the matter. Later Lincoln emphasized the precautionary or preventive purpose of the arbitrary arrests, which were made "not so much for what has been done, as for what probably would be done."

In a more elaborate opinion Attorney General Edward Bates refuted Taney's contention that the President had violated his constitutional duty of executing the laws. The executive, he insisted, was not subordinate to the judiciary, but was one of three coordinate departments of government. Moreover, the President's oath to "preserve, protect, and defend the Constitution" makes it particularly his duty to put down a rebellion since the courts are too weak to do so. Bates cited *Martin V. Mott*[5] (1827) to support the President's discretionary power in the manner of discharging his duty. Therefore, if the President in case of rebellion or insurrection considers the suspension of the habeas corpus privilege necessary for the public safety he may order it on his own authority.

Beneath all the legal arguments lay a fundamental difference in philosophy of government between the President and the Chief Justice. Lincoln strongly believed that the preservation of the Union was of such transcending importance that the federal government should, if necessary, use extraordinary powers, even at the temporary expense of civil liberties, to attain that objective. Taney, on the other hand, considered the dissolution of the Union as less disastrous than the violence and bloodshed which was necessary to preserve it by civil war.

THE HABEAS CORPUS ACT AND IMMUNITY OF FEDERAL OFFICERS

Through the Habeas Corpus Act of March 3, 1863, Congress attempted to regularize and modify the President's control of political prisoners so that the authority of the courts would be respected without restricting too seriously the executive and military

[5] See p. 245.

authorities. The President was "authorized to suspend" the habeas corpus privilege and military officers were relieved from the obligation to answer the writ. On the other hand, the Secretaries of State and War were required to furnish lists of political prisoners to the federal courts, and if grand juries found no indictments against them they were to be released upon taking the oath of allegiance. Thus in degree congressional authority and regulations were substituted for executive authority, and judicial procedure rather than executive discretion was made the basis for the detention of prisoners.

The Habeas Corpus Act also contained indemnity sections which granted broad immunity to federal enforcement officers and extended the jurisdiction of federal courts at the expense of state judiciaries. It provided that any order made by or under the authority of the President should be a defense in all courts to any action or prosecution for any search, seizure, arrest, or imprisonment. Provision was also made for the removal of suits of this type from state to federal courts and for imposing a two-year limitation upon the initiation of such suits.

In practice the Habeas Corpus Act seems to have made little difference in the crucial matters of arrest, confinement, and release of prisoners. Not until September 1863 did the President issue a new proclamation basing his suspension of the habeas corpus privilege upon the law of March 3. The executive authorities were negligent also in furnishing the courts with lists of prisoners. Judge Advocate General Joseph Holt ruled that the new law did not apply to prisoners triable by military commissions, a ruling which left the executive department without restraint in all cases where martial law was instituted. Release of political prisoners, therefore, continued to be largely at the discretion of the War Department rather than by federal judges.

With the restoration of peace and normal judicial procedures in the loyal states in 1865, the immunity or indemnity features of the Habeas Corpus Act became important. Many people considered these sections unconstitutional, since they afforded blanket protection to military and civil officers from such prosecution as would normally follow an unwarranted invasion of private rights or an actual injury of persons and property. Beginning in 1865 many individuals previously held on suspicion of disloyalty sued federal

officers for false imprisonment. Suits, both civil and criminal, were brought in state courts and efforts were made to prevent them from being transferred to federal courts. In Kentucky, where opposition to the immunity features was most determined, former federal officers were convicted of violating state laws and subjected to fines and imprisonment for such war activities as giving passes to Negroes or impressing horses for pursuit of guerillas. Special state laws were enacted to obstruct the federal law by prohibiting the removal of alleged immunity cases from Kentucky to United States courts. In 1866 Congress attempted to meet such state defiance by supplementary legislation making state judges liable if they proceeded with cases after proper action had been taken to transfer them to the federal courts. Considerable legal confusion persisted in this field for several years, with instances of injustice on both sides.

The immunity and jurisdictional features of the federal law were characteristic of hasty and extreme war legislation and were open to serious objections. Chief among these were the excessive federal jurisdiction conferred, the extraordinary methods of acquiring such jurisdiction, the setting aside of existing judicial remedies for private wrongs, the subjection of state judges to personal damages, the application of a federal statute of limitations to state causes, and the failure to provide any means of relieving those who were injured by the acts of indemnified officers. On these grounds certain state courts declared the law unconstitutional, but the Supreme Court later upheld its constitutionality in *Mitchell v. Clark* (1884). However, later legislation dealing with this subject was to avoid most of the objections that applied to the Civil War law.

MARTIAL LAW AND THE MILLIGAN CASE

The climax in the impairment of civil rights was the institution of martial law and the limited use of military tribunals for the trial of civilians in both border and free states. Since portions of all the border states were at various times during the war occupied by Confederate troops or hostile guerillas, martial law was employed there as an essential means of military security. Moreover, disloyalty to the Union in these areas was so widespread and so violent that the President considered martial law necessary for the preservation of peace and order. Usually martial law was applied in specified limited districts where the situation seemed most serious, but

in July 1864 Lincoln put the whole state of Kentucky under martial law. At the time of Lee's invasion of Pennsylvania in 1863, the President, in response to the petitions of many citizens, proceeded to put that area under martial law.

In all these instances, however, actual interference with the civil authorities was generally held to a minimum and the power over citizens entrusted to the military authorities was sparingly used. Political and judicial officers continued to function except as interruption was necessary for the military authorities to preserve order and punish military crimes. In short, the federal government made no effort to carry martial law beyond certain specified objectives considered necessary for the successful prosecution of the war.

More important to constitutional law was the actual trial and conviction of citizens before military tribunals. In regions under martial law military commissions could properly be used for the trial of civilians who had committed offenses of a military character, such as sniping or spying. The vast majority of cases brought before military commissions in the border states were of this general type, and many individuals were convicted and punished, sometimes severely, for such offenses. Little adverse criticism was made at that time, and little has been made since.

A great legal controversy arose, however, when citizens were subjected to military tribunals in regions remote from military operations and where the civil courts were unimpeded by the course of the war. This situation developed during 1863 and 1864, especially in Ohio, Indiana, and Illinois, where many Democrats were so opposed to the administration's new war policies that they were demanding a negotiated peace and obstructing the prosecution of the war. Some of these so-called "Copperheads" were arrested by zealous military commanders for "disloyal practices affording aid and comfort to rebels" and in accordance with the President's proclamation of September 24, 1862, were tried and sentenced by military commissions.

Two of these cases, which attracted nationwide attention, strikingly reveal the effect war may have upon decisions of the Supreme Court. The first case involved Clement L. Vallandigham, a former Democratic congressman of Ohio. In April 1863 General Ambrose Burnside, commanding the military department of Ohio, issued a

general order stating that persons declaring sympathy for the enemy would be arrested and punished by military procedure. On May 1, Vallandigham made one of his public speeches bitterly denouncing the Lincoln administration for needlessly prolonging the war. For this offense he was placed under military arrest and promptly tried by a military commission in Cincinnati, although he strongly denied its jurisdiction. The commission found him guilty of disloyal sentiments with the object of weakening the government and sentenced him to close confinement during the war.

Vallandigham then applied to the judge of the United States Circuit Court for a writ of habeas corpus, which the judge, after the unusual procedure of requesting and receiving a statement from General Burnside, refused to issue. Whereupon the case was carried to the Supreme Court on a motion for a writ of certiorari to review the sentence of the military commission. Vallandigham's attorney argued that the jurisdiction of a military commission did not extend to a citizen who was not a member of the military forces, that the prisoner had been tried on a charge unknown to the law, and that the Supreme Court had the power to review the proceedings of the commission.

In February 1864, in *Ex parte Vallandigham,* the Supreme Court refused to review the case, declaring that its authority, derived from the Constitution and the Judiciary Act of 1789, did not extend to the proceedings of a military commission because the latter was not a court. The Supreme Court, said Justice James Wayne in the official opinion, "cannot without disregarding its frequent decisions and interpretation of the Constitution in respect to its judicial power, originate a writ of certiorari to review or pronounce any opinion upon the proceedings of a military commission." Neither in this case nor in any other during the war did the court deny or even question officially the President's authority to establish military commissions for the trial of civilians in nonmilitary areas.

A very similar case but one destined to result in quite a different decision was that of L. P. Milligan, who with certain associates was arrested in Indiana on October 5, 1864, by the military commander of the district. A few weeks later Milligan was tried before a military commission at Indianapolis and convicted of conspiracy to release and arm rebel prisoners and to march with these men into Kentucky and Missouri in order to co-operate with rebel forces

there for an invasion of Indiana. In comparison with Vallandigham, Milligan had engaged in distinctly subversive or treasonable activities. The commission sentenced him to be hanged on May 18, 1865, but President Andrew Johnson commuted the sentence to life imprisonment. Milligan petitioned the federal circuit court for a writ of habeas corpus, and the judges, disagreeing, certified the question of law to the Supreme Court.

In April 1866, in the midst of the conflict between Congress and President Johnson over reconstruction, the Supreme Court rendered its famous decision in *Ex parte Milligan*, unanimously holding the military commission authorized by the President to have been unlawful. Contrary to the Vallandigham decision, the Court asserted its right to review the action of a military commission and to nullify it if the action was without legal foundation. Since Milligan had not been indicted by a grand jury at the next session of the federal court, the Court held that according to the Habeas Corpus Act of March 1863 the government had no legal right to hold him and that he must be released.

A majority of five justices, with David Davis as their spokesman, chose to state their further opinion that Congress as well as the President was without legal power to institute a military commission to try civilians in areas remote from the actual theater of war, where the civil courts were open. Davis maintained that such a military tribunal violated the safeguards for civil liberties established by the Constitution and the Bill of Rights. "The Constitution of the United States," he declared, "is a law for rulers and people, equally in war and in peace. . . . No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence."

Davis insisted that Milligan should have been tried by the civil courts in Indiana, which were fully competent to deal with such cases, and that "no usage of war could sanction a military trial there for any offense whatever of a citizen in civil life." Martial law, he declared, might be used in case of invasion, but it cannot arise merely from "a threatened invasion." "The necessity must be actual

and present, the invasion real, such as effectually closes the courts and deposes the civil administration. . . . Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war."

Chief Justice Chase, speaking for a minority of four, dissented from the majority's narrow delimitation of military authority and insisted that "Congress had power, though not exercised, to authorize the Military Commission which was held in Indiana." Congress' constitutional powers to declare war, to raise and support armies, and to make regulations for the military forces, Chase maintained, necessarily encompass "many subordinate and auxiliary powers" and are not abridged by "the fifth or any other amendment." Therefore it cannot be doubted, the Chief Justice concluded, that "in such a time of public danger" as that prevailing in Indiana in October 1864, "Congress had power, under the Constitution, to provide for the organization of a military commission, and for trial by that commission of persons engaged in this conspiracy. The fact that the federal courts were open was regarded by Congress as a sufficient reason for not exercising the power; but that fact could not deprive Congress of the right to exercise it. Those courts might be open and undisturbed in the execution of their functions, and yet wholly incompetent to avert threatened danger, or to punish, with adequate promptitude and certainty, the guilty conspirators."

Despite the controversy and criticism it aroused at the time, the Milligan decision came to be considered as one of the real bulwarks of American civil liberty. It proclaimed in sweeping terms that the constitutional rights of citizens would be protected by the federal judiciary against arbitrary or military rule established by either President or Congress, in war as well as in peace. It focused national attention upon what was, potentially at least, the most vulnerable phase of Lincoln's handling of the home front—the tendency to use arbitrary means to deal with disloyalty when regular civil means were available and to act on his own authority when congressional authorization could have been obtained.

It is questionable, however, whether the majority opinion in *Ex parte Milligan* was a realistic approach either to the Civil War experience or in providing for a future contingency of a similar kind. Davis' declaration that the Civil War had demonstrated that military

rule in nonmilitary areas was never necessary scarcely coincided with the facts. To be sure, the rebellion might well have been suppressed without resort to martial law in the loyal states, but actually it was not. Lincoln strongly believed that disloyalty in the North might become so violent, unless held in check by military authority, that it would materially bolster Confederate morale and thus jeopardize the Union cause, or at least prolong the war and bring about additional loss of life. Therefore his policy of arbitrary arrests and military trials for suspected citizens was essentially precautionary and in case of civil war perhaps necessary. Although as commander in chief he felt impelled in such a great crisis to employ military authority to curtail temporarily certain civil rights, he made no attempt to establish a despotic military regime. He did not believe that such a policy would subvert the Constitution or permanently impair the rights of citizens, and his belief proved to be correct.

In none of the more recent wars has disloyalty seemed to have been sufficiently prevalent to require the type of arbitrary or military control of citizens employed during the Civil War. In World War II, however, Japanese-American citizens had their civil rights suspended more completely and for less justifiable cause, and with the approval of the Supreme Court.[6] If a future invasion or similar emergency should again raise the main issue of the Milligan case, Congress might choose to act in conformity with the minority rather than the majority interpretation.

CONSTITUTIONAL SIGNIFICANCE OF THE CIVIL WAR

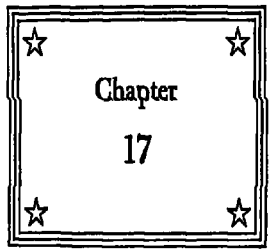
The Civil War was one of the great turning points in American constitutional development. Some of the most profound issues that had agitated the American people since winning their independence were now definitely settled, while new ones were created or recognized.

The most significant result was the definitive decision as to the nature of the Union under the Constitution. The North's complete military victory destroyed not only the Confederacy but also the doctrine that the Constitution was a compact of sovereign states, each with the right to secede from the Union. The Supreme Court confirmed this military decision in *Texas v. White* (1869), when

[6] See Chapter 29 for a discussion of more recent aspects of this issue.

it declared: "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." The Constitution was now recognized everywhere as the supreme law of the land, with sovereignty residing in the people of the United States collectively. A unified American nationality gradually became a reality, replacing the intense sectionalism and excessive decentralization of the preceding era. The term "national government" became almost synonymous with "federal government." This development was in harmony with the general growth of nationalism throughout Western civilization, but it had been attained at a terrible price in loss of lives and property and in the destruction of much of the culture of the pre-war South.

The war had four other important constitutional results. First, closely related to the establishment of national supremacy was the marked centralization of authority in the federal government. This national authority was extensively used during the reconstruction period and then was largely neglected for a generation before it was reasserted on a positive and permanent basis during the twentieth century. Second, Lincoln established a precedent for strong presidential leadership in case of a great national crisis, although this also was not to become important until the twentieth century. Third, the destruction of the institution of slavery eliminated the source of great constitutional conflict, but the postwar status of the freed Negroes raised many new issues. Fourth, the Civil War demonstrated that American democracy could fight a gigantic war under the Constitution without critically jeopardizing the basic rights of citizens.



Reconstruction: The Presidential Phase

THE DESTRUCTION of the Confederacy settled one great constitutional issue—the nature of the Union—but it created additional constitutional issues of critical importance. What was the legal status of the defeated states, and what steps were necessary to restore them to a normal position in the Union? The Constitution, which did not contemplate the possibility of secession, contained no direct answer to either question. The way was thus opened for the formulation of a variety of constitutional theories resting in part upon certain seemingly relevant passages in the Constitution itself, and in part upon differing theoretical observations on the effect of secession and civil war. One theory became the basis for an attempted executive program of reconstruction, while a second group of related theories furnished the foundation of a congressional reconstruction advanced by the so-called Radical Republicans.

PRESIDENTIAL RECONSTRUCTION: THE FIRST PHASE

The first ideas on reconstruction to be given practical expression were those advanced by President Lincoln while the war was still in progress. Lincoln held that secession was null and void *ab initio*, and that the so-called seceded states were therefore still in the Union. He admitted that the Southern states were out of their normal relationship to the other states and the federal government, since they had no loyal governments and were controlled by persons in rebellion against federal authority. But the states, as political entities distinguished from their governments, still were in the Union. Hence all that was necessary for reconstruction was the suppression of actual military rebellion, the creation of loyal state governments by loyal citizens, and the resumption of normal relations with the federal government.

Lincoln assumed that it was the duty of the federal government to assist the states in reconstruction. The justification for this assumption he found in Article IV, Section 4, of the Constitution, by which the United States guaranteed every state a republican form of government. All subsequent reconstruction schemes, by the way, drew upon this somewhat vague constitutional provision as justification for federal controls.

Finally, Lincoln assumed that the President had authority to carry through a competent reconstruction program with little congressional assistance. A principal step in the plan was the suppression of rebellion, already being accomplished under the President's war powers. Lincoln admitted that in practice Congress would have final authority to pass upon presidential reconstruction, since it could seat delegates from Southern states at its discretion. President Andrew Johnson was later to claim that Congress could not lawfully refuse to seat delegates from reconstructed states, but Lincoln did not advance this argument.

Lincoln's plan had two great virtues. It was consistent, for it rested upon the same premise of the nullity of secession upon which the administration had prosecuted the war. And it was simple of execution and promised a rapid restoration of a normally functioning constitutional system. Its great practical weakness was that Congress could destroy it merely by refusing to seat delegates from the reconstructed states.

Presidential reconstruction began while the Civil War was still in progress. In December 1863, more than a year before the war ended, Lincoln issued a proclamation offering a pardon to anyone engaged in rebellion, certain Confederate officials excepted, provided the individual took an oath of loyalty to the United States. The proclamation further declared that whenever the number of loyal persons qualified to vote within a state should equal 10 per cent of the total qualified voters as of 1860, the loyal persons would be empowered to form a state government, which would receive federal protection under the constitutional provision guaranteeing every state a republican form of government and protecting it from domestic violence. The President also implied that the abolition of slavery would not be unwelcome, although he said nothing of Negro suffrage, believing that the Negro was not yet prepared for it.

Under this proclamation, "loyal" state governments were erected before the end of the war in Tennessee, Arkansas, and Louisiana. The loyal voters in Union-occupied areas in these states first elected delegates to constitutional conventions. These conventions repudiated secession, abolished slavery, drafted new state constitutions, and provided for new state governments which were set up during 1864. In Virginia, it will be recalled, the Pierpont government had been created under a similar arrangement in 1862, and had given its consent to the separation of West Virginia in 1863. Thus four loyal state governments existed in the South before the war ended.

These governments were exceedingly flimsy affairs. They had almost no popular support and undoubtedly would have collapsed except for federal military protection. Congress thought so little of them that with certain exceptions it refused to seat their senators and representatives. Yet Lincoln, acknowledging their weakness, insisted that they were constitutionally correct and that they represented a very real opportunity for carrying out reconstruction with as little difficulty as possible.

Soon after Johnson entered office in April 1865, he adopted the main features of Lincoln's reconstruction theory and practice. In a proclamation of May 29, Johnson pardoned all persons lately engaged in rebellion, except for high Confederate officials and Confederate supporters who possessed more than $20,000 in property. Persons accepting amnesty were required to take an oath of loyalty

to the national government, which included a promise to abide by and support all federal laws and proclamations adopted during the war concerning the emancipation of slaves.

At the same time, Johnson issued a proclamation appointing W. W. Holden provisional governor of North Carolina and outlining a plan of presidential reconstruction for that state. The governor was to call a constitutional convention of delegates chosen by and from loyal voters accepting the presidential amnesty. The convention was to "alter and amend" the state constitution and to take the necessary steps to restore the state to its normal constitutional status. Significantly, the proclamation said nothing of Negro suffrage, although in subsequent statements the President advocated extension of the franchise to Negro taxpayers and to literate Negroes. In the course of the next six weeks Johnson issued similar proclamations for the remaining Southern states where Lincoln-sponsored governments had not been erected. Meanwhile, he had extended full recognition to the four Lincoln governments.

Between August 1865 and March 1866, conventions met in all of the seven unreconstructed states. These bodies, except in South Carolina, passed resolutions declaring the various ordinances of secession to have been null and void. South Carolina, clinging pathetically to dead constitutional theory, merely repealed the ordinance. All of the conventions formally abolished slavery within their respective states. With the exception of South Carolina and Mississippi, all repudiated the state debt incurred in rebellion. The conventions also provided for elections of state legislative, executive, and judicial officers.

The newly elected legislatures met shortly and, except in Mississippi, ratified the Thirteenth Amendment. Johnson virtually insisted upon ratification, and it was by this device that the requisite three-fourths majority of the states was secured for the adoption of the amendment. This requirement of ratification was altogether inconsistent with the theoretical sovereignty of the new governments; however, this technical consideration attracted little notice. The new legislatures also chose United States senators, and provided for the election of House members.

Thus by the time Congress met in December 1865, the Johnson reconstruction program was approaching completion in every Southern state. All that remained was for Congress to seat the Southern

delegates and constitutional reconstruction would be complete. Instead, Congress first rejected and then overthrew the entire Johnson program.

THE RISE OF THE RADICALS

It will be recalled that during the war there had come into being a congressional bloc which sought a more vigorous prosecution of the war. Well before the war ended, this bloc, which came to be known as Radicals or Radical Republicans, assumed a more positive role in opposing the reconstruction program and favoring more extreme measures. This group objected to Lincoln's program on several counts. First, while the program implied the abolition of slavery, it guaranteed neither Negro suffrage nor Negro civil rights. Many Radicals were convinced that the Negro ought to be elevated forcibly to a position of civil, social and political equality with the whites. Second, the program contained few punitive provisions, whereas many Radicals believed that all Southerners should be punished severely for rebellion. Third, the program virtually excluded Congress from any share in reconstruction, and thus it aroused congressional jealousy. Fourth, the program contained no guarantees of Republican political ascendancy, which might be threatened were the Democratic Southern states immediately readmitted to Congress. This objection was strengthened by the consideration that the abolition of slavery presumably made obsolete the three-fifths clause for slave representation. Negroes as free men would be counted on the same basis as whites in determining representation, so that one result of abolition would be an increase in the representation in Congress of the late slave states. Ex-Confederates with increased representation would probably vote with Northern Democrats to overthrow Republican ascendancy in Congress.

In short, the Radicals were determined to force a social revolution in the status of the Southern Negro, to impose punitive measures upon ex-Confederates, to secure control of reconstruction for Congress, and to build up a Radical party organization in the South which would help assure Republican political ascendancy nationally. Not until these requirements were guaranteed were the Radicals willing to restore the Southern states to representation in Congress and to equal status in the Union.

A number of related constitutional theories were advanced to support the Radical objectives, the most important being the "conquered provinces" and "state suicide" theories.

The conquered provinces theory was advanced by Thaddeus Stevens of Pennsylvania, who emerged in 1865 as the determined and embittered leader of the Radical bloc in the House of Representatives. Stevens, a stark realist, argued that secession, constitutional or not, had been an accomplished fact. The South had organized as a foreign state and had waged war against the United States. This action, he held, had severed all existing compacts and brought the Confederacy under the international law of war. Conquest of the South had thus reduced the former states to the status of mere conquered provinces with no internal political rights whatever.

The state suicide theory was advanced by Charles Sumner, senator from Massachusetts and idealistic champion of Negro rights. Sumner held that the mere act of secession instantly destroyed the state as well as its government as a political entity. Unlike Stevens, he contended that secession did not remove the state from the Union but that it worked "an instant forfeiture of all those functions and powers essential to the continued existence of the state as a body politic." The effect of secession was ultimately to reduce the state's domain to the status of unorganized territory. Under the Constitution, Congress had exclusive power to govern the territories; hence the late Confederate states were now completely subject to congressional authority.

The two theories differed in premise, but their resultant conclusions were identical. Since the seceded states had become legally nonexistent, they were now mere unorganized territory. The Constitution gave Congress specific power to govern the territories; hence the South properly should be under direct congressional control. If Congress saw fit to do so, it could presumably govern the South indefinitely as unorganized territory. Moreover, Congress had sole power to create new states and admit them to the Union. Certainly the President could not do so. The presidential program was at best tentative; at worst, it was illegal. Since the congressional power to admit new states was discretionary, Congress could impose conditions precedent upon the new states prior to their admission. Conditions imposed might well include dis-

franchisement of Confederate supporters, a guarantee of Negro civil rights, and Negro suffrage.

The obvious weakness of both theories was their inconsistency with the constitutional doctrines under which the Union had prosecuted the Civil War. Union theorists had repeatedly drawn a sharp distinction between the states as entities and the people and governments thereof. Northern thinkers had contended that the states themselves as distinct from their governments remained unchanged by rebellion. The congressional Radicals, however, denied this doctrine and proceeded on the premise that the rebellion of individuals destroyed the states as entities.

The first organized Radical attack on presidential reconstruction came with the passage of the Wade-Davis bill on July 2, 1864. This measure provided that a majority of the white male population in any state must take an oath of loyalty to the Constitution before a constitutional convention could be called. This body must in turn draft a constitution disfranchising Confederate civil and military officials, formally abolishing slavery, and repudiating the Confederate debt. The President might then obtain the formal consent of Congress to recognition of the government erected under this constitution. Lincoln pocket-vetoed the bill, but its provisions anticipated future congressional reconstruction plans.

When President Johnson entered office in April 1865, the Radicals hoped with some reason that he would support their program. The new President was a fiery Tennessee unionist, recently loud in his denunciation of the "traitors" and the "slavocracy." When Johnson, after some hesitation, adopted the Lincoln program, Stevens, Sumner, and their followers were furiously indignant. For the moment, however, they could do nothing to interfere with Johnson's course, for Congress would not convene until December, and meanwhile Johnson refused to call a special session.

When Congress assembled in December 1865, the Radicals at once attacked Johnson's program. It was as yet uncertain that they could command a two-thirds majority and assume control of reconstruction, but they scored an immediate success when they blocked the admission of Southern representatives and senators, by means of a Republican party caucus order instructing the clerks in each house to ignore the seceded states in the roll-call.

Radical leaders next secured the appointment of a Joint Commit-

tee on Reconstruction, composed of nine representatives and six senators, who were instructed to make a thorough study of the entire reconstruction problem and to report upon whether any of the Southern states ought to be represented in Congress. Another resolution was passed pledging that neither house would seat representatives from the seceded states until the Joint Committee made its report.

The new committee's most powerful figure was Thaddeus Stevens, now in undisputed ascendancy among the Radicals. The chairman, Senator William P. Fessenden of Maine, was something of a moderate, but other important members, Representatives John A. Bingham of Ohio, Roscoe Conkling of New York, and George Boutwell of Massachusetts, were all thoroughgoing Radical Republicans. The temper of the committee's report was thus virtually predetermined.

It was soon clear that the Radical Republicans had much popular support and were rapidly gaining in strength. Four long years of terrible warfare had left their mark on the Northern mind; and the assassination of Lincoln, widely attributed to Confederate machinations, greatly increased Northern bitterness. Even generous spirits desired adequate guarantees that the fruits of the war would not be lightly thrown away in a soft and careless reconstruction program.

Several developments strengthened this attitude. The so-called "Black Codes," adopted by the reconstructed states in 1865 and 1866, bore a suspicious resemblance to the ante-bellum slave codes. These codes contained harsh vagrancy and apprenticeship laws, which potentially lent support to the establishment of a system of Negro peonage. Their penal sections provided more severe and arbitrary punishments for Negroes than for whites. The new codes undoubtedly imposed an inferior status upon the Negro, and the North mistakenly viewed them as an attempt to subvert the Thirteenth Amendment.

The South also erred politically in electing prominent ex-Confederates to high state and national offices. Georgia, for example, sent Alexander H. Stephens, former Vice-President of the Confederacy, to the Senate. Stephens had opposed secession in 1861 as unconstitutional and revolutionary and an error in political tactics; but the North nonetheless thought his election to the Senate

compounded treason with honor, and expressed doubt concerning Southern sincerity in accepting the results of the war.

Johnson's political ineptitude strengthened the Radicals' position still further. The President was a courageous fighter, and his views on reconstruction, essentially identical with Lincoln's, were moderate and intelligent. But his coarse mannerisms, his bitterness of speech, and his uncompromising attacks upon all who differed with him eventually drove many moderates into the Radical camp. Perhaps Lincoln himself could not have resisted the Radical onslaught, but Johnson's personal shortcomings undoubtedly made his opponents' task much simpler.

By the summer of 1866, the Radicals had a firm grip upon the Republican party machinery in Congress, and from that time forward their cause was identified more or less completely with that of the regular Republican organization. Radicals and Republicans were now practically one.

EVOLUTION OF THE FOURTEENTH AMENDMENT

By early January of 1866, the Radicals were openly formulating their own program, and so preparing for a decisive conflict with the President. The more extreme Republicans were now determined forcibly to impose a revolution in Negro social status and Negro suffrage on the South as a condition precedent to readmitting the seceded states to Congress. Many of the Radicals, motivated by genuinely high ideals, viewed this procedure as a necessary step in obtaining justice for the Negro. The more politically minded believed that a Southern social revolution and mass Negro suffrage would pave the way for firm Radical control in these states and so offset the prospective increase in Southern congressional representation resulting from the abolition of slavery. A series of tentative Radical measures eventually led to the formulation of the Fourteenth Amendment to the Constitution, adopted by Congress in June 1866.

The first step in the evolution of the amendment came with the passage by Congress of the Freedmen's Bureau Bill on February 19, 1866. The Freedmen's Bureau had been created by act of Congress in March 1865, as an emergency wartime relief agency for distressed freedmen. The new bill, introduced by Senator Lyman Trumbull of Illinois, extended the Bureau's life indefinitely. More

important, however, it extended federal military jurisdiction over the civil rights and immunities of the Negro. Any person in any of the formerly seceded states charged with depriving a freedman of his civil rights was to be tried by a military tribunal or Freedmen's Bureau agent in accordance with martial law. No presentment or indictment was required.

The bill was open to serious constitutional objections. It violated the procedural guarantees of the Fifth Amendment, which specifically enjoined presentment and indictment in federal criminal trials except in the armed forces and in the militia in time of war, and which clearly implied the right of trial by regularly established civil tribunals. Moreover, the bill placed ordinary private rights under federal jurisdiction, although the definition and control of such rights was obviously not within the express or implied powers of Congress and had always been reserved to the states.

In answer to these objections, Trumbull in debate contended that the Thirteenth Amendment, which empowered Congress to enforce its provisions by appropriate legislation, was sufficient warrant for congressional action protecting the freedmen's rights. This contention, as many Democrats and moderate Republicans pointed out, was a dubious one, for it assumed that the mere abolition of slavery not only automatically elevated the Negro to the same status as the white population but also placed all Negro rights under federal protection.

Johnson vetoed the bill, calling the provisions for military tribunals a violation of the Fifth Amendment, and questioning the constitutional capacity of the present Congress to function at all. A Congress which barred eleven states outright, Johnson said, was not legally capable of enacting any legislation, especially for the states which it barred. Congress sustained Johnson's veto of the Freedmen's Bureau bill by a narrow margin. This was the last time it did so on any important measure, however, for the Radicals were growing steadily stronger.

The Civil Rights Bill, passed by Congress on March 13, embodied another and more detailed attempt by the Radicals to extend federal guarantees over Negro civil rights. It first declared that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed," were citizens of the United States. This section, shortly to be incorporated in the Fourteenth Amend-

ment, bestowed United States citizenship upon the Negro, and directly overruled the Dred Scott opinion, in which the Supreme Court had held Negroes to be incapable of federal citizenship. The bill next provided that Negroes were entitled to the same rights within the various states as were white citizens, and it then enumerated certain rights in detail. These included the right "to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property," and to the "full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens."

Although the Constitution contained no clause authorizing the national government to regulate citizenship, Congress had several times asserted the right, and the first section of the Civil Rights bill could therefore be defended on the basis of precedent. But as many conservatives, notably Senator Reverdy Johnson of Maryland, pointed out, the provision placing private rights under federal jurisdiction was open to the same constitutional objections as the Freedmen's Bureau Bill. Trumbull and other Radicals, however, defended the guarantee of civil rights as justified under the Thirteenth Amendment.

Johnson vetoed the bill, cogently presenting the same objections as he had stated against the Freedmen's Bureau Bill, but Congress on April 9 passed the law over his veto. After this defeat, the President lost all control over Congress. Although the Democratic minority continued to support the administration, the Radical Republican majority promptly passed all important reconstruction measures over Johnson's veto.

Meanwhile the Joint Committee on Reconstruction was engaged in an extensive study of the reconstruction problem. In January, Thad Stevens and Roscoe Conkling introduced a proposed constitutional amendment to exclude outright from the basis of congressional representation any person whose political rights were denied or abridged by the state on account of race or color. By implication this measure enjoined Negro suffrage under penalty of a reduction in the representation of any state not granting it. The amendment passed the House late in January, but the less radical Senate rejected it. After some further delay, the Joint Committee on April 30 reported out a far more comprehensive constitutional amend-

ment, destined to emerge with some modifications as the Fourteenth Amendment.

The opening sentence of Section I of the proposed amendment provided that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

Thus the lack of a citizenship clause in the original Constitution was formally remedied. National citizenship now became primary and state citizenship secondary; thereby the issue of the locus of citizenship, discussed in the Missouri Compromise and later debates and left in a confused condition by the Dred Scott decision, was finally put to rest. The clause also obviously conferred outright national and state citizenship upon Negroes, as was its intent.

The three remaining clauses in Section I guaranteed private rights against state interference:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

These provisions, largely the work of Representative John A. Bingham of Ohio, presumably gave constitutional sanction to the federal government's determination to protect the private and civil rights of Negroes. The "privileges and immunities" referred to were presumably those enumerated in more detail in the Civil Rights Act, although the Supreme Court was to deny this contention in the *Slaughterhouse Cases* (1873).[1] The clause guaranteeing due process of law was borrowed from the Fifth Amendment, the same injunction which there was lodged against the federal government now being applied as a limitation upon the power of the states. The provision that no state should deny any person equal protection of the laws seemed again to reinforce the Civil Rights Act. In everyday language, it warned the states not to discriminate against Negroes.

[1] See pp. 503–504.

Presumably Section 1 was written merely to guarantee Negro citizenship and protect Negro rights. Certain historians, however, have challenged this assumption, and have presented a so-called "conspiracy theory" of the Fourteenth Amendment. This theory had its inception in a statement made by Roscoe Conkling in arguing a case before the Supreme Court in 1882. Conkling stated that the Joint Committee had deliberately drafted the due process and equal protection clauses to protect corporate property, and had employed the word "person" instead of "citizen" in these provisions in order to extend their protection to corporations as well as humans. Some historians have taken Conkling's statement at face value, and have concluded that the Joint Committee, under the pretense of protecting human rights, engaged in a conspiracy to protect corporate property interests.

The conspiracy theory cannot stand up under close examination, however. It overlooks the apparent fact that the due process clause in the amendment was evidently lifted directly from the Fifth Amendment, where the word "person" is also used. Evidence from the Joint Committee's journal also indicates that Bingham selected the word "person" instead of "citizen" because the former term covered Negroes, while "citizens" might not do so. But the most obvious objection to the conspiracy idea is that it presupposes an ability on the Committee's part to peer a generation into the future and perceive the subsequent great expansion of substantive due process and its association with corporate property rights. Substantive due process—that is, due process as an absolute limitation upon legislative right as distinguished from mere procedural guarantees—was little known in 1866 and had seldom been associated with corporate property rights. Bingham, it is true, apparently understood the substantive conception of due process, but he thought of it merely as limiting the legislature's right to abrogate civil and personal rights, rather than as a bulwark of property.

Sections 2 and 3 dealt with the problem of Southern representation. Section 2 as reported by the Committee was a compromise based on the rejected Stevens-Conkling amendment of January. It based state representation in the House upon the whole number of people in each state and so abrogated the three-fifths clause, but it excluded from the basis of representation those persons denied the franchise for any reason other than "participation in rebellion,

or other crime." This section in effect insured that the conservative white population should not be able to take advantage of increased state representation together with Negro disfranchisement to place the Southern states and Democrats in control in Washington once more. At the same time, the section did not categorically bestow the vote upon Negroes.

As originally drafted by the Joint Committee, Section 3 unconditionally disfranchised all participants in the late rebellion until March 4, 1870. Many moderate Republicans thought this provision at once too severe and too temporary. It passed the House, but it was then unanimously stricken out in both houses and a substitute provision by Senator Jacob Howard of Michigan was put in its place. Howard's provision merely barred from state and federal offices all participants in rebellion who had formerly held political office and had in that capacity taken an oath to support the Constitution. It further empowered Congress to remove this disability by a two-thirds vote.

Section 4 recited the obvious—it guaranteed the United States public debt and outlawed debts incurred in rebellion against the United States. Section 5 empowered Congress to enforce the amendment by appropriate legislation.

The amendment passed both houses in its final form on June 13, 1866. The required three-fourths of the states had ratified by June 1868, and it was proclaimed the Fourteenth Amendment to the Constitution on July 28, 1868.

REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION

The amendment was one part of a comprehensive plan of reconstruction submitted by the Joint Committee. The Committee submitted its full report late in June 1866, together with a voluminous body of testimony and evidence gathered in the previous six months.

The report adopted a so-called "forfeited rights" or "dead states" theory of the effect of secession. This conception, less extreme than the state suicide or conquered provinces theories, was advanced in an effort to win the support of moderate Republicans in Congress. The Committee dodged the question of whether the Southern states were in or out of the Union. But it declared that the seceded states, by withdrawing their representatives in Congress and levying war against the United States, had forfeited all political rights incident

to the Union. They were politically dead, entitled to only such rights as the conqueror should grant them. Like Sumner's and Stevens' theories, the forfeited rights theory paved the way for congressional reconstruction, since only Congress could restore "dead" states to a full position in the Union. Accordingly, the Committee disavowed presidential reconstruction and partially disavowed the governments Johnson had created. "The powers of conqueror," said the Committee, "are not so vested in the President that he can fix and regulate the terms of settlement and confer congressional representation on conquered rebels and traitors."

The Committee did not absolutely repudiate Johnson's governments, however. Instead it recommended that before any Southern state should be readmitted to Congress, steps should be taken to guarantee the civil rights of all citizens, secure a "just equality of representation," and protect against rebel debt claims.

These terms evidently referred to the Committee's constitutional amendment and to a bill submitted by the Committee the previous April providing that any state lately in insurrection might secure representation by ratifying the amendment. The bill was not formally acted upon in Congress, but it was clearly understood to be a part of the Radical program.

In declaring the Southern states to be politically dead and yet at the same time insisting that they ratify a constitutional amendment as a prelude to readmission to Congress, the Radicals had put themselves in a hopelessly inconsistent constitutional position. The seceded states were without rights; yet they could perform the highest sovereign trust reserved to a state—the power to amend the Constitution! This inconsistency the Committee of necessity overlooked, for ratification by some of the Southern states would be necessary to secure action by a requisite three-fourths of the states. The forfeited rights theory, which theoretically recognized the continued existence of the Southern states, probably also tempered the apparent inconsistency in the plan for many Republicans.

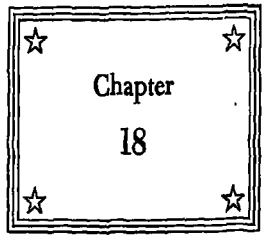
The success of the Joint Committee's plan depended upon whether the Southern states would consent to ratify the Fourteenth Amendment. Had they done so, it is probable that Congress would have then recognized the Johnson governments and restored all the Southern states to representation. Tennessee indeed did promptly ratify and was promptly "readmitted" to representation in July.

The other ten Southern states, however, acting between July and November 1866, all rejected the Fourteenth Amendment and thereby rejected the Radical overture. In taking this step the states were in effect refusing to accept enfranchisement of the Negro and the social revolution implicit in the Fourteenth Amendment. Many Southerners, though dissatisfied with the *status quo*, nevertheless preferred their present position to that envisioned after ratification. Evidently they also believed that the Radicals could not force their plan through against the will of the President and the nation. A congressional election would occur in November. Should Johnson's supporters win control of Congress, the President could then secure admission of the Southern states to representation on his own terms.

Both the President and the Radicals made every effort to win the congressional elections of 1866, for it was evident that the elections would resolve the conflict between them. Both the conservative Republican-Democratic coalition and the Radicals held party conventions in Philadelphia in August and September. Johnson himself made a "great circle" tour of the northern and western states. Both sides sponsored ex-soldiers' conventions.

In November the Radicals won an overwhelming victory. In the next Congress, they would now, by direct mandate of the people in the North, command better than a two-thirds majority in both houses. The Radicals had capitalized on their seizure of the old Republican Party's name and organization, now known as the party of Lincoln and the Saviors of the Union. The North was also still suspicious of Southern good faith, and a series of unfortunate race riots in the South in 1866 seemingly confirmed this suspicion. Also, Johnson's speaking tour was a disastrous failure, his coarse mannerisms disgusting many moderates.

Thus the Lincoln-Johnson program of speedy and moderate reconstruction, which a majority of Northern people apparently had approved in 1865, stood repudiated a year later. An era of radical congressional reconstruction was about to begin, which would impose a far more severe strain upon the traditional constitutional system than had the relatively conservative Johnson program.



Radical Congressional Reconstruction

When Congress met in December 1866, the Radical leaders, now confident of popular support, determined upon a far more extreme program than that of the previous June. Their plans now contemplated repudiation of the Johnson governments and the creation of temporary military government for the South. The ten unreconstructed states would be "readmitted" only after they had drawn up new constitutions and set up new governments in which a majority of the white population would be disfranchised and Negro suffrage guaranteed. As noted before, many of the Radical leaders were sincere idealists who firmly believed in the justice of their prospective social revolution. All were well aware, however, that their plans would entrench the Radical Republican faction in the Southern states and in Congress.

THE MILITARY RECONSTRUCTION ACTS OF 1867

The first fruit of the Radicals' new supremacy was the Military Reconstruction Act, which passed Congress on March 2, 1867, un-

der the leadership of Thaddeus Stevens of Pennsylvania, Roscoe Conkling of New York, and George Boutwell of Massachusetts. The act declared that "no legal state governments" existed in the ten unreconstructed states. It then divided the "said rebel states" into five military districts, and placed each district in command of a general of the army appointed by the President. If the district commander thought it necessary, he could suspend or supersede entirely the functioning of the so-called Johnson governments outright, but in any case it definitely subordinated them to military rule. The commanding general could also bring "disturbers of the public peace" and criminals to trial before military tribunals.

Section 5 of the act outlined a plan by which the seceded states could secure readmittance to Congress and escape military rule. It provided that the people of a "rebel state" might call a constitutional convention. In the voting for delegates, Negroes were specifically enfranchised, while all participants in rebellion were virtually disfranchised. The convention was to draft a constitution, which was to be ratified by the same electorate and then submitted to Congress for approval. If Congress approved, and if the state legislature elected under the new constitution ratified the Fourteenth Amendment, the state was to be "declared entitled to representation in Congress," and the military provisions of the act were to become inoperative for the reconstructed state as soon as the Fourteenth Amendment had become a part of the national Constitution. The Second Reconstruction Act, passed on March 23, 1867, outlined reconstruction procedure in more detail but did not alter the plan set forth in Section 5 of the first act.

The constitutionality of the congressional plan rested in large part upon the validity of Radical reconstruction theories. Assuming that the Southern states were politically dead, conquered provinces, or unorganized territories, Congress undoubtedly had the authority to establish military government in the South. Congress by the same theory also had the constitutional right to dictate the process by which new states were to be created. It could even be argued that Congress could require a newly organized state to ratify a constitutional amendment before formal admission to the Union, not in its constitutional capacity as a state but as a condition precedent required as a gesture of good faith, such ratification to be without effect upon the adoption of the amendment by the required three-

fourths of the states. The only part of the military reconstruction plan which could not possibly be defended as constitutional even under the congressional view of Southern status was the provision for military trial of civilians in peacetime.

If, on the other hand, the Lincoln-Johnson hypothesis of Southern status be accepted as correct, then the entire military reconstruction plan was hopelessly unconstitutional. The plan set aside lawful state governments, imposed military government upon sovereign states of the Union, denied representation to states lawfully entitled to it, and imposed illegal conditions precedent upon the Southern states before re-admitting them to representation.

Certain historians have contended that the ultimate constitutional issue involved in military reconstruction was that of outright national centralization versus continuation of the traditional constitutional system. This argument is untenable. Drastic as military reconstruction was, a large majority in Congress plainly intended it as a temporary policy under which the Southern states would ultimately be fully restored to the Union. The plan did not contemplate a permanent union of unequal states nor any permanent alteration in state-federal relationships except in so far as the Fourteenth Amendment placed certain private rights under federal control.

Johnson vetoed the March reconstruction acts as unconstitutional; but when Congress promptly re-enacted them, the President put them into operation. On March 11, Johnson appointed a commanding general to each of the five military districts. These officers presently registered the enfranchised population in their districts. In all of the Southern states the proportion of Negroes registering was very large. In Alabama, for example, 104,000 out of 165,000 registered voters were Negroes; in South Carolina, 80,000 out of 127,000 were Negroes. In five states Negroes were in a majority; in the others, they nearly equaled the whites. Many white voters registered with intent to frustrate ultimate ratification of the new constitutions, for the Reconstruction Act of March 23 stipulated that a constitution must be ratified in an election in which a majority of all registered voters in the state participated. They hoped to block ratification merely by remaining away from the polls.

RADICAL RECONSTRUCTION WITHIN THE SOUTH

In all ten of the unreconstructed states actual political control now rapidly passed from the conservative white population to radical political groups dominated by Northern immigrants (carpetbaggers), a native white minority group supporting the Radical program (scalawags), and Negroes. Since 1865, Southern Radical leaders had made steady progress in building up Radical political organization in the South. Union League clubs, controlled by carpetbaggers and scalawags, instructed and catechized the new Negro voters in the Radical Republican political faith. Military reconstruction officials further strengthened the Radical position by refusing to register large groups of the white population. The so-called Third Reconstruction Act of July 19, 1867 had placed almost complete discretionary authority in registering the white population in the hands of local military officers, and it had redefined in extremely broad terms the disfranchised class listed in the Second Reconstruction Act. Thus the conservative white population, largely disfranchised and demoralized, was thrust aside.

In the fall of 1867, all ten Southern states voted by large majorities to call constitutional conventions, and the various conventions met in the winter and spring of 1868. All were dominated by Radicals, and all had many Negro members. In one state, South Carolina, Negro delegates outnumbered the whites 76 to 48.

The constitutions drafted were very like other mid-century state constitutions except that they embodied Radical suffrage provisions. They all categorically guaranteed Negro suffrage and disfranchised outright large elements of the white population. Thus Louisiana disfranchised everyone who had voted for secession or "advocated treason." Certain provisions in the constitutions, however, were surprisingly enlightened. The sections dealing with taxation and finance have generally been characterized as intelligent and progressive, while the provisions which aimed at universal free public education were undoubtedly more democratic than those in earlier Southern constitutions.

When the new constitutions were submitted to the voters, most enfranchised whites stayed away from the polls in an effort to block the majority of the registered vote required for adoption. In Alabama this device succeeded temporarily, but Congress promptly

took even this weapon away from the Southern Conservatives. The so-called Fourth Reconstruction Act, enacted in March 1868, provided that the new constitutions could be ratified by a simple majority of those voting. In all the remaining states except Mississippi the constitutions were ratified by large majorities.

Accordingly Congress in June 1868 voted to "readmit" Alabama, Arkansas, North and South Carolina, Georgia, Florida, and Louisiana to the Union, and to accord them representation in Congress. Alabama's admission was an altogether irregular procedure, for the state had not ratified its constitution by the majority of the registered vote then required. Nonetheless Congress voted to disregard this technicality and admit the state anyhow.

"Readmission" of Texas, Mississippi, and Virginia was delayed until June 1870. Mississippi had rejected its constitution, while in Texas and Virginia the vote had been delayed too long for Congress to act in that session. In all three states there was much opposition to the drastic disfranchisement provisions in the new constitutions. President Grant, who entered office in March 1869, sympathized with the Southern whites in this matter, and in April 1869 he asked Congress to enact legislation permitting the three unreconstructed states to vote separately upon the disfranchisement clauses.

At this time, Radical leaders in Congress were engaged in pushing through Congress a constitutional amendment intended to guarantee the franchise to Negroes. This proposal, shortly to become the Fifteenth Amendment to the Constitution, had been inspired by Radical dissatisfaction with the Fourteenth Amendment, which did not categorically enfranchise the Negro. Republican leaders in Congress accepted Grant's proposal for a separate vote on disfranchisement in Texas, Mississippi, and Virginia, but they coupled to the necessary act a clause requiring Texas, Mississippi, and Virginia to ratify the prospective amendment as an additional condition precedent to admission. This act became law in April 1869. Virginia, Mississippi, and Texas complied with its terms and were "readmitted" to the Union in 1870.

The constitutional amendment submitted to the states as a result of the foregoing political bargain stipulated that:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

The foregoing secured ratification by the necessary three-fourths of the states in March 1870, and thereby became the Fifteenth Amendment to the Constitution.

The legal framework of congressional reconstruction was now complete. Political and social reconstruction, however, was anything but complete. The attempt to foist a social revolution on the South resulted in a series of violent upheavals, in which the white "Conservatives" fought to wrest control from Negroes and Radicals. This conflict provoked further congressional interference in the South lasting until 1877.

THE IMPEACHMENT OF JOHNSON

After the break between Johnson and Congress in the spring of 1866, all party relations between the President and the Radical Republicans had come to an end. The President had vetoed every important reconstruction measure since the Freedmen's Bureau bill, and since the passage of the Civil Rights Act the Radicals had promptly passed all their measures over the President's veto. Their bitterness at Johnson's "obstructionism" was extreme, and they feared that the President might somehow succeed in destroying the Radical program.

Beginning in March 1867, the Radicals forced through a series of acts intended to restrict the President's authority as much as possible. The Army Appropriation Act of March 2, 1867, required that all army orders be issued through the General of the Army, and that the general in command of the army should not be removed without the Senate's consent. This act virtually deprived the President of his full constitutional authority as commander in chief and was unquestionably unconstitutional. The Third Reconstruction Act of July 19, 1867, vested the entire power to appoint and remove officials under the act in the General of the Army, a direct and undoubtedly illegal transfer of the President's constitutional appointive power to a subordinate official.

Of even greater significance was the Tenure of Office Act, also enacted on March 2, 1867. This law was intended to destroy the President's power to remove subordinate officials without the Senate's consent. It provided that all executive officials appointed with the Senate's consent should hold office until a successor was appointed and qualified in the same manner. Thus no presidential re-

moval would be valid under the act until the Senate consented by ratifying the nomination of a successor. A partial exception was made for cabinet officers, who were to hold office only during the term of the President appointing them, and for one month thereafter.

Another section of the act provided for ad interim appointments. When the Senate was not in session, the President could remove an official for crime, misconduct, or incapacity and fill the vacancy so created with an ad interim appointment. But the President was obliged to report the removal to the Senate within twenty days after that chamber next convened. If the Senate then refused its consent to the removal, the office reverted to the former incumbent. Accepting or holding an office in violation of the statute was made a misdemeanor punishable by fine and imprisonment.

This statute reopened the old dispute over the President's removal power. As the reader is aware, the First Congress had decided that the President possessed a separate right of removal without the Senate's consent. Also, Jackson had successfully reaffirmed that right in 1833, and it had since been commonly exercised. Johnson's veto recalled these facts and denounced the bill as an unconstitutional usurpation of executive authority; however, Congress promptly passed the measure over his veto.

Meanwhile the Radical leaders had been searching for plausible grounds upon which to impeach the President. In the spring of 1867 a House investigating committee had covered every possible charge thoroughly and had been forced to report in July that no adequate grounds for impeachment existed. The investigation continued, however, and in December the committee, now under control of Representative George S. Boutwell of Massachusetts, recommended impeachment, although no specific grounds for such a step were presented.

In the debate that followed, the Radical leaders contended for a broad construction of the Constitution's impeachment clause, holding that the phrase "high crimes and misdemeanors" was not to be construed narrowly, but that it embraced all misbehavior and incompetence in office, whether or not the offense was recognized at law. Implausible as this position was, some precedent for it existed, for Judge John Pickering had been impeached and convicted in 1804, although he had technically not been guilty of any high crime

or misdemeanor, his actual "offense" being insanity.[1] For the moment, however, the conservative argument—that some offense known either to federal statute or to the common law was a prerequisite to impeachment—carried the day, and the House voted down the committee report 100 to 57.

Very shortly, however, Johnson committed what appeared to be a specific violation of the Tenure of Office Act, and so opened the way for his impeachment. The President had long been at odds with Secretary of War Edwin M. Stanton, who had openly aligned himself with the congressional Radicals. Stanton had refused to resign and had used his position in the cabinet as a vantage point to spy on the President and to undermine the President's administration.

In August 1867, Johnson removed Stanton from office and appointed General U. S. Grant in his place. The removal and appointment were made ad interim (that is, while the Senate was not in session), and so did not constitute a violation of the Tenure of Office Act. When the Senate convened in December it refused to confirm the removal, whereupon Grant resigned and Stanton resumed office. Grant's resignation disappointed the President, for he had hoped to force Stanton to resort to the courts in an effort to recover his office. In this manner, Johnson could conceivably have obtained a judicial opinion on the constitutionality of the Tenure of Office Act. Grant's refusal to retain the office after the adverse Senate vote defeated this plan.

In February 1868 Johnson forced the issue by summarily removing Stanton as Secretary of War and appointing Major General Lorenzo Thomas as his successor. Since the Senate was then in session, the President's act appeared to be a specific violation of the Tenure of Office Act. This was precisely what the Radical leaders had been waiting for, since the President had now presumably committed the specific statutory offense that many hesitant Republicans considered necessary for impeachment. Two days later, on February 24, the House voted, 128 to 47, to impeach the President.

On March 2 and 3 the House voted eleven articles of impeachment against Johnson. The first three articles charged the President with deliberately violating the Tenure of Office Act in removing Stanton and appointing Thomas. Articles 4 to 8 charged the President with entering into a conspiracy with Thomas to violate the

[1] See the account of the Pickering impeachment on pp. 232–233.

same law. Conspiracy to violate a federal statute was a punishable offense by a statute of July 31, 1861. Article 9 charged Johnson with having attempted to subvert the provision in the Army Appropriation Act of 1867, which made all orders issuable through the General of the Army.

Article 10, inserted at the insistence of Ben Butler, charged the President with attempting to "bring into disgrace, ridicule, hatred, contempt, and reproach the Congress of the United States." This charge was supported by reference to a number of Johnson's political speeches attacking the congressional Radicals. In substance, this article thus sought the President's conviction merely because he was a political enemy of the congressional majority. Article 11, inserted at Stevens' suggestion, was a "catch-all" provision summing up all the previous counts.

On March 30 the impeachment trial began before the Senate, with Chief Justice Salmon P. Chase presiding. The attorneys for the prosecution, or "managers," appointed by the House of Representatives to prosecute the case before the Senate, were John A. Bingham of Ohio, Ben Butler of Massachusetts, George Boutwell of Massachusetts, John A. Logan of Illinois, Thad Stevens of Pennsylvania, Thomas Williams of Pennsylvania, and James Wilson of Iowa. Johnson was defended by former Attorney General Henry Stanbery, Benjamin R. Curtis, and William M. Evarts, all more able lawyers than any of the prosecution.

The first important matter of contention was the Senate's judicial status. Was the Senate sitting as a court or as a political body? The issue was extremely important. If the Senate was a regular court, then it was bound by legal rules of evidence. Presumably, also, it could convict the President only if it found him guilty of a specific offense either at the common law or defined in a federal statute. It could not rightfully convict the President merely as a political enemy of Congress. On the other hand, if the Senate sat as a political body, not only could it hear evidence usually inadmissible in a regular court of justice, but also it might conceivably convict the President of a political offense.

Johnson's attorneys argued powerfully that the trial was strictly a judicial proceeding. The Constitution, they pointed out, adhered strictly to a common-law terminology in describing impeachment. The Senate was empowered to "try" impeachments, make a con-

viction, and enter a judgment. With equal force they contended that if impeachment was a mere political proceeding, then the whole long-established constitutional relationship between executive and Congress would be threatened. Were the President removable merely because he was politically inacceptable to Congress, executive independence would be destroyed and parliamentary ascendancy would replace the American presidential system.

The prosecution, on the other hand, argued that the nature of impeachment made the Senate something more than a court. Offenses other than those known to the common law were impeachable. Impeachment, they said, could be pressed for improper motive, or even "action against the public interest." If not, what other method was there for getting rid of an incompetent officeholder? Here they cited the Pickering precedent.

The issue was technically settled in favor of the defense. Early in the trial the Senate voted, 31 to 19, to permit the Chief Justice to settle all questions of law, evidence, and the like, unless the Senate overruled him. The implication was that the Chief Justice was the presiding officer in a regular court, the senators sitting as associate justices. In reality, however, this ruling hardly destroyed the political character of the proceedings, for many senators were still prepared to vote according to their political convictions regardless of evidence.

The principal argument in the trial centered on Johnson's supposed violation of the Tenure of Office Act. The prosecution argued that Johnson had committed a deliberate violation of a constitutional statute, clearly an impeachable offense. Johnson's attorneys in reply argued that the Tenure of Office Act did not apply to Johnson's removal of Stanton at all. The act specified that cabinet officers were to hold office during the term of the President appointing them, and for one month thereafter. Stanton had been appointed by Lincoln, not Johnson, and Johnson had never reappointed him but had merely tacitly assented to Stanton's continuance in office. The prosecution replied that Johnson was merely an "acting President" serving Lincoln's unexpired second term—a weak argument, for since Tyler's time Vice-Presidents succeeding to office had been considered as Presidents-in-full.[2]

[2] In the face of some opposition in Congress, Tyler had been successful in asserting he was President in every sense, not merely acting President. The precedent here established had been recognized under Fillmore and Johnson.

The cornerstone of Johnson's defense, however, was the contention that the Tenure of Office Act was unconstitutional. Counsel for the President cited the debates in the First Congress on the removal power, Jackson's successful removal of Duane, and the established practice of eighty years, all of which supported the contention that the removal power was an executive prerogative separate and distinct from the power of appointment. Against the weight of these precedents the House managers retorted that the Tenure of Office Act was a formal declaration of the meaning of the Constitution, and therefore finally settled a long-mooted constitutional issue. This was tantamount to the assertion that Congress possessed a final right of constitutional interpretation even with regard to issues apparently settled by long-established practice—a dubious contention, since it was now generally recognized that the ultimate power to interpret the Constitution belonged to the Supreme Court.

Finally the defense contended that Johnson's deliberate violation of law had not been subversive, but that the President had merely wished to test the act's constitutionality by bringing it before the courts. The President's action was therefore not a misdemeanor but an attempt to institute judicial proceedings. This argument the prosecution dealt with effectively. The President, they said, must like everyone else bear responsibility for his acts. If he violated a law on the grounds that it was unconstitutional, he must face the consequences if the proper tribunal, in this case the Senate, decided that the law was valid. If the Senate decided that the Tenure of Office Act was constitutional, then Johnson had committed a misdemeanor and must be punished regardless of intent.

On May 16 the Senate began balloting upon the impeachment articles. The Republican majority in the Senate, intent on securing a conviction, instructed the Chief Justice to poll the Senate first on Article 11, which included all possible charges and supposedly offered the greatest chance of conviction.

The final vote on Article 11 was 35 "guilty," and 19 "not guilty," one vote short of the two-thirds majority required by the Constitution for impeachment. Seven Republican senators—Fessenden, Fowler, Grimes, Henderson, Ross, Trumbull, and Van Winkle—had risked political annihilation to vote with the Democratic minority for acquittal. After an adjournment to May 26, the Senate voted on Articles 2 and 3. On Article 2, the vote was again 35 to 19; on

Article 3, the vote fell to 34 to 19. In disgust, the Senate majority voted to adjourn as a tribunal "without day." [3] The Radical grand design had failed. The minority Republicans, who had saved the day for Johnson, afterward made it clear that they believed that the Tenure of Office Act was unconstitutional and that the President had not committed the statutory offense they believed necessary to conviction.

Since 1868 many analysts have held that Johnson's acquittal saved the American presidential system from destruction. The actual basis for Johnson's impeachment, they asserted, was the Radicals' intense hatred for his political principles. They have concluded that had impeachment proved successful as a weapon to remove a politically inacceptable President, the precedent would have been established for the removal of any President refusing persistently to co-operate with Congress, an eventuality implying the establishment of a parliamentary form of government with legislative ascendancy.

The argument has some weight, but it ignores the political atmosphere of the reconstruction era. The Radicals were bent upon the destruction of a President whom they had come to regard as a traitor, a blackguard, a drunkard, and a madman. Successful impeachment would therefore have established about the same precedent as that in the Pickering trial—that is, a loose construction of the impeachment power. While the issue of impeachment for political dissent was certainly a major factor in the case, many other long steps would have been required before impeachment became a mere routine means of voting "no-confidence" in the parliamentary sense of the word.

RECONSTRUCTION AND THE COURT

The Supreme Court pursued a generally cautious policy of neutrality through the turbulent struggle between Johnson and Congress, but it did not succeed in remaining entirely aloof from the conflict. The Radicals had good reason to doubt the constitutionality of much of their own legislation, and they had no intention of permitting the Court to destroy their program. Several times they invaded the supposed sanctity of the Court to protect themselves from judicial interference.

The first Radical move against the Court came in July 1866.

[3] That is, without setting another meeting date—in other words, permanently.

Justice John Catron's death in May 1865 had given Johnson his first opportunity to make an appointment to the supreme tribunal, and in April 1866, he nominated Attorney General Henry Stanbery to the vacancy. Instead of acting upon this nomination, the Senate passed a bill introduced by Lyman Trumbull reducing the number of justices in the Court from ten to eight. This in effect destroyed the existing vacancy and the next one which would occur as well. In July, Trumbull's bill became law over Johnson's veto. Justice James Wayne's death in 1867 shortly reduced the Court to eight men, five of whom were Lincoln appointees, the remaining three being prewar Democrats. By enacting Trumbull's bill, Congress had engaged in a kind of negative "court-packing."

In spite of this law, which prevented Johnson from appointing two justices who presumably would have supported his views, it soon became evident that the Radical position on the Court was not secure. In December 1866, the Court delivered an opinion in *Ex parte Milligan*, holding unconstitutional the military trial of civilians in areas where actual military operations were not in progress. Although four of the nine justices held that Congress lawfully could have provided for the military tribunals in question, the plain implication of the opinion was that a majority of the Court would hold void similar provisions in the Freedmen's Bureau, the Civil Rights Act, and the forthcoming military reconstruction bill.[4]

Other decisions adverse to Radical interests soon followed. In *Cummings v. Missouri*, decided in January 1867, the Court reviewed a clause in the Missouri constitution of 1865 requiring voters, ministers, attorneys, and candidates for public office to swear that they had never engaged in rebellion against the United States, or given aid to rebels, or even expressed any sympathy for their cause. Those who could not take the oath were disfranchised or debarred from the profession or office in question as the case might be. Justice Field's opinion for the five majority justices called the provision a bill of attainder and an ex post facto law and held it unconstitutional.

In *Ex parte Garland*, decided the same day, the Court held, also by a 5-to-4 majority, that the Federal Test Act of 1865 imposing a similar oath upon federal attorneys was unconstitutional on the same grounds. These two decisions threatened other aspects of the

[4] See pp. 443-448, for a full discussion of the Milligan case.

Radical program, since the Radicals contemplated disfranchisement and disbarment from office of ex-Confederates and their sympathizers.

These decisions immediately evoked in both houses of Congress a bitter Radical attack on the Court. Thad Stevens called the Milligan decision "more dangerous" than that of the Dred Scott case, while Bingham suggested that Congress at once deprive the Court of all appellate jurisdiction and thereby render it impossible for the justices to interfere with the Radical program. For the moment, however, Congress took no action.

Meanwhile the Court in *Mississippi v. Johnson* (1867) dodged an opportunity to rule upon the constitutionality of the Reconstruction Acts of March 1867. In April, attorneys for the Johnson state government in Mississippi, then about to be supplanted by federal military administration, asked the Court to issue an injunction restraining the President from enforcing the Reconstruction Acts, on the grounds that they were unconstitutional. While the request was extraordinary, counsel for the state pointed out that the Court had several times held the executive to be amenable to judicial writ, notably in *Marbury v. Madison.*

Notwithstanding the precedents cited, the Court refused the injunction. In his opinion, Chief Justice Chase drew a distinction between mere ministerial acts involving no discretion and large executive acts such as those carrying into effect of an act of Congress. The former, he said, could be enjoined; the latter, on the other hand, involved political discretion and could not be. Such an injunction would amount to interference with the political acts of the legislative and judicial branches of the government; and defiance of them, Chase observed, would create an absurd situation. In May, the Court in *Georgia v. Stanton* (1867) dismissed a similar suit in which the states of Georgia and Mississippi asked injunctions restraining the Secretary of War and General Grant from enforcing the Reconstruction Acts. The suits, said the Court, involved proposed adjudication of political questions over which the Court had no jurisdiction. Plainly the Court had drawn back from the danger involved in so direct and unprecedented an attack on congressional policy.

In February 1868, however, the Court consented to hear arguments in *Ex parte McCardle*, a case arising in a Mississippi military tribunal, and carried on appeal under the authority of the Habeas

Corpus Act of 1867. The case by implication involved the constitutionality of the Reconstruction Acts, since the appellant McCardle contended that the military tribunal which existed by virtue of the acts had no lawful authority.

When it thus became apparent that the Court might dare to declare the Reconstruction Acts invalid, the Radical majority immediately moved to end the possibility. In March, Congress passed a bill dealing with appeals in customs and revenue cases. Attached was a rider repealing the Supreme Court's jurisdiction in all cases arising under the Habeas Corpus Act of 1867. The rider was admittedly designed to kill the McCardle case. Johnson gave the bill a blistering veto, but Congress immediately overrode the veto. The Court eventually dismissed McCardle's plea on the ground that the new act had destroyed the Court's jurisdiction.

On the same day that the Court bowed to Congress in *Ex parte McCardle*, it indicated even more clearly in *Texas v. White* (1869) that it had no wish to engage in a major controversy with Congress. The latter case involved an action by the Johnson government of Texas to recover title to certain United States bonds formerly the property of the state but sold by the Confederate state government during the war. The Court here found an opportunity to pass upon the status of both the Confederate and Johnson state governments, and hence to analyze at length the theories of secession and reconstruction.

Chief Justice Chase first presented very convincingly the orthodox Lincoln theory of secession. The United States, said Chase, was an indissoluble Union of indissoluble states. Hence secession did not destroy the state of Texas, nor the obligations of Texans as citizens of the United States. The pretended Confederate state government, though for some purposes a *de facto* government, was in its relations to the United States a mere illegal combination.

This analysis might have paved the way for a direct challenge to the congressional theory of reconstruction, since it held that the seceded states still were in the Union. However, the Chief Justice then made a major concession to the Radicals by holding that the constitutional right of permanent reconstruction devolved upon Congress. He quoted with evident approval the opinion in *Luther v. Borden*, growing out of the Dorr Rebellion of 1842 in Rhode Island, in which the Court had decided that Congress had power

under Article IV, Section 4, of the Constitution to guarantee republican governments in the states and to recognize the correct government in any state. Chase specifically refrained from expressing any opinion upon the constitutionality of the Reconstruction Acts, but he nevertheless cited the acts as authority for the provisional character of the Johnson governments. The decision was a major victory for the Radicals, and it clearly indicated that the Court would make no direct onslaught upon congressional reconstruction.

Because the Supreme Court was unwilling to challenge Congress directly on the issue of Southern reconstruction, it must not be assumed that the Court failed to function positively during the Reconstruction era. The modern conception of judicial review began to make its appearance at this time. Between the years 1789 and 1864 the Court had declared just two acts of Congress unconstitutional; during the nine-year tenure of Chief Justice Salmon P. Chase, from 1864 to 1873, it declared void ten acts of Congress. The Court, in short, was beginning to assert its right to review congressional legislation just as in the days of John Marshall it had asserted powerfully the right to review state legislation. The Court was beginning to assume its modern role as the final arbiter of the constitutional system, the balance wheel of federalism.

THE COURT-PACKING CHARGE

Once Johnson left office, Congress was more than willing to enlarge the Court once more, since the new appointments thereby created would then fall to President Grant, whom the Radicals controlled. Accordingly, in April 1869, Congress enacted a statute increasing the number of justices to nine. The following December, Justice Robert Grier, now aged and mentally impaired, resigned from the bench under pressure from his colleagues, and Grant was thus enabled to nominate two new justices. The President first named Edwin M. Stanton and Attorney General Ebenezer R. Hoar. However, Stanton died in December, four days after the Senate had confirmed his appointment, and the Senate rejected Hoar. Thereupon Grant in February 1870 nominated Joseph P. Bradley, a well-known Republican railroad lawyer, and William Strong, a former Pennsylvania Supreme Court Justice, both of whom the Senate confirmed.

A few hours before Grant nominated Bradley and Strong, the

Supreme Court, in *Hepburn v. Griswold*, declared the Legal Tender Act of 1862 unconstitutional. This statute had made "greenbacks," the fiat money issued by the federal government during the Civil War, legal tender in payment of debts. Chief Justice Chase, speaking for four of the seven justices, said that the law was invalid in so far as it applied to contracts made before its passage. The act, said Chase, was contrary to the due process clause of the Fifth Amendment and also violated the obligation of contracts. Although there was no contract clause limiting the federal government, Chase nevertheless held that the violation was contrary to the spirit of the Constitution. Three Republican justices—Miller, Swayne, and Davis—dissented vigorously, arguing that the federal monetary power amply included the right to make paper money legal tender.

It was at once evident that this opinion might well be reversed should the Legal Tender Act come before the enlarged Court. A year later, in the *Second Legal Tender Cases* (1871) this reversal occurred; the Court directly overruled *Hepburn v. Griswold* by a majority of five to four with Bradley and Strong joining Miller, Swayne, and Davis.

This sequence of events led Grant's enemies to charge him with having deliberately packed the Court to obtain a reversal of *Hepburn v. Griswold*. The truth of this charge depends entirely upon the meaning of the expression "packing the Court." Grant disapproved of the decision in *Hepburn v. Griswold*, and it appears certain that he was aware that both Bradley and Strong were known to consider the Legal Tender Act constitutional. Apparently Grant had obtained no prior commitment or understanding, expressed or implied, from either appointee that they would vote to reverse *Hepburn v. Griswold*, but it is plain that he had needed none. Grant's action differed little or not at all from that of all Presidents making appointments to the Court, since Presidents invariably consider the constitutional, political, and economic implications of their judicial appointments.

THE DISINTEGRATION OF RADICAL RECONSTRUCTION

A bitter political and social struggle ensued after 1868 in all the so-called reconstructed states. The white population, at first largely disfranchised and leaderless, was nevertheless bitterly determined to resist "Negro domination," and soon re-entered the political con-

flict. The conservative leaders rallied whites to the polls, sought the support of Negroes disgusted with Radical tactics, and through the Ku Klux Klan resorted to night-riding and terrorism in their struggle for supremacy. The Radicals fought back with their principal weapons: the Negro vote, white disfranchisement, corruption, and appeals to Washington.

Although the Southern states were now nominally "reconstructed," Congress did not hesitate to interfere in the resultant chaos. For example, when the conservatives secured control of the Georgia legislature, Congress responded in December 1869 by a statute imposing additional requirements on the supposedly reconstructed state. The Radical governor was empowered to determine the membership of the legislature, and the state was also required to ratify the Fifteenth Amendment. The unconstitutionality of this statute is too evident to require analysis; even the extreme Radicals were embarrassed in their attempts to defend it.

Another law, the so-called Enforcement Act of May 1870, guaranteed Negro suffrage, and imposed heavy penalties upon individuals for night-riding or for infringing the right to vote secured by the Fifteenth Amendment. This statute attempted to protect the right to vote against all infringement, whether or not disfranchisement was based upon race, color, or previous condition of servitude. The Supreme Court in *United States v. Reese* (1876) was to declare these portions of the act void on the ground that the Fifteenth Amendment did not extend any positive guarantee of the franchise.

The so-called Second Enforcement Act, passed in February 1871, placed congressional elections under direct federal supervision. This statute, the real purpose of which was again to protect Negro and Radical voters, was undoubtedly constitutional, since Congress had full authority to regulate congressional elections.

Most drastic of all, however, was the Third Enforcement Act, or the "Ku Klux Klan Act," which the Radicals pushed through Congress in April 1871, on the alleged grounds that an actual state of rebellion against federal authority existed in some areas in the South. The law levied heavy penalties against persons conspiring to rebel against the United States, interfering with the duties of any federal office or the enforcement of any federal law, infringing any private civil right, or intimidating voters. Whenever the President found that insurrection, rebellion, or conspiracy to violate the pro-

visions of the act existed, he was authorized by proclamation to suspend the writ of habeas corpus and to employ the armed forces of the United States to suppress the conspiracy. Insofar as it attempted a general guarantee of the franchise, this statute was open to the same constitutional objection as the First Enforcement Act, and eventually the Supreme Court in *United States v. Harris* (1883) declared it void on the same grounds.

Under the provisions of the Ku Klux Klan Act, federal troops were dispatched to suppress literally hundreds of disturbances throughout the South in the next few years. The most notable instances of federal intervention occurred in South Carolina, Louisiana, and Arkansas. In October 1871, when Klan activity became particularly violent in South Carolina, President Grant issued a proclamation declaring nine counties in that state to be in rebellion, suspended the writ of habeas corpus, and sent in federal troops to restore order.

In Louisiana, conflict between Radicals and Conservatives in 1872 resulted in the erection of rival state governments. The Radicals, claiming victory in the state election of that year, used federal troops and irregular federal processes to place the so-called Kellogg-Pinchback government [5] in power. The Conservatives nonetheless organized a separate legislature and recognized John McEnery as rightful governor. Grant sent troops to support the Radicals, but the Conservative government continued to exist, and violence, political chaos, and semi-anarchy prevailed in the state for the next four years.

In Arkansas, the followers of Robert Brooks, unsuccessful Conservative candidate for governor in 1872, raised an armed force and in April 1874 ejected the Radical governor, Elisha Baxter, from the state house. Actual civil war ensued in Little Rock, and again federal troops were called in to keep order. Eventually Grant sustained Baxter's administration.

In spite of their many handicaps—disfranchisement, the presence of federal troops, and effective Radical organization—the Conservatives made steady progress in regaining control of the reconstructed states. Several factors assisted them. Most important, the Conservatives had the support of approximately nine-tenths of the white

[5] So called because Governor William P. Kellogg and Lieutenant-Governor P. B. S. Pinchback headed the Radical political machine.

population. In 1871, Congress modified the Test-Oath provisions which had virtually debarred ex-Confederates from voting, and in the following year, Congress took action under Section 3 of the Fourteenth Amendment and passed a broad amnesty act restoring the right of office-holding to nearly all ex-Confederates.

These statutes reflected a rising sense of disgust among moderate Republicans, as well as Democrats, with the obvious failures of Radical reconstruction. In 1872, a number of so-called "liberal Republicans," who disagreed sharply with Radical reconstruction policies and who were dismayed by the growth of high protective tariff sentiment in their party as well as by the increasing prevalence of political corruption, bolted their party and nominated Horace Greeley, famous New York Tribune editor, for the presidency. The revolt ended in failure, but it threw a scare into the Radical Republicans, who thereafter hesitated to pass legislation interfering too far in the internal affairs of the South. It was evident that public opinion in the North was becoming weary of the attempt to impose a new social order on the South, and this fact strengthened the hand of Democrats and more conservative Republicans in Congress.

By 1874, the Southern Conservatives, now mainly operating through the Democratic party, had recovered control in seven states. Only in South Carolina, Florida, Mississippi, and Louisiana was the attempt at Radical reconstruction prolonged for another two years.

THE DISPUTED ELECTION OF 1876

The presidential election of 1876, which resulted in a bitter political and constitutional controversy, greatly hastened the final disintegration of Radical reconstruction.

The election at first appeared to have resulted in a victory for Samuel J. Tilden, the Democratic candidate. An early tabulation gave him 184 undisputed electoral votes, with but 185 votes necessary for election. Rutherford B. Hayes, the Republican candidate, had but 165 undisputed votes. However, it soon appeared that Hayes had a chance to win. South Carolina, Florida, and Louisiana, with nineteen electoral votes, emerged as disputed states. Conflict also developed in Oregon, where one Republican elector was ineligible because he was a federal officeholder. Eventually all four states submitted dual electoral returns to Congress. If the disputed elec-

toral votes of all four were added to the Republican column, Hayes would emerge victorious.

The double returns from the Southern states resulted from a confused struggle between the Radicals and the Conservatives. In South Carolina, where the Radical machine was still in control, the Republicans had apparently carried the state, and the Republican-controlled returning board certified the Hayes electors; nevertheless the Democratic electors submitted ballots for Tilden. In Louisiana, after an utterly chaotic election, the illegally constituted Kellogg-Pinchback Radical government conducted an incredibly partisan count and certified the Hayes electors. McEnery, the Democratic gubernatorial pretender, then issued certificates to the Democratic electors, who balloted for Tilden. In Florida the Republican board certified the Hayes electors, only to have the newly elected Democratic governor and legislature establish a new returning board which certified the Tilden electors.

In Oregon, the secretary of state was the proper returning board, and he first certified the victory of the Republican electors. It shortly appeared, however, that one Republican elector was a postmaster, and therefore ineligible under the Constitution to serve as an elector. The Democratic governor then put forward the plausible claim that the ineligible elector had never legally been chosen, and that the office thereupon devolved upon the elector having the next highest number of votes, who was a Democrat. The governor, acting in concert with the secretary of state, then issued certificates to the two uncontested Republicans and to one Democratic elector. The two Republicans nonetheless met with their ineligible colleague, who had meanwhile resigned both as postmaster and as elector, and reappointed him an elector. The three then cast three ballots for Hayes.

Thus, when Congress met in December, it was confronted with dual returns from Florida, Louisiana, South Carolina, and Oregon. Unfortunately, there was no constitutional provision governing such a situation, nor was there any clear precedent for solving the problem. The Constitution stipulated merely that electoral returns were to be opened by the president of the Senate in the presence of both houses, and should then be counted. Did this mean that the president of the Senate had the right to count the votes and to decide between conflicting returns? If this contention, immediately advanced by

the Republicans, was correct, it would presumably place Hayes in the White House, for Thomas W. Ferry, president of the Senate pro tem, was a Republican. However, the argument had but little weight, for the president of the Senate had never in the past assumed to exercise any discretionary authority in counting the vote.

The so-called Twenty-Second Joint Rule, adopted by Congress in 1865, had provided that in case objection was offered to the vote of any state, the two houses were to separate and decide independently whether the vote was to be received. The rule further provided that no vote was to be counted unless both houses assented to it. Since the House was now Democratic, the application of this rule would have made impossible a count favoring the Republicans. Unfortunately for the Democrats, the rule was no longer in effect, for in January 1876 the Senate had refused to readopt it for the coming election.

After some initial confusion, a joint Senate-House committee on January 18 reported a bill creating an Electoral Commission of Fifteen to decide all disputed returns. The Commission was to be composed of five representatives (three Democrats and two Republicans), five senators (three Republicans and two Democrats), and four justices of the Supreme Court, who were to name a fifth justice. The four justices designated were those assigned to the first, third, eighth, and ninth circuits, which in reality meant Nathan Clifford, Stephen J. Field, William Strong, and Samuel Miller—two Democrats and two Republicans. It was generally understood that the fifth justice would probably be David Davis of Illinois, who was nominally a Republican but very moderate in his viewpoint. The bill provided that the Commission's decision on all disputed returns should be final unless an objection were sustained by the separate vote of both houses.

Nearly all Democrats and most Republicans supported this proposal, though the extreme Radical Republicans, led by Senator Oliver P. Morton of Indiana, opposed it. The Democrats believed that the Commission would settle at least one disputed return in their favor and so elect Tilden. This expectation was badly shaken when the Illinois legislature elected Davis to the Senate. As a result the fifth justice named was Joseph Bradley, who was a staunch Republican, and thus the Republicans controlled the Commission by a count of eight votes to seven.

When the electoral votes were counted in joint session, the returns from the four states were all disputed and were therefore referred to the Commission.

The Commission settled the dispute by refusing "to go behind the election returns." It held that it had power merely to decide what electors had been certified in the proper manner by the correct returning board, in accordance with the state law; and that it could not investigate the actual popular vote to determine whether the returning board had correctly counted that vote. The Commission based this conclusion on the argument that each state under the Constitution was entitled to choose its electors as it saw fit. The federal government, the Commission held, had no constitutional power to control this process, for to do so would be an intrusion upon the sovereign sphere of state authority. In accordance with this rule, the Commission decided, by a vote of eight to seven in each instance, that the Republican electors in South Carolina, Florida, and Louisiana had been properly certified and that their vote was valid.

The Oregon case was more difficult, but the Commission resolved it by deciding that under Oregon law the secretary of state alone was the properly constituted returning board and that he had originally certified the election of the three Republican electors. The ineligibility of one elector the Commission held to be immaterial, since he had resigned both his federal office and his electorship and had then been reappointed by the other two electors according to law. The Commission rejected the Democratic argument that his ineligibility had resulted in election of a Tilden elector. Acceptance of this contention would have taken the board into the considerations behind the secretary of state's certificates; moreover, American legal precedent was against a defeated candidate for office being declared the winner when his opponent was revealed as ineligible.

Thus the Commission by a partisan vote of eight to seven decided every disputed return in favor of the Republicans. The House dissented from the Commission's report in every instance, but the Senate concurred, and therefore the Commission's decisions stood. Hayes was accordingly declared elected, 185 votes to 184, the final decision being formally reached on March 3, the day before the scheduled inauguration.

Then and ever since outraged Democrats have charged that the Republicans "stole the election" of 1876 and deprived Tilden of the presidency. The contention has some merit. Hayes electors were evidently "counted in" in both Florida and Louisiana under heavy Republican pressure. The Commission also clearly made all its decisions by a straight partisan majority; plainly the eight Republican members were concerned mainly with placing Hayes in the White House. The sudden concern of Morton and other Republican Commission members for the sanctity of states' rights—this by men who had sponsored a long series of attacks upon state autonomy—was not convincing. Had political expediency demanded it, they clearly would have manipulated their constitutional theories to suit the opposite approach.

The Commission's decision nevertheless had a certain consistency in constitutional theory. The contention that federal authority over state choice was limited to fixing the identity of the electors lawfully certified by the legal state agency for this purpose had a great deal of force. Electors are technically state officials, and the Constitution does indeed give each state the right to choose its electors as it wishes. To "go behind the returns" and subject a state election to scrutiny and analysis would indeed have been an act of doubtful constitutionality.

It is sometimes charged that the Commission was inconsistent in that it actually did go behind the returns in Oregon. This charge is unjustified. The Commission did not investigate the state's popular vote; it merely held that the secretary of state's original certification of three Republican electors was legal and had not been invalidated by the governor's refusal to deliver certificates to the Hayes electors.

Hayes' election marked the practical end of Radical reconstruction and federal control of the South. The Republicans had already lost control of the House, and the new President was a moderate who did not approve of continued federal interference in state affairs. Hayes at once withdrew federal troops from the three Radical-controlled Southern states. The Democrats shortly assumed control in all of them, thereby bringing the Radical Republican era in the South to an end.

AFTERMATH OF RECONSTRUCTION

The social revolution in Negro-white relations once projected by Sumner, Stevens, and their fellows was not consummated. After 1876 the remnants of the legal structure imposed upon the South in the Reconstruction era steadily disintegrated. The Thirteenth Amendment was of course not challenged, but the dominant white majority nevertheless succeeded in defeating for the most part the original intent of the Fourteenth and Fifteenth Amendments with respect to the Negro.

The immediate reason for the failure of the Southern social revolution the Radicals had projected was the abandonment by Congress after 1876 of support for the attempted new Southern social order. After 1876 Congress followed a policy of non-interference in Southern internal affairs. In part, this change of policy was forced upon Congress because of increasing Northern weariness and disgust at the continued violence and chaos inherent in the Radical Republicans' policies. After 1876, the Northern Democrats had far enough revived in prestige and power to compete seriously in congressional elections with Radical Republicans so that Republican candidates who "waved the bloody shirt" too violently might be defeated at the polls. In effect, the Northern electorate refused to support interference in Southern "local affairs" any longer.

Also the general character of the Republican party was undergoing alteration. Increasingly the party came to represent the big business interests of the Northeast. Reflecting this trend, the party's politicians turned their interest toward tariff and monetary policies while the reconstruction issue steadily lost importance.

After 1876, the Republican party was the more willing to abandon Southern controls because it perceived that the task of building an effective Southern Republican machine was not only apparently hopeless but also had become unnecessary to the party's national dominance. While the Democratic party had revived somewhat, it had nonetheless become apparent that the Republican party possessed such strength in the North and West that it could control Congress most of the time and win most presidential elections without the aid of a Southern Republican party. The Republican party in the South was accordingly allowed to disintegrate and to become

the property of a small hierarchy of Southern Republican office-holders dependent upon patronage from Washington.

The Supreme Court also lent support to the restoration of "white supremacy" in the South. In a long series of decisions, the Court greatly reduced the significance of the Fourteenth and Fifteenth Amendments as guarantees of Negro rights.

The first big step in this development came in 1876, when the Court first decided that the Fourteenth Amendment did not place ordinary private rights under federal protection except as against state interference. The Fourteenth Amendment, said Chief Justice Morrison R. Waite in *United States v. Cruikshank* (1876), "adds nothing to the rights of one citizen as against another. It simply furnishes a federal guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society."

In 1883, in the Civil Rights Cases, the Court applied this doctrine in declaring void the Civil Rights Act of 1875. This law, the last serious effort of the Radicals to establish civil equality for Negroes, had provided that all persons, regardless of race, were entitled to "the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances on land or water, theatres and other places of public amusement . . . ," and made it a misdemeanor for any person to impair or deny the foregoing rights.

Justice Bradley in his opinion pointed out that the Fourteenth Amendment was "prohibitory upon the States," but not upon private individuals. The Amendment declared that no state shall "abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws." The Amendment thus clearly prohibited invasion by state action of certain private rights, but, said Bradley, "Individual invasion of individual rights is not the subject-matter of the amendment."

In effect this opinion served notice that the federal government could not lawfully protect the Negro against the discrimination which private individuals might choose to exercise against him. This was another way of saying that the system of "white supremacy" was mainly beyond federal control, since the Southern social order

rested very largely upon private human relationships and not upon state-made sanctions.

The Court eventually went so far as to validate state legislation which by implication recognized the Negro as a special caste. Thus the Court, in *Plessy v. Ferguson* (1896) accepted a so-called "Jim Crow" law requiring separate railroad accommodations for whites and blacks. Such a law, said the Court, did not technically deprive the Negro of equal protection of the laws, providing Negroes were furnished accommodations equal to those for whites. Acting on the same principle—that classification is not necessarily discrimination—the Court in *Cumming v. County Board of Education* (1899) held that laws establishing separate schools for whites and blacks were also valid, so long as equal accommodations were provided for both races. In *Berea College v. Kentucky* (1908), the Court even recognized the constitutionality of a Kentucky statute prohibiting private schools from admitting whites and blacks to the same institution.

The Court made a nominal concession to Negro rights when it held in *Strauder v. West Virginia* (1880) that laws barring Negroes from jury service were a violation of the equal protection clause and were void. However, the Court later destroyed the implication of this decision when it ruled in *Ex parte Virginia* (1880) that the mere absence of Negroes from a jury did not necessarily mean a denial of right. To prove a denial of due process an accused Negro was obliged to prove that Negroes were deliberately excluded from the jury trying him. This decision paved the way for the practical exclusion of Negroes from juries through the cautious exercise of discretionary authority by local officials.

The Southern states were also able through a variety of devices to escape the intent of the Fifteenth Amendment and effectively disfranchise the Negro. In *United States v. Reese* (1876) the Supreme Court first pointed out the obvious but important fact that the Fifteenth Amendment did not "confer the right of suffrage upon anyone." It merely prohibited the states or the United States from excluding a person from the franchise because of race, color, or previous condition of servitude. The primary control of suffrage remained with the state. The Court accordingly declared Sections 3 and 4 of the Enforcement Act of 1870 to be unconstitutional since they provided penalties for obstructing or hindering any person for

any reason from voting in any election. The right of Congress to legislate for state elections, said Chief Justice Waite, was limited to legislating against discrimination because of race, color, or previous condition of servitude.

Thus it was evident that if the Southern states could discover and impose certain restrictions which nominally did not bar Negroes as such but actually had that effect, such statutes might be constitutional. Eventually the South discovered four such devices, the first two of which the Court accepted as constitutional. These were the literacy test, the poll tax, the "grandfather law," and the state primary law.

In *Williams v. Mississippi* (1898), the Court held that a law giving local officials authority to require any voter to read and interpret any part of the Constitution was valid. Such a law admittedly opened the way for mass disfranchisement of Negroes, since local offices could simply administer to any "undesirable" voter a reading test which few men could meet. In the same case, the Court declared that the payment of a poll tax as a prerequisite for the franchise was also valid—though again the practical effect was to disfranchise nearly all Negroes and poor whites alike.

The Court, however, refused to validate so-called "grandfather laws," in which the state disfranchised Negroes by extending the franchise only to all those whose ancestors had had the right to vote in 1866. In *Guinn v. United States* (1915), the Court said that the only possible purpose of such a law was to disfranchise the Negro, and that the law was a deliberate evasion of the Fifteenth Amendment. At the time of the decision, however, such laws had already been in effect for a generation and had largely served their purpose.

A more recent technique in Negro disfranchisement is that by which Negroes are in some fashion barred from Democratic primaries. In *Nixon v. Herndon* (1927) the Court held void a Texas statute barring Negroes from participation in Democratic party primary elections, Justice Oliver Wendell Holmes called the law a "direct and obvious infringement" of the Fourteenth Amendment, on the grounds that classification by color alone violated equal protection of the laws. *Grovey v. Townsend* (1935) temporarily robbed this decision of its force, when the Court held that Democratic state conventions could lawfully restrict party membership to whites, since a political party was a private organization, and as

such not subject to the limitations imposed by the Fourteenth Amendment. But in *United States v. Classic* (1941) the Court decided that the federal government could lawfully regulate a state primary where such an election was an integral part of the machinery for choosing candidates for federal office. A possible implication of this decision was that the guarantees of the Fifteenth Amendment extended to state primary elections. In *Smith v. Allwright* (1944) the Court specifically overruled *Grovey v. Townsend*, holding that a primary was a state election when conducted under state authority, and therefore fell within the provisions of the Fifteenth Amendment. A political party therefore might not lawfully ban Negroes from voting in its primary.

These and other Court decisions indicate that Negro disfranchisement in the South, well established by 1880, may be breaking down. But it still remains to be seen whether Court decisions will not once more be subverted in actual practice.

Although Section 2 of the Fourteenth Amendment declares that any state abridging the suffrage in federal elections for any reason other than rebellion or crime shall have its representation in Congress reduced in proportion, this provision has remained a dead letter. Occasionally a Northern congressman, usually one seeking support from Negro constituents at home, has suggested such a reduction, but these proposals have never been taken seriously.

The Reconstruction era closed with state-federal relations on much the same plane as they had occupied before 1860. Some of the centralization effected in the Civil War, through the creation of a new national banking system and increased federal controls over the monetary system, remained in effect. Slavery stood abolished by constitutional amendment, with Congress empowered to enforce the prohibition. The Fourteenth Amendment had at length settled definitively the status of citizenship by making national citizenship primary and state citizenship secondary. Civil rights were now guaranteed by the Constitution and by Congress against impairment by a state, though not against impairment by private individuals. There was now a federal guarantee against any state's impairing the right to vote because of race, color, or previous condition of servitude, a guarantee which, as has been observed, meant little in actual practice. But the basic character of the American constitutional system had emerged unimpaired. A few Radical extremists

had desired to destroy state autonomy permanently, but there had never been any serious prospect that they would succeed in this objective. The issues of state sovereignty and the supposed right of secession had been settled forever. The Union remained essentially the same one as that described in the Federalist papers and in the great opinions of John Marshall.

In 1876, something like a constitutional revolution was in the making, but it had comparatively little to do with the great issues of the reconstruction period. It was to be associated, rather, with the remarkable industrial revolution under way in the North. It was to be in part based upon judicial interpretation of the Fourteenth Amendment, but it had little to do with the original intent of that Amendment or with the constitutional controversies of Southern reconstruction generally. After 1876 the principal constitutional issues in national development were no longer associated with the question of the ultimate character of the Union but rather with the question of how a document, drafted in the eighteenth century for a socially decentralized agrarian state, could be adapted to the needs of a modern urban industrial society.

Chapter

19

The Revolution in Due Process of Law

IN THE generation after the Civil War a gigantic economic revolution transformed the United States from an agrarian republic into the world's leading industrial nation. Some industrial development had occurred in the two generations before the Civil War. Early industrial development had centered mainly in the Northeast and had included chiefly production in textiles, shoes, coal, iron, brass, and small ware. The Civil War, with its heavy demands upon northern manufactures, sharply accelerated industrial activity in the North. After the war a great boom began in steel, coal, railroads, meat packing, oil, milling, lumber, and textiles. This development was interrupted by panic and depression in 1873 and 1893; but the underlying trend, inspired by the nation's matchless natural resources and remarkable technological progress and by expanding markets at home and abroad, continued unbroken.

By 1900 the United States had become the greatest industrial nation in the world. It produced more iron and steel than Great Britain and Germany combined. The value of American manufactured products exceeded eleven billion dollars annually, compared with

less than two billion dollars in 1860. Whereas in 1860 there had been not more than 30,000 miles of railroads in the United States, by 1900 there were about 200,000 miles. Population growth and urbanization had kept pace with industrial development. In 1860 there were some 31,000,000 people in the United States, of whom approximately 16 per cent lived in cities; by 1900 the nation's population exceeded 70,000,000, of whom almost 50 per cent lived in cities.

The industrial revolution opened a new chapter in American constitutional history. The Constitution of 1787 was written for an eighteenth-century agrarian republic of less than four million people. The same document now had to serve as the frame of government for a modern urban industrial society with all the new complex social and economic problems inherent in such a civilization. A continuous and rapid process of constitutional growth and adjustment was therefore necessary and inevitable if the Constitution was to be adapted successfully to the modern era. In fact, nearly all constitutional development since the close of the Reconstruction period has been concerned directly or indirectly with the impact of the new social order upon government. After 1880 constitutional questions became increasingly entangled in a series of political and social issues of basic consequence to America's destiny.

REVIVAL OF THE DOCTRINE OF VESTED RIGHTS

In the generation after 1876, the new masters of industry and capital sought little in the way of positive constitutional change. Through the Republican Party they obtained favorable tariff and banking legislation and railroad subsidies in the form of land grants, but these involved no radical alteration in the constitutional system. For the rest, their interests in government were generally negative —they wished protection against the efforts of agrarian and liberal dissident groups to impose governmental controls upon big business. In part this protection could be secured in one way or another through political action. Business leaders influenced party platforms, supported promising candidates, and lobbied against what they considered to be unreasonable and arbitrary state and national legislation. However, these procedures were not always effective. In particular, many of the western states frequently fell into the hands of agrarian radicals who passed laws subjecting railroads and business enterprise to a variety of regulatory measures. Even eastern

state legislatures and Congress were not immune to the liberal reformer's zeal. Against such legislation business sought and found protection in the courts.

What business needed was a means whereby the prevailing doctrine of *laissez-faire* economic theory could be written into constitutional law as a positive protection against "unreasonable" legislation. The old doctrine of vested rights, developed by the state and national judiciary between 1790 and 1830, served this purpose to some extent, since in a vague way it guaranteed private property against arbitrary or confiscatory laws. The doctrine had been identified in part with the contract clause, but otherwise it rested upon no specific provision of federal or state constitutions but rather upon the general nature of constitutional government. A more definite identification with the written constitution was highly desirable to the business leaders.

The due process clause in the first section of the Fourteenth Amendment was to serve this purpose. In a series of epoch-making decisions between 1873 and 1898, the Supreme Court revolutionized the historic interpretation of due process of law and thus established the Fourteenth Amendment as the specific constitutional authorization for the doctrine of vested rights.

This constitutional revolution was not a conspiracy. It was a reflection of the prevailing economic philosophy of *laissez faire* and the preoccupation of the country with the rapid development of its natural resources. No group of men sat down together and plotted the changes in constitutional interpretation necessary to extend maximum protection to the property of American industry. The process was a gradual one, in which the decisions responded slowly to the arguments of many different attorneys who came before it and to changes in the point of view of the judges who were appointed to the courts. So involved in legal technicalities was the shift in the meaning of due process that most judges and lawyers seem hardly to have been aware of what was happening. Yet the revolution was no less real because it was gradual and unconscious; and when it was completed, the courts occupied a new position of power and prestige in American life as the guardians of property.

The reader will recall that the doctrine of vested rights was originally a product of eighteenth-century natural rights theory and compact philosophy. Certain rights, according to this theory, were

so fundamental as to be derived from the very nature of justice, even from the very nature of God. It was the purpose and function of organized society to protect these rights; indeed constitutional government existed to assure their protection. Not the least of such rights was that of private property. Therefore the legislature of a state did not have an unlimited right of interference with private property. The bill of rights set up certain specific immunities, but it did not follow that rights mentioned in the Constitution were of an exclusive character, or that the legislature could commit a violation of natural right merely because the right in question was not written down. The whole body of natural rights inhered in the people, and the legislature was powerless to interfere with them in any fashion.

The doctrine of vested rights most often found expression in the early national era by its infusion into the obligation of contracts clause in Article I, Section 10, of the Constitution. It was in this connection that the doctrine achieved its most positive and specific limitations upon legislative authority. *Vanhorne's Lessee v. Dorrance* (1795), wherein Justice Paterson condemned a Pennsylvania statute as a violation of the "primary object of the social compact," the protection of property, arose under the contract clause. It will be recalled that the doctrine was again identified with the contract clause in *Fletcher v. Peck* (1810) and in *Dartmouth College v. Woodward* (1819). And again, in *Terrett v. Taylor* (1815), a case involving Virginia's attempt to take title to certain lands of the disestablished Episcopal Church, Justice Story discoursed at length upon the doctrine of vested rights, which he identified with the contract clause in imposing limitations upon the state's legislative authority. In brief, in the early nineteenth century the contract clause played somewhat the same role in the embodiment of the doctrine of vested rights as the due process clause was to play after 1890.[1]

[1] The courts did not invariably associate the doctrine of vested rights with the contract clause, but sometimes instead rested vested rights merely upon the general nature of all constitutional government. Thus in *Calder v. Bull* (1798) Justice Samuel Chase observed that "an act of the Legislature (for I cannot call it a law) contrary to the first great principles of the social compact, cannot be considered a rightful exercise of legislative authority." Among other examples of such legislation he included "a law that takes property from A and gives it to B." Justice Story used much the same language in *Wilkinson v. Leland* (1829) when he said that "We know of no case in which a legislative Act to transfer the property of A to B

With the rise of popular sovereignty after 1830, the doctrine of vested rights suffered a temporary decline, for it conflicted with the growing idea of the ascendancy of popular will as expressed through legislative fiat. The prevailing attitude expressed by most courts between 1830 and 1850 was that the legislature represented the sovereign power of the people, and that the only proper limitations upon its will were those specifically imposed in the state and federal constitutions.

About 1850, the doctrine of vested rights underwent a revival and at the same time became associated to some extent with the guarantee of due process of law in state and federal constitutions. In *Wynehamer v. New York* (1856) the New York Court of Appeals declared unconstitutional a state law regulating the manufacture of liquor and in so doing tied the doctrine of vested rights to the due process clause in the state constitution. It held that this clause constituted a general restriction on the legislature's power to interfere with private property. A year later, in the Dred Scott case, Chief Justice Taney referred incidentally to the due process clause in the Fifth Amendment to the federal Constitution, construing it as prohibiting the federal government from imposing restrictions upon property in slaves within the territories. Again, in *Hepburn v. Griswold* (1870) the Court briefly invoked the due process clause of the Fifth Amendment in holding invalid federal legal tender legislation.

The guarantee of "due process of law" and its counterpart, "the law of the land," were already centuries old in the nineteenth century. In England, the thirty-ninth article of the Great Charter granted by King John to his barons in 1215 contained the pledge that "no freeman shall be taken or imprisoned or disseised or exiled or in any way destroyed . . . except by the lawful judgment of his peers and by the law of the land." Magna Charta from time to time was reaffirmed by successive English monarchs, and in the Statute of Westminster of the Liberties of London, enacted in 1354, the phrase "due process of law" occurred for the first time in English law. According to Sir Edward Coke, "due process of law" and

without his consent has ever been held a constitutional exercise of legislative power in any State of the Union." And Chancellor Kent in his *Commentaries*, published in 1826, emphasized that vested rights were to be protected from legislative attack whether or not the constitution specifically protected them. He regarded them as associated with the general nature of all constitutional government.

"law of the land" had the same meaning, although no certain definition of either phrase was ever laid down.

The phrase "law of the land" was incorporated in several colonial charters, and thus became a part of the commonly accepted body of liberties of the American colonists. The Massachusetts constitution of 1780 contained the phrase "the law of the land," virtually as it had been originally embodied in Magna Charta. Most of the other early state constitutions contained the same general guarantees. In 1791 due process passed into the federal Constitution with the adoption of the Fifth Amendment, which provided that "no person shall . . . be deprived of life, liberty, or property without due process of law." Thus after some centuries of development "due process of law" found its way into the American constitutional system.

Before 1850 due process was generally assumed to be a procedural rather than a substantive restriction upon governmental authority. That is, it guaranteed certain protective rights to an accused person before he could be deprived of his life, liberty, or property. These rights included protection against arrest without a warrant, the right to counsel, the requirement of indictment by a grand jury before trial, the right of the accused to hear the nature of the evidence against him, the right to an impartial trial by a jury of the accused person's peers, and the requirement of a verdict before any sentence was executed. In other words, due process of law historically was of significance primarily in criminal cases. It promised accused persons that they would not be punished in an arbitrary and indiscriminate fashion and without the protection of long-established criminal procedure. By the same token, due process hitherto had had no relation to the doctrine of vested rights, nor had it constituted any limitation upon the right of legislatures to regulate private property in the interests of the public welfare.

The tentative association between due process of law and the doctrine of vested rights in the Wynehamer, Dred Scott, and Hepburn cases thus represented a radical departure in the historic meaning and content of due process. The new association between due process and vested rights gave due process a substantive content and made it a guarantee against unreasonable legislative interference with private property. Before 1870, the substantive conception of due process was tentative, and had appeared in only a few cases. It

remained to be seen whether the due process clause in federal and state constitutions would replace the obligation of contracts clause as the principal constitutional limitation upon legislative capacity to interfere with private property and vested rights.

THE FOURTEENTH AMENDMENT AND THE SLAUGHTERHOUSE CASES

The Fourteenth Amendment to the federal Constitution, taking effect in 1868, contained in Section 1 the clause: "Nor shall any State deprive any person of life, liberty, or property, without due process of law." Unlike the similar clause in the Fifth Amendment, which guaranteed the individual against the federal government, the due process clause in the Fourteenth Amendment was a federal guarantee against arbitrary state action interfering with individual rights.

The reader will recall that the entire history of the Fourteenth Amendment prior to passage indicated that it was passed to protect the newly acquired political and legal rights of Negroes against arbitrary state action. There is little evidence that the statesmen who wrote the amendment were interested in bringing about the intervention of the federal government in the protection of vested rights. Certainly there was nothing to indicate in their time that the due process clause of the Fourteenth Amendment was destined to become one of the most important foundation stones of modern constitutional law.

The Supreme Court first ruled upon the meaning of the Fourteenth Amendment in 1873, in the *Slaughterhouse Cases*. The legislature of Louisiana in 1867 had conferred upon one firm what was in effect a monopoly of the slaughterhouse business in New Orleans and had banned all other slaughterhouses already established within the city. Some of the businesses affected brought suit in the Louisiana courts, asserting among other things that the law in question was a violation of the Fourteenth Amendment. The Supreme Court of Louisiana, however, held that the law constituted a legitimate exercise of the police power of the state and thus upheld the constitutionality of the act. An appeal was then taken to the Supreme Court of the United States.

The most insistent claim of the appellant was that the statute in question constituted a violation of the privileges and immunities clause of the Fourteenth Amendment—"no state . . . shall abridge the privileges and immunities of citizens of the United States."

This interpretation of the clause by implication placed all civil rights under the protection of the federal government, but the Court refused to accept this contention. Instead it resorted to the doctrine of dual citizenship. "It is quite clear," said Justice Miller, "that there is a citizenship of the United States and a citizenship of a state, which are distinct from each other."

The consequence of this doctrine of dual citizenship was that the Court was enabled to draw a sharp line between those privileges and immunities which accrued to an individual by virtue of his state citizenship and those which accrued to him by virtue of his citizenship in the national government. Only the latter, said the Court, fell under the protection of the Fourteenth Amendment.

But what were the privileges and immunities of citizens of the several states as distinct from national citizenship? Here the Court quoted earlier decisions to demonstrate that the whole body of commonly accepted civil liberties fell within this category. It included, said Miller, "protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the [state] government may prescribe for the general good of the whole." It was not the intent of the Fourteenth Amendment, said Miller, to transfer this whole body of rights to the keeping of the federal government. The consequences of such an interpretation, if accepted, were "so serious, so far-reaching and pervading," and they altered so radically "the whole theory of the relations of the state and Federal governments to each other" that the Court simply rejected this line of thought completely.

What, then, were the privileges and immunities of national citizenship, which the Court admitted the amendment did protect against state action? These the Court refused to define absolutely, but it suggested what some of these might be. They included the right of a citizen "to come to the seat of the government to assert any claim he may have upon that government"; the "right of free access to its seaports"; and the right "to demand the care and protec-

tion of the Federal government over his life, liberty, and property when on the high seas, or within the jurisdiction of a foreign government."

What the opinion said in effect was that the whole body of traditional rights of the common law and of state bills of rights still remained solely under the protection of the states. The privileges and immunities clause of the Fourteenth Amendment had not placed the federal government under an obligation to protect these rights against state violation. So far as the federal Constitution was concerned, therefore, the "privileges and immunities" of the citizens of the separate states were in exactly the same status as they were before the amendment was adopted. By implication, the privileges and immunities clause had thus done nothing to disturb or restrict the power of the various states to regulate private property interests within their boundaries.

The plaintiffs also asserted that the Louisiana statute in question deprived them of their property without due process of law, again in violation of the Fourteenth Amendment. The Court simply dismissed this contention with the observation that "under no construction of that provision that we have ever seen, or that we deem admissible, can the restraint imposed by the state of Louisiana . . . be held to be a deprivation of property within the meaning of that provision." In other words, the Court accepted without debate the procedural interpretation of due process; it acted as though it had never heard of the substantive interpretations of due process which had been stated briefly by Taney in his Dred Scott opinion and again by the majority in *Hepburn v. Griswold*.

Justice Miller gave the equal protection clause of the Fourteenth Amendment similar summary treatment. The Court simply said that it had reference to state laws discriminating against Negroes. Justice Miller doubted "whether any action of a state not directed by way of discrimination against the Negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."

This interpretation of Section 1 of the Fourteenth Amendment was about as narrow a one as the Court could possibly extract from the language of the section. It came close to nullifying the apparent intent of the amendment. It seems probable that Congress had intended to place the whole generally accepted body of civil and pri-

vate rights within the protection of the federal government as against state action. Yet by emphasizing the conception of dual citizenship the Supreme Court had denied that the federal government had any interest in a state's regulation of the common private rights of its citizens under the privileges and immunities clause. The Court had gone on to dismiss briefly the argument that the due process clause in the amendment was concerned with the right of a state to regulate private property, a conclusion which accorded with nearly all past interpretations of due process. It had concluded by holding that the equal protection clause was merely a warning to the states not to discriminate against Negroes.

Why had the Court refused to place the common body of "privileges and immunities" within the protection of the federal government? The answer probably is that it did not care to recognize any profound or fundamental alteration in the relations of state and federal governments as a result of the amendment. And to recognize that all private rights were now entrusted to the specific protection of the federal government would have indeed constituted a radical change in the nature of the American constitutional system. The justices on the bench at the time were political conservatives, interested in seeing the old relationships of state and federal governments maintained with as little disturbance as possible. Hence they advanced the very plausible conception of dual citizenship, which seemed to remove nearly all common private rights from the sphere of federal control.

Furthermore, a majority of the Court were not in sympathy with the argument that the meaning of the amendment extended beyond its immediate purpose—the protection of the Negro. The Court was not impressed by the attempts of counsel to make due process of law a general limitation upon the power of the state to regulate private property. Those lawyers and statesmen who wished to extend the protecting hand of the federal government over vested property rights could draw but cold comfort from the Court's contemptuous rejection of the plea that due process of law was a guarantee of vested property rights against state interference.

Four justices—Stephen J. Field, Salmon P. Chase, Noah H. Swayne, and Joseph Bradley—dissented. Field based his spirited dissent mainly upon the doctrine of vested rights, but he also insisted that the Louisiana statute violated the privileges and immuni-

ties of citizens of the United States, arguing very plausibly that the Civil Rights Act expressed the true intent of the framers of the amendment as to the general category of rights to be protected by the section. Bradley and Swayne gave more importance to the due process clause, Bradley observing that any act which banned a citizen from a lawful occupation was a violation of due process; while Swayne defined due process as the "fair and regular course of procedure" and yet implied that to impair a property right by statute was in fact a violation of procedure and hence of due process. These minority opinions anticipated the day when a majority of the Court would accept the dictum that due process was indeed a limitation upon the regulatory powers of the state.

MUNN V. ILLINOIS: THE GRANGER CASES

Four years later, in 1877, the Court was presented with an opportunity to set forth again its attitude toward due process of law. In *Munn v. Illinois* and in the other *Granger Cases*, the Court again refused to apply a substantive conception of due process. Instead, it reaffirmed at considerable length the right of the states to regulate private property in the public interest.

These cases involved a characteristic example of the way in which the new economic power was clashing with the attempts of the states to subject that power to some degree of regulation. In the seventies a profound movement of agrarian unrest and discontent swept many of the western states. The causes behind the discontent of the farmer were fairly complex. The deflation of postwar years had lowered his cash income; he had been left with debts which had been contracted during the period of high farm prices, expansion, and war prosperity; and at the same time he was suffering the more general effects of the great business depression which hung over the entire nation between 1873 and 1880.

Economic discontent is at all times likely to seek a political outlet. All over the West in the seventies the farmers joined the Granger movement. Local Grange clubs were both social and political in purpose. Politically, they sought to capture control of state legislatures in order to enact legislation in the interests of the farm group. For a time in the seventies and eighties the Grange or men sympathetic to it held control of the legislatures in most of the northwestern states.

Farmers in the Granger movement laid the blame for their plight chiefly at the door of the railroads and other public utilities. These, they felt, were controlled by eastern financiers or by selfish businessmen who operated them at exorbitant profit without regard to the interest of the farmer they were supposed to serve. Granger-controlled legislatures as a consequence passed numerous laws subjecting railroads, warehouses, and other public utilities to sharp regulation of prices charged for hauling freight, storing grain, and the like.

Munn v. Illinois arose out of an act passed in 1873 by the Granger-controlled legislature of Illinois fixing the rates for the storage of grain in warehouses located in cities of 100,000 population or more. The only city in Illinois of that size was Chicago, and the law was in reality aimed at preventing abuse of the monopoly which the elevator operators had succeeded in establishing over the grain elevator business at the mouth of the Chicago River. Some nine different elevator firms were engaged in business in this vicinity; yet the uniformity and exorbitancy of their rates indicated clearly that the various firms constituted a near-monopoly.

The elevator operators shortly attacked the constitutionality of the statute in the Illinois courts, asserting that the act constituted an infringement upon the power of Congress to regulate interstate commerce and that it violated the due process clause of the Fourteenth Amendment. The decision of the Illinois Supreme Court was favorable to the constitutionality of the act, and an appeal was then taken to the Supreme Court of the United States.

The other *Granger Cases* had a similar origin. A number of Granger-controlled western legislatures, among them those of Wisconsin, Iowa, and Minnesota, had enacted statutes fixing rail rates within the states. The railroads had attacked the constitutionality of these statutes in the courts of the several states. The issue here was the same as that in *Munn v. Illinois*, and the Court therefore settled these cases by direct reference to the former decision.

The opinion in *Munn v. Illinois*, as presented by Chief Justice Morrison R. Waite, showed that a majority of the Court still clung to the notion of due process of law laid down in the *Slaughter-house Cases*, though the Court's reasoning showed some evidence that the traditional conception of due process as purely procedural was weakening. Waite began with an analysis of the police power,

which he rested both upon the nature of constitutional government and upon an appeal to history. He quoted the constitution of Massachusetts, which describes the body politic as "a social compact by which the whole people covenants with each citizen, and each citizen with the whole people." From this it followed that the social compact authorized "the establishment of laws requiring each citizen to . . . so use his own property as not unnecessarily to injure another." This was a fairly clear exposition of the doctrine of state police power. Waite admitted, however, that the state could not control rights which were "purely and exclusively private," an intimation that in certain circumstances the Court might admit due process to be a limitation upon the police power.

Chief Justice Waite defined the extent of the state's regulatory authority by asserting that when private property is devoted to a public use it is subject to public regulation. "When, therefore," he said, "one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good." Waite reinforced his doctrine by an appeal to English and American legal history, and cited several precedents from English and American law in which wharfs, warehouses, and private businesses had been subjected to regulation in the public interest.

As in the *Slaughterhouse Cases*, the Court did not enter into an extensive analysis of due process of law; instead Justice Waite contented himself with demonstrating that the legislative power to regulate private property in the public welfare had passed unchallenged for centuries. No one had ever held the police power to be controlled or limited by due process of law.

Yet the very statement that property vested with a public interest was subject to public regulation gave some implied recognition to a substantive conception of due process. What constituted a public interest? Suppose the property in question were vested clearly with a mere private interest? Would the state then have the power of regulation? The Court did not try to answer this embarrassing question. Yet here was a clear anticipation of the growth of substantive due process in the next twenty years.

Field again dissented, and this time he based his dissent directly upon the due process clause. He denied specifically that the mere fact that a business was vested with a public interest gave the state

any regulatory power. "If this be sound law, if there be no protection, either in the principles upon which our republican government is founded, or in the prohibitions of the Constitution against such invasion of private rights, all property and all business in the State are held at the mercy of a majority of its legislature." Here was an unequivocal demand that the judiciary constitute itself the guardian of property rights against restrictive state legislation under the authority of the federal Constitution. Though only one other justice, Strong, agreed with his dissent, Field was to see his conception of due process triumph completely before he left the Court in 1897.

THE GROWTH OF SUBSTANTIVE DUE PROCESS, 1877–1898

The Supreme Court had now apparently placed its approval upon a new era of extensive economic regulation by the states. This dictum, if allowed to stand, would have provided a broad constitutional base for the states to control the mass of powerful propertied interests springing up in the nation. New and powerful corporate interests could have been controlled by law simply because they were "vested with a public interest." State government now had been assigned the right to play an important part in molding the industrial revolution then going on in the nation.

Actually no such thing occurred. The gigantic growth of industrial life in the United States in the generation after 1875—in steel, oil, railroads, sugar, lumber, and coal, proceeded substantially unaffected by state legislation. There was regulation, much of it, but it was not of a character to constitute a major checkrein upon the men who were directing the destinies of American industry.

Several factors account for this. First, the whole spirit of the times was against extensive state regulation of the new economic life in America. American industry seemed to be doing very well indeed for itself without the necessity for any governmental interference. Most of America was profiting in one way or another by the tremendous rise in industrial wealth and productive power. True, a few industries and a few men associated with them were amassing fortunes beyond the comprehension of the average person, but the great majority of Americans saw no wrong in the acquisition of wealth; they asked only an equal opportunity to use their own imagination, skills, business sense, and good fortune to en-

rich themselves. Most Americans despised any suggestion of paternalism in government. The modern idea of the service state had not yet arisen.

State legislatures were nonetheless sometimes controlled by men hostile to business and industry. This was particularly likely to occur in agricultural states, as the Granger laws had shown. The constitutional doctrines of *Munn v. Illinois* might be exceedingly embarrassing in such circumstances. There were, however, two remedies against restrictive state legislation, and American business availed itself of both of them.

First, business went into politics to protect its interests. It is significant that *Munn v. Illinois* was followed by a perceptible quickening of the interest of industry in politics. Since the state had been confirmed in its power to regulate industry, industrialists now became greatly concerned about the kind of regulation that was to be imposed. Control of a state legislature by a farm group hostile to the railroads, for example, might result in the establishment of rate schedules or warehouse regulations which the railroads would consider altogether inimical to their welfare.

American industry had always been in politics to some degree. After 1880, however, industry and the railroads went into state politics to an extent hitherto unknown. They put forward their own attorneys as candidates for office; they donated funds to political parties; they backed this or that faction in the state legislature. Sometimes less scrupulous industrial leaders resorted to bribery. The eighties and nineties saw a new low in the moral level of the American state legislature. That the seats of assemblymen in Harrisburg or Albany were often for sale was a matter of common knowledge. From the point of view of business these tactics, whether or not they remained within the scope of orthodox political morality, were a matter of practical necessity. State interference with industry might be dangerous. Therefore the state government must be kept out of hostile hands.

Second, business carried the fight against restrictive state legislation into the courts, where, after a long fight, it won a substantial victory in the general acceptance of due process as a substantive limitation upon the power of government to regulate private property. The doctrine propounded in *Munn v. Illinois*, that private property vested with a public interest is subject to public regula-

tion, technically was not subsequently overturned; but by 1898 the Court was to strike down statutes imposing "unreasonable" rail rate legislation on the ground that the rates in question were confiscatory and so took property without due process of law. In the next twenty years judicial emphasis was to pass almost completely from the dictum in *Munn v. Illinois* to reiteration of the principle that due process of law offered immunity to private property and vested interest against unreasonable social legislation. In its emphasis upon the capacity of state legislatures to control private property in the interest of the public welfare, *Munn v. Illinois* was at odds with the dominant economic interests of business and industry. And it was big business and industry which, in the generation after 1876, for the most part controlled the formation of national policy in Congress and ultimately in the courts as well.

The judiciary could hardly be expected to remain immune to the "big business" conception of the role of government in society. Judges, then as now, usually reached their positions through the legal profession. The philosophy of the legal profession, as always, was generally colored by the interests and attitudes of the men it most often represented—that is, industrialists, bankers, and railroad men. The path of corporation lawyers to the bench in the two generations after the Civil War was made easier by the fact that the Republican Party controlled the presidency for all but two administrations between 1868 and 1912. The Republican Party was for the most part a party of big business, and the men its Presidents appointed to the bench were most often corporation lawyers by training. Thus, it is not surprising that the attitude of the Supreme Court, as well as that of the federal and state judiciaries in general, began to reflect the economic and social attitudes of big business. Judges of this background might be expected to interpret the Constitution in the light of the *laissez-faire* economic philosophy and to regard the Constitution and the judiciary as bulwarks of property. They did not disappoint these expectations.

After 1877 the Court gradually gave more and more recognition to the substantive conception of due process of law and its identification with the doctrine of vested rights. Between 1877 and 1898 a flood of cases came up from the lower courts, in which appellants attacked state statutes attempting to regulate corporate property or some private vested interest. Always the claim was the same: the

statute in question, by imposing some limitation upon the use of private property, constituted a violation of the due process clause of the Fourteenth Amendment. And notwithstanding the Court's outright denial of the conception of substantive due process in the *Slaughterhouse Cases* and its strong insistence in *Munn v. Illinois* upon the validity of public regulation, the Court between 1890 and 1898 finally gave full recognition to substantive due process as a limitation on state legislative power.

How very much alive the doctrine of vested rights was in legal minds, even in the Supreme Court itself, at the time of the *Slaughterhouse Cases* and *Munn v. Illinois* was demonstrated in *Loan Association v. Topeka* (1875). The decision dealt with the validity of a Kansas statute authorizing municipalities to issue bonds for the encouragement, in certain instances, of private businesses. The interest and principal on such bonds were to be paid from the public treasury. The Supreme Court found that the law in question authorized taxation for a private purpose and so was unconstitutional and void. The appropriation of public money for a private purpose was, the Court held, a violation of the basic nature of constitutional government. There were limitations upon the legislative power of the states, said Justice Miller's opinion, "which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name." Then followed the already classic formula illustrating the validity of the doctrine: "No court, for instance, would hesitate to declare void a statute which . . . should enact that the homestead now owned by A should no longer be his, but should henceforth be the property of B." Clearly the justices had by no means accepted the doctrine that the legislative power of the state was limited only by specific constitutional restrictions.

As yet a majority of the Court was drawing the doctrine of vested rights from the "essential nature of all free governments," as it had done years before in *Calder v. Bull*. Should it ever decide, however, that due process of law itself constituted a limitation upon the police power of the state, then the doctrine of vested rights would be tremendously strengthened. For the immunity of vested rights from legislative interference would then be supported by the authority of a specific clause in the Constitution of the United

States, rather than by some vague conception of the nature of compact government. All that was necessary, in other words, was to tie the doctrine of vested rights to the due process clause of the Fourteenth Amendment. Were that done, the police power of the states would be seriously impaired.

Evidence of the growing tendency to identify due process of law with the doctrine of vested rights came in 1878 in *Davidson v. New Orleans*. Broadly speaking, Justice Miller here again confirmed the now seemingly established opinion that the due process clause of the Fourteenth Amendment carried only procedural implication. He noted the number of cases coming up from the state courts under the amendment and concluded rather impatiently: "There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the XIVth amendment." Yet the opinion also conceded that under extreme circumstances a regularly enacted statute imposing a property regulation might be a violation of due process. A law transferring property from A to B, thought the Court, would be a violation of the Fourteenth Amendment. For the first time a majority of the Court held that at least one extreme form of property regulation by state legislation—the most extreme imaginable to be sure—would be a violation of due process of law.

In the next dozen years death and retirement depleted the conservative majority on the Court. The men who, with Justice Miller, felt that there existed "some strange misconception" of due process were dying off. Between 1877 and 1890 no less than seven of the justices who had participated in *Munn v. Illinois*—Nathan Clifford, Ward Hunt, William Strong, Morrison R. Waite, Noah H. Swayne, David Davis, and Samuel F. Miller—resigned or died. These men were all constitutional conservatives, interested in maintaining the traditional relationships of state and national governments. Upon the death of Justice Miller in 1890, only Joseph Bradley and Stephen J. Field remained of the bench that had decided the *Slaughterhouse Cases* and *Munn v. Illinois*. And both Bradley and Field had dissented strongly in the *Slaughterhouse Cases*, contending that due process constituted a guarantee of vested rights against state action, while Field had reiterated this belief in his dissent in *Munn v. Illinois*.

Most of the new appointees were the product of Reconstruction politics and accustomed to the doctrine of strong national govern-

ment. Nearly all of them had legal backgrounds calculated to inspire respect for vested interests and property rights. Justice John Marshall Harlan, appointed by President Hayes in 1877, was a Kentuckian and a former slaveholder who had sided with the Union in 1861 and had subsequently fought in the Northern army. Because of his respect for property rights he had opposed the Thirteenth Amendment. By 1868, however, he was a Radical Republican and a thoroughgoing nationalist. Eventually Harlan emerged as a strong liberal nationalist, but he was at first not at all reluctant to use the federal judiciary to protect vested interests. Horace Gray, appointed in 1882 by President Chester A. Arthur, was a property-minded Republican lawyer from Boston. Samuel Blatchford, also an Arthur appointee of 1882, was a New York Republican and a patent lawyer.

Several of Cleveland's appointees, all Democrats, were also highly property-minded. Melville Fuller, appointed Chief Justice by Cleveland in 1888, was an old-time Illinois Democrat, and his record hitherto had been that of an extremely public-spirited man. Once on the Court, however, he quickly fell under the influence of Field's ideas and became a staunch defender of private interests against social legislation. Lucius Quintus Cincinnatus Lamar, also a Cleveland appointee of 1888, was a one-time Confederate general and ardent states' rights advocate of decidedly conservative temperament. Edward D. White, appointed in 1894 during Cleveland's second term, was a wealthy conservative Louisiana sugar planter and tariff protectionist, although at the same time generally an ardent champion of states' rights. Rufus W. Peckham, appointed in 1895, was a conservative New York attorney.

David J. Brewer, appointed by President Benjamin Harrison in 1889, was a nephew of Justice Field and much under the latter's influence. At the time of his appointment he had already acquired a solid reputation as a federal circuit judge for upholding corporate property rights: in one notable decision of 1885 he had refused to accept the authority of *Munn v. Illinois* as to the broad police powers of the states. Henry B. Brown, appointed by Harrison in 1890, was a conservative Detroit admiralty lawyer.

The new appointees were conservatives, but of a very different kind from the judges who had decided the *Slaughterhouse Cases* and *Munn v. Illinois*. The conservatives of the seventies had been

concerned with the protection of the old established state-federal relations against the upheavals of the Civil War and the onslaught of Radical reconstructionism. The conservatism of the new judges, on the other hand, was concerned primarily with protecting the property rights and vested interests of big business and with the defense of the prevailing economic and social order against agrarian and dissident reformers. The new appointees, in short, were extremely receptive to the constitutional theories advanced by Justice Field and by the brilliant attorneys appearing before the Court.

In 1886, the Court in *Stone v. Farmers Loan and Trust Co.* made its first great concession to the lawyers who were trying to give a substantive meaning to due process and so to link it with the doctrine of vested rights. The case involved a Mississippi statute which had erected a state railroad commission with authority to revise rates, a power which the Mobile and Ohio Railroad Company upon appeal charged was in violation of due process of law.

The Court again said "No," citing *Munn v. Illinois*. Yet the very words of the opinion carried a concession to the argument. "General statutes regulating the use of railroads in a State, or fixing maximum rates of charge for transportation," said Chief Justice Waite, "do not necessarily deprive the corporation owning or operating a railroad within the State of its property, without due process of law within the meaning of the Fourteenth Amendment." But at the same time Waite warned that "it is not to be inferred that this power of limitation or regulation is itself without limit. . . . Under pretense of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

In other words, the Court now openly admitted that there were conceivable circumstances in which a legislative regulation of private property, a pretended exercise of the police power, might constitute a violation of due process. All that remained was for the Court to find a specific instance in which legislative regulation denied due process. The emergence of substantive due process would then be virtually complete.

Four years later the Court, in *Chicago, Milwaukee, and St. Paul Ry. Co. v. Minnesota* (1890), took what was practically the final

step in this development, when it declared a Minnesota rail rate statute of 1887 to be in violation of the Fourteenth Amendment. The act in question had set up a rail and warehouse commission with power to examine rail rates and to revise those which it found to be unreasonable or unequal. Justice Blatchford, who wrote the majority opinion, based his argument mainly upon the fact that the law as interpreted by the Minnesota Supreme Court gave the commission final and conclusive rate-fixing powers, with the result that the rates set by it were not subject to any review by the courts as to their equality or reasonableness. Under the statute, said Blatchford, there was "no power in the courts to stay the hands of the Commission, if it chooses to establish rates that are unequal and unreasonable." In other words, he said, the statute "deprives the Company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy." The question of whether a rate was reasonable, he continued, "is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States."

Now on the surface the Court was here concerned merely with a procedural due process and not with a substantive limitation upon the rate-fixing powers of the legislature itself. It merely found a procedural defect in the commission's prescribed method of rate-fixing. In other words, it treated the commission as though it were a court or at least a quasi-judicial body, and it described the determination of the reasonableness of rates as a judicial process. Acting on these assumptions, it found that the commission's mode of fixing rates violated one of the essential elements in procedural due process—the right of appeal.

The commission, however, was more than a quasi-court. Its rate-setting powers had been delegated by the legislature. The Court had said that the commission could not lawfully be given the power to fix rates from which there was no judicial appeal. But what if

the legislature itself should set the rate directly and allow no judicial appeal? Here the substantive implication of the decision stood clearly revealed. It would be but a short step for the Court to hold that a rate fixed by the legislature itself, with no appeal to the courts, would violate due process of law. The way was now open for a decision which without seeming to reverse *Munn v. Illinois* would take most of the practical economic significance out of that decision by permitting the courts a general review of all rate-schedules fixed by legislative determination.

Justice Bradley in a cogent dissent pointed out that the majority decision practically overruled *Munn v. Illinois*. In that case the Court had presumably settled definitely that the rates charged by a business affected with a public interest were subject to public regulation. In the present case, the Court said in effect that public regulation must be reasonable and that what was reasonable was a judicial question. "On the contrary," said Bradley, the question of reasonableness "is pre-eminently a legislative one, involving considerations of policy as well as of remuneration." By undertaking to rule on the reasonableness of a legislative act, the judiciary was, in Bradley's view, determining a matter of policy ordinarily left to the legislature.

The present rate had been set by a commission, not by the legislature. Yet Bradley pointed out that it was "perfectly clear, and well settled by the decisions of this court, that the Legislature might have fixed the rates in question. . . . No one could have said that this was not due process of law." If the legislature could set the rate, Bradley asked, why not the commission?

Bradley might have put this inquiry the other way about: if the Court here insisted upon its right to review the reasonableness of a commission decision, why should it not in the future insist upon the right to review the reasonableness of direct legislative rate regulation by the legislature itself? In short, did it not imply its willingness to review the reasonableness of all state legislation regulating property?

To complete the evolution of substantive due process, it remained for the Court only to declare void a statute fixing rates directly through legislative enactment. The Court affirmed its power to do this in 1894 in *Reagan v. Farmers' Loan and Trust Co.*, although no statute was actually declared to be unconstitutional at this time.

This step came in 1898 in *Smyth v. Ames*, wherein the Court held void a Nebraska statute setting intrastate freight rates. After protracted inquiry into the earning power of the railroads affected, the opinion concluded that the law imposed rates so low as to be unreasonable and thus to amount to a deprivation of property without due process of law.

DUE PROCESS AND FREEDOM OF CONTRACT

Substantive due process was at first concerned only with the protection of vested property rights against the police power of the states. It was property that could not be subjected to unreasonable restrictions. As yet the Court had said nothing of any substantive limitation upon the right of the states to regulate liberty. Yet it was a logical step for the Court to enlarge the substantive limitations of due process to include liberty as well as property. The legal instrument used to bring this about was the doctrine of freedom of contract.

Freedom of contract was a conception introduced into constitutional law directly from *laissez-faire* economics. There is virtually no other explanation for its appearance, for it certainly rested neither upon any specific constitutional principle, nor upon any well-established legal precedent. As we have seen, the old guarantee of liberty in due process had been entirely procedural—it merely threw certain safeguards about accused persons in criminal cases. The new doctrine asserted that when two parties came together to reach an agreement that was not contrary to public policy, the legislature had no right to interfere and to dictate the terms of that agreement or the conditions under which it should be carried out.

In *Allgeyer v. Louisiana* (1897) the Court entered into a comprehensive discussion of the liberty guaranteed by due process of law. Liberty, said the Court, included "not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."

In reality, the concept of freedom of contract was to be used after 1900 mainly to invalidate state laws regulating conditions of labor. This became apparent as early as 1898, in *Holden v. Hardy*, when the Court considered whether or not a Utah statute limiting hours of labor in mines to eight hours a day was in violation of freedom of contract.

DUE PROCESS AND THE FIFTH AMENDMENT

Although the revolution in due process of law occurred through judicial interpretation of the Fourteenth Amendment, it will be recalled that there was also a due process of law clause in the Fifth Amendment, constituting a guarantee against the federal government. Early Supreme Court opinions, with the exception of the Dred Scott Case and *Hepburn v. Griswold*, interpreted the due process clause in the Fifth Amendment as extending purely procedural safeguards to the individual as against federal action. Presumably it expressed in a general way the same immunities expressed by the other clauses of the Fifth and Sixth Amendments in a specific way.

Once the substantive conception of due process of law had evolved, however, there was every prospect that the idea would be applied to the Fifth Amendment also. Although the federal govment had no general police powers except in the territories, it nevertheless possessed extensive regulatory powers over private property within limited spheres of jurisdiction. Congress, in exercising its authority over interstate commerce and taxation, in particular, frequently imposed extensive limitations upon private property rights and vested interests.

After several times suggesting that the due process clauses in the Fifth and Fourteenth Amendments meant substantially the same thing, the Court in *Adair v. United States* (1908) held void a federal statute prohibiting "yellow dog" labor contracts (by which employees agreed not to join labor unions) on the ground that the act impaired freedom of contract and so violated the due process clause of the Fifth Amendment. In a series of cases dealing with the federal commerce power, the Court ruled also that to be within due process, rail rates fixed by the Interstate Commerce Commission must be reasonable and not arbitrary or confiscatory. This was substantially the same conception, applied to federal legislation, as

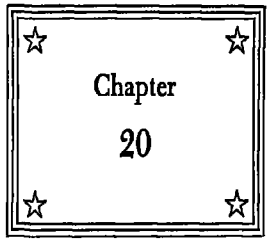
that advanced against state legislation under the Fourteenth Amendment.

It may be well to summarize the history of due process between 1870 and 1900 so that the extent of the constitutional revolution involved may be appreciated.

In the *Slaughterhouse Cases* the Court, disregarding the prior tentative association of due process and vested rights in the Dred Scott and Hepburn cases, had held that the due process clause of the Fourteenth Amendment had merely the traditional procedural content. It had denied the contention that due process constituted a substantive limitation upon the legislative capacity of the states. In *Munn v. Illinois* the Court had re-emphasized the capacity of state legislatures to regulate private property in the interest of the public welfare; and although it had by implication admitted the possibility of substantive due process, it had been concerned mainly with upholding state police power.

In a series of cases between 1877 and 1898, the Court gradually coupled vested rights to the due process clause, so that due process came to be a substantive limitation upon the power of a state to regulate private property in the interests of the public welfare. Liberty of contract also became a vested right, guaranteed by due process against unreasonable state legislation. Shortly after 1900 the substantive interpretation of due process was applied to the Fifth Amendment, so that substantive due process also became a limitation upon congressional legislative power.

What constituted due process now became the most important consideration in constitutional law. Moreover, since judicial decision as to due process in reality involved passing judgment upon considerations of social and economic policy, substantive due process actually endowed the courts with a kind of quasi-legislative power. In 1890, accordingly, the judiciary stood on the threshold of a new era of power and prestige in the American constitutional system.



The New Due Process and Judicial Review—1890–1920

IN HUNDREDS of cases after 1890, the federal and state judiciaries developed a complex new law of substantive due process controlling state police power and federal legislative capacity. The content of due process underwent constant change and development, so that until 1937, at least, it was not possible at any one time to define absolutely the limits of substantive due process. From the time of the *Slaughterhouse Cases*, the Supreme Court consistently refused to lay down any inclusive definition or set of rules about due process; instead it preferred to develop the concept, as it remarked in 1877, by the method of "inclusion and exclusion." Yet the Court in the generation after 1890 succeeded fairly well in setting forth the fundamental nature of due process in a series of general propositions which remained moderately stable until 1937.

THE CONTENT OF DUE PROCESS

Due process was, broadly speaking, a general substantive limitation upon the police power of the state. Any state statute, ordinance,

or administrative act which imposed any kind of limitation upon the right of private property or free contract immediately raised the question of due process of law. And since a majority of statutes of a general public character imposed some limitations upon private property or contractual right, the ramifications of due process were endless. Under the due process clause, the Supreme Court could and did consider the constitutionality of such varied statutes as a New York ten-hour law for bakers, a Massachusetts compulsory vaccination law, a Louisiana statute licensing foreign corporations, and an Illinois act compelling railroads to make at their own expense certain alterations for drainage purposes. Not in every instance was the statute found to be a violation of due process. In most cases the opposite was true. However, the Court insisted upon its right to examine the statute in question and to determine whether it constituted a legitimate exercise of the police power.

What constituted a legitimate exercise of the police power now became a judicial question, not merely a legislative question. Whereas formerly the Court had assumed that the decision of the legislature was conclusive as to the limits of the police power, the Court now reserved for itself the right to consider the whole question of whether the statute under review constituted a valid exercise of that power. Theoretically, the will of the legislature was still held in high respect. Actually the Court was often openly contemptuous of the reasons which had impelled legislatures to pass the legislation in question.

To be accepted as within the bounds of due process a statute must in the opinion of the court be "reasonable." This was the general and all-inclusive test that a law under review had to meet and pass. If the purpose for which the statute had been enacted was a reasonable one, if the act employed reasonable means to achieve its ends, if the means employed bore a reasonable and substantial relationship to the purposes of the act, and if the law imposed no unreasonable limitations upon freedom of contract or private vested right, then the Court would accept the law as a legitimate exercise of the police power.

Very closely associated with the concept of reasonableness was the requirement that a statute should not be "arbitrary." On most occasions where a law was found to be unreasonable it was also found to be arbitrary, an arbitrary statute being one "which re-

stricts individual liberty or property right more severely than advantage to the community can possible justify."

The question of the reasonableness or arbitrariness of a law could not be settled by reference to any specific constitutional provision or any absolute principle of law. A reasonable law was one that seemed sensible, plausible, and intelligent to the judges who passed upon it. What constitutes sensible, plausible, and intelligent public policy, however, is largely a matter of the individual's economic and social philosophy—his standard of values. When the Court applied the test of reasonableness to legislation, therefore, it measured the law against its own economic and social attitudes. If in the light of these attitudes the law seemed intelligent, the justices upheld it; if not, they declared it unreasonable, arbitrary, and a violation of due process of law.

DUE PROCESS AND THE REGULATION OF HOURS OF LABOR

The manner in which the Court used due process as a medium through which to pass upon the constitutionality of state social legislation in the light of the justices' social and economic theories may be illustrated by a consideration of the judicial history of state statutes regulating maximum hours for the employment of labor.

This issue first came before the Court in *Holden v. Hardy* (1898), a case involving the constitutionality of a Utah statute of 1896 prohibiting the employment of workingmen in mines, smelters, or ore refineries for more than eight hours in any one day, except in emergencies. By a vote of 7 to 2 the Court held the statute constitutional. Justice Henry B. Brown's opinion for the majority was a closely reasoned argument for preserving the flexibility of state police power as a necessary instrument to deal with the extraordinary amount of change then taking place in the social order. It was exceedingly important, he thought, "that the Constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, should not be so construed as to deprive the states of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land." He admitted the general right of free contract as set forth in *Allgeyer v. Louisiana* (1897), but at the same time emphasized the extent to which the right of

contract was "subject to certain limitations which the state may lawfully impose in the exercise of its police powers." Examining briefly the Utah statute, he commented upon the hazardous and unhealthful character of mining as an occupation and the unequal bargaining power of employers and employees as sufficient justification for the law as a reasonable exercise of the state's police power.

Holden v. Hardy established no general precedent as to the constitutionality of statutes limiting hours of labor. In *Lochner v. New York* (1905) the Court, by a 5-to-4 majority, declared unconstitutional a New York statute limiting hours of labor in bakeshops to sixty hours in one week or ten hours in any one day. Justice R. W. Peckham, speaking for the majority, first cited the right of free contract as established in *Allgeyer v. Louisiana*, and emphasized further that the right to purchase or sell labor was an important part of the liberty guaranteed by the Fourteenth Amendment. He admitted that state police power might on occasion limit the right of free contract; indeed, he said, the Court had in the past been very liberal in accepting impairment of property or contract rights under state police power. But there were limits to the valid exercise of state police power; otherwise the Fourteenth Amendment would be without meaning.

Peckham then denounced the New York ten-hour law as unreasonable and void:

> There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state, interfering with their independence of judgment and of action. They are in no sense wards of the state. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals, nor the welfare, of the public, and that the interest of the public is not in the slightest degree affected by such an act. . . .

He went on to invoke the *argumentum ad horrendum*—the contention that if the present statute were valid there was no logical

limit to the regulatory power of the state, and freedom of contract would be destroyed. "Not only the hours of employees, but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, lest the fighting strength of the state be impaired."

Harlan wrote a dissent for himself, Edward D. White, and William R. Day, emphasizing the broad scope of the police power and the state's capacity to interfere with the right of free contract, and examining briefly some of the economic and social evidence as to the possible reasonable character of the New York law. But it was Justice Holmes who made the most effective attack upon the majority for injecting *laissez-faire* social theory into the content of constitutional law and substituting the Court's judgment upon public policy for that of the legislature. He wrote:

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various opinions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. . . . The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics . . . a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez-faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

It is possible that Holmes' brilliant rebuke in *Lochner v. New York* had some effect upon the other justices. Three years later, in *Muller v. Oregon* (1908), the Court unanimously upheld the constitutionality of an Oregon statute of 1903 prohibiting the employment of women in mechanical establishments, factories, and laun-

dries for more than ten hours in any one day. The Oregon statute was substantially similar to a number of state acts then being enacted for the protection of the health and morals of women, and social workers and liberals generally were exceedingly anxious to secure a favorable judicial verdict on the law. At the request of Florence Kelley and Josephine Goldmark, both prominent social workers, the state of Oregon retained the noted Boston attorney Louis D. Brandeis to defend the constitutionality of the law before the Supreme Court.

Brandeis submitted to the Court a brief which disposed of the constitutional precedents in two pages, but which devoted over a hundred pages to statistics upon hours of labor, American and European factory legislation, and the health and morals of women. The logic behind the brief rested upon the premise that if the Court in fact passed upon legislation of this kind in the light of its reasonable character and plausible relation to the social welfare, then the best possible approach was to overwhelm the justices with direct and specific documentary evidence as to the wisdom and intelligence of the law under review.

The "Brandeis brief," as it was thereafter called, was a spectacular success, and set the precedent for many subsequent appeals to the Court of the same kind. Justice David Brewer in his opinion virtually admitted that Brandeis had succeeded in convincing the Court that the Oregon statute was a reasonable exercise of the state police power. He made the admission with some embarrassment, since it was virtually an open confession that social and economic philosophy and not mere constitutional precedent had been decisive in the Court's decision. "The legislation and opinions referred to in the margin," [1] said Justice Brewer,

> may not be, technically speaking, authorities, and in them there is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil. Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a

[1] The substance of Brandeis' brief was reprinted in the margin of the Court's published opinion.

written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge.

This attempt to preserve the theory of a static written constitution and a body of constitutional law derived from that constitution by pure logic and precedent had a somewhat threadbare aspect. It was plain that the Court had in fact been overwhelmed by Brandeis' evidence as to the wisdom and intelligence and social advisability of legislation limiting female hours of labor. The fiction of judicial consistency could be maintained without too much difficulty, however, and Justice Brewer distinguished the present statute from that in *Lochner v. New York* by laying heavy emphasis upon the peculiarities of "woman's structure," and women's weak and indefensible position in society, so that the state was justified in interfering with female freedom of contract, although such interference would not be constitutional for men.

Nine years later, in *Bunting v. Oregon* (1917), the Court went even further, and accepted the constitutionality of an Oregon ten-hour statute applying both to men and women. The decision was the more remarkable because the law had a provision permitting employees to work not more than three hours overtime per day, provided they received additional pay at the rate of one and a half times the regular wage. The law thus appeared to regulate wages as well as hours of labor. It was this feature of the statute that most concerned the Court. But Justice Joseph McKenna's opinion disposed of the contention that the law regulated wages (and thereby possibly violated due process) with the assertion that the wage provisions were in the nature of a restrictive penalty for overtime rather than a permissive wage regulation. The law was therefore essentially a maximum-hours statute, not one regulating wages, and the Court proceeded to treat it as such. McKenna then made a brief inquiry into existing statutes regulating hours of labor and found that the Oregon law was not more restrictive than were those in force in other states. He concluded that the statute under review

was a reasonable exercise of the state's police power and so constitutional. He did not even mention the embarrassing bakeshop precedent; but it was reasonable to suppose that the Court's decision in *Lochner v. New York* now stood silently overruled. The Court nevertheless in 1923 was to revive *Lochner v. New York* sufficiently to use it as precedent for overturning the constitutionality of a federal minimum wage law for the District of Columbia.[2]

DUE PROCESS AND OTHER ASPECTS OF SOCIAL LEGISLATION

The Court also brought its social philosophy to bear in passing upon the reasonableness, under due process, of a great variety of state police statutes imposing limitations upon private property or freedom of contract.

Jacobson v. Massachusetts (1905) is of interest in demonstrating how the Court could accept as constitutional a law imposing substantial limitations upon personal liberty where the justices approved of the social purpose of the legislation in question. This case involved the constitutionality of a Massachusetts statute providing for compulsory vaccination and imposing a fine of five dollars upon any person refusing to submit to free vaccination. Justice Harlan, in approving the reasonable character of the law, observed that "for nearly a century most members of the medical profession have regarded vaccination, repeated after intervals, as a preventive of small pox." As was usual in situations where the Court approved of the statute under review, Harlan emphasized the broad scope of state police power and the limitations upon the liberty secured by the Fourteenth Amendment. Liberty, he said, "does not import an absolute right in each person to be, at all times and in all circumstances, wholly free from restraint. . . . Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others."

On the other hand, a majority of the justices were unable to approve of the reasonable character or social purposes behind federal and state statutes prohibiting "yellow dog" contracts. This issue first came before the Court in *Adair v. United States* (1908), a case

[2] See the discussion of *Adkins v. Children's Hospital* (1923), on pp. 698–700.

involving the constitutionality of Section 10 of an act of Congress on June 1, 1898, which made it a misdemeanor for an employer to require any person, as a condition of employment, to agree not to become or remain a member of a labor union. Justice Harlan denounced the statute as having no reasonable public character and therefore as being in violation of freedom of contract. The law was hence unconstitutional as "an invasion of the personal liberty, as well as the right of property" guaranteed by the Fifth Amendment. Harlan's disapproval of the law's purpose and intent was patent throughout his opinion. It was "not within the functions of government" he said, "to compel any person, in the course of his business and against his will, to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another." Harlan also held that the law exceeded the federal commercial power.[3] Both McKenna and Holmes dissented, holding that the law might fairly be interpreted as having a reasonable public purpose and a reasonable relationship to the federal commerce power.

In *Coppage v. Kansas* (1915) the Court applied the precedent in *Adair v. United States* to hold unconstitutional a state statute forbidding yellow-dog contracts. Pointing out that the law did not differ in principle from that considered in the Adair case, Pitney emphasized that the right of an employer to buy labor on his own terms and the right of a laborer to sell on his terms were part of the freedom of contract protected by the Fourteenth Amendment. After a fairly elaborate discussion of freedom of contract as an essential ingredient in the whole process of human freedom, Harlan attacked the statute as one which had no reasonable or plausible relationship to the health, morals, and welfare of the community. The law was therefore void as a violation of the due process clause of the Fourteenth Amendment. Justices Holmes, Day, and Charles Evans Hughes dissented, Holmes restating briefly his contention in *Lochner v. New York*—that the Court ought not to substitute its judgment for that of the legislature in matters of public policy.

In *New York Central R.R. Co. v. White* (1917) the Court upheld the constitutionality of the New York Workmen's Compensation Act of 1914. The law set up an automatic schedule of compensation for payments in case of the accidental injury or death of an

[3] See p. 591.

employee, without regard to any question of fault except in cases involving the employee's willful self-injury or injury as a result of drunkenness. The statute thus abrogated the "fellow-servant" and "contributory negligence" rules of the common law, whereby an employer had been held not liable for any injury sustained through the carelessness or fault of another employee nor for an injury sustained through the employee's contributory negligence. The law also set aside the common-law rule of "recognition of risk" whereby an employer was held not liable for injuries sustained by an employee who might reasonably have recognized the possibility of the accident as inherent in his work. The New York statute was in fact similar to many state compensation acts adopted about this time, some thirty states having enacted such legislation by 1915. Justice Pitney, speaking for a unanimous Court, made it plain that he approved of the general social purpose behind the law: "The act," he said, "evidently is intended as a just settlement of a difficult problem, affecting one of the most important of social relations." The subject regulated, Pitney added, had a "direct relationship to the common welfare" and therefore constituted a reasonable impairment of the right of free contract and a constitutional exercise of the police power.

In *Mountain Timber Co. v. Washington* (1917), the opinion on which was handed down at the same time, the Court accepted the constitutionality of the Washington Workmen's Compensation Act by a 5-to-4 majority. This statute differed from the New York law principally in that it provided for a system of enforced contributions by the employer to a state compensation fund whether or not any injuries had befallen the employer's own workmen. The New York law, by contrast, had merely required the employer to carry compensation insurance or to show ability to pay probable claims. Speaking for the majority, Justice Pitney said the Washington statute had a reasonable relationship to a matter of great importance to the public welfare. The contributions imposed upon employers, he added, were not so excessive as to amount to deprivation of property without due process of law, nor were they oppressive, since they were justified by the public nature of the object in view. Chief Justice White and Justices McKenna, Willis Van Devanter, and James McReynolds dissented without opinion.

In June 1917, three months after the foregoing decisions, the

Court, in *Adams v. Tanner*, declared unconstitutional a Washington statute making it unlawful to receive fees from any person as a payment for aid in securing employment. Justice McReynolds' opinion observed first that the statute put an outright end to the employment agency business; the law was therefore one of prohibition, and not mere regulation. McReynolds thought such prohibition of a lawful public business lacked any adequate social justification. He considered it self-evident "that there is nothing inherently immoral or dangerous to public welfare in acting as paid representative of another to find a position in which he can earn an honest living. On the contrary, such service is useful, commendable, and in great demand." And he continued, "Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way." Citing *Allgeyer v. United States* as precedent for his assertion that the Fourteenth Amendment guaranteed the right "to earn a livelihood by any lawful calling," McReynolds denounced the statute at hand as arbitrary and oppressive and a violation of due process of law. Justice McKenna dissented briefly, while Brandeis wrote a lengthy dissenting opinion in which Holmes and Clarke concurred. Brandeis' opinion, filled with masses of detailed sociological data, cited the "vast evils" associated with the employment agency business as justification for the state's right to prohibit it entirely. Once again it was evident that the Court's acceptance or rejection of a police statute under the Fourteenth Amendment was essentially a function of the justices' social philosophy.

DUE PROCESS AND PUBLIC UTILITY RATES

Substantive due process had emerged primarily from the Court's review of state statutes prescribing rate structures for a variety of public utilities, railroads, grain elevators, and the like. As substantive due process broadened out into a constitutional doctrine supporting the general review of all state police statutes, the Court continued on appeal to examine the rate structures imposed upon public utilities in the light of the general proposition that such rates must be fair and reasonable, so as to allow the business in question a reasonable return on its property. A rate which had any arbitrary

or confiscatory character or which did not permit the concern a fair return on its investment would be held to violate the due process clause of the Fourteenth Amendment.

The problem of what constituted a fair and reasonable return on a public utility corporation's investment was an exceedingly difficult one and almost invariably plunged the Court into the complexities of accountancy theory. No rate structure could be adjudged without reference to some estimated valuation of the property in question; this in turn meant that the Court was involved in the complexities of original cost versus replacement or earning capacity theories of evaluation, methods of apportioning the cost of doing business among the various services of a highly ramified public utility network, division of costs between interstate and intrastate rates, and many like problems. Very often these questions could be settled only by reference to highly technical accountancy theory. The Court tried to steer clear of this difficulty as far as possible by granting the rate schedules fixed by the state a prima facie validity, but the very fact of review usually imposed upon the Court an examination of rate theory. Thus in the *Minnesota Rate Cases* (1913), the Court announced that it would not interfere with the presumptive evidence of a fair rate as prescribed by the state, unless the evidence was clear as to the rate's confiscatory character, but in that very case, the Court found it necessary to examine such matters as the depreciation factor in the railroad's right of way, the methods of prorating the costs of state and interstate business, and the validity of various applications of cost-of-reproduction methods of computing the value of railroad properties.[4] Again, in *Northern Pacific Railway v. North Dakota* (1915), where the Court was concerned with the validity of a North Dakota statute fixing maximum intrastate rates for hauling coal, the Court made an elaborate examination of the prorata distribution of costs between interstate and intrastate freight rates to arrive at the conclusion that the statute was void as allowing the roads an inadequate return. And in *Norfolk and Western Railway Co. v. West Virginia* (1915), where the issue was the constitutionality of a state statute fixing intrastate passenger rates of two cents a mile, the Court used much the same methods in concluding that the rate was confiscatory and invalid.

Regardless of what theories of evaluation and rate analysis the

[4] The *Minnesota Rate Cases* are discussed at some length on pp. 606–608.

Court adopted, there remained the question of what constituted a "fair" and "reasonable" return on a given investment. The Court never adopted a categorical theory of what constituted a reasonable return, but instead settled each case upon its merits. Perhaps it came the closest to enunciating a general philosophy of fair profits in *Willcox v. Consolidated Gas Co.* (1909), where the Court in effect stated that a return of 6 per cent was reasonable upon the property of a New York city gas company, a concern in which the element of business risk was reduced to a minimum. Thus the Court gave some recognition to the prevailing conception of a "normal" or "just" profit.

DUE PROCESS AND TAXATION

It will be recalled that some of the earlier cases involving the doctrine of vested interest had concerned the validity of various state revenue statutes. In *Loan Association v. Topeka* (1875), for example, the Court had held invalid a state tax law on the ground that the act authorized the expenditure of public taxes for private purposes and so transferred the property of A to B in violation of the basic nature of lawful constitutional government. With the emergence of substantive due process the Court began to pass upon the validity of state tax measures in the light of the more specific requirements of the due process and equal protection clauses of the Fourteenth Amendment.

A majority of due process tax cases involved questions of a state's jurisdiction to tax property held outside the state. The issue in such cases was essentially one of interstate jurisdictional relations in a federal system of government, and seemingly had little to do with due process of law as such. In *State Tax on Foreign Held Bonds* (1873), a case occurring before the rise of substantive due process, the Court had ruled that a state tax on railroad bonds held outside the state violated the obligation of contracts clause. Justice Field had observed that "property lying beyond the jurisdiction of the state is not a subject upon which her taxing power can be legitimately exercised."

With the rise of substantive due process, the Court reaffirmed the foregoing principle under the due process clause of the Fourteenth Amendment. Thus in *Delaware, Lackawanna and Western Railroad Co. v. Pennsylvania* (1905), the Court held invalid a Penn-

sylvania tax on the capital stock of a railroad where the state included $1,700,000 in coal, situated outside the state but owned by the road, as part of the capital stock in question. Justice Peckham first observed that a tax imposed directly on the coal would have been unconstitutional, and the tax here, he added, amounted to the same thing, since the Court had frequently ruled that a tax on the value of the capital stock of a corporation was a tax on the property in which that capital was invested. The tax therefore violated due process and was void.

The Court applied the same general principle in *Union Refrigerator Transit Co. v. Kentucky* (1905), a case involving the validity of a Kentucky tax on two thousand refrigerator cars owned by a corporation doing business within Kentucky, although very few of the cars in question were within the state's boundaries at any given time. Justice Peckham cited *State Tax on Foreign Held Bonds* as authority for the proposition that the state could not lawfully tax property located outside its jurisdiction. Such a levy, he said, was in the nature of an extortion rather than a lawful levy and violated due process of law. In *Buck v. Beach* (1907) the Court extended this principle to intangible property. Here the state of Indiana had attempted to collect a personal property tax upon certain notes deposited for security in a vault in Indiana, although the owner of the notes resided in New York and the borrowers were residents of Ohio. Justice Peckham observed first that "generally speaking intangible property in the nature of a debt may be regarded, for the purpose of taxation, as situated at the domicile of the creditor" and therefore within the tax jurisdiction of that state. In this instance, the paper deposited in Indiana was not the actual debt as property but merely the evidence thereof. The debt had no actual relationship to the jurisdiction of the state of Indiana, and "the enforcement of such a tax would be the taking of property without due process of law."

The general rule established in these cases—that a state could not lawfully tax property located outside its jurisdiction—led subsequently to the growth of a large body of case law on taxation and due process, too ramified to be analyzed at length here. Some idea of the importance of this type of due process tax law may be gained from Benjamin F. Wright's statement that between 1899 and 1937 the Court declared unconstitutional twenty-nine state tax laws which

in some way discriminated against out-of-state enterprises or attempted to tax property not located within the jurisdiction of the state.[5]

In another group of cases, the Court was concerned with the question of certain fair and equitable procedures in levying taxes and assessments. The Court repeatedly held that due notice and an opportunity for a hearing for property owners was a prerequisite to due process of law in the assessment of taxes. Thus in *Londoner v. Denver* (1908) the Court held unconstitutional a street assessment by the city of Denver on the ground that the city council had enacted the tax without giving an opportunity for a full hearing to the landowners assessed. Although the property owners had been permitted to file complaints, Justice William H. Moody asserted that "a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief; and if need be, by proof, however informal." The Court followed the same rule in *Turner v. Wade* (1920), where it held unconstitutional certain portions of the Georgia Tax Equalization Act. The act provided that the county board of assessors was empowered to examine property returns and correct them when necessary. Although the act provided for arbitration in case the taxpayer objected to his levy, Justice Day pointed out that the board of assessors "was not required to give any notice to the taxpayer, nor was opportunity given to him to be heard as of right before the assessment was finally made against him." Therefore the statute took property without due process of law.

In still another category of state tax cases, the Court held that there must be a reasonable relationship between the person or thing taxed, and any benefit which might accrue as a result of the tax. Thus in *Myles Salt Co. v. Board of Commissioners* (1916), the Court held unconstitutional an assessment levied by a Louisiana drainage district, where the owner of the lands taxed showed that his property could not benefit from the tax and that the tax had been laid upon him merely as a means of raising revenue without regard to benefit derived. And in *Gast Realty and Investment Co. v. Schneider Granite Co.* (1916) the Court held unconstitutional a St. Louis city ordinance authorizing the erection of assessment districts for pub-

[5] Benjamin F. Wright, *The Growth of American Constitutional Law* (Boston, 1942), p. 160.

lic improvements, where the districts were so bounded that certain properties within them would derive no benefit from prospective improvements. Justice Holmes said that since "the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand against the complaint of the one so taxed in fact."

It might reasonably be supposed that the Court after 1895 would have extended the limitations of due process to prohibit taxation for a private purpose, but this did not occur. It may be recalled that in *Loan Association v. Topeka* (1875) the Court had denounced such a tax as contrary to the fundamental nature of constitutional government. But when, after 1895, various taxes were attacked before the Court as not levied for a public purpose, the Court showed itself unwilling to narrow the scope of "public use" unduly. Thus in *Fallbrook Irrigation District v. Bradley* (1896) the Court accepted the constitutionality of a California statute permitting groups of landowners by vote to organize themselves into irrigation districts which, in turn, had the authority to levy assessments upon all landowners within the district. Justice Peckham admitted that a law that levied taxes for other than a public purpose would violate due process; but he then added that what constituted public use of revenues was mainly a matter of local circumstances and that the Court must defer to the familiarity of the people in California with the circumstances surrounding the passage of such an act. Peckham concluded that irrigation constituted a public purpose within the decision of the people of California; hence the tax was devoted to a public use and the law was constitutional.

The Court adhered to this line of reasoning in *Jones v. Portland* (1917), where the issue was the constitutionality of a 1903 Maine statute authorizing any city or town to establish a fuel yard to sell wood and coal to the inhabitants. Thus such an enterprise might conceivably have been labeled a private business and taxation for it denounced as a violation of due process, but the Court refused to take this stand. Instead Justice Day asserted that "local conditions are of such a varying character that what is or is not a public use in a particular state is manifestly a matter respecting which local authority, has peculiar facilities for securing accurate information." In other words, the Court would ordinarily defer to whatever conception of public use was adopted by state and local authorities.

The Court's rule of noninterference with the judgment of state legislatures on matters of public use in relation to tax revenues was carried to its logical conclusion in *Green v. Frazier* (1920). Here the Court passed favorably upon the constitutionality of a series of North Dakota statutes creating a state industrial commission and authorizing the commission to engage in a variety of business enterprises, among them the operation of a state bank, a mill, and an elevator association to buy and sell all farm products, and a Home Building Association authorized to construct homes for citizens of the state. The state was empowered to issue bonds to capitalize these enterprises, and to pay for the bonds by taxation. These statutes seemingly put the state of North Dakota into private business on a large scale, but the Court again deferred to local circumstances and opinion as to what constituted public use. Justice Day pointed out that North Dakota had declared the various acts in question to have a public purpose, and he then cited *Jones v. Portland* to support the constitutionality of governmental business enterprise. *Loan Association v. Topeka* he distinguished, apparently on the ground that in the earlier case taxation had been for the benefit of a privately owned and operated enterprise as distinct from the publicly owned concerns benefiting from the tax under review.

THE RULE OF REASON AND JUDICIAL REVIEW

It is clear that the meaning of substantive due process as it developed after 1900 can be expressed by one phrase: "the rule of reason." Reasonableness, however, was not a quality of law specifically defined in the Constitution. It could not be related to any specific legislative limitation which the Constitution imposed upon the states such as that banning *ex post facto* laws. The one source upon which judges could draw when they decided for the first time whether a statute was reasonable was their own social and economic philosophy. If the law appeared to aim at objectives which the justices regarded as socially unwise, then frequently they ruled that it constituted an unreasonable or arbitrary interference with private property rights. If, on the other hand, the law strove for social objectives which the justices thought intelligent, they accepted it as a reasonable exercise of the states' police power.

The result was nothing less than the creation of a new type of judicial review, in which the Court examined the constitutionality

of both state and federal legislation in the light of the judges' social and economic ideas. There had been occasional instances of this sort of judicial review in the early days of the court; for example, in *Terrett v. Taylor* (1815) Justice Joseph Story had held unconstitutional a Virginia statute confiscating church lands without referring to any constitutional clause but merely on the grounds that the act was "utterly inconsistent with a great and fundamental principle of republican government, the right of the citizens to the free enjoyment of their property legally acquired." And as has already been observed, the Court in certain early contract cases incorporated broad social generalizations in its opinions. In most instances, however, the Court did not consider it to be within its province to inquire whether legislation that came before it was reasonable or wise. Presumably such inquiry was a legislative function. In this earlier conception of judicial review it was the duty of the Court merely to pass upon the question of whether the law violated any provision of the Constitution. Both the law and the Constitution were subject to judicial interpretation, it is true, and judicial review, even of this limited character, was influenced substantially by the justices' social and political ideas. John Marshall, to take one instance, was a conservative nationalist, and he found ways and means of arguing conclusively for the constitutionality of strong national legislation. Yet Marshall did not presume to pass upon the wisdom or desirability of congressional legislation; he was concerned only with the question of whether Congress had acted within its authority under the Constitution. In theory, at least, he matched a written statute with the written Constitution.

The new judicial review was something very different. As has already been observed, in passing upon the wisdom and desirability of legislation under due process of law, the justices were in reality settling matters of public policy. This was a legislative rather than a judicial function. In democratic states men who decide whether laws are socially wise and desirable ordinarily sit in elective legislative bodies. They are sent there by their constituents to vote for or against measures in accordance with the interests of their constituents and in the light of their convictions as to the wisdom and expediency of the proposals upon which they pass. Legislative issues are commonly political rather than judicial in character, and as such are ordinarily settled in the political arena. But under the new judi-

cial review, the Court, as well as Congress and the various state legislatures, now settled many issues of this kind.

The new judicial review thus made the Supreme Court a kind of "negative third chamber" both to the state legislatures and to Congress. Paralleling this development, the supreme courts of the various states became negative third chambers of their own state legislatures. The judicial chamber, it is true, had only a negative vote. It could not initiate legislation. Though limited in this way, its legislative power was nevertheless real. The judicial veto after 1890 constituted a powerful check upon the policies of every legislative chamber in the nation, a check exercised not only in terms of the requirements of the written constitution but also in terms of the social and economic ideas of the justices concerned. It was this fact which Justice Holmes had in mind when he observed in *Lochner v. New York* that the case was decided in accordance with an economic philosophy with which a large portion of the American people did not agree.

Paradoxically, the early twentieth century witnessed the general acceptance by judges of a theory of jurisprudence which denied the law-making capacities of the judiciary. The prevailing theory of jurisprudence around 1900 was that of "received law." This conception held that judges did not make or formulate law, but simply discovered and applied it. The Constitution, the theory held, was fundamental, absolute, and immutable. It contained, by implication, the answer to every constitutional question which might ever be raised in relation to any state or federal statute. The document was a written expression of certain fundamental principles of eternal right and justice. All that was necessary was for the Court to apply the appropriate word or clause of the Constitution to the law in question. Any constitutional issue could be solved by application of the suitable provisions in the Constitution, and the correct conclusion was presumably self-evident to any competent judge. This concept of jurisprudence Roscoe Pound in 1913 called the "slot-machine theory" of law.

Judges who adhered to the theory of received law were likely to deny strenuously that they were ever influenced by their view of the wisdom of legislation. They would deny even that the "rule of reason" in due process involved judicial discretion in any degree. They would deny also that the realities of social or economic life

were any concern of theirs. Constitutional questions were to be settled specifically in accordance with the requirements of the written document. This theory was maintained squarely in the face of the rule of reason, in which it would appear to have been clear to any realistic observer that decisions of the Court were being arrived at in accordance with the social and economic philosophy of the judges who made them. In spite of the general acceptance of this theory, however, attorneys appearing before the Court after the presentation in 1908 of the Brandeis brief in *Muller v. Oregon* frequently included in their briefs materials demonstrating or denying the economic or social necessities behind the law in question. This was the real significance of the Brandeis brief; the repeated resort to its technique constituted a fairly general recognition by the legal profession that the Court did in fact pass upon the wisdom and desirability of legislation in deciding questions of due process.

On occasion dissenting justices on the Court attacked the Court's tendency to decide the matter of reasonableness in the light of the justices' social philosophy. Justice Holmes' classic denunciation in *Lochner v. New York* has already been quoted. For thirty years thereafter Justice Holmes on notable occasions repeated his charge that the Court was in fact basing its decision upon its social predilections. In Justice Frankfurter's words, "Against this subtle danger of the unconscious identification of personal views with constitutional sanction Mr. Justice Holmes battled during all his years on the Court." [6] Justice Louis D. Brandeis, appointed to the Court in 1914, came to occupy somewhat the same position; unlike Holmes, however, Brandeis tended to attack majority opinions as bad social thinking, whereas Holmes attacked the identification of either liberal or conservative social theory with the process as indefensible.

One important result of the new conception of the judicial function was a great increase in the resort to the judicial veto as applied to both state and national legislation. In the entire seventy-one years between the founding of the national government and secession, the Supreme Court had declared but two acts of Congress unconstitutional—in *Marbury v. Madison* and in *Dred Scott v. Sandford.* While in this same period the Court invalidated state laws with much greater frequency, even this exercise of the judicial veto was

[6] Felix Frankfurter, *Mr. Justice Holmes and the Supreme Court* (Cambridge, 1939), p. 34.

attended with considerable restraint. According to Benjamin F. Wright, there were some sixty cases before 1861 in which the Court declared state legislation void. After the Civil War, on the other hand, resort to the judicial veto increased steadily. Professor Wright reports that during the years 1874–1898 there were twelve decisions invalidating acts of Congress and 125 decisions declaring state legislation contrary to the Constitution.[7] After 1898 the Court invalidated acts of Congress with still greater frequency: there were about fifty such decisions between 1898 and 1937, while in the same period the Court invalidated state laws in some four hundred cases.

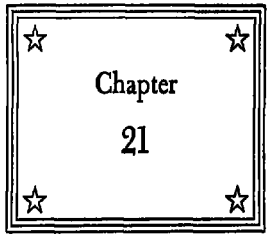
The explanation of this more frequent use of the judicial veto is to be found in part in the implications of the "rule of reason." As long as judges passed upon legislation mainly in accordance with the requirements of a written constitution, it was necessary only occasionally to declare a statute to be unconstitutional. However, when legislation had to meet the test of the justices' social philosophy, the chance that the law in question might be found wanting was much greater. It must be observed, however, that the increased use of the judicial veto can be accounted for in part merely by the great increase in the Court's volume of business. The Court was hearing many more cases at each term than in the early national era; hence the chances of invalidating a greater amount of legislation were proportionately increased.

It was also true that during this later period the states, in their efforts to deal with the social and economic problems induced by the industrial revolution, more frequently enacted legislation of a novel and experimental character, which posed new constitutional problems for the Court. Departure from traditional legislative patterns greatly increased the likelihood that some of the new legislative efforts would fail to meet the approval of the Court. When all allowances of this kind have been made, however, it remains true that the Court, after the rise of substantive due process and the new judicial review, was more willing than formerly to strike down state legislation as contrary to the Constitution.

The rise of substantive due process and the new concept of judi-

[7] The foregoing figures are from Benjamin F. Wright, *The Growth of American Constitutional Law* (Boston, 1942). See also the Library of Congress pamphlet, *Provisions of Federal Law Held Unconstitutional by the Supreme Court of the United States* (Washington, 1936).

cial review were factors in the partial failure of the states to deal adequately with the many social and economic problems growing out of the industrial revolution. Of equal importance in this failure, however, was the fact that most of the problems precipitated by the industrial revolution were regional or even national in scope, so that the area of sovereignty of any one state was not sufficiently broad to make possible the imposition of really effective controls. Rail rate problems, for example, were essentially national in character, and regulation by the various states could result only in a disjointed and confused regional and national rate pattern, or indeed in no pattern at all. The failure of the states to function effectively as the arbiters of American economic life became increasingly clear after 1885. The result was a growing demand for national economic controls and a federal program of regulation on the theory that only the national government could deal effectively with a national economy.



The First Era of National Economic Regulation

As we have seen, the comparative failure of the states to control economic and social life within their own boundaries had other causes than the interposition of the judiciary as a guardian of vested interests. This failure was also due to the very fact that the American economy had become a national one.

The development of the railroads first made clear the extent to which the great new industrial and commercial life of the nation was being intertwined in one vast network. A single great railroad crossed many states. The Pennsylvania Railroad, for example, cut across the borders of five states and had branch lines extending into many others. The policies of such a road, particularly in its rate structures, affected the welfare of the entire area it served—indeed, of the entire nation.

No one state could control effectively the rail rate structure within its own boundaries, for that structure was too closely bound up with a network extending into other states, in which the state attempting control had no authority. Intrastate rail regulation would at best mean dozens of unrelated and uncorrelated rate structures,

with no rational organization of rates on a nationwide basis.

The great trusts that sprang up in industry during the last two decades of the nineteenth century were also nationwide. The Standard Oil Company, for example, became after 1882 a combination of some thirty-nine oil companies doing business in all the states in the Union. It refined oil in half a dozen states; it owned wells in eight widely scattered states; and it marketed in four continents. The huge combinations in steel, sugar, tobacco, and other commodities were hardly less impressive in financial power, size, and extent. As in the case of the railroads, it was not possible to impose a unified national policy upon any such industry by state legislation. Forty separate state laws did not constitute a unified control of the oil industry.

State regulation was made the more difficult by the fact that a corporation chartered in one state could do business in all the others under the constitutional provision by which each state must recognize the public acts of every other state. It became common policy for large-scale industries to incorporate in those states whose incorporation laws were most lenient toward the type of business concerned. This often meant incorporation in Delaware or New Jersey, where state legislation regulating the granting of corporate charters and controlling corporate enterprise was particularly lax.

Although by 1885 it was clear that the railroads and trusts were national phenomena and that they could not be effectively regulated by state law, there was for a long time comparatively little demand for national controls. The whole tradition of the nation's economic and legal thinking was against national regulation of economic life. The Constitution had not contemplated the imposition of an extensive national economic policy by the federal government. The potential authority over national economic life implicit in the commerce clause had been exercised only sporadically in the first century after 1787. Nearly all federal regulation of commerce had been confined to foreign commerce or water-borne domestic commerce, and had for the most part been concerned with mere detail. Much commercial activity was still regulated by state law; the concurrent right of the states to impose certain limited regulations upon interstate commerce within their boundaries had been recognized by the Supreme Court in *Cooley v. Board of Wardens* (1851) and had been confirmed as recently as *Munn v. Illinois* (1877). In short,

federal authority over interstate and foreign commerce had hitherto been employed primarily as a negative rather than as a positive power, as a guarantee against state regulation having a restrictive or harmful effect upon normal commercial life.

Furthermore, few theorists before the late nineteenth century would have admitted that the right to regulate interstate commerce implied a general right in the national government to regulate all national economic life. John Marshall had indeed held in *Gibbons v. Ogden* (1824) that the federal commerce power was supreme and that it lawfully extended to all objects directly concerned with commerce, even though such regulation might incidentally affect the internal affairs of the states. Even Marshall, however, had admitted that the commerce power could not be made the basis for a regulation "of matters of pure domestic concern" to the states. The question of whether the federal government could regulate production, for example, did not even arise before the Civil War; and it seems evident that until the enactment of the Sherman Act in 1890, the commerce power was thought to comprehend only control over a variety of forms of interstate communication—highways, railroads, and marine shipping.

Yet the distinction between interstate commerce and economic matters of purely domestic concern to the states was every year becoming more archaic and artificial. By the late nineteenth century commerce and industry were so intertwined on a national scale that any effective regulation of commerce would of necessity include certain controls over manufacturing. The very existence of the great trusts, combinations in manufacturing, finance, and commerce, raised the question of whether commerce could be controlled effectively unless some restrictions were imposed upon manufacturing. The implications of economic reality had not yet affected constitutional theory, however, and it took more than half a century after the development of the tangled national network of production and trade for economic reality to find effective reflection in constitutional law.

The new masters of capitalism were, quite naturally, not interested in a federal regulatory program. While they sought and obtained from the national government numerous favors which meant increased earnings for industry, such as high tariffs and cheap railroad, timber, and mining lands, they were averse to effec-

tive federal economic controls. And in this attitude a majority of Americans usually concurred. The average citizen, in particular the average entrepreneur, was an individualist with but little understanding of the rapidity with which the small free enterprise of an earlier day was disappearing. Before 1885, most of the demand for the regulation of commerce and industry came from agrarian radicals, labor leaders, and certain unorthodox economic theorists.

Yet the malcontents had succeeded in raising some degree of public interests in the railroad and trust problems. Here the evils of uncontrolled private enterprise were so evident, so flagrant, and so widely publicized as to bring strong popular pressure for a degree of regulation on a national scale.

THE RAILROADS AND THE INTERSTATE COMMERCE COMMISSION

Even before 1880 it was evident to many thoughtful persons that the abuses of railroad operation were a scandal to the nation. Rebates—the practice of refunding in secret to a shipper a portion of the established rate for a given haul—offered a method by which roads favored one business at the expense of another and so paved the way for the rise of monopoly. Pools and rate-fixing agreements ended competition between competing roads and were used as a monopolistic means to raise freight and passenger rates to high levels. Basing point systems, whereby shippers were obliged to pay the rate to a designated shipping point plus any additional mileage charges, and other distorted rate schemes favored certain industrial regions and certain corporations at the expense of others. As practices of this sort developed, the public began to demand regulatory measures, and indeed many railroad operators themselves began to recommend legal safeguards against cutthroat competition.

The states attempted to deal with this problem, although for reasons already made clear their efforts were not very effective. In the seventies, most of the states enacted legislation banning certain of the most evident abuses of the roads and also setting up commissions to enforce their laws. Most such commissions were authorized to conduct hearings into abuses, investigate violations of law, and issue orders to offending carriers to "cease and desist" from the violation in question. Very often the commissions were

given the power to fix freight and passenger rates. Such regulation was established under the theory that the states retained power to regulate commerce within their own boundaries as well as to assert a certain incidental authority over interstate commerce in the absence of federal regulation.

Only gradually did the extent of the failure of state rail regulation attract attention. In 1874 a Senate committee under Senator William Windom of Minnesota publicized for the first time the extent of the evils practiced and recommended national legislation to enforce fair competitive practices. In 1878 the House of Representatives passed the Reagan bill, which would have imposed some degree of regulation upon the roads, but a railroad and trust lobby blocked the bill in the Senate. Several bills of similar intent were introduced into Congress soon after 1880, but as Congress was reluctant to oppose organized minority pressure and public opinion was not yet insistent, nothing came of these measures.

By 1886, however, the demand for reform commanded a strong measure of popular support, particularly in centers of agrarian unrest in the West and the South. In addition, the railroads had now come to realize the ruinous consequences of certain practices, so that many rail executives were ready to accept the necessity of some federal regulation as the only remedy. Two developments in that same year which brought to a head the demand for appropriate legislation were immediately responsible for the passage of the Interstate Commerce Act during the following year.

The Supreme Court, in *Wabash, St. Louis, and Pacific Railway Company v. Illinois* (1886), handed down a decision seriously impairing the legal capacity of the states to cope with the railroad problem. The case dealt with the validity of an Illinois statute prohibiting long-short haul rate discriminations. The state of Illinois sued to enjoin the Wabash road from charging more for a haul between Gilman, Illinois, and New York City than was charged for a haul between Peoria, Illinois, and New York City, a distance eighty-six miles greater. As most of the haul lay outside the state of Illinois, the case involved the validity of a regulation of interstate commerce by a single state.

The Court held that the Illinois statute was void as an intrusion upon the federal commerce power. In his opinion, Justice Miller observed that a state admittedly might regulate commerce entirely

within its boundaries, and that such regulation might incidentally and remotely affect interstate commerce and still be valid. However, he said, the Illinois law attempted to regulate interstate commerce directly and so violated the Constitution. He virtually admitted that the decision gravely impaired the dictum that the states had a limited concurrent jurisdiction over interstate commerce, as recently expressed in *Munn v. Illinois* and the other *Granger Cases*. Yet he insisted that it never had been "the deliberate opinion of a majority of this court that a statute of a State which attempts to regulate the fares and charges of a railroad company within its limits, for a transportation which constitutes a part of commerce among the States, is a valid law."

The effect of the Wabash decision was to remove the interstate rail rate structure almost completely from state control. It thus made some kind of federal regulation imperative.

In 1886, also, a special Senate committee on railroads working under the chairmanship of Senator Shelby Moore Cullom of Illinois made its report recommending the passage of a comprehensive federal regulatory statute. The convincing body of evidence that it presented exposed nothing new; yet the report obtained far more publicity than any prior investigation, and the demand for regulation became too overwhelming for Congress to ignore.

The Interstate Commerce Act became law on February 4, 1887. Constitutional issues were scarcely touched upon during the debate that preceded the passage of the bill, for few questioned that the federal government had authority thus to regulate under the interstate commerce clause. Only Senator Leland Stanford of California had the temerity to suggest that transportation was not commerce and that a law regulating common carriers would therefore be unconstitutional. Stanford's rail interests were well known, and no one took his argument seriously.

The Interstate Commerce Act provided that all charges for rail transportation in interstate commerce should be reasonable and just, but did not attempt to define a reasonable and just rate. The law prohibited rebates, discriminatory rate agreements, long-short haul discriminations, pools, and rate-fixing agreements, and required the publication of all rate schedules.

The act entrusted enforcement to a five-man Interstate Commerce Commission, modeled generally on the state commissions of

the time, the members to be appointed by the President with the consent of the Senate. The Commission had the power to hear complaints, to inquire into the books and accounts of railroads, to hold hearings, and to compel the attendance of witnesses. It was not specifically authorized to fix rates and charges, but it was empowered to issue cease-and-desist orders against any carrier found to be violating the provisions of the law. This clearly implied the power to issue orders against unreasonable rates, but whether it implied the power to fix a new rate for the one destroyed was very doubtful.

The Interstate Commerce Commission was the first permanent federal administrative board to which Congress delegated broad powers of a quasi-legislative, quasi-executive, and quasi-judicial nature. Its establishment was a landmark in American constitutional history.

In theory, at least, the Commission was a branch of the executive; its members were appointed by the President, and it was their duty to administer the law. The Commission also had certain functions similar to those of a court—namely, the holding of hearings, the taking of evidence, and the handing down of decisions which had the effect of court orders. Furthermore, its administrative orders had the effect of law and were based upon considerations of public policy; they were therefore quasi-legislative in character. The Commission thus cut squarely across the bounds of the three branches of the federal government.

The Commission and subsequent similar administrative boards actually represented a fundamental departure from the principle of the separation of powers. Why did this departure occur? The best explanation is the growing complexity and technical nature of the problems which confronted lawmakers. The mass of technical detail was in turn a direct reflection of the incredible complexity of the new economy. No one but a specialist-expert could hope to master certain problems—in this instance rate structures—which the government was now called upon to supervise and administer. Congressmen were first of all politicians and statesmen and seldom technical experts. They could not be expected to learn the details involved in the whole complex tangle of rail rates. All Congress could do, therefore, was to set up broad principles of policy, while the mastery of detail and the specific solution of numberless administrative problems were left to Commission experts.

In founding the Commission, Congress thus recognized the indispensable place which the technical expert was coming to play in the governmental process.

THE COMMISSION AND THE COURTS—1887–1900

Within a few years after the establishment of the Interstate Commerce Commission, the Court had stripped it of most of its powers. The Court did not hold void any single part of the Interstate Commerce Act, but in a series of interpretative opinions it first denied to the Commission the power to fix rates, and then in another series of cases it impaired seriously the Commission's authority as a fact-finding body.

After some uncertainty expressed in early decisions, the Court finally denied to the Commission all positive rate-fixing power. In *Cincinnati, New Orleans, and Texas Pacific Railway Co. v. Interstate Commerce Commission* (1896), Justice Shiras observed for the Court that he could not find anything in the act that "expressly or by necessary implication" conferred the power to fix rates. Replying to the Commission's argument that the power to pass upon the reasonableness of existing rates necessarily implied the right to set a new rate by commission order, Shiras said that was "not necessarily so." The reasonableness of a particular rate, he held, "depends on the facts, and the function of the Commission is to consider these facts and give them their proper weight. If the Commission, instead of withholding judgment in such a matter until an issue shall be made and the facts found, itself fixes a rate, that rate is prejudged by the Commission to be reasonable."

A year later, in *Interstate Commerce Commission v. Cincinnati, New Orleans, and Texas Pacific Railway Co.* (1897) the Court denied the Commission these powers in even more categorical terms. As in the earlier case, the Commission had after hearing adjudged the railroad's rate structure to be unreasonable and had then ordered a new schedule of rates to be put in effect. In this instance, a lower court had certified the question of the Commission's rate-fixing powers to the Supreme Court. Justice Brewer, who delivered the majority opinion, first pointed out that "there is nothing in the act fixing rates," and he added that "no just rule of construction would tolerate a grant of such power by mere implication." Brewer then quoted at length from various state statutes to show the clear and

unequivocal language invariably used in granting state commissions rate-fixing power, whereas the federal law used no such language.

In reality, Brewer and his colleagues were unwilling to grant a quasi-legislative function to an administrative body, since to do so appeared to violate the separation of powers. Rate-fixing by the Commission would have been essentially legislative in character, since the Commission's orders would have had the force of law. Therefore, said Brewer, the power to fix rates ought not to be exercised by a branch of the executive. "The power given," he said, "is the power to execute and enforce, not to legislate. The power given is partly judicial, partly executive and administrative, but not legislative." The ideas that Congress might delegate quasi-legislative authority to the executive was too new to win the justices' acceptance.

The Commission, thus deprived of any positive rate-setting powers, now possessed only the negative right to declare that schedules already in effect were unreasonable. It could then issue cease-and-desist orders against such rates, and resort to the courts if the carriers refused to obey its orders. Theoretically the Commission might strike down one rate after another as illegal until the railroad finally established an acceptable rate, but such a method of control was hopelessly ineffective.

A few months later, in *Interstate Commerce Commission v. Alabama Midland Ry. Co.* (1897), the Court dealt a second heavy blow to the Commission by impairing its function as a fact-finding body. The act of 1887 had declared that the findings of fact upon which the Commission based its orders were to be accepted as conclusive by the courts. Clearly this implied that the court to which appeal was taken must accept the facts of the case as the Commission presented them and not ignore the Commission's findings by conducting an extensive original investigation of its own.

The Supreme Court, however, refused to accept this implication. Instead it ruled that the language of the act authorized the circuit courts as courts of equity to hear appeals from the orders of the Commission. This, said the Court, necessarily implied a right to investigate anew all facts in any case. "It has been uniformly held by the several circuit courts and the circuit courts of appeal, in such cases," said Justice Shiras' opinion, "that they are not restricted to the evidence adduced before the Commission, nor to a considera-

tion merely of the power of the Commission to make the particular order under question, but that additional evidence may be put by either party, and that the duty of the court is to decide, as a court of equity, upon the entire body of evidence."

This decision further curtailed drastically the powers and usefulness of the Commission. The decisions it made could be reversed *in toto*, as to both facts and law, by the circuit courts. It was to become a frequent practice for the railroads to hold back important evidence and facts in any Commission hearing; on appeal these could then be presented to the courts in such a manner as to make the Commission's order appear to be ill-advised or even ridiculous. It is difficult to disagree with Justice Harlan, who in his dissent in the Alabama Midland Case observed, "Taken in connection with other decisions defining the powers of the Interstate Commerce Commission, the present decision, it seems to me, goes far to make that Commission a useless body for all practical purposes, and to defeat many of the important objects designed to be accomplished by the various enactments of Congress relating to interstate commerce."

Between 1898 and 1906, the Interstate Commerce Commission was little more than an agency for public information. It sometimes issued cease-and-desist orders, but it had little chance of sustaining these in the courts. Of the sixteen principal cases carried on appeal to the Supreme Court between 1897 and 1906, the Commission lost all but one.

PASSAGE OF THE SHERMAN ANTI-TRUST ACT

Meanwhile public attention was focusing upon the evils associated with the great trusts springing up in American industry.

The methods of trust combination were varied, although their purpose was always the same: the imposition of some degree of monopolistic control upon chaotic and cutthroat competition. Sometimes the combination was simply a price- or rate-fixing agreement. Sometimes production was allocated and profits were pooled and prorated among several participating firms. More spectacular were the great combinations which practically ended competition within an industry. Thus the Standard Oil Company, founded in 1882, was a trust combination of thirty-nine principal refining concerns which together dominated completely the business of producing, refining, and marketing oil in the United States. Likewise forty-odd inde-

pendent sugar refiners were replaced in 1892 by a single firm, the American Sugar Refining Company. The trust controlled between 90 and 98 per cent of the sugar-refining business in the United States. Similar combinations were created in tobacco, leather, meat packing, and electrical goods. The United States Steel Corporation, organized in 1901, had the largest financial resources of all the trusts formed up to that time. This concern, originally capitalized at $1,450,000,000, controlled some 50 per cent of the nation's iron and steel manufacturing capacity, and the absorption of additional firms in 1907 raised this figure for a time thereafter to more than 70 per cent.

From the point of view of big business, combination was a sensible method of solving a serious problem. Unrestrained competition was ruinous and often led to bankruptcy, and combination appeared to be the only rational way to impose some limits upon cutthroat economic warfare. Viewed historically, the process of integration seems to have been a certain inevitable stage common to the development of large-scale industries in all capitalistic economies. Processes of combination substantially similar to those in America occurred also in Britain, France, and Germany.

Public opinion in the eighties and nineties, however, viewed the trusts in a different light. The trusts menaced the traditional structure of free private enterprise. They often destroyed the little fellow and replaced the open market with a closed semi-monopolistic one. Moreover, the ruthless and unscrupulous methods adopted by many trusts to attain their ends added greatly to their unsavory reputations. Rural areas in the South and West in particular came to look upon trusts as symbols of an economic revolution in which rich, powerful, and corrupt financiers and industrialists had grasped power and riches at the expense of small and helpless farm folk.

By 1890, the West and the South, as well as many eastern liberals, reformers, and small entrepreneurs, were in full hue and cry after the trusts. Many states passed antitrust laws, but by now it was generally recognized that the great trusts were nationwide combinations and that only the national government could deal with them effectively. In 1888, both major political parties demanded trust regulation by Congress, and the demand for federal regulation thereafter grew more insistent.

Senator John Sherman of Ohio took the lead in Congress in de-

manding the passage of a federal antitrust law. In 1888 and 1889 he introduced antitrust bills into Congress, but until 1890 neither house acted upon his proposals.

The session of 1890 was dominated by a conservative Republican majority, which might ordinarily have been expected to pay little attention to agrarian and liberal demands for an antitrust law. The Republican Party, however, was in a somewhat embarrassing position. Many Democrats and reformers were charging that Republican high-tariff policies were directly responsible for the rise of the trusts, since the tariff eliminated foreign competition. Congress was even then engaged in the passage of the McKinley Tariff Act, which was to raise tariff duties to unprecedented levels. If the Republican majority was to escape condemnation as the friend of the trusts, it was imperative that it take some very positive stand against industrial combinations. Sherman's bill had therefore the support of the regular party organizations in Congress, and there was little doubt of its passage in some form.

As originally introduced, Sherman's proposal made illegal all manufacturing combinations producing goods for interstate commerce. The bill thus raised an important constitutional question. Congress certainly had the power to regulate interstate commerce, but did it thereby have the power to regulate industrial combinations, merely because those combinations produced goods intended for interstate commerce? Senator James Z. George of Mississippi immediately attacked the constitutionality of Sherman's bill on this point. The power of Congress to regulate manufacturing, he said, could not rest upon the subsequent transportation of goods so produced. Several senators supported this view. They freely predicted that Sherman's measure, even if enacted by Congress, would eventually be declared unconstitutional by the Supreme Court.

Sherman's bill was open to the equally serious objection that it did not prohibit trusts as such, but only those formed with the intent to manufacture for interstate commerce. Several senators pointed out that intent would often be impossible of proof.

Two other methods of trust control were proposed in the Senate debates on the Sherman bill. Senator George suggested discriminatory federal taxes against industrial combinations as a constitutional method of regulation. This he supported with the plausible assertion that the federal government's right to use the power of taxa-

tion as a regulatory device had already been upheld by the Supreme Court. Senator George Vest of Missouri suggested an amendment which would have made state legislation the basis of federal action. His measure would have provided that whenever a state prohibited trusts within its own boundaries, it should then become unlawful for any carrier or producer to move the products of any trust in or out of that state. This scheme was not unlike that later embodied in the Webb-Kenyon Act of 1913, ultimately sustained by the Supreme Court, for controlling the traffic in liquor between wet and dry states. Vest's suggestion received little support, however, the basic objection being that it would result in irregular administration.

After some debate, Sherman's bill was referred back to the Senate Judiciary Committee and redrafted to eliminate the constitutional objections that had been raised. The new bill, reported for the committee by Senator George F. Hoar of Massachusetts, made illegal every contract, combination, and trust in restraint of trade or interstate and foreign commerce. Thus the bill left open the question whether a combination in production could be held to restrain commerce and so be construed as a violation of the law; this question was thrown upon the courts for a decision. It is probable that this was the intent of the authors of the measure.

In the debate on the revised bill, the question arose as to whether it prohibited all combinations in restraint of trade. If so, virtually every business contract or agreement, however innocent, would become illegal, since it might be construed as a limitation upon trade or commerce in some degree. Senator Hoar replied that the intent of the bill was to write the English common-law provisions on monopoly into federal law; that is, "monopoly" and "restraint of trade" were to be defined as in the English common law. Presumably, this would not make every contract of sale illegal, but only those which resulted in substantial control of some phase of industry or commerce by some one group or firm.

The revised Sherman bill became law on July 2, 1890, having encountered little organized opposition in either house. The statute was entitled "An Act to Protect Trade and Commerce against Unlawful Restraint and Monopolies." The important provisions of the law were embodied in Sections 1 and 2. Section 1 provided that

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . .

Section 2 declared that

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . .

The act provided appropriate punishments for violation of its provisions and further stipulated that the law might be enforced against any illegal combination by a suit in equity to dissolve it.

The critical constitutional question of whether the Sherman law prohibited manufacturers' trusts on the ground that they restrained interstate commerce was now a matter for the courts to decide. Unless the law was interpreted so as to control trusts in production it would be of little value and could be used only against those combinations formed strictly in interstate commerce—in railroads, steamship lines, and the like. It did not seem probable that the Supreme Court would yield an affirmative answer to this question, since the justices who were being called upon to interpret the law were the very ones who were even then developing the concept of due process of law as a constitutional rationalization of *laissez-faire* and vested interests and who were in the process of stripping the Interstate Commerce Commission of its power to fix rail rates.

THE SUGAR TRUST CASE: "MANUFACTURING IS NOT COMMERCE"

The Supreme Court first had occasion to interpret the Sherman Act in *United States v. E. C. Knight Co.*, decided in 1895, five years after the passage of the law. The case involved a suit brought by the government for the dissolution of the American Sugar Refining Company.

The government charged that this concern had, by contracts with four other defendants, gained control of more than 90 per cent of the manufacture of all refined sugar in the United States. The government contended that this constituted a substantial restraint

upon commerce among the states, since the trust tended to raise prices and so restrict trade. It asked the voiding of the contracts upon which the trust rested and an injunction restraining the defendants from further violations of the Sherman law.

In denying the government's claim, Chief Justice Fuller, speaking for the majority, based his opinion upon a sharp distinction between manufacturing and commerce. "Commerce succeeds to manufacture, and is not a part of it," he said, and he went on to argue that the Sherman law was directed only against combinations in interstate commerce and could not be construed as invalidating those in production. He admitted that the present combination constituted a trust to monopolize the manufacture of sugar, but he held that it was not on that account illegal, for the trust was not in interstate commerce but in manufacturing.

Nor was it possible, said Fuller, to allow federal regulation of manufacturing merely upon the ground that production had an ultimate or indirect effect upon commerce. "It will be perceived," he said, "how far reaching the proposition is that the power of dealing with a monopoly directly may be exercised by the general government whenever interstate or international commerce may be ultimately affected. The regulation of commerce applies to the subjects of commerce and not to matters of internal police."

The Chief Justice then drew a sharp distinction between "direct" and "indirect" effects upon commerce. If a trust or monopoly had a direct effect upon commerce, then presumably it was subject to federal regulation. Combinations in manufacturing, however, were not of this kind: "Contracts, combinations, or conspiracies to control domestic enterprise in manufacture, agriculture, mining, production in all its forms, or to raise or lower prices or wages, might unquestionably tend to restrain external as well as domestic trade; but the restraint would be an indirect result, however inevitable and whatever its extent." Regulation of contracts of this kind was not a permissible exercise of federal power. "Slight reflection will show," he said, "that if the national power extends to all contracts and combinations in manufacture, agriculture, mining, and other productive industries, whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for state control."

The Court's categorical distinction between commerce and

manufacturing had some precedent. True, it has on occasion been contended with some force that the Constitutional Convention used the term "commerce" in a very broad eighteenth-century sense to comprehend all economic activity, including production, although not all historians accept this view. It is also true that John Marshall had repeatedly given an extremely broad connotation to the commerce power, although he observed that it did not comprise all forms of economic activity. And Justice Story in his *Commentaries*, though flatly denying that Congress had any authority to regulate manufacturing as such, nonetheless pointed out that such regulation might occur incidentally to the legitimate exercise of the commerce power.

However, after the Marshall era there was an increasing tendency to define the commerce power in limited terms. Thus Justice Daniel in *Veazie v. Moor* (1852) denied that the commerce power extended to manufacturing or agriculture. And in *The Daniel Ball* (1871) Justice Field in an otherwise nationalistic opinion on the federal commerce power stated that "whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced," the implication being that interstate commerce began when transportation or movement began. And in *Kidd v. Pearson* (1888) Justice Lamar observed that "no distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce." It was this later stream of precedent, which viewed the commerce power as little more than control over interstate transportation and trade, to which Fuller appealed. One may hazard the guess that had John Marshall written the Sugar Trust opinion he would have pushed Fuller's precedents aside.

The Court's distinction between direct and indirect effects upon commerce had an amorphous and metaphysical quality—a quality that made it useful to legislative-minded jurists who were not averse to bringing their personal philosophy to bear in passing upon constitutional issues. In a later generation a conservative-minded Court was to invoke Fuller's distinction repeatedly in order to strike down congressional statutes attempting to assert control over some phase of the national economy.

The Court's distinction between manufacturing and commerce

was not based upon economic reality. Whatever the situation in 1787, manufacturing had during the last decades of the nineteenth century become intimately associated with commerce. Some federal control over the instruments of production had become a necessary part of any effective national program for the promotion and control of interstate commerce.

More serious, the Court's distinction struck a hard blow at the doctrine of national ascendancy. That doctrine, as set forth by Marshall in *McCulloch v. Maryland* and *Gibbons v. Ogden*, held that the powers of Congress were paramount and that in their exercise Congress could lawfully invade the sphere of authority ordinarily reserved to the states whenever the matters affected had legitimate national ends. Some of Taney's opinions, it is true, had held that state and national authority constituted two mutually exclusive spheres of sovereignty and that Congress never could lawfully impinge upon the sphere reserved to the states. But the weight of decisions had been in the other direction. The powers of Congress were supreme within the federal field; those of the states were supreme only so long as they did not intrude upon federal authority. Chief Justice Fuller's distinction between commerce and manufacturing was completely at odds with this doctrine. Although it was evident that effective exercise of the commerce power now required some degree of national control over production, the Court nonetheless categorically set manufacturing aside as reserved unconditionally to the sovereign sphere of the states.

It seems fair to assume that in taking this position the Court was reluctant to concede any federal control over productive processes. Like all conservatives of the day, the justices were thoroughly imbued with the doctrine of *laissez faire*, and they viewed governmental controls over property as potential instruments in the hands of reformers and agrarian radicals who wished to assault the temples of private property and vested interest. The recent growth of substantive due process had indoctrinated the justices in the practice of relating their social philosophy to constitutional theory. Given this state of mind, it is understandable that the Court found plausible constitutional means to deny federal authority over production under the Sherman act.

United States v. Knight marked the beginning of a "twilight zone" between state and national powers—a zone in which neither

the federal government nor the states could act. Certain economic problems it was obviously beyond the competence of the states to regulate; yet they were now constitutionally beyond the authority of the national government. The separate states could not regulate monopoly. They might regulate manufacturing within their own boundaries, but they could not impose comprehensive regulation upon a concern extending over a number of states. Nor could the national government impose the necessary controls upon such a business, for the Court had denied federal authority to do so. In other words, certain phases of national economic life lay outside the control of both the states and the national government. No more complete perversion of the principles of effective federal government can be imagined.

The Sugar Trust opinion for the time being vitiated in very large degree federal control of trusts and monopolies. The only successful prosecutions conducted by the government in the next few years were those directed against railroad rate combinations. Since a railroad was in itself a business directly engaged in interstate commerce, the issue in such cases was not federal control of production but the regulation of commerce itself, and the dictum in *United States v. Knight* did not apply. Thus in *United States v. Trans-Missouri Freight Association* (1897) the Court held that an "association" formed by several western railroads to fix rail rates was monopolistic in character and violated the Sherman law. In *Addystone Pipe and Steel Co. v. United States* (1899) the Court took at least one short step toward recognition of the intimate relationship between commerce and production. Here the Court held that a combination entered into by several pipe manufacturers, which divided the pipe market along regional geographic lines and which fixed the prices of pipe through collusive bidding by members of the combine, had a direct effect upon interstate commerce and was therefore illegal under the Sherman law. But decisions of this kind were rare.

IN RE DEBS: THE PULLMAN STRIKE

The Court might attack national supremacy when the federal government attempted to deal with monopoly, but it nevertheless found it possible at the same session to expound national supremacy and federal sovereignty in the most sweeping terms in the Debs

case. The Court's inconsistency is apparent only in the realm of constitutional theory; on the economic plane it acted with complete consistency. For in the Debs case the Court used national supremacy to defend corporate property and law and order against labor union violence and anarchy.

In re Debs (1895) rose out of the great Pullman strike. In May 1894, the Pullman Car Company, because of the prevailing business depression, imposed a 20 per cent wage cut upon its employees. At the same time it maintained the high level of executive salaries and company dividends. Several thousand Pullman workers, organized within the American Railway Union, thereupon went out on strike. Under the leadership of Eugene V. Debs, the union presently resorted to a secondary boycott by refusing to move trains hauling Pullman cars. The strikers and their sympathizers shortly engaged in rioting and mob violence to block rail traffic. The result was the physical obstruction of interstate commerce and blockage of the mails in the region of Chicago and elsewhere in the nation.

President Grover Cleveland thereupon interfered in the strike to protect the mails and assure the free movement of interstate commerce. Over the protest of the governor of Illinois, Peter Altgeld, he despatched federal troops to the strike scene to keep order. At the same time the President's Attorney General sought and obtained an injunction in the Federal Circuit Court for Northern Illinois against further interference with the mails or with railroads engaged in interstate commerce. When violence and disorder continued, Debs and his associates were arraigned in federal circuit court, convicted of contempt, and sentenced to imprisonment.

In sentencing Debs the district court invoked the Sherman Act as authority for the injunction and for the convictions, on the ground that the strikers had engaged in a conspiracy in restraint of trade within the meaning of the law. The Court disregarded the objection that in enacting the antitrust law Congress had presumably been aiming at corporate trusts and not at labor union activities.

When Debs and his associates sought a writ of habeas corpus from the United States Supreme Court, the Court denied the writ. Justice Brewer made his opinion in *In re Debs* the occasion for a forceful exposition of national supremacy and the commerce power. The federal government, he said, had "all the attributes of sovereignty," and federal authority within its proper sphere was neces-

sarily supreme over that of the states when the two came in conflict. "The strong arm of the national government," he said, "may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails." Resort to injunction, he added, was a proper remedy for securing the protection of commerce and the mails. He did not mention the Sherman law, as the circuit court had done, but instead he rested his opinion on the broadest possible grounds of national sovereignty and supremacy.

No one accepting the doctrine of national sovereignty could quarrel with the Court's language or reasoning, or with the decision. In Cleveland's words, the Court had established "in an absolutely authoritative manner and for all time, the power of the national government to protect itself in the exercise of its functions." It is difficult to see how the administration or the Court could have acted otherwise. But there was irony in the fact that federal supremacy, so helpless to deal with the obstructions to interstate commerce imposed by monopolies and trusts, should be expounded so effectively against the leaders of a too-militant labor union.

THE FIRST INCOME TAX CASE

At the same session in which the Supreme Court decided *United States v. Knight* and *In re Debs,* it also rendered an unfavorable decision on the constitutionality of the federal income tax provisions incorporated in Wilson-Gorman Tariff Act of 1894. The two income tax cases, *Pollock v. Farmers' Loan and Trust Company* (1895) and *Pollock v. Farmers' Loan and Trust Company* (1895), illustrated another way in which the Court acted as the guardian of private vested rights and used its new quasi-legislative status to defeat attempts of the national government to cope with modern economic problems.

As a federal revenue measure, the income tax was not new. An income tax had been levied by Congress during the Civil War and had remained in effect until 1872. In *Springer v. United States* (1881) the Court in a unanimous decision had held this tax to be constitutional as applied to lawyers' professional earnings. Thus the new income tax seemed to involve no novel issue of federal power.

The income tax was a logical and obvious revenue device which

recognized important shifts in the nature of taxable wealth that were occurring in the country. The older forms of wealth had been principally realty and personal property. Since the Constitution required that direct taxes be apportioned among the states, it was impracticable for the national government to tax realty. Congress therefore had hitherto depended primarily upon import duties and excises in raising federal revenue. The assets of the new industry, however, were primarily in the earning power of its capital investments, the visible symbols of which were stocks and bonds, the intangible property of banks, corporations, and private individuals scattered over the nation.

Eastern liberals and agrarian radicals of the West and South were insistent in their demands for an income tax. At the same time they attacked the tariff, which they condemned as a tax upon farmers and consumers. Thus the National Alliance and Industrial Union, a southern Populist group, demanded that the tariff be replaced with a "just and equitable system of graduated taxes on incomes." The 1892 platform of the Populist Party also voiced this demand. The Democratic platform upon which Cleveland was re-elected to the presidency in November of that year called for drastic downward revision of the tariff, but said nothing of an income tax. However, a majority of southern and western Democratic congressmen now strongly supported such a tax, while Cleveland apparently also accepted the tax in principle, although he opposed its immediate enactment as inexpedient.

A severe financial crisis and business depression struck the nation in 1893, and as a consequence the federal treasury encountered a series of quarterly deficits in 1893 and 1894. It was apparent that the Democratic Congress would be forced to seek out additional sources of federal revenue. The southern and western agrarians saw in the income tax an obvious solution of the government's financial difficulties. When the House in December 1893 began consideration of the Wilson bill for tariff revision, the proponents of the income tax, led by William Jennings Bryan of Nebraska, seized their opportunity and forced the incorporation of several income-tax sections in the bill. These provisions subsequently withstood the attacks of eastern Democrats and Republicans in both houses.

The Wilson-Gorman Act, which became law on August 15, 1894, effected a number of minor reductions in import duties. The

income tax sections of the law levied a 2 per cent tax upon all kinds of income—rents, interests, dividends, salaries, profits, and the like. The act provided an exemption of $4,000, but, unlike the levies of a later day, the tax was not graduated.

A few months after passage of the Wilson-Gorman Act, *Pollock v. the Farmers' Loan and Trust Company* (1895), a case challenging the constitutionality of the statute's income-tax provisions, reached the Supreme Court. Pollock had sued as a stockholder to enjoin the company from payment of the tax. This was an astute method of attacking the constitutionality of the law, for an act of Congress of 1867 had specifically banned suits "for the purpose of restraining the assessment or collection of a tax." As Justice White very aptly observed in his dissenting opinion, the stockholder's suit ingeniously avoided this prohibition. Moreover, the case clearly constituted a collusive suit, since both parties obviously had the same interest in having the law declared unconstitutional. Ordinarily the Court will not consent to hear or decide collusive suits attacking the constitutionality of a federal statute. In spite of these dubious elements, the Supreme Court consented to review the Pollock case.

A brilliant array of legal learning, headed by Joseph Choate of New York and former Senator George Edmunds of Vermont, who were generally recognized as among the foremost lawyers of the day, appeared before the justices to attack the constitutionality of the income tax law. They were assisted by a battery of legal talent only slightly less distinguished. These gentlemen submitted one of the most elaborate briefs the Court had ever seen, a brief loaded with references to the Constitutional Convention, early American and English history, and works on economic theory.

Fundamentally the plaintiff's argument, as Chief Justice Fuller observed in his opinion, came down to three points. First was the contention that the tax was unconstitutional in so far as it levied a tax upon income from land. This claim was based upon the provisions in the Constitution (Article I, Section 2, and Article I, Section 9) that direct taxes must be levied among the states according to population. Taxes on land had always been classified as direct taxes. A tax on income from realty was equivalent to a tax on land. Therefore, plaintiff argued, the present law, in so far as it levied upon income from realty, was unconstitutional. An incidental additional claim was here entered: that since the sections of the law

levying a tax upon income from land were inseparable from the other income tax sections, all those sections of the law dealing with the income tax were unconstitutional.

Second was the assertion that since the income tax exempted all persons and corporations earning less than $4,000 yearly and certain other corporations and associations, it violated Article I, Section 8, of the Constitution, which required that all taxes must be uniform throughout the United States.

Third was the claim that the law was invalid in so far as it levied upon the income of state and municipal bonds.

These arguments, except for the last, which was limited in application to a small category of income, were of questionable validity. Choate and Edmunds supplemented them, however, with a plea which was presumably much closer to their hearts—an impassioned appeal to the Court to defend the sacred rights of private property and the foundation of honest government against the assaults of the mob. Edmunds spoke in the following vein:

> And this we call free government, a government of equal protection of the laws; we call it constitutional government. Three-fourths, nine-tenths of the people of this government, paying nothing toward carrying it on, shall be at liberty, under a Constitution which has been supposed always to protect the rights of minorities, to impose all the taxes of government upon those who own property amounting to more than $80,000, and nothing on those who own less. . . .
>
> This would be followed by further invasions of private and property rights, as one vice follows another, and very soon we should have, possibly, only one per cent of the people paying the taxes, and finally a provision that only the twenty people who have the greatest estates should bear the whole taxation, and after that communism, anarchy, and then, the ever following despotism.

The technique of this argument, another example of the *argumentum ad horrendum,* is worth noting carefully, for it was used with increasing frequency in after years. It consisted essentially in dwelling upon the horrible results which would follow were the principles embodied in the legislation before the Court carried to a supposedly logical extreme, an extreme which in reality lay beyond all rational probability.

This kind of plea is intelligible if we recall the panicky state of

the conservative mind between 1893 and 1896, when agrarian revolt, culminating in the Populist movement, loomed as a threat to the interests of sound property and government everywhere. The air was full of demands for monetary inflation, for government operation and ownership of railroads and other utilities, for abolition of the protective tariff. A series of bitter strikes was of recent memory: the Homestead strike of 1892, which had culminated in a pitched battle between the steel workers and Pinkerton detectives; the Pullman Company strike in Chicago, which Cleveland had finally squashed by the use of federal troops; the savage warfare of striking miners at Cripple Creek, Colorado. It was a day when the bitter unemployed men of Coxey's army marched in protest upon Washington—only to be arrested for walking on the grass! To conservatives of the day, the liberal, the populist, the socialist, the anarchist, and the communist were all of one stripe. The very foundations of American society seemed to be breaking up under radical attack. To damn the income tax as an anarchist assault upon the foundations of the American social order was an exceedingly clever approach to a Court dominated by a group of conservative property-minded justices. The argument did not fall upon deaf ears.

Chief Justice Fuller, who wrote the majority opinion, devoted most of his attention to the question of whether or not a tax upon income from land was in reality a direct tax. It would have been exceedingly simple for Fuller to reach a conclusion on this point, for there were two outstanding decisions of the United States Supreme Court to serve as precedents.

The first was *Hylton v. United States*, decided in 1796. It will be remembered that here the Supreme Court had been confronted with the validity of a federal tax upon carriages. A unanimous Court had held that the tax on carriages was not a direct tax, but an excise. Justice Paterson, who had been in the Constitutional Convention, had also expressed the belief that direct taxes, within the meaning of the Constitution, included only land and capitation taxes, an opinion in which Justice Chase concurred. This opinion had been quoted with approval by the Supreme Court numerous times during the succeeding century.

The second precedent was even more pertinent. As has already been observed, Congress had, during the Civil War, levied a tax upon incomes, which had remained in force until 1872. In *Springer*

v. United States (1881) the Supreme Court had upheld the constitutionality of the Civil War statute, asserting that an income tax was not a direct tax within the meaning of the Constitution. In rendering this opinion the Court had quoted *Hylton v. United States* as precedent.

Taken together, *Hylton v. United States* and *Springer v. United States* had established a clear precedent, not merely as to the constitutionality of taxes upon income from land, but indeed as to all income taxes, with the possible exception of those levied upon state securities. Fuller, however, chose to ignore the force of these two precedents and instead sought to prove that the term "direct taxes" as used in the Constitution included "all taxes on real estate or personal property or the rents or income thereof." This contention he supported with an elaborate historical inquiry into the work of the Constitutional Convention of 1787, the state ratifying conventions, and early debates in Congress.

His appeal to history did not bear out his contention. If his evidence proved anything, it was merely that the term "direct taxes" had as of 1787 no certain and fixed meaning at all. In the Constitutional Convention, for example, Rufus King had "asked what was the precise meaning of direct taxation. No one answered." Fuller quoted this, and he quoted Luther Martin's letter to the Maryland legislature in which Martin had clearly implied that direct taxes meant capitation taxes and assessments on property. Also he quoted Albert Gallatin, who in 1796 had said that "direct taxes meant those paid directly from and falling immediately on the revenue." Evidence of this kind proved merely that in 1787 there was no general agreement as to what direct taxes were. Some men in 1787 apparently thought direct taxes included only capitation and realty taxes; others held that they included income; while still others defined direct taxes according to their status in theoretical economics. General agreement was absent. Yet in the face of this evidence, Fuller stated with no reservation that direct taxes, as of 1787, included "taxes on real estate or personal property or the rents or income thereof." This assertion prepared the way for his conclusion: that those portions of the present statute which provided for a tax upon the income from land established a direct tax, and were therefore unconstitutional.

Before Fuller could arrive at this conclusion, however, he had to

dispose of the two embarrassing precedents of the Supreme Court itself. What of *Hylton v. United States?* Here Fuller emphasized that Justice Chase had merely said he was "inclined to think" that direct taxes included only capitation and land taxes; that is, he held that this portion of the Hylton opinion was not official, and was mere *obiter dictum.* Technically the Court had not defined direct taxes as such; it had merely decided that the tax on carriages was an excise.

What of *Springer v. United States?* Here Fuller disparaged the decision as precedent on the grounds that the case involved a tax on personal income which was derived from attorney's fees, and "not in any degree from real estate." The precedent thus narrowly construed did not in his opinion govern the question of the validity of a tax on the income from land.

Fuller thereupon concluded that taxes on income from land were not different from taxes on land itself, and were therefore unconstitutional. This, said Fuller, was well understood in 1787 and afterward. *Hylton v. United States* and *Springer v. United States* he construed as not relevant to the present decision.

In addition, Fuller's opinion held that those portions of the statute which laid a tax upon the income of state and municipal bonds were unconstitutional. Here he merely followed those precedents which prohibited the federal government from taxing state bonds.

Five other justices concurred with Fuller in the first two conclusions of his opinion. Only Justices Harlan and White dissented and in separate minority opinions argued that the tax was constitutional in its entirety.

There remained the far more important questions of whether the unconstitutionality of two parts of the tax law made void the entire statute and whether the entire income tax was void because it violated the principle of uniformity. Upon these crucial questions the Court was silent. The Chief Justice instead merely stated that the eight men participating in the decision—Justice Howell E. Jackson was ill at the time and took no part—were equally divided, 4 to 4, upon these questions and that the Court therefore rendered no opinion upon them.

It was at once evident that the decision was inconclusive, for the Court had refused to rule upon the constitutionality of the law as a whole. Yet by striking down part of the measure the Court had

shown itself amenable to the arguments of the brilliant lawyers who had assailed the tax. The 4-to-4 decision was an open invitation for Choate, Edmunds, and their associates to return to the attack.

THE SECOND INCOME TAX CASE

Chief Justice Fuller had delivered his opinion in the first Pollock case on April 8, 1895. One week later, Choate and his associates asked for a rehearing. Their reason was the very plausible one that the inconclusive 4-to-4 decision of the Court upon the constitutionality of the law in its entirety made a clear decision upon this question imperative. This petition the Court granted, since Justice Jackson was expected to return to the bench shortly, and a majority opinion by a full Court might therefore be expected. Accordingly the case was reargued early in May, and on May 20 the Court in *Pollock v. The Farmers' Loan and Trust Company* (second case) handed down a second decision.

This time the opponents of the law won a complete victory, the Court striking down, 5 to 4, all the income-tax sections of the Wilson-Gorman Act as unconstitutional. Chief Justice Fuller based his opinion in the second Pollock case in part upon the point already decided in the first income tax opinion: that income taxes on realty were direct taxes and therefore unconstitutional. That is, the Court had already put taxes on income from land in a special category, separate from other income taxes; they were direct taxes, even though other income taxes conceivably were not.

Justice Fuller then proceeded to indulge in a major solecism. In the first case he had held that income taxes on land were in a separate category from other income taxes and were unconstitutional as being in effect taxes on land. Yet he now declared that he was unable to see any distinctive difference between a tax on income from land and taxes on income from other property. Although the Court had already held a tax on income from land to be void as falling in a special category, the Court now concluded that all taxes on income from all property were void, on the ground that it was not possible to distinguish between taxes on income from land and taxes on the income from other property. In a word, although the precedent of the first decision was followed, the carefully constructed special category for income taxes on land therein set up, having served its purpose, was now thrust aside. As Professor Cor-

win has neatly put it, "The ladder having served its purpose—having put the Court in the second story—is kicked down." [1]

There followed an involved historical analysis, in which Justice Fuller was obliged again to evade the clear-cut implications of *Hylton v. United States* and *Springer v. United States*. This he did by placing an excessively narrow construction upon the Hylton case, emphasizing the bad reporting in the decision and animadverting upon certain trifling elements of doubt as to the nature of a direct tax expressed by Justices Chase, Paterson, and Iredell in their opinions. The purpose of his argument was now precisely the opposite from that in the first case; there he had been concerned with proving conclusively the precise meaning of direct taxes as of 1787; now he was concerned with proving that the judicial precedents were historically weak. The apparently unanswerable *Springer v. United States* he did not even refer to; instead his opinion laid much stress upon certain vague English decisions as to the meaning of direct taxes.

Chief Justice Fuller then held that the unconstitutionality of the tax on income from all forms of property invalidated all the income-tax provisions of the law. Here the Court followed a well-established rule of statutory construction—that if the various parts of a statute are inextricably connected with one another in such degree as to warrant the assumption that the legislature intended the law to function as a whole, then if some portions of the statute are unconstitutional, the law must be treated as unconstitutional in its entirety. It was obviously impossible to regard the sections of the statute relating to income taxes on salaries, income taxes on businesses, income taxes on property, and the like, as separate and independent in character. Fuller therefore declared all the sections of the Wilson-Gorman Act relating to the income tax to be unconstitutional.

It is difficult to escape the conclusion that the two Pollock cases constituted exceedingly unsound and unwise decisions on the part of the Court. The opinions disregarded one hundred years of decisions by the Court itself in which the meaning of a direct tax had been narrowly and definitely established. One can hardly argue that the Supreme Court ought on all occasions to follow the rule of *stare decisis*, for there have been occasions on which the Court has

[1] E. S. Corwin, *Court Over Constitution* (Princeton, 1938), p. 190.

deliberately and consciously abandoned a set of precedents and has been applauded by enlightened liberals for doing so. In the income-tax cases, however, no rational justification seems to have existed for abandoning the older interpretation. For a century the tax practices of the federal government had been built upon the premise that direct taxes included only capitation and realty taxes.

There was a pre-eminently sound reason for this narrow construction. Apportionment of direct taxes among the states according to population was an archaic device. As Justice Paterson had pointed out in *Hylton v. United States*, the Convention had inserted the provision at the insistence of the southern states to protect their preponderant holdings in land and slaves against excessive taxation. By 1895 the clause had become obsolete and pointless. Moreover, from the beginning it worked not for justice but for injustice. Again, as Justice Paterson had observed, were a tax upon carriages to be apportioned among the states according to population, carriage-owners in those states having but few carriages in proportion to the states' population would be placed under an immense burden as compared to owners in states of equal population having many carriages.

By broadening indefinitely the category of direct taxes the Pollock cases threw doubt upon the entire excise structure of the federal government. For a hundred years, the federal government had levied a variety of taxes on the assumption that direct taxes included only capitation and land taxes. After 1895 no man could say with any certainty what taxes might be recognized as direct within the meaning of the Constitution and hence declared unconstitutional. Even the adoption in February 1913 of the Sixteenth Amendment did not clarify this matter, since it merely legalized income taxes as such.

The speciousness of Chief Justice Fuller's historical argument hardly needs further comment. He could not, in fact, show that in 1787 there was any general understanding about direct taxes.

Then, as already observed, the Court was not logically consistent in its two opinions. In the first case, the Court was able to quote with approval the Hylton case as establishing that direct taxes included taxes on land. Taxes on income from land were therefore held to fall in a special category. In the second case, the Court held that it was unable to perceive any difference between taxes on

income from land and any other form of income tax, a clear denial of its premise in the first case. In spite of this, however, it used the first case as precedent in holding all income taxes unconstitutional.

Most significant was the way some of the justices evidently yielded to the demands of Choate and Edmunds that the Court constitute itself the guardian of property rights and vested interests. Here the Court's new legislative role was clearly displayed. The Court was asked to void the act in question in part upon the grounds that it was socially unwise—a purely legislative conception of the Court's powers. It is true that Justice Fuller in the second case denied that the Court had any interest or concern with the economic or social implications of the law. But Justice Field, who stood with the majority in both cases, wrote a concurrent opinion for the first decision in which he clearly revealed that social and economic considerations were uppermost in his mind. "The present assault upon capital," he said, "is but the beginning. It will be but the stepping stone to others, larger and more sweeping, till our political contests will become a war of the poor against the rich; a war constantly growing in intensity and bitterness."

The Court, in other words, was to constitute itself a guardian of property against revolution. If we recall the fervor with which Justice Field was working at this time to convert "due process of law" into a bulwark of property rights, this conception of the Court's function was not a surprising development.

The decision invalidating the entire income-tax law in the second case was made possible because one justice, whose identity is unknown, changed his mind on the constitutionality of the statute during the five weeks between the first and second decisions. It will be recalled that in the first case the justices were divided by a vote of 4 to 4 on the larger question of whether the law was void in its entirety, this tie vote having been made possible by the illness of Justice Jackson. But the identity of the four justices opposed to the constitutionality of the law *in toto* and the four who believed the law constitutional is unknown, for Chief Justice Fuller did not name them in his opinion.

In the second case, Justice Jackson returned to the Court and took part in the case. When the majority opinion was announced, he dissented and voted in favor of the constitutionality of the income-tax law. Three other justices—White, Harlan, and Brown—voted

with him to make a minority of four in favor of upholding the law. But in the first case, four justices, names unknown, had also been in favor of the constitutionality of the law in its larger aspects. Had all four men in favor of the law in the first case again voted in favor of the law five weeks later, it is clear that, except for the provisions for taxes on income from land and income from state bonds, the law would have been declared constitutional by a vote of 5 to 4. Thus it is obvious that one of the original four men who favored the law in the first case shifted his vote in the second case and voted against the law's constitutionality.

Who was the justice who shifted his vote? Some deductions by the process of elimination are possible. It was not White, Brown, or Harlan, for they voted for the law in the second decision. The five justices who voted against the law in the second case were Fuller, Field, Shiras, Gray, and Brewer. Of these Justice Field plainly expressed himself in his concurrent opinion in the first case as opposed to the constitutionality of the law in its entirety, and Chief Justice Fuller was from the beginning clearly opposed to the entire law. This leaves only Justices Shiras, Gray, and Brewer. For many years Justice Shiras was thought by most students to have been the one who shifted in the second case. More recently doubt has been thrown on this supposition. Some present students are of the opinion that Justice Gray was the one who changed his vote; others believe it was Justice Brewer.

Regardless of who was responsible, the shift upset one hundred years of Supreme Court history as to what constituted direct taxes, made necessary the passage of the Sixteenth Amendment to the Constitution, and delayed the adoption of the income tax by the federal government for some nineteen years—far-reaching results to be produced by the constitutional doubts and vacillations of one anonymous justice.

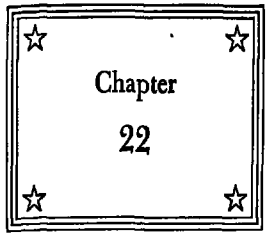
THE FAILURE OF THE FIRST MOVEMENT FOR NATIONALISM

By 1896 the first attempts on the part of agrarian radicals and liberals to provide certain national controls for a nationalized economy had failed almost completely. The Interstate Commerce Law had been stripped of its meaning by the Supreme Court. The Sher-

man Anti-Trust Law had been crippled, and the first attempt to modernize the federal tax structure had collapsed under the judicial blows. The Supreme Court of the United States had become legislative-minded, and the controlling philosophy behind its decisions was that of *laissez faire*. The group of conservative justices dominated by Justice Field had been successful in blocking all attempts by Congress to nationalize the constitutional system along more liberal lines.

The effect of these gentlemen's decisions had been to create for the first time in the American federal system a twilight zone of sovereign authority—a zone which belonged neither to the states nor to the nation. The current judicial interpretations of due process of law and the Fourteenth Amendment were by 1900 crippling the states as instruments of social control. The first attempts of the national government to deal with the railroads and trusts and great wealth through the instruments of the national government had also been struck down by the Court.

After 1896, the impulse to national reform was for the moment dormant. The failure of agrarian radicalism in Bryan's defeat of that year, the return of prosperity, and the rise of great issues in foreign affairs all served to draw attention away from the problems of a nationalized economy. The impulse to national reform was not dead, however, and it was to rise again within a decade in a second and more powerful wave of social change and liberalism. With the new wave of reform there would come renewed demands that problems now beyond the competence of the states be dealt with by the national government.



The Rise of Liberal Nationalism

IN SEPTEMBER 1901, as a result of the assassination of William McKinley, Theodore Roosevelt became President of the United States. While this event belonged in the category of political accidents, the powerful wave of nationalistic reform which began its sweep across the country almost coincidently with the accession of the new President had its roots deep in the American political scene. Within the next ten years the new reform movement was to bring about the development of a new federal "police power" as an instrument of national social reform, a substantial revival of the Sherman law and of federal trust prosecutions, and the passage of a new and more effective Interstate Commerce Commission Act. The constitutional issues raised in this new era of "liberal nationalism" set the stage for most of the subsequent constitutional controversies of the next thirty years.

THE DOCTRINE OF LIBERAL NATIONALISM

The popular impulse toward national reform, first manifested in the 1880's, had never died. It had merely been suppressed and diverted. William McKinley's victory over William Jennings Bryan in the presidential election of 1896 had thoroughly demoralized

the agrarian radicals in the Populist and Democratic parties. Moreover, many middle-class people had been driven in alarm away from the idea of social reform because of the successive outbreaks of class violence after 1890. For some time they were too frightened by the specter of revolution to care much about reform. The war with Spain also diverted the nation's attention from internal problems to foreign affairs and to the political controversies associated with America's sudden acquisition of a far-flung world empire. Not until after 1900 did the focus of national interest gradually turn back to internal affairs.

When it did turn back, it found that the old nationwide problems raised by America's industrial revolution were as far from solution as ever. Federal trust legislation was almost completely ineffective. The Sherman law, rendered harmless by the Supreme Court's intellectual calisthenics in the Knight case, was openly ignored. Meanwhile the trend toward the centralization and integration of American business and industry had continued. America saw the formation of the United States Steel Corporation, its first billion-dollar trust, during the year Theodore Roosevelt entered the White House. Railroad legislation, too, had become comparatively meaningless; since the courts had stripped the Interstate Commerce Commission of its authority, all the old evils—rebates, pools, regional discrimination and the like—flourished as in the days before 1887, although somewhat more covertly than before.

A host of new social problems also essentially national in character emerged after 1900. Public opinion demanded that the great corporations in production and commerce submit to some degree of control over their commercial and financial practices and their labor policies. As the reform movement grew, journalists and muckrakers brought other evils into the public forum for discussion and analysis—bad conditions in the meat-packing industry, child labor, employer liability, adulterated and spoiled foods, the traffic in women. Most liberals saw all the foregoing as nationwide problems demanding federal regulation.

There were two ways by which federal authority might be expanded to cover these problems. First, the Constitution might be amended. Most liberals, or Progressives as they presently called themselves, did not consider this a feasible approach to the prob-

lems at hand. Except for the amendments incident to the Civil War and Reconstruction, the Constitution had not been altered for a century, and most competent observers had concluded that because a small minority in a fraction of the states could block effectively any move for constitutional reform it was virtually impossible to amend the Constitution.

There remained the method of constitutional change by constitutional reinterpretation instead of formal amendment. This could conceivably be accomplished by the bold assertion of national authority by Congress and the President on the assumption that the necessary legislation would receive the sanction of the Supreme Court. It was this technique which met with the approval of President Roosevelt and other nationalistic liberals. It proposed to make the Constitution a living, growing instrument of national authority rather than a static charter of government. This would mean that the powers of the national government were not to be regarded as absolutely fixed but as subject to constant reinterpretation and reconstruction to keep abreast of the growth of American economic life.

THEODORE ROOSEVELT'S STEWARDSHIP THEORY

President Roosevelt was in many respects well fitted to serve as the leader of a strong liberal national movement. He had a dynamic and powerful personality that captured the popular imagination and inspired large numbers of people to follow him in whatever ideals he proclaimed. Roosevelt was psychologically incapable of accepting a secondary role in the government. Through his speeches and messages, his explosive symbol-making, and his ability to dramatize any cause he adopted, he made the presidency rather than Congress the center of national sovereignty and national leadership. In contrast most Presidents since Lincoln had been mediocre individuals who were well content to let the controls of government slip into the hands of Congress. Roosevelt literally insisted upon becoming the head of the state, and he had sufficient force of personality to make good his claim.

Roosevelt conceived of the presidency as a "stewardship," in whose care the common welfare and destiny of the American people were entrusted. Any matter concerning national welfare Roose-

velt assumed to be his affair. He felt himself to be personally responsible for the safety, prosperity, and happiness of the entire United States.

The stewardship theory of presidential duties took Roosevelt far afield of the constitutionally prescribed functions of the presidency. Thus in the great coal strike of 1902, Roosevelt interfered and used the prestige of his office to force a settlement. So also, in the panic of 1907, Roosevelt stepped in to prevent the spread of a financial panic in Wall Street. In this instance, he took upon himself the responsibility for suspending the operation of the Sherman law in order to make possible a financial combination deemed desirable to check the panic.

Roosevelt revived the old Hamiltonian doctrine of inherent executive prerogative power which held that the President was not limited in authority by the enumeration of executive functions in the Constitution. To put it differently, the President could do anything which the Constitution or some act of Congress did not forbid him to do. Acting according to this concept, Roosevelt felt himself justified in settling a coal strike, quieting a financial panic, or arranging the finances of the Dominican Republic.

There were nevertheless grave difficulties in the way of Roosevelt's espousal of a nationalistic economic program. Both Congress and the Supreme Court were dominated by conservatives who had little interest in liberal nationalism. In the Senate a conservative Republican oligarchy, headed by Senators Nelson W. Aldrich of Rhode Island, Henry Cabot Lodge of Massachusetts, Mark Hanna of Ohio, Henry Foraker of Ohio, John Spooner of Wisconsin, and Thomas Platt of New York, held a firm, almost dictatorial grip over the affairs of the upper chamber. Representative of big business and of state political machines, they were naturally opposed to legislation designed to control commerce or industry or to effect social reform. In the House the conservatives were almost equally entrenched. Joseph Cannon of Illinois, who became speaker in 1903, exercised a vigorous control over the lower chamber, usually in the interests of Republican conservatism.

Although by tradition the Republican party had been nationalistic in its constitutional theories, the conservative majority after 1900 turned increasingly toward strict constructionist and even states' rights arguments. In nearly every debate on progressive

national legislation between 1901 and 1918, the Republican leadership was to raise the constitutional issue. In this, they were joined by many Democrats, particularly those from the South with its tradition of states' rights. Most conservatives thought of the Constitution as a document whose meaning remained absolutely fixed and unchanged except by the process of formal amendment, and to them the liberal attempt at constitutional reinterpretation appeared as a sophistical attempt to prove that the Constitution did not mean what it said.

The constitutional conservatives had their allies in the judiciary, although after 1900 the Court was in general tenor somewhat more liberal than it had been in the nineties. Still present from the property-minded bench of the last decade were three judges who had voted against the constitutionality of the income-tax law—Chief Justice Melville Fuller and Justices David Brewer and George Shiras. Justices Edward D. White and Henry B. Brown, who had voted for the income-tax law, were also still present; but White was on most occasions a conservative states' rights advocate and at best an indifferent champion of strong national government, and Brown was also a moderate conservative. Justice Rufus Peckham, a New York Democrat appointed by Cleveland in 1895, was definitely conservative in his attitude toward social legislation. Justice William R. Day, who replaced Justice Shiras in 1903, was a Republican lawyer and former Secretary of State under McKinley. Justice Day was to prove himself generally willing to accept moderate liberal nationalism, although he wrote the opinion in *Hammer v. Dagenhart* (1918) invalidating the first Child Labor Law. Justice William H. Moody, who replaced Justice Brown in 1906, had served as Roosevelt's Secretary of the Navy and Attorney General. During his four years on the Court he also proved to be a moderate liberal.

The two justices most in sympathy with liberal nationalism were John Marshall Harlan and Oliver Wendell Holmes. Justice Harlan, a Hayes appointee of 1877, was usually to be found on the nationalist side, although he wrote the opinion in *Adair v. United States* (1908) invalidating the federal statute outlawing railroad yellow-dog contracts. Justice Holmes, who was appointed by Roosevelt from the Massachusetts bench in 1902, was to become perhaps the most distinguished Supreme Court jurist of the early twentieth century. He was to vote against the government in the Northern Securities

Case, but thereafter nearly always supported liberal nationalism. He based his judicial philosophy in considerable part upon a reluctance to impose judicial restraints upon legislative policy making. Essentially a skeptical conservative who was little interested in social reform as such, he nevertheless refused to countenance the resort to judicial review as a means whereby the Court might substitute its social theories for those of Congress. His famous dissent in *Lochner v. New York*, wherein he attacked the majority justices for their attempt to write *laissez-faire* economics into constitutional law, has already been cited.[1]

THE RISE OF A FEDERAL POLICE POWER: THE LOTTERY AND OLEO CASES

The first important victory for the proponents of liberal nationalism was the recognition of a federal police power. Theoretically the national government has no general police power, the right to legislate for the health, morals, and welfare of the community being reserved to the states. Nonetheless Congress after 1900 proceeded to attack a variety of social and economic problems, using its powers to regulate commerce and to tax as instruments of social reform. Although the intent of such legislation was patently the protection of the health, morals, and public welfare of the community, the Supreme Court between 1903 and 1915 accepted as constitutional a whole series of statutes of this kind and thus in effect recognized a growing sphere of federal police power.

The Court first recognized the use of the commerce power for police purposes in *Champion v. Ames* (1903). The case rose out of a relatively insignificant act of Congress passed in 1895 in an attempt to deal with the lottery problem. The law forbade the shipment of lottery tickets in interstate commerce. The real purpose of the law was not the regulation of commerce but the control of gambling, a matter that had previously lain entirely within the sphere of state police power.

By a vote of five to four, the Court held the lottery law to be constitutional. Justice Harlan, who spoke for the majority, dwelt at length upon the supreme and plenary power of Congress in the field of interstate commerce. "The power to regulate commerce

[1] See p. 525.

among the several states," he said, "is vested in Congress as absolutely as it would be in a single government." This regulatory power could rightfully touch any problem that could be correctly construed as interstate commerce. There was nothing very revolutionary about this, and Harlan made his point by citing *Gibbons v. Ogden* and like precedents on the broad extent of the commerce power.

Harlan then held that Congress might lawfully impose absolute prohibitions upon portions of interstate commerce if it wished to do so. Harlan drove this point home with a forceful rhetorical question: "If lottery traffic, *carried on through interstate commerce*, is a matter of which Congress may take cognizance and over which its power may be exerted, can it be possible that it must tolerate the traffic, and simply regulate the manner in which it may be carried on?" [2]

There were ample precedents for Harlan's position here. Congress had several times laid absolute prohibitions upon certain types of commerce in pursuance of its power of regulation. The Embargo Act of 1807 was the most notable instance of this kind; here Congress had prohibited all foreign commerce entirely. True, in this instance the prohibition had been exercised over foreign commerce and not over commerce between the states as in the lottery law; but unless one were prepared to argue that foreign commerce and commerce between the states lay in two separate and distinct categories, the embargo precedent was perfectly sound.

Harlan admitted that the logic of his opinion led "necessarily to the conclusion that Congress may arbitrarily exclude from commerce among the states any article . . . which it may choose, no matter with what motive, to declare shall not be carried from one state to another." This admission carried the further possible implication that Congress might conceivably use the commerce power to invade the sphere of sovereignty reserved to the states and thus to break down the federal character of the constitutional system. However, said Harlan, "it will be time enough to consider the constitutionality of such legislation when we must do so."

Chief Justice Fuller's dissent, in which Brewer, Shiras and Peckham concurred, centered on the intent or purpose behind the law. The real purpose of the statute, according to Fuller, was not the

[2] The italics are in the original.

regulation of commerce but the suppression of lotteries. The measure therefore constituted a clear invasion of the police powers of the states under the pretense of regulating interstate commerce. Fuller warned that this conception of the commerce power would "defeat the operation of the 10th Amendment," and would break down all distinction between state and national authority. To his way of thinking, the present decision was a "long step in the direction of wiping out all traces of state lines, and the creation of a centralized government."

Fuller also challenged Harlan's two main assumptions: that the right to regulate commerce included the right to prohibit it entirely, and that federal power over interstate commerce was as extensive as that over foreign commerce. He cited no precedent against the power of Congress to prohibit interstate commerce entirely. However, had he searched the records of the slavery controversy, he would have found that the proponents of interstate trade in slaves had once argued against the constitutionality of any prohibition of the interstate traffic in slaves. And in at least one case, *Groves v. Slaughter* (1844), certain of the justices of the Supreme Court had accepted this argument.[3]

There were also precedents, although of somewhat dubious value, for Fuller's assertion that while the federal power over foreign commerce was unlimited and supreme, that over interstate commerce was not. Madison in his later years had once mentioned the idea with approval. And in a few cases before and after 1900, the Supreme Court had suggested the distinction. The argument appears to draw but little plausibility from the wording of the Constitution, however, for the two types of commerce are mentioned without distinction in the same phrase.

Fuller's dissent closed on a dire note:

> I regard this decision as inconsistent with the views of the framers of the Constitution, and of Marshall, its greatest expounder. Our form of government may remain notwithstanding legislation or decision, but, as long ago observed, it is with governments, as with religions: the form may survive the substance of the faith.

A year later, in *McCray v. United States* (1904), the Court sustained a federal police statute involving the use of an excise tax as

[3] See the discussion of *Groves v. Slaughter* on p. 358.

an instrument of social control. In 1902 Congress, in response to powerful pressure from a national dairymen's lobby, had enacted a statute raising the excise on artificially colored oleomargarine to ten cents per pound but at the same time providing for a tax of but one-fourth cent per pound on oleomargarine free from artificial coloring. The obvious intent of the statute was not to raise revenue but to suppress the manufacture and sale of artificially colored oleomargarine, then being sold widely as butter. The statute was attacked in the courts on the ground that its true purpose was not taxation but the regulation of manufacturing, and that as such the law invaded the reserved powers of the states in violation of the Tenth Amendment. The tax was denounced also as being so heavy as to be confiscatory and hence in violation of the due process clause of the Fifth Amendment.

Justice White's opinion in *McCray v. United States* turned upon the Court's refusal to inquire into the motive or intent behind the tax or the result it produced. Laying down what amounted to a rule of judicial noninterference with federal tax statutes, he held that if Congress on the surface had power to levy the tax in question, then the Court could not inquire into the motive behind the law. "The decisions of this court from the beginning," he said, "lend no support whatever to the assumption that the judiciary may restrain the exercise of a lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." Nor could the statute's result be considered. Since the tax was valid, regardless of motive, any invasion of the reserved powers of the states was incidental, and the law did not violate the Tenth Amendment. As for the Fifth Amendment, the result of the tax might well be the destruction of the oleomargarine business, but the statute could not thereby be said to be confiscatory and a violation of due process.

McCray v. United States opened potentially a vast area of federal social controls through the medium of taxation. On the basis of this decision there seemed to be no limits to the discretion of Congress as to either the motive behind a federal tax statute or the ultimate effect of the law. It remained only to be seen to what extent Congress would make use of the new power. Chief Justice Fuller and Justice Peckham dissented as they had in the lottery case, and Justice Brown joined them on this occasion.

EXPANSION OF THE FEDERAL POLICE POWER

In the decade after *Champion v. Ames* and *McCray v. United States* there occurred a general growth of federal police power. By 1916 nearly a score of statutes had been enacted, ostensibly either as regulation of interstate commerce or as tax measures, but actually as regulatory statutes aimed at specific social evils which liberal nationalists insisted required federal regulation. The most important statutes of this character using the commerce power were the Pure Food and Drug Law of 1906, the Meat Inspection Acts of 1906 and 1907, the White Slave Traffic Act of 1910, and the Child Labor Act of 1916. The most important statutes employing coercive or destructive taxation were the Phosphorus Match Act of 1912 and the Harrison Anti-Narcotics Act of 1914.

Every one of these statutes had much the same history behind its passage. Some widespread social evil or problem was brought to light, more often than not through the efforts of crusading writers—"muckrakers," as Theodore Roosevelt called them—in popular magazines and newspapers. The result was an aroused public opinion and a campaign for remedial federal legislation that eventually won sufficient popular support to push through an act of Congress.

The Pure Food and Drug Act, for example, was enacted in June 1906, after a protracted campaign in periodicals and the press against the menace of adulterated and spoiled foods. Much publicity was given the research of Dr. Harvey Wiley, a chemist in the Department of Agriculture, which demonstrated that the use of preservatives, coloring matter, and fradulent substitutes in the preparation of foods had become so common as to be "almost universal." Since many foods were now sold in nationwide markets, there was comparatively little chance of effective state regulation. In December 1905, President Roosevelt asked for federal legislation to control the evil, and a bill barring adulterated and misbranded foods from interstate commerce was thereupon introduced into Congress. Although several congressmen attacked the statute as an invasion of state police power, it nonetheless became law on June 30, 1906.

While the Pure Food Act was still a live issue, the nation became tremendously aroused over the situation in the meat-packing industry. A novel by Upton Sinclair, *The Jungle,* published in 1906, portrayed in terms of vivid realism the hard working conditions,

the filth, and the general indifference to public welfare that prevailed in the great packing houses in Chicago. The whole country was swept by a wave of indignation. President Roosevelt responded by instigating an investigation which confirmed most of the charges that Sinclair had leveled. Although the packers had hitherto succeeded in resisting federal regulation as an invasion of state sovereignty and as socialistic, the pressure of public opinion aroused by the congressional revelations defeated their efforts to block legislation.

On June 30, 1906, the Meat Inspection Act became law, as part of a statute making appropriations for the Department of Agriculture. Branch offices under the Department of Agriculture were established at all packing houses which prepared meat for interstate commerce. Inspectors were to examine live animals for disease and carcasses for disease and putrefaction. Uninspected and rejected meat was banned from interstate commerce. In March 1907 Congress re-enacted the Meat Inspection Act, using virtually the same language as that in the 1906 law.

It is interesting to note that the commerce power was here used to effect the establishment of a local inspection service. Legally there was no direct way in which packers could be forced to submit to inspection; but if they did not, their products were banned from interstate commerce, so that practically they had no choice but submission.

Somewhat similar circumstances attended the passage of the White Slave Traffic Act of 1910, popularly known as the Mann Act. The Bureau of Immigration had long sought to cope with the international traffic in prostitutes by watching ports of entry. In 1907 Congress, in an attempt to make such control more effective, had enacted a statute making it a punishable offense to harbor an alien woman for immoral purposes within three years after her arrival in the United States. However, in *Keller v. United States* (1909), the Supreme Court by a vote of six to three declared this act unconstitutional, Justice Brewer's majority opinion holding that the act attempted the local regulation of prostitution and hence invaded the police power of the states in violation of the Tenth Amendment. This decision made immigration controls over the traffic in prostitutes partially ineffective. Late in 1909 the Bureau of Immigration informed President William Howard Taft that

much of the traffic in women was now carried on in commerce between the states and as such was beyond immigration controls.

Meanwhile a concerted agitation against the "white slave trade" had broken out in the press. An article by George Kibbe Turner in *McClure's* for November 1909 named New York City as one of the three world centers of the traffic. Taft was not the constitutional nationalist that Roosevelt had been, but in his annual message of December 1909 he hesitantly expressed the belief that an act prohibiting interstate and foreign traffic in women for immoral purposes might be constitutional. Representative James Robert Mann of Illinois shortly introduced such a measure in the House. The bill prohibited, under suitable penalties, the transportation of women for immoral purposes in interstate or foreign commerce. Although congressional conservatives attacked the bill as "an attempt to exercise police authority by the federal government under guise of regulating commerce among the states," public support for Mann's bill was so overwhelming that it passed Congress without protracted opposition, and became law on June 25, 1910.

The Child Labor Act of 1916 was another typical product of the Progressive era. Liberals, social reformers, and muckrakers alike had been attacking the evils attendant upon child labor in industry since the turn of the century. In 1906 Senator Albert J. Beveridge of Indiana had introduced a bill to prohibit carriers from moving the products of child labor in interstate commerce. The conservative majority had denounced the bill with tolerant amusement as "hopelessly unconstitutional," and it got nowhere. For the next ten years thereafter, bills of a similar character were nevertheless introduced into each Congress, and the drive for a federal child labor law gained strength with the Progressive tide. After 1913, President Woodrow Wilson lent his support to the demand for a child labor statute.

The Keating-Owen Child Labor Act became law on September 1, 1916, after an extensive debate as to the constitutionality of the measure. The House Labor Committee's report had defended the bill as a legitimate exercise of the plenary power of Congress over interstate commerce; but conservatives in both houses denounced the measure as a thinly disguised invasion of state police power. Most members of Congress voted for the law as a highly desirable statute, regardless of any doubts they entertained as to its validity under the Constitution.

The Child Labor Act of 1916 made it a misdemeanor for any manufacturer to ship in interstate commerce the product of any mine, quarry, factory, cannery, or like workshop, in which children under fourteen had been employed within thirty days of shipment. The statute imposed like restrictions upon manufacturers employing children between the ages of fourteen and sixteen for more than eight hours a day six days a week, or at night. The law was one of the outstanding achievements of the liberal national era. But it marked a frank invasion by the federal government of a field of labor relations in manufacturing, and as events were to demonstrate, it went beyond the limits of the Court's willingness to accept as constitutional the use of the commerce power for police purposes.

The Harrison Act, enacted on December 17, 1914, was the most notable and important federal statute to employ taxation as a federal police-power device. The United States had become a party to the Hague Convention of 1912 to suppress the traffic in narcotic drugs, and Congress passed the statute at the instance of Treasury Department authorities seeking to implement the treaty. The Harrison Act required all persons manufacturing or selling narcotic drugs to register with the Collector of Internal Revenue, to pay a tax of one dollar a year, to use certain prescribed blanks in recording all drug transactions, and to keep detailed records available for federal inspection. The statute also made it unlawful to manufacture, sell, or transport narcotic drugs except for legitimate commercial or professional purposes. It is evident that the tax levied was in fact simply a legal device invoked as a constitutional means for setting up an elaborate system of federal anti-narcotic controls. However, the law was passed by Congress virtually without opposition, the general sentiment being that the statute was socially highly desirable.

FEDERAL POLICE POWER IN THE COURTS

The new federal police legislation was at first accorded a very favorable reception in the Court. As Mr. Dooley, the creation of Finley Peter Dunne, had once remarked, "The Supreme Court follows the election returns," and perhaps the Court was merely reflecting the prevailing liberal national temper of the years between Theodore Roosevelt's inauguration and the first World War.

In *Hipolite Egg Co. v. U.S.* (1911), for example, the Court sus-

tained the Pure Food and Drug Act, without reference to the angry differences of philosophy which had aroused the justices in the lottery case. The question before the Court was the validity of a federal order seizing several cases of preserved eggs. Justice Joseph McKenna's opinion reminded the appellants that there were very few limits to the federal commerce power. No trade could be "carried on between the states to which it does not extend" and the power was "complete in itself" and "subject to no limitations except those found in the Constitution." The opinion said nothing of the intent or purpose of Congress in enacting the law, nor of any distinction between foreign and interstate commerce. If any of the conservative justices disagreed with such an expression of extreme nationalism, they kept their opinions to themselves. There was no dissent.

Two years later, the Court in *Hoke v. United States* (1913) ruled favorably upon the constitutionality of the Mann Act. Answering the contention that the statute invaded the police powers of the states in violation of the Tenth Amendment, Justice McKenna declared explicitly that the commerce power could be used to promote the general welfare:

> Our dual form of government has its perplexities, state and nation having different spheres of jurisdiction, as we have said; but it must be kept in mind that we are one people; and the powers reserved to the states and those conferred on the nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral.

These were powerful words. They effectively disposed of the question of purpose, for the purpose of regulation need only have been the welfare of the American people. They seemed to lend conscious sanction to the Rooseveltian conception of national power: that the federal government could interpret its authority so as to adjust itself to the realities of new social conditions.

In spite of the foregoing precedents, the Supreme Court in *Hammer v. Dagenhart* (1918) invalidated the Child Labor Law by a 5-to-4 majority. This statute, said Justice Day, was not a regulation of commerce but an outright prohibition and as such was void. Here the Court revived the distinction between the regulation of commerce and outright prohibition, an idea that had apparently been discredited and discarded as a result of the Court's acceptance of

the lottery, pure food, and white slave laws, all of which had imposed similar outright prohibitions. But Justice Day now asserted that in the earlier statutes the thing prohibited had been in itself harmful, and prohibition had been necessary to save commerce itself from contamination. The products of child labor, however, were in themselves harmless, and their movement in commerce was also harmless.

Justice Day then brought up once more the old issue of purpose. The real purpose of the present law, he said, was not to protect commerce, but to regulate child labor. The statute thus used subterfuge to invade the reserved powers of the states in violation of the Tenth Amendment. Justice Day thereupon formally revived the conception of dual federalism. "The grant of authority over a purely Federal matter," he said, "was not intended to deny the local power always existing and carefully reserved to the states in the 10th Amendment to the Constitution."

In his enthusiasm for placing restrictions upon federal authority, Justice Day even misquoted the Tenth Amendment. "In interpreting the Constitution," he said, "it must never be forgotten that the nation is made up of states, to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the national government are reserved." The word "expressly" is not in the Tenth Amendment, and was in fact specifically rejected by its framers.

Justice Day concluded with the *argumentum ad horrendum:* ". . . if Congress can thus regulate matters intrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed. . . ."

Justice Holmes' dissent, concurred in by Louis D. Brandeis, Joseph McKenna, and John H. Clarke, implied broadly that the majority had been influenced not so much by constitutional precedent as by the justices' social philosophy, which Holmes incidentally thought very bad. "If there is any matter upon which civilized countries have agreed," he said, "it is the evil of premature and excessive child labor. I should have thought that if we were to introduce our own moral conceptions where, in my opinion, they do not belong, this was preeminently a case for upholding the exer-

cise of all its powers by the United States." As for Day's distinction between the present law and earlier police statutes, Holmes thought it specious: "The notion that prohibition is any less prohibition when applied to things now thought evil I do not understand."

The Court's decision in *Hammer v. Dagenhart* rendered uncertain and confused the constitutional status of federal police legislation. Obviously the decision was incompatible with *Champion* v. *Ames*, *Hipolite Egg Co. v. United States*, and *Hoke v. United States*. The distinction made between things harmful in themselves and things merely producing harmful results lacked even metaphysical reality. Moreover, since 1903 the Court had repeatedly rejected the old Madisonian doctrine that Congress could regulate commerce but could not prohibit any phase of commerce outright. Finally, revival of the old issue of congressional purpose, emphatically rejected in *Champion v. Ames*, promised endless judicial complications and confusion, since it implied that the Court would inquire into the constitutionality of congressional purpose every time Congress enacted any regulation of commerce, however correct in form.

In short, the Court in *Hammer v. Dagenhart* broke sharply with the seemingly well-established liberal national tradition and returned to the spirit of strict construction and dual federalism. However, the Court's desertion of liberal nationalism was not unconditional. A few weeks later, in November 1918, the Court, in *Pittsburgh Melting Co. v. Totten*, ruled briefly that the Meat Inspection Act of 1906 was constitutional. The enactment of the law, said Justice Day in a unanimous opinion, was "within the power of Congress in order to prevent interstate and foreign shipment of impure or adulterated meat-food products."

The Court also accepted the Narcotics Act the following year, though by only a 5-to-4 majority. Justice Day's brief opinion in *United States v. Doremus* (1919) stated that Congress had complete discretion in levying taxes, subject only to the constitutional provision for geographical uniformity. Although Congress in levying a one-dollar tax subject to elaborate restrictive regulation had obviously intended to suppress the illicit drug traffic, Day waved aside the question of purpose: "The act may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue." Why purpose was irrelevant here

and not in the child labor case Day did not explain. Chief Justice White, speaking for the minority, showed more consistency when he attacked the law as "a mere attempt by Congress to exert a power not delegated; that is, the reserved police power of the states."

In spite of the government's victory in *United States v. Doremus*, it was evident thereafter that federal police statutes using taxation as an instrument of control now also rested on a somewhat uncertain constitutional foundation. A slight shift in personnel or opinion on the Court might well send taxation as a police device into the constitutional discard.

THE POLICE POWER AND RAILWAY LABOR

The regulation of railway labor was a sphere in which the Court early proved reluctant to recognize the constitutionality of the federal police power. During the liberal national era Congress enacted several statutes which attempted to regulate the relations of interstate carriers and their employees. The Court held unconstitutional two major statutes of this kind, and it confirmed a third only by the narrowest of majorities.

The Court's hostility to railway labor legislation first became apparent in *Adair v. United States* (1908), the so-called "yellow-dog" contract case. The Erdman Act, passed by Congress on June 1, 1898, had attempted to regulate certain broad phases of railway labor policy. Section 10 of the statute prohibited contracts by which any employee promised as a condition of employment not to join a labor union. Such agreements were familiarly known by labor as "yellow-dog" contracts. The same section of the act forbade also discrimination against any employee because of membership in any labor union or organization.

A majority of the Court thought Section 10 of the Erdman Act unconstitutional. Harlan's opinion called the statute an unreasonable violation of freedom of contract [4] and an interference with the right of employer and employee to negotiate on terms of employment which might be mutually agreeable. Hence the act was in violation of due process of law. Furthermore, Harlan saw no pertinent relationship between the subject of the act and interstate commerce. "We hold," said Harlan, "that there is no such connection between interstate commerce and membership in a labor or-

[4] See p. 529 for a discussion of the due process aspects of the opinion.

ganization as to authorize Congress to make it a crime against the United States for an agent of an interstate carrier to discharge an employee because of such membership on his part."

Justice Holmes thought differently. He believed that the law had a very obvious relationship to interstate commerce. "It hardly would be denied that some of the relations of railroads with unions of railroad employees are closely enough connected with commerce to justify legislation by Congress." As for the reasonableness of interfering with the right of free contract in employment, or even the deliberate promotion of labor unions by Congress, the question was "one on which intelligent people may differ." Holmes thus intimated that the Court was substituting its conception of public policy for that of Congress.

The Court's attitude of hostility toward railroad labor appeared also in the *First Employers' Liability Cases* (1908). The federal Employers' Liability Act of June 11, 1906, had made every common carrier engaged in interstate commerce liable for the injury or death of any employee sustained in the carrier's employ. The statute had specifically abrogated the old "fellow-servant rule" of the common law, which had held an employer not liable for injuries to an employee suffered through the negligence of a fellow-workman. The statute had also modified the common-law rule of "contributory negligence," which had held the employer not liable for injuries to an employee suffered through the negligence or carelessness of the injured person. The act was similar to many laws then being enacted by the various states, experience with modern industrial conditions having revealed that the old common-law limitations upon employer liability were thoroughly outmoded and archaic.

By a majority of 5 to 4 the Court declared the Employers' Liability Act of 1906 unconstitutional, on the ground that the law invaded the sphere of intrastate commerce. The majority opinion, written by Justice White, admitted that Congress could lawfully regulate the employer liability of rail carriers engaged in interstate commerce. But the Court thought the wording of the statute was too sweeping in its all-inclusiveness. It put the relations of the carrier and *all* his employees under the terms of the act, whether or not a particular employe was directly engaged in interstate commerce.

The Court was widely divided in its decision. Only Day agreed completely with White's reasoning. The conservative bloc, Fuller, Peckham, and Brewer, concurred in White's decision holding the law invalid, but they refused to accept the opinion in its discussion of the extent of the commerce power. To their way of thinking, Congress had no right to regulate employer liability at all, since their view of interstate commerce was too narrow to include employer relationships of carriers. Four justices dissented outright on the grounds that the statute was constitutional. Moody, Harlan, and McKenna thought that Congress had a right to regulate all carrier liability, while Holmes thought the statute could have been read so as to make it constitutional.

Congress presently corrected the constitutional deficiency in the original liability statute by the enactment of a new law. The Federal Employers' Liability Act of April 22, 1908, was so drafted as to apply only to carrier liability for the injuries of employees actually engaged in interstate commerce. True to its implied promise in the *First Employers' Liability Cases*, the Court found no difficulty in holding the revised statute constitutional. Justice Willis Van Devanter's opinion in the *Second Employers' Liability Cases* (1912) was a persuasive brief for the right of Congress to regulate virtually every phase of carrier-employee relationships. Commerce, said Van Devanter, is an act. "It is performed by men, and with the help of things." These men and things are "the instruments and agents" of commerce. Therefore they can be regulated by commerce. The decision, a unanimous one, reflected the spirit of liberal nationalism on the Court at the height of the Progressive era.

In spite of the disturbing opinion in the Child Labor Case, the conception of federal police power was thoroughly established by the close of the Progressive era. While it suffered some reverses in the courts in the reactionary era after 1920, the idea did not die, and additional police statutes of substantial importance were to be enacted after 1920.

REVIVAL OF FEDERAL TRUST PROSECUTIONS: THE NORTHERN SECURITIES CASE

The Court in the Sugar Trust Case and a benevolent Republican administration had put the Sherman Law to rest as a menace to the trusts for a time after 1895. Public opinion, however, was not at

rest. Newspapers and periodicals were full of articles denouncing the trusts as "monsters" or defending them as benevolent instruments of economic progress. More important was the voice of the voting public, which insistently demanded action against the evil of monopoly.

In his first annual message to Congress in December 1901, Roosevelt demanded a federal incorporation law and federal regulation of all concerns doing interstate business. Great corporations, he said, were all interstate organizations and ought to be subject to federal regulation, since it was utterly impossible to impose adequate state regulation upon them. He thought that a federal incorporation law would be constitutional under the interstate commerce power; but if this idea was not acceptable to Congress, he was prepared to ask for a constitutional amendment to give the federal government this right.

In response to the President's plea, Representative Charles E. Littlefield of Maine introduced a bill embodying part of Roosevelt's program. The proposed law did not provide for federal incorporation, but instead would have denied the facilities of interstate commerce to any firm which engaged in monopolistic practices through price discrimination, special privilege, rebates, or any other technique. Carriers would be prohibited from transporting goods produced in violation of the statute.

The Littlefield bill passed the House with strong administration support, but the conservative senatorial oligarchy led by Tom Platt of New York denounced the bill as utterly unconstitutional. Roosevelt, who had his more cautious moments, thereupon withdrew the support of the administration from the measure, and the bill died. This was but the first of several occasions on which Roosevelt failed to support his followers when they attempted to write his proposals into law. The difficulty with the bill was of course not alone its doubtful constitutionality. The conservative senatorial majority was shocked at the idea of such federal regulation of business.

In February 1903 Congress did enact a statute establishing a Department of Commerce and Labor and setting up a Bureau of Corporations within the department. The bureau had no regulatory powers, however, but was a mere statistics-gathering and publicity body. Roosevelt several times returned to his request for a federal

incorporation law, but Congress thereafter treated his recommendations as so much verbiage.

Roosevelt's attack upon the trusts in the federal courts was more impressive. Since the Sugar Trust Case in 1895, the federal government had not prosecuted a single industrial combination. Beginning in 1902, however, Attorney General Philander C. Knox launched a series of suits against several important combinations and won a number of impressive victories. These brought the Sherman law back to life and considerably altered the constitutional status of trust legislation.

Knox's first big success was gained in *Northern Securities Co. v. United States* (1904). The case grew out of a battle between the Harriman and Hill railroad interests. In 1900, James J. Hill and his associate J. P. Morgan, owners of the Northern Pacific and Great Northern railroads, bought control of the Burlington railroad in order to secure a terminal line into Chicago. E. H. Harriman, who controlled the Union Pacific, was also interested in the Burlington line. He accordingly asked the Hill-Morgan group for permission to join with them in the purchase of the Burlington. Morgan and Hill refused, whereupon Harriman attempted to accomplish the same result by the grander scheme of buying control of the Northern Pacific in the open market. The resultant stock market scramble between Hill and Harriman brought about the so-called Northern Pacific Panic of 1901, in which for a few mad hours Northern Pacific stock sold for more than a thousand dollars a share.

Eventually Hill and Harriman compromised. They set up a holding company, the Northern Securities Company, capitalized at $400,000,000. Its stock was used to purchase control of the Northern Pacific and Great Northern roads. A board of directors representing both the Hill and the Harriman interests presided over the new concern. It was this trust which the Department of Justice now attacked in a suit in equity to dissolve the corporation. In December 1903 the case reached the Supreme Court.

Much to the surprise of the financial community at large, a 5-to-4 majority of the Court held that the Northern Securities Company was an unlawful combination within the meaning of the Sherman Act. Justice Harlan's majority opinion first attacked the defense argument that the holding company in question was the result of a mere stock transaction, not in itself commerce, and that the com-

bination was therefore beyond the reach of the Sherman Law. Defense counsel here had relied heavily upon *United States v. Knight*, which had seemingly established the precedent that combinations not strictly in commerce were outside the meaning of the act.

This contention Harlan denied in sweeping terms. The act of 1890, he said, was aimed at all contracts, combinations, or conspiracies in restraint of trade, which "directly or necessarily" operate in restraint of commerce. The combination in question did not need to be in commerce. It could be simply a stock transaction or presumably even a manufacturing combine. It was necessary to show merely that the combination operated in restraint of commerce for it to become illegal under the Sherman Act.

Harlan turned next to the defense contention that if the Sherman law actually applied to the present combination, it was unconstitutional as an invasion of the sovereignty of the states and a violation of the Tenth Amendment. The corporation in question, the defense counsel had argued, was lawfully organized under the statutes of New Jersey. It was a state corporation. It had not violated any act of the state of New Jersey. Hence, interference with it by the federal government was an invasion of the sphere of state sovereignty.

Harlan attacked their line of argument as invalid; it amounted, he said, to an assertion that a state statute could confer immunity from federal law. As he put it: "It means nothing less than that Congress, in regulating interstate commerce, must act in subordination to the will of the states when exerting their power to create corporations." The defense argument, Harlan pointed out, constituted a denial of the paramount authority of the federal government within its own sphere of power. To claim that the act of a state could paralyze federal authority within the legitimate sphere of the national government was a direct attack upon national supremacy. Harlan concluded that "no such view can be entertained for a moment."

Chief Justice Fuller, and Justices Peckham, White, and Holmes all dissented. Fuller's opinion for the minority followed the established lines of *United States v. Knight* in its narrow definition of interstate commerce. The commerce power, Fuller said, did not extend to the regulation of corporations or stock transactions merely because the parties involved happened incidentally to be engaged

in interstate commerce. In a separate opinion, Holmes implied that the present case paralleled *United States v. Knight* so closely that he could see no grounds for departing from that decision.

The principal significance of the Northern Securities Case was the extent to which it modified *United States v. Knight* by broadening the definition of commerce, insisting once more upon the paramount character of the commerce power, and virtually ignoring the more recent distinction between "direct" and "indirect" effects upon commerce. Any combination was unlawful, Harlan had said, merely if it had a restraining effect upon commerce. It is conceivable that some of the justices felt the force of the fact that the Northern Securities combination had been effected between railroads, which obviously were involved in interstate commerce in the most direct fashion possible. Yet Harlan's language was broad enough to apply to a trust in production, should occasion arise. The opinion, in short, revitalized the Sherman law. In the remainder of Roosevelt's term of office, the government commenced more than forty prosecutions under the Sherman Law, and many of them ended successfully.

The administration's most notable victory after the Northern Securities Case came in *Swift and Co. v. United States* (1905), in which the Court first formulated the "stream of commerce" doctrine. Here the government sought to enjoin a number of great packing houses from conspiring to manipulate and control livestock and meat prices in stockyards and slaughtering centers. The combinations in question had occurred in local yards, the animals in question were for the moment at rest there, and the sales involved were admittedly local transactions. But Holmes, speaking for the Court, emphasized the extent to which the animals and processed meat products moved in and out of the yards in interstate commerce, so that the supposedly local combination actually effected a combination in interstate commerce. "When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce." The Court's conservatives apparently considered this dictum to be harmless enough; the combination was in sales and not

production, and there was no dissent. In reality, the "stream of commerce" doctrine was to become a basic legal concept in the expansion of the commerce power. The idea provided a logical premise under which production itself could later be held to be a part of commerce. Should this occur, the distinction between commerce and manufacturing would break down. This, in fact, is what happened after 1937.

THE RULE OF REASON

Eventually, much of the significance of the foregoing trust prosecutions was destroyed by the application of the so-called "rule of reason" to the Sherman law. In several early trust prosecutions the defense had attempted to introduce the English common-law conception of monopoly. Briefly, this held that not all combinations in restraint of trade were illegal but only those which were unreasonable, or against public interest. This contention first appeared in counsel's argument in the *Transmissouri Freight Association Case*,[5] where it had been emphatically rejected by the Court, Justice Peckham observing that "the plain and ordinary meaning" of the Sherman law prohibited all combinations in restraint of interstate commerce, not merely unreasonable ones.

The doctrine was potentially too useful to be discarded. It made its appearance again in *Northern Securities Co. v. United States* (1904), where the conception evidently made some impression, for Holmes referred to it with respect. The persistence of counsel in pressing home this interpretation of the Sherman law in the face of repeated rebuffs recalls in striking fashion the manner in which the substantive conception of due process of law ultimately triumphed in the Court.

The Court formally recognized the rule of reason in *Standard Oil Co. v. United States* (1911). This case had grown out of a Roosevelt-inspired government prosecution against the oil trust. A United States district court decision had held the Standard Oil combination to be in violation of the Sherman Law and had ordered the company's dissolution into its component parts. This decision the trust then appealed to the Supreme Court.

The Court denied the appeal; yet the very words of Justice

[5] See p. 560.

White's opinion recognized the rule of reason. White reviewed at length the law of monopoly and concluded that the historically correct interpretation of the Sherman Act was that it forbade only unreasonable combinations or contracts in restraint of trade. "Reasonable" monopolies, he held, were legal.

The implications of White's opinion were revealed two weeks later, in *United States v. American Tobacco Company* (1911), in which the Court passed on the government's suit against the tobacco trust. Although it ordered the American Tobacco Company to reorganize, the Court refused to impose absolute dissolution upon the concern, presumably on the grounds that the combination was not altogether an unreasonable one. Justice White's opinion put the full seal of approval upon the rule of reason with the amazing pronouncement that "the doctrine thus stated was in accord with all previous decisions of this court. . . ." This extraordinary attempt at legal consistency was too much for Justice Harlan to swallow, and in his dissent he remarked ironically that "this statement surprises me quite as much as would a statement that black was white or white was black."

The Court's acceptance of the rule of reason was altogether consistent with the judicial philosophy which had inspired the expansion of substantive due process. As has already been explained, due process had become whatever the Court held to be a "reasonable" exercise of legislative authority. What was reasonable or unreasonable was for the Court to decide. The same subtle distinction was now applied to monopoly cases. Unreasonable monopolies were illegal; but what constituted unreasonable monopoly was for the Court to decide. A "reasonable" trust was a "good" trust—that is, one which the Court found to be socially and economically acceptable.

After 1911, it proved virtually impossible to prosecute any great trust successfully, for almost any monopoly could put up a plausible argument for its social respectability and thus claim to be a "reasonable" combination. Thus in the arguments advanced in the shoe machinery trust case, *United States v. Winslow* (1913), counsel for the monopoly dwelt at length upon the corporation's high commercial character and the advances in technology which it had effected. The plea was successful. The government was able to show that the trust had been formed with intent to monopolize, that it almost com-

pletely controlled the industry, that it had frequently conspired to drive competition out of business. It was not enough. The Court held that the combination was a reasonable one, and hence not in violation of the Sherman law. Prosecution of the United States Steel Corporation a few years later in *United States v. United States Steel Corporation* (1920) produced the same argument of "economic legitimacy" and the same acceptance of the reasonableness of the trust by the Court.

These decisions paved the way for the unprecedented era of combination and monopoly in the America of the 1920's. As one authority has put it, "The merger movement of the 1920's was in effect simply a capitalization of the opportunities made available by the judicial legislation of 1911 as amplified and clarified by the outstanding decisions of the ensuing decade." [6]

THE REVIVAL OF THE INTERSTATE COMMERCE COMMISSION

More effective than Roosevelt's trust prosecutions was the revival of the Interstate Commerce Commission brought about by the passage of the Hepburn Act in 1906 and by a subsequent series of Court decisions favorable to the new law. Since the Court's decisions in the Cincinnati and New Orleans case and in the Alabama Midland case, in 1897, the Interstate Commerce Commission had been moribund. It had no rate-setting powers; it could only issue "cease and desist" orders directed at specific rates. It was virtually impossible to enforce these orders in the courts. Since the Commission found it difficult to obtain evidence, and since the courts insisted upon a complete review of all the facts in a case, the Commission's orders were usually overturned on appeal.

This situation resulted in the renewal of all the evils the Commission had originally been set up to control. Rebates, pools, discriminatory practices against shippers, long- and short-haul discrimination had all been revived in force. The Elkins Act of 1903 checked rebates to some extent by making any deviation from published rates unlawful and subjecting both carrier and shipper to prosecution for the offense. The law was successful within a limited sphere, but left the broader aspects of the rail rate structure untouched.

By 1905, a majority of the general public as well as many big shippers and railroads were demanding more effective rail legisla-

[6] Myron W. Watkins, "Trusts," *Encyclopaedia of the Social Sciences*, XV, p. 117.

tion. In response to Roosevelt's plea, the House in 1905 passed the Cullom bill, designed to enlarge the powers of the Interstate Commerce Commission. The Old Guard in the Senate blocked the measure, however, and instead set up a committee to investigate the entire railroad problem. The committee hearings merely confirmed what everybody knew—that grave abuses existed and a stronger law was needed.

In December 1905, Roosevelt again asked Congress to enact effective rate regulation. In response, Representative William P. Hepburn of Iowa introduced a bill which finally passed the House in February 1906. This measure gave the Commission ultimate rate-fixing powers, although it could not fix rates originally. The railroads could still publish their own rate schedules, but the Commission could take any rate under review on complaint, decide upon a fair and reasonable maximum rate, and order the railroad not to charge in excess of it.

As passed by the House, the Hepburn bill provided for very narrow review of the Commission's orders by the courts. It will be recalled that since the Alabama Midland case in 1897, the courts had exercised very broad review of the Commission's decisions, insisting upon a right to re-examine all the evidence *de novo* as well as the law in the case. This in effect had rendered the Commission little more than a fifth wheel, its entire work being duplicated by the courts. The Hepburn bill now provided that in reviewing a Commission order the court of appeal could decide only whether the order in question had been "regularly made"—that is, whether the Commission had observed the procedure prescribed by law. It was admitted in the House debates that the courts would also retain the right to decide that a given order was confiscatory or unreasonable and thereby in violation of due process. The courts could not, however, review facts, decide questions of policy, or try the case *de novo*.

When the Hepburn bill reached the Senate, the Republican Old Guard and conservative Democrats alike vigorously attacked both the Commission's proposed new rate-fixing powers and the provisions for narrow judicial review. In a long speech in late February, Senator Joseph B. Foraker of Ohio went so far as to assert that the power to fix rates was a purely judicial function; hence Congress itself did not possess the power and therefore could not delegate it to a commission. The proposed bill, he argued, was thus a gross

violation of the separation of powers. As for narrow review, it would thrust policy-making discretion "without supervision or control" into the hands of a commission which "has erroneously decided almost every important case upon which it has passed judgment during the whole period of the nineteen years of its existence." In the weeks that followed, Senators John Spooner of Wisconsin, Nelson W. Aldrich of Rhode Island, Philander C. Knox of Pennsylvania, Henry Cabot Lodge of Massachusetts, and other conservatives took their cues from Foraker's speech, and for the most part centered their attacks upon the wisdom and constitutionality of "narrow review."

Eventually the conflict between the advocates of broad and of narrow review centered in the dispute between the respective merits of two amendments to the bill—the Long and Allison amendments. The former, offered by Senator Chester I. Long of Kansas on April 2, was understood to have been submitted at the instance of the President. By its terms, jurisdiction on appeals was lodged in the circuit courts, which had the power merely "to hear and determine in any such suit whether the order complained of was beyond the authority of the commission or in violation of the rights of the carrier secured by the Constitution."

In a brilliant speech, Long defended both the constitutionality and the wisdom of his amendment. Rate-setting was a legislative function, and provided Congress fixed certain broad limits of policy, the power could be delegated to a commission, he said. The courts were not policy-making bodies, and they should have no authority to review the "wisdom and policy" of the Commission's orders but should merely decide upon their legality and constitutionality.

Although the Long amendment was presumed to be an administration-sponsored measure, Roosevelt withdrew his support from it some days later. Why he did this is a matter of some controversy. It seems probable, however, that he was informed by Republican leaders in the Senate that they would not support the amendment and would rebel should he insist upon it. To avoid an open breach with the senatorial oligarchy, the President let it become known that he was no longer interested in the Long amendment.

Early in May, Senator William B. Allison of Iowa introduced an amendment as a substitute for the Long proposal. In place of the specific provisions for narrow review in the Long amendment, the

Allison amendment was extremely vague in phraseology. It provided merely that the orders of the Commission should take effect within a reasonable time and should run for two years. Venue on appeals was to lie in the district court where the carrier had its principal office. No injunction or restraining order could be issued on less than five days' notice. The amendment made no effort to define the limits of judicial review and hence threw the whole matter into the hands of the courts for future definition.

Although the proponents of narrow review made every effort to defeat the Allison amendment, it was shortly adopted by a 2-to-1 majority. Subsequently the Hepburn bill passed the Senate by a vote of 71 to 3. After some resistance, the House concurred in the Allison amendment, and the Hepburn Act became law on June 29, 1906.

It remained to be seen whether the new law would prove more effective in operation than the old statute of 1887. Most important, the Hepburn Act plainly gave the Commission positive rate-setting powers, once a complaint had been filled and a hearing held on a particular rate. Also the burden of appeals was now placed upon the railroads and not upon the Commission. The critical question was how the courts would interpret their own powers of review. If they insisted upon the right to review policy and facts as well as law, the new act would have little meaning.

THE COMMISSION IN THE COURTS

Within the next few years, the Court virtually sustained the constitutional arguments of the congressmen who had insisted upon narrow review and upon the validity of the commission principle. Only a year after the passage of the Hepburn Act, the Supreme Court served notice in *Illinois Central Railroad Company v. Interstate Commerce Commission* (1907) that it would not investigate *de novo* all the facts of a case on appeal. It pointed out that the commission was a responsible tribunal, that its findings of fact were by law prima facie true, and that a "probative force" must be attributed to them. While in theory there was nothing revolutionary about this, the principle had hitherto been largely ignored.

Three years later, in *Interstate Commerce Commission v. Illinois Central Railroad Company* (1910), the Court had occasion to interpret directly the meaning of the Allison amendment. Its decision

was a triumph for the principle of narrow review and the commission system. "Beyond controversy," said Justice White, "in determining whether an order of the Commission shall be suspended or set aside, we must consider (a) all relevant questions of constitutional power or right; (b) all pertinent questions as to whether the administrative order is within the scope of delegated authority under which it purports to have been made; and (c) . . . whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determine the validity of the exercise of the power." These words were in effect an endorsement of the principle embodied in the defeated Long amendment.

The Court then warned that it would not usurp the Commission's policy-making functions under the pretense of reviewing its decisions. The powers of review of the judiciary, the opinion held, "lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised. Power to make the order, and not the mere expediency or wisdom of having made it, is the question."

This decision, shortly reinforced in several other cases, amounted to a signal triumph for the commission principle of administration. For if the Commission's orders were recognized as having an intrinsic validity, subject only to a review of power and constitutionality, then they would ordinarily have the effect of law; and the Commission's decisions on policy would almost invariably stand. This was precisely what was necessary to make commission administration successful.

The Court also granted generous recognition to the new rate-fixing powers of the Commission. The test case came in 1910, when, after investigation, the Commission issued an order reducing class rates on certain western lines, and substituted a comprehensive rate schedule of its own. The Court, in *Interstate Commerce Commission v. Chicago, Rock Island, and Pacific Railway Company* (1910), accepted the validity of this order, which was in effect an asser-

tion by the Commission of a general right of control over the rail rate structure. The Court hardly touched upon the question of whether such power could lawfully be delegated to an administrative commission.

In the Mann-Elkins Act of June 18, 1910, Congress delegated original rate-setting powers to the Commission. The law also created a Commerce Court whose function was to hear appeals from the Commission. As originally conceived, the Commerce Court appears to have represented an ingenious attempt to strip the Commission of its hard-won authority and to reinstate "broad review," for the bill would have permitted the new court to inquire into both findings of fact and the wisdom and expediency of Commission orders. Against these provisions in the bill, Robert M. LaFollette of Wisconsin, Albert J. Beveridge of Indiana, and other Senate liberals revolted successfully. As finally passed, the act conferred no extraordinary powers upon the new tribunal. The Commerce Court had only a brief and ineffective career and was abolished by Congress in 1913.

It now only remained for the Supreme Court to confirm the original rate-fixing powers of the Commission. The formal step came in *United States v. Atchison, Topeka, and Santa Fe* (1914). Here counsel for the road had argued that the grant by Congress of original rate-fixing powers to the Commission was an unconstitutional delegation of legislative authority. The Court replied by citing summarily a whole series of cases in which the delegation of quasi-legislative authority to the executive had been recognized as valid.

The Commission now had the grant of authority that it needed for a successful career. It had a broad degree of administrative discretion, which the Court recognized as legal. It was now recognized as a policy-making body, and the Court had served notice that the judiciary would not, under guise of judicial review, interfere with the Commission's policy-making function.

The Commission's triumph opened the way for a new era in government administration, in which the number and importance of executive boards was vastly increased. The movement really got under way in President Wilson's administration, with the establishment of three important administrative boards, the Federal Trade Commission, the Federal Tariff Commission, and the Federal Reserve Board.

THE INTERSTATE COMMERCE COMMISSION AND NATIONAL ASCENDANCY

Not the least of the Interstate Commerce Commission's legal victories was that in which the Supreme Court recognized the Commission's control over intrastate commerce where that commerce affected interstate commerce directly. The decisions concerned were based upon the same principles of national ascendancy as that in the Northern Securities and Lottery cases, although the immediate constitutional issues were somewhat different.

The first opinion of this kind was delivered in the *Minnesota Rate Cases* (1913). The immediate question involved was the validity of a Minnesota Warehouse Commission order fixing rail rates within that state. While the order was concerned only with intrastate rates, it was admitted by both sides that it would have some effect upon the interstate rate structure. Justice Charles Evans Hughes' opinion upheld the validity of the state's regulation. Most of his opinion dealt with and powerfully emphasized the paramount authority of Congress over interstate commerce; but, taking his cue from the venerable *Cooley v. Board of Wardens*, he held that there was a sphere of state regulation of interstate commerce within which the states might act, provided the federal government had not yet assumed control. Hence the Minnesota commission's order was valid.

Then came the explosive part of the opinion. Interstate commerce and intrastate commerce, said Hughes, were nowadays so inextricably blended that the federal government probably had at least some power to regulate the former. If by reason of this fact some federal regulation of intrastate commerce was necessary, it was for Congress to determine and apply the necessary regulation. Thus by implication the decision confirmed a certain degree of federal authority over the internal commerce of the states.

The full significance of the foregoing opinion emerged a year later in the *Shreveport Rate Cases* (1914), in which the Supreme Court sustained the Commission's authority to regulate intrastate rail rates. The case involved the rate structure of the Louisiana–east Texas region. It appeared that rates on the rail lines from Houston and Dallas eastward to east Texas cities were much lower than those for like distances from Shreveport, Louisiana, to the same

east Texas cities. The result was serious discrimination against Shreveport in favor of Dallas and Houston.

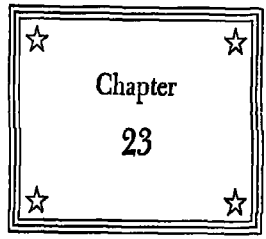
The Interstate Commerce Commission attempted to correct this situation, and it accordingly issued an order forbidding the railroads in question to charge a higher rate from Shreveport to east Texas than from Houston and Dallas to east Texas. This order could have been complied with either by raising the intrastate rate from Houston and Dallas to east Texas, or by lowering the interstate rate from Shreveport to east Texas. However, the reduction of the interstate rate was impracticable, for it was part of a much larger regional rate structure. Hence the lower court had held that the Commission's order absolved the railroads in question from the obligation to obey the intrastate rate set by the Texas Railroad Commission.

On appeal, the Supreme Court upheld the validity of the Commission's order, even when interpreted as invalidating a purely intrastate rate. In his opinion, Justice Hughes dwelt at length upon the paramount powers of Congress over interstate commerce. This might sometimes make necessary some regulation of intrastate commerce, he said, for "Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the final and dominant rule."

Hughes inquired next into the question whether the present order was within the authority granted to the Commission by Congress. Again he reached an affirmative conclusion. The point rested upon Section 3 of the Interstate Commerce Act of 1887, which forbade any common carrier from giving undue advantage to one locality as against another. Here he recalled the *Minnesota Rate Cases*, which he distinguished sharply from the present situation. In the Minnesota cases an intrastate rate fixed by the state had had an incidental effect on interstate commerce, but there had been no attempt by either Congress or the Commission to regulate the Minnesota rate schedule; nor had the rate in question adversely affected interstate commerce. Hence the intrastate rate had been held valid. In the present case, however, the Federal government had acted through the Interstate Commerce Commission to invalidate an intrastate rate and in effect fix a new rate. This action was legal, for

the Interstate Commerce Commission was empowered to maintain a reasonable interstate rate structure, and the local Texas rate had been found by the Commission to have an adverse effect upon interstate commerce. The Texas rate could therefore legally be set aside and a new rate fixed, for the paramount authority of the national commerce power made it both imperative and constitutional to do so.

In so far as the Court in the future should be willing to follow its own reasoning, this decision meant that federal authority could go to great lengths in the regulation of intrastate commerce, provided such regulation was incidental to some constitutional exercise of the national commerce power. Would not this principle, if given complete recognition, logically compel the Court to recognize that the federal government might regulate any matter ordinarily within the sphere of state authority if such regulation seemed necessary and incidental to some constitutional power of Congress? The larger implications of the *Minnesota Rate Cases* was clearly the same as that in the Lottery Case: the Court recognized the interpenetration of state and national economic life; yet it insisted upon the maintenance of national authority even though this might now mean a considerable invasion of the province originally reserved to the states. How far this expansion of federal sovereignty could be carried the Court was not prepared to say.



The Progressive Revolt

In 1908, a triumphant Republican party had elected William Howard Taft to the presidency, brushing aside William Jennings Bryan's third and final bid for the office. Taft was virtually Roosevelt's personal choice as his successor, and the new President entered upon his duties with apparent assurance that he would be able to continue Roosevelt's policies and at the same time command the support of a Republican majority in Congress. This prospect was not to be realized. Instead, a serious insurgent movement broke out in Republican ranks in both houses, so that by 1912 the Republican party had split into conservative and liberal wings, and the liberal insurgents were moving to organize the Progressive Party.

The Progressive revolt was in part the result of Taft's political ineptitude and Roosevelt's impatience with his successor's submission to the conservative senatorial oligarchy under Senator Aldrich. More fundamentally, however, Republican insurgency reflected the continuance of a deep-seated underlying sentiment of agrarian discontent and liberal unrest which had survived since the days of the Populist movement. The old agrarian and western hatred of the trusts, "Wall Street," and the "money power" had never died. It is significant that most of the Populist platform of the nineties—in-

cluding control of the trusts, monetary reform, increased federal sponsorship of social reform, and the initiative, referendum, and recall—eventually became part of the Progressive Party's faith. Also there was still much dissident political belief in the great urban centers of the North and East, where there had long been widespread conviction that the industrial revolution had given rise to certain social and economic evils that must be brought under national control. Henry George's classic exposition of single-tax theory, *Progress and Poverty* (1879), was still enjoying wide circulation in the decade after 1900, as was Edward Bellamy's Utopian socialist novel, *Looking Backward* (1888), while Henry Demarest Lloyd's *Wealth Against Commonwealth* (1894) was regarded as a great classic by the Progressive reformers.

The Progressive movement had a "grass-roots" beginning. It began with a whole series of local urban and state reform movements directed against corrupt and boss-ridden urban and state governments. In Toledo, Mayor Samuel M. Jones, a wealthy manufacturer turned reformer and philosophic radical, broke with the regular city Republican organization and went on to establish free kindergartens, public playgrounds, and police reform, and to advocate municipal ownership of public utilities. In Cleveland, Thomas L. Johnson, a wealthy manufacturer and traction magnate who had read *Progress and Poverty* and had been converted to liberal reform, was elected mayor in 1901 and at once began a long fight for comprehensive city planning, a three-cent fare, tax reform, public parks and playgrounds, a modern sewage system, and adequate institutions for the handicapped and delinquent. In New York, Charles Evans Hughes as a special prosecutor exposed the corrupt and inefficient practices of the nation's leading insurance companies, an achievement that led to his election as governor in 1906. In this office, he antagonized party regulars with his successful advocacy of a state public utilities commission and his attack on race-track gambling.

Of great significance for the future of the Progressive Party was the career of Robert M. LaFollette, who became governor of Wisconsin in 1900. As governor, La Follette engaged in a long and spectacular battle with the railroads, trusts, and utility interests, to achieve effective rate regulation, antitrust laws, and a strong public utilities commission. His sponsorship of graduated income and inheritance taxes, workmen's compensation, maximum hours for

women and children, and a state primary law, marked him as one of the nation's outstanding liberal Republicans. Elected to the Senate in 1906, La Follette speedily became the leader of the small but highly vocal group of Republican insurgents in the upper house.

In California, Hiram Johnson achieved fame as a special prosecutor in a spectacular bribery case involving railroads, public utilities, and a corrupt San Francisco city council. Partial success led to his election as a reform governor of California in 1910, and in 1912 he became Roosevelt's running mate on the Progressive Party's presidential ticket. In Chicago, George C. Cole, an enlightened political boss, organized the Municipal Voters' League, and began a long but ultimately unsuccessful fight to clean up Chicago politics. In Missouri, Joseph Folk, a St. Louis prosecutor, was more successful in his battle against utility and railroad lobbyists and bribery and eventually emerged as an outstanding reform governor of the state.

About 1906, a liberal Republican faction began to make its appearance in Congress, although for a time there was no sharp breakdown in party lines. La Follette first distinguished himself as a party rebel during the Senate debates on the Hepburn bill,[1] when he sponsored strong rail rate regulation, much to the disgust of the Republican regulars, who made a point of walking out of the chamber every time he spoke. Senator Albert J. Beveridge of Indiana, at the outset of his career a conservative Republican protectionist and imperialist, gradually drifted away from party regularity, and after 1906 underlined his new liberalism by championing the Meat Inspection Act, federal regulation of corporations, conservation, tariff reform, and in particular a federal child labor law. Senator Jonathan Dolliver of Iowa broke with Aldrich and the regular party organization in 1906 and soon emerged as an enemy of Republican protectionism and a supporter of federal rail rate regulation. Albert B. Cummins, a former reform governor of Iowa who entered the Senate in 1909, immediately joined the Progressive faction. William E. Borah of Idaho also lent support to the Senate liberals, as did Moses E. Clapp of Minnesota, who represented the more radical agrarian Republican elements in that state.

In the House, Charles A. Lindbergh of Minnesota, who entered the lower chamber in 1907 as a Republican, soon identified himself

[1] See p. 601.

as a potential insurgent by his attacks on big business and his support for tariff reform and income and corporation taxes. Victor Murdock of Kansas, a former newspaperman with a typical Kansan Populist background, took his seat in 1909 and at once joined the liberal Republican faction. George W. Norris of Nebraska began his long and illustrious liberal career with his entrance into the House in 1908, where he soon assumed the leadership of the House insurgents.

By 1909, liberal Republicans and their Democratic sympathizers in and out of Congress were rapidly drawing together on a program of political and social reform. The Progressives believed that many of the problems created by the industrial revolution were national in scope and could be solved only by a broad program of federal controls. They were unanimous in desiring strong national legislation which would subject big business to a full measure of social control in the interests of public welfare.

Like the Jeffersonians of a century before, the Progressives had an abiding faith in the intelligence and good will of the American people. Fundamentally, their remedy for the failures of democracy was more democracy. Let the will of the people really reach into Congress, the courts, the state legislatures, and America could then solve its problems. This explains Progressive enthusiasm for the direct primary, and for the initiative, referendum, and recall. There was an unrealistic element of democratic idealism in the Progressive mind here; it remained to be seen whether more direct popular control of government would lead to a more efficient and equitable political order. In their enthusiasm, the liberals of the day too often forgot that democratic government requires strong party organization and discipline if it is to be effective and that an unorganized "will of the people" needs strong leadership and statesmanship if it is to find expression.

THE INCOME TAX AMENDMENT

It was the fight for a federal income tax law in the special session of 1909 which produced the first serious evidence that party lines in Congress were close to the breaking point. Here the threat of a Progressive-Democratic coalition forced the conservative Republican party leaders in both houses to make substantial concessions in order to hold party lines intact.

Liberal nationalists had never concealed their disgust with the constitutional status of income tax legislation after the two Pollock opinions of 1895. They believed that a federal income tax law was an indispensable means of reaching the intangible forms of property and wealth created by the industrial revolution and redressing what Progressives regarded as gross inequities in the distribution of national income. Yet all proposals to enact the necessary statute had been met with the seemingly unanswerable objection that the income tax was unconstitutional. The Supreme Court appeared to be an almost hopeless obstacle to the passage of a federal income tax law.

As the liberal faction in both parties in Congress grew stronger, however, it became more and more impatient with judicial restraint. In 1907 Roosevelt had recommended passage of an income tax law in his annual message to Congress. The Democratic platform of 1908 also had favored the tax, and William Howard Taft, the Republican candidate, had approved the income tax "in principle." Every session of Congress after 1905 had seen the introduction of one or more bills to levy an income tax, to enforce the old act of 1894, still technically on the statute books, or to legalize the tax by constitutional amendment.

The income tax amendment adopted by Congress in 1909 was a by-product of a congressional tariff fight. President Taft called Congress into special session in March in fulfillment of a campaign promise to reform the tariff. Early in April, while the Senate was engrossed in debating tariff schedules, Senator Joseph W. Bailey of Texas rose to present an amendment to the tariff bill virtually reenacting the provisions of the old 1894 income tax law. The only difference of consequence was that Bailey's measure, in deference to the first income tax decision, would have exempted from taxation state, county, and municipal securities. He did not believe that the Court's opinion in the two Pollock cases was "a correct interpretation of the Constitution," and he did not think it "improper for the American Congress to resubmit the question to the reconsideration of that great tribunal." Bailey was a Southern conservative and had little sympathy with the income tax, but as a good party Democrat he was more than willing to embarrass the opposition majority with his bill. His measure called merely for a flat 3 per cent tax on all incomes above $5,000 and therefore did not suit

the more ardent Progressives. Accordingly, Senator A. B. Cummins of Iowa, with La Follette's support, shortly introduced an amendment to the tariff bill calling for a graduated tax running up to 6 per cent on incomes above $100,000. The Cummins amendment proved to be too extreme to win general support, but Bailey's proposal attracted strong support from both liberal Republicans and Democrats.

When it became clear that the Bailey amendment stood an excellent chance for adoption, Senator Nelson W. Aldrich of Rhode Island, the Republican floor leader and administration spokesman, adopted extraordinary tactics to defeat the measure. Aldrich and Senator Henry Cabot Lodge of Massachusetts first introduced a substitute amendment proposing to levy a 2 per cent excise tax upon corporations. This tax Aldrich defended as constitutional, since the Supreme Court had ruled in 1898 that an excise tax on corporations, calculated as a percentage of corporate income, was not a direct tax within the meaning of the Constitution. He admitted that the real purpose of his proposal was to defeat the enactment of a general income tax law.

Since it still seemed likely that the Bailey amendment would be adopted, the Senate conservatives took the extraordinary step of presenting a constitutional amendment to legalize the income tax. This proposal was conceived solely as a device designed to defeat Bailey's proposal. Early in June, Senator Aldrich and other members of the Senate Finance Committee held a conference on strategy with President Taft. As a result of this meeting, Taft on June 16 sent a message to Congress recommending the passage of a constitutional amendment to legalize federal income tax legislation. The President pointed out that any law enacted without benefit of constitutional amendment would certainly face "protracted litigation" before it could be enforced. He also expressed concern lest Congress damage the prestige of the judiciary. Re-enactment of a law once held unconstitutional would "not strengthen public confidence in the stability of judicial construction of the constitution." Immediately after the President's message had been delivered to the Senate, the Finance Committee reported out the draft of a proposed amendment to the Constitution to legalize the income tax.

The appearance of the amendment threw the liberals into a quandary. They were convinced that once the amendment was

submitted to the states the income tax would be dead, for there seemed but little chance that the amendment would secure approval by the necessary three-fourths of the states. They recognized the majority stratagem as an attempt to kill enactment of the tax, and apparently most of them believed that the diversion would be successful. Nevertheless, the Progressives could not bring themselves to vote against the amendment. They favored it in principle; hence they would vote for it even while condemning the tactics of the majority. Senator Cummins expressed this view when he declared he would vote for the amendment with the full understanding that its purpose was to defeat the Bailey clause and with the belief that the amendment would never become a part of the Constitution.

The majority strategy succeeded in its immediate objective. At the end of June, the Senate voted down Bailey's amendment to the tariff law, 45 to 31, and immediately thereafter it accepted the Aldrich amendment for a corporation franchise tax as a substitute. Early in July the Senate voted to submit the constitutional amendment by the impressive margin of 77 to 0.

Before the final vote, Senator Bailey and the Progressives made an unsuccessful attempt to get the Senate to provide for ratification by conventions in the several states rather than by state legislatures. They believed that if conventions were called for the specific purpose of voting on the amendment, it might possibly win ratification. The majority had no intention of increasing the chances of ratification and rejected the proposal.

A week later the House concurred in submitting the amendment. Before the representatives voted, they were treated to the amusing circumstance of hearing the majority floor leader, S. E. Payne of New York, the formal sponsor of the amendment before the House, denounce the income tax "as one that makes a nation of liars," and a "tax on the income of honest men which exempts the income of rascals." Cordell Hull of Tennessee responded to this somewhat too frank revelation of majority motives with a bitter speech in which he repeated the charge that the only purpose of the constitutional amendment was to kill the tax. But no liberal representative could vote against the amendment, and a few moments later the House passed it by a vote of 318 to 14.

Aldrich and Payne had won a Pyrrhic victory. Contrary to all expectations, the income tax amendment was ratified by one state

legislature after another and was proclaimed in effect on February 25, 1913. It thus became the first constitutional amendment to secure adoption since Reconstruction days. Like its precursors of fifty years before, the Sixteenth Amendment heralded political and social changes little short of revolutionary. It inaugurated a new era in federal finance. Within a very few years the income tax was to become by far the most important source of federal revenue. The tax had an important effect upon the country's economic and social structure, for it partially shifted the growing burden of federal finance to the wealthy and in a measure served the very purposes of the agrarian radicals who had first suggested it as a device to effect the redistribution of income and wealth. It remains today one of the most important amendments to the Constitution.

THE REVOLT AGAINST THE SPEAKER

The Speaker of the House had since 1789 been a powerful figure in the federal government. His right to recognize members on the floor and to appoint all standing committees dated from the First Congress. From the beginning the privileges of the office had been exercised in the interest of personal power and party politics, and during the course of the nineteenth century a succession of great speakers, above all the masterful Henry Clay, had contributed to the growing prestige of the speakership.

In the post-Civil War era, the office had reached a new pinnacle of authority and prestige. This was in part because of the increased power of Congress, which had engaged and defeated President Johnson in the conflict over Reconstruction. Also, a long series of undistinguished Presidents, extending from Grant through McKinley, had strengthened congressional ascendancy over the executive. Further, the speaker derived much of his authority from the growing size of the House, which increased the necessity for effective discipline. In 1790 the House had had but 65 members; by 1860 the membership was 243; by 1906 it was 385; and by 1911 it had reached 433. No legislative body of this size could function effectively without strong discipline and organization, which it was the Speaker's function to impose.

Thomas B. Reed of Maine, who took the gavel in 1889 in the administration of Benjamin Harrison, was the most powerful Speaker up to that time. His influence stemmed in considerable part from

his appointment and control of committees, especially the five-man Rules Committee, of which he was a member. This committee could and did recommend "special order" for any bill, this giving the measure priority on the House calendar and assuring its early passage. Reed also exercised to the full the Speaker's time-honored discretionary right to recognize members on the floor. This privilege had often been exercised for partisan purposes, but Reed went further in this respect than had any man before him. He invariably greeted representatives who sought recognition with the question: "For what purpose does the gentleman rise?" The implication was clear: any one who sought to revolt against the order of business prescribed by the Rules Committee could not even gain the floor.

Reed also destroyed the old minority tactic of refusing to answer a roll-call and then raising the plea of "no quorum" as a device for blocking House business. When a roll-call showed no quorum to be present, he merely instructed the clerk to enter the names of the silent members as "present." The first time he did this, he plunged the House into pandemonium. An infuriated Kentuckian rose to deny the speaker's right "to count me as present." Reed merely replied, "The Chair is making a statement of fact that the gentleman from Kentucky is here. Does he deny it?" The House laughed, and Reed won his point. The ruling weakened further the ability of the minority to resist Reed's absolutism.

Reed also used the party caucus for disciplinary purposes. The Republican majority in caucus was informed in advance of the coming legislative program and was also bound to co-operation, secrecy, and discipline. Majority members who were indiscreet enough to disobey this order were punished by expulsion from committees and by future oblivion.

The precedents established by Reed in the speakership prevailed from 1889 until 1910. Joseph Cannon of Illinois, familiarly known as "Uncle Joe," who became Speaker in 1903, had been trained in the Reed tradition, and until 1910 he wielded the gavel with all the arbitrary power of his preceptor.

The rise of the Progressive bloc in Congress opened up the possibility of an effective Progressive-Democratic attack on the Speaker's powers. The Progressives looked upon the office as it was then employed as an affront to their ideal of democratic self-government

and as a reactionary bulwark against the passage of liberal social legislation. They were eager to co-operate with the Democrats in an effort to reduce Cannon's authority. Representative George W. Norris of Nebraska was the astute director of the campaign toward this end, undertaken with the able assistance of Charles A. Lindbergh of Minnesota, Irvine Lenroot and Henry Cooper of Wisconsin, and Victor Murdoch of Kansas.

The first victory of the rebels was the inauguration in March 1909 of "Calendar Wednesday." For years the reports of the more important committees had so monopolized the time of the House that there was little opportunity to consider the bills of individual members. Although a measure might be of the greatest significance, it had little chance of obtaining consideration by the House unless the all-important Rules Committee decided to give it priority. Needless to say, bills of which the speaker's machine disapproved never emerged from oblivion. The Progressives and Democrats now sought to remedy this situation by a proposed amendment to the House rules setting apart one day a week on which the speaker would be obliged to "call the calendar"—that is, to take up the business of the House in order, without regard to priorities fixed by the Rules Committee. A lengthy debate on the proposal ended in victory for the rebels, when a Progressive-Democratic vote forced adoption of the reform.

A year later, in March 1910, the Progressive-Democratic coalition after a protracted and bitter debate forced through a Norris-sponsored resolution abolishing the five-man Rules Committee. The resolution substituted a ten-man Committee on Rules elected by the House, the Speaker not being eligible for membership. The Speaker thus lost the right to control legislation on the floor, the most important source of his power.

The Speaker retained the right to make appointments to all other standing committees, but even that privilege was shortly taken from him. In the election of 1910, the Democrats secured control of the House, and when the new majority met in caucus in December 1911, they took from the new Speaker, Champ Clark of Missouri, the right to appoint committees and lodged it instead in the Chairman of the Ways and Means Committee, who in turn was to be elected by the House. Thus the chairman of the Ways and Means Committee, charged with organization of the House, emerged as an

extremely powerful legislative leader. The Speaker still retained important elements of power. As presiding officer he could influence the course of debate, and if a popular and influential man, he might have an appreciable effect on legislation. He was, however, no longer the "dictator" of the Reed and Cannon days.

While the new arrangements better suited individual members of the House, it is doubtful whether they constituted altogether desirable reforms from the standpoint of legislative efficiency. The House was a large and unwieldy body, and to perform its duties effectively it required strong discipline. The Speaker had now lost the power to impose such discipline. Also, in certain respects, committee rule was a poor substitute for the Speaker's guiding hand in legislation. It might be argued that a more effective reform would not have reduced the Speaker's power so completely but rather would have made its exercise more open and more responsible to the will of the entire chamber.

The House now looked to the executive rather than to the Speaker for necessary discipline and legislative leadership. The reduction of the Speaker's authority therefore was one factor which tended to increase the power of the President. After 1913, on most occasions the real leader of Congress was the occupant of the White House.

THE SEVENTEENTH AMENDMENT

Election of United States senators by direct popular vote had long been advocated by many who felt that election by the legislatures of the several states was not consonant with the principles of democratic government. A constitutional amendment for this purpose had been offered in the House of Representatives as early as 1828. Forty years later, President Johnson in a special message to Congress had again recommended the reform.

The older conception of the Senate as a body representing the states as such rather than the people had for a long time precluded the change. The Senate also had certain nonlegislative functions in its power to ratify treaties and presidential appointments, which supposedly made it advisable to remove it from direct popular influence.

However, the Civil War had destroyed the idea of the states as sovereign political entities and had virtually ended the idea that they

were represented as such in the Senate. The rise of economic unrest in the late nineteenth century also brought the Senate under fire. Agrarian radicals and reformers of the day frequently portrayed the Senate as filled with venal-minded corporation lawyers, retired millionaires, and corrupt state bosses, who represented the will of the "interests" and not that of the people. A cartoon of 1897 pictured the Senate in session as a group of overstuffed moneybags, each marked with the label of the "oil trust," "sugar trust," "money trust," and other corporate interests supposedly represented there.

Though exaggerated, such charges possessed a considerable element of truth. Senator H. B. Payne of Ohio was for years the faithful servant of the Standard Oil Company, and Senator Joseph Foraker of Ohio was later revealed as a pensionary of the same concern. Many senators had risen to high office as railroad and corporation lawyers. Still others—Tom Platt of New York, Matthew Quay of Pennsylvania, Boies Penrose of Pennsylvania, and Roscoe Conkling of New York—were the products of corrupt state political machines and boss politics.

A majority of the senatorial Old Guard were honorable and upright men of high personal integrity, but from the standpoint of agrarian radicals and Progressives they were too generally associated with large business enterprise, too conservative, and too far removed from popular democratic influences. Typical of this group were Marcus A. Hanna of Ohio (generally known as Mark Hanna), a retired steel manufacturer and President McKinley's friend and sponsor; Nelson W. Aldrich, a conservative Rhode Island statesman; John C. Spooner of Wisconsin; and the aristocratic Henry Cabot Lodge of Massachusetts. On the whole, these men were notably resistant to the kind of social legislation so frequently sponsored after 1900 by Progressives. Also, they were for the most part supporters of a high protective tariff and thereby incurred the opposition of agrarian interests in the South and West and of the Progressives, most of whom believed that excessive tariff duties served the interests of the trusts.

First the Populists, then the Bryan Democrats, and finally the liberal Republicans and Progressives advocated direct election of senators in the belief that the upper chamber would thereby become more democratic and more responsive to liberal forces. It was

easy to get the necessary constitutional amendment through the House, but more difficult to secure adoption in the Senate, where most members regarded the proposal as a threat to their political security. The House passed the amendment in 1893, 1894, 1898, 1900, and 1902, but each time the measure reached the Senate, it was either ignored or voted down.

Meanwhile, however, the way for the amendment was being prepared by the passage by various states of preferential primary laws. These statutes allowed the voters of a state to express their preference for United States senator. The state legislature then automatically ratified the vote of the people, in much the same manner that the electoral college acts in the choice of a President. Nebraska established the senatorial primary in 1875, but it was not until the turn of the century that the idea began to spread rapidly. By 1912, twenty-nine states had senatorial primaries, and were therefore in fact if not in theory choosing their senators by direct election. Since senators chosen in this fashion generally became supporters of a formal constitutional amendment for direct election, the Senate's resistance to the change weakened year by year.

The final impetus to reform came from the scandal attendant upon the Illinois legislature's election of George Horace Lorimer to the Senate in 1911. The *Chicago Tribune* shortly published a story revealing that Lorimer's election had been brought about through wholesale bribery in the State assembly. The Senate refused to seat Lorimer, but the incident broke down the remaining resistance in the Senate to direct election. The amendment passed Congress by the necessary two-thirds majority in June 1911 and upon securing the necessary ratification by three-fourths of the states became the Seventeenth Amendment to the Constitution on May 31, 1913.

The composition of the Senate altered substantially after the amendment's adoption, and thereafter political bosses, retired millionaires, and corrupt corporate pensionaries were much less in evidence. To what extent the Seventeenth Amendment was responsible for this change is uncertain. The Progressive revolt destroyed many urban and state political machines, so that the states sent fewer political bosses to the Senate than formerly. Moreover, the growth of a somewhat irrational prejudice against men of great

wealth in politics and the enactment of strict state and federal election laws made increasingly difficult the use of private fortune as a key to public office.

A new type of political leader was in the making—one who secured election to public office through the techniques of democratic leadership and mass psychology rather than the craftsmanship of the conservative elder statesman. Behind this development was the growth of vastly superior methods of communication—the press, the telephone, the automobile, and finally the radio. In the face of these instruments the conservative and colorless politician who operated through private contacts and personal manipulation had a much smaller chance of survival. The Seventeenth Amendment undoubtedly facilitated the appearance of the new type of statesman in the Senate, but the technological revolution was of even more importance.

THE PROGRESSIVE ATTACK ON THE JUDICIARY

The judiciary felt the full force of the Progressive attack upon undemocratic, oligarchical government. Well before the end of Theodore Roosevelt's second term, an undercurrent of bitter criticism against the courts was perceptible in America. During Taft's administration criticism broke into the open, and for the next few years liberals in both parties vied with one another in their condemnation of the judiciary. The main focus of attack upon the courts was the fashion in which they had handled social legislation. Decisions such as that in *Lochner v. New York*, invalidating the New York ten-hour bakeshop law, and *Adair v. United States*, declaring void the federal yellow-dog contract statute, had aroused the enmity of Progressives. Vitriolic propagandists denounced the courts as "tools of the trusts," stooges of "entrenched corporate interests," "enemies of the working man" and of the common social welfare. Calmer critics contended that judges were too often disciplined in a purely static conception of constitutional law, that they were in general extremely conservative in economic and social matters, and that as a result the courts acted as a drag upon reform and social progress.

True to the American tradition of formulating an economic or social argument in legalistic terms, the Progressives made a powerful attack upon the constitutionality of judicial review. Much of their

argument was historical. The Constitutional Convention, they asserted, had never intended to give the courts the power to declare laws void; *Marbury v. Madison* was sheer judicial usurpation. An amazing amount of ink and oratory was poured forth in support of this claim. For example, a New York lawyer, Louis B. Boudin, contended in a series of highly partisan articles that there were no valid state cases of judicial review prior to 1787; that the members of the Constitutional Convention had never intended to sanction the practice; and that Marshall's argument for judicial review as presented in *Marbury v. Madison* was historically and logically unsound. This argument was answered by a number of thoughtful scholars, among them Andrew C. McLaughlin, Edward S. Corwin, and Charles A. Beard. After examination of the evidence these men all concluded that most members of the Convention apparently had taken judicial review for granted and that the action of the federal judiciary in assuming this function could hardly be construed as usurpation.

Other critics resorted to a theoretical attack upon judicial review. Certain arguments employed were very old, and could have been found in the writings of Jefferson, Jackson, or Lincoln. They may be summarized briefly as follows: (1) Under the doctrine of the separation of powers, there is no more reason for the judiciary to have the final right of constitutional interpretation than for the President or Congress to exercise the power. This was Jackson's old argument. (2) Most decisions holding laws unconstitutional are not in reality interpretations of the Constitution. Almost never does an act of Congress or of a state legislature violate specifically some provision of the written Constitution. Instead the law is found to violate some precept of social or economic philosophy held by the judges. This practice the Progressives denounced as in effect judicial legislation. (3) Five-to-four decisions on crucial constitutional questions are particularly obnoxious. Laws are not supposed to be declared invalid unless they are unconstitutional beyond a reasonable doubt. Yet 5-to-4 decisions reveal that there is actually room for very great doubt. (4) Judicial review is an utterly undemocratic method of settling constitutional questions. Its result is that a few men, removed from popular control, formulate the supreme law. (5) Judges are not fitted to interpret the Constitution in the light of modern social needs. Their training is legal, not

economic or social. They tend to settle constitutional questions by legal precedents, most of which were formulated in the light of seventeenth- and eighteenth-century social conditions. Most judges do not understand modern society, and are incapable of formulating constitutional and legal precepts to meet modern conditions. This last argument was a favorite of Louis D. Brandeis and Theodore Roosevelt.

Every conceivable remedy was offered for the alleged evils of judicial review. Some writers, among them Louis B. Boudin, urged the outright abolition of the power of any court to declare any federal or state law void. Others, recognizing that the operation of the federal system required that some agency review state legislation, would have permitted the federal courts to void state legislation but would have abolished their right to declare acts of Congress unconstitutional. Another group, seeking to take advantage of the clause in the Constitution which permits Congress to define the jurisdiction of the federal courts, would have limited the federal judiciary's right to consider certain types of cases involving social and economic legislation. Other critics, among them George W. Norris and Hiram Johnson, would have prohibited the Supreme Court from declaring any act of Congress unconstitutional unless the decision was rendered by at least a 6-to-3 majority. Still other writers, among them Louis D. Brandeis, saw the remedy not in the abolition of judicial review, but rather in the social education of the bar and of the judiciary and in the growth of judicial self-restraint.

THE JUDICIAL RECALL

From a political viewpoint the most significant remedies advanced were those for the recall of judicial decisions on constitutional questions, and for the recall of judges. The two ideas came into prominence in Progressive circles about 1910, and Roosevelt, now out of office and associate editor of the *Outlook*, championed both reforms. Many other Progressives, among them LaFollette, Beveridge, and Norris, gave them support.

The recall of judges was the first of these proposals to enter the field of acute political controversy. In 1911 Congress took under consideration a joint resolution which would have admitted Arizona and New Mexico as states to the Union. The state constitution which Arizona had submitted to Congress provided for the

recall of state judges by a majority of the popular vote. The provision precipitated considerable discussion on the floor of Congress, where it was hotly defended by Progressives in both houses. On August 11, 1911, Congress passed the resolution, but with the provision that the legislature of Arizona at the first state election should submit to the voters a constitutional amendment which, if adopted, would except all judicial officers from the recall.

There was grave question of the constitutional validity of this provision. In effect, it erected a condition subsequent to Arizona's admission, an issue which had been discussed at the time of the Missouri Compromise. Except where a property right of the federal government is concerned, there is no constitutional way in which Congress can force a state, once in the Union, to carry out the provisions of a condition subsequent. The effect of such agreements, if fulfilled, would be to create a Union of unequal states, as had been pointed out in the debates on the admission of Missouri.[2]

President Taft sent the resolution back to Congress with a veto. His veto did not mention the constitutional objections to imposing a condition subsequent upon Arizona but was based solely upon his objections to the recall of judges, which he termed "so pernicious in its effect, so destructive of the independence of the judiciary, so likely to subject the rights of the individual to the possible tyranny of a popular majority" that he felt obliged to "disapprove a constitution containing it." Recall, he held, would subject the judiciary to "momentary gusts of popular passion" and so destroy democratic processes. Taft went on to condemn radical solutions of the judicial problem on the ground that they were unnecessary. There were but few hidebound conservative judicial decisions, he said, and they did "not call for radical action."

Taft's veto forced Arizona to remove the constitutional provision in question. After admission, however, Arizona promptly amended her constitution to incorporate an even more drastic provision for the recall of judges. This provision was now entirely beyond the reach of Congress.

In 1912, attention shifted to the recall of judicial decisions, a

[2] In *Stearns v. Minnesota* (1900), the Court held constitutional a condition subsequent in the act admitting Minnesota to the Union, whereby Congress reserved the right to determine subsequently the disposition of federal public lands in the state. See also the discussion of the Missouri Compromise debates on pp. 261–270.

proposed reform thought by many advocates to rest upon sounder grounds than that of the recall of judges. Colorado had a constitutional provision by which the people of the state could vote by referendum upon the constitutional issues involved in any decision of a Colorado court holding a state law unconstitutional. In January 1912, Roosevelt endorsed the Colorado plan in the *Outlook*. He also urged that the next New York state constitutional convention provide that the people be empowered to decide by popular ballot "what the law of the land shall be" in cases where "the courts of the state have refused to allow the people to establish justice and equity." Roosevelt conceded that when the federal Supreme Court finally passed upon a question of constitutionality, its interpretation ought to be allowed to stand. Prior to such a decision, however, the opinion of the people as to "what is or is not constitutional" should be final. A few days later Roosevelt endorsed this idea before the Ohio constitutional convention.

Roosevelt's sponsorship of this measure shocked many conservatives in both parties. It was in part responsible for his break with Philander Knox, Lodge, Root, and Taft, and for the fight inside the Republican national convention in June 1912, in which Roosevelt lost the nomination and bolted with his Progressive supporters to form the "Bull Moose" Party.

Judicial recall was subjected to thoughtful criticism by competent students of government and constitutional law, many of whom raised serious objections. Walter F. Dodd, a specialist in state government and constitutional law, pointed out that any attempt to force a popular interpretation of the federal Constitution overlooked the implications of Article VI of the Constitution. That provision bound state judges to uphold the federal Constitution regardless of anything in their own state constitutions and laws. Hence, it would be unconstitutional to force a state judge to accept a popular decision as to the constitutionality of a state statute, if that decision conflicted with the judge's conviction as to the requirements of the federal Constitution. It was this difficulty which caused the Progressive Party in 1912 to recommend only that decisions of state courts declaring state acts void under the provisions of state constitutions be subject to recall.

THE JUDICIARY ACT OF 1914

While "recall of decisions" gradually lost ground, a more moderate reform was finding support on the floor of Congress. Under the Judiciary Act of 1789, appeals could be taken from state courts to federal courts on Constitutional questions only when the state court had denied a "right, title, or claim" arising under the federal Constitution, treaties, or laws. As the reader is already aware, the intent of this section had been to insure the supremacy of federal law over state law. Were any claim under federal law denied by a state court, an appeal could be taken to the federal judiciary.[3] But no provision was made for appeals when a state court admitted a claim under federal law, since such action was not thought to be necessary.

This situation altered after 1900, when in numerous instances state courts began to find the law of their own states unconstitutional as violations of the due process clause of the Fourteenth Amendment. Since this was technically an admission of a claim raised under the federal Constitution, no appeal could be taken to the federal courts under existing law. This protected a reactionary state judge in an adverse decision on state legislation, for if the highest court in a state handed down such a decision, there was no way in which it could be overruled even by a state constitutional convention. This situation threatened to bring about a new regionalism in constitutional law. A certain type of state statute might be held constitutional under the federal Constitution as interpreted in New York, void as interpreted in New Jersey, constitutional as interpreted in Illinois, and so on. In *Cohens v. Virginia*, Marshall had dwelt upon the danger of this evil, and the necessity of avoiding it through a system of appeals to the federal judiciary on constitutional questions. The same problem had now appeared in a new form, and there appeared to be no remedy available, unless Congress should by law broaden the basis of appeals to the federal courts.

The problem was given pointed expression in 1911, when the New York Court of Appeals in *Ives v. South Buffalo Railway Company* found the New York state employers' liability act unconstitutional under the Fourteenth Amendment. The opinion rejected

[3] See the discussion of the Judiciary Act of 1789 on pp. 172–174.

with fine sarcasm the idea that social or economic objectives could have anything to do with the constitutionality of a law. Roosevelt, speaking through the *Outlook*, quoted "an eminent jurist" as saying that the case was "one more illustration of the principle that in many American courts property is more sacred than life." The decision was also attacked by eminent lawyers and students of constitutional law. Professor Ernst Freund of the University of Chicago Law School observed that "there is good reason to believe that the Supreme Court would sustain such a law." Shortly afterward, the supreme courts of both New Jersey and Washington held similar statutes to be constitutional. This absurd situation led the House Judiciary Committee to observe that "the Fourteenth Amendment means one thing on the east bank of the Hudson and the opposite thing on the west bank."

The remedy was a federal statute to permit appeals from state to federal courts on all questions arising under the federal Constitution and laws, regardless of whether or not the state court upheld a claim advanced under the federal Constitution. In 1911, the American Bar Association drafted a bill giving the Supreme Court the authority to accept writs of error from state courts in cases where the highest state court had sustained a federal right, as well as in those cases in which that right had been denied. The House promptly passed the bill by an overwhelming majority. The Senate Judiciary Committee, however, while approving of the general principle of the bill, amended the measure to provide for appeal upon writs of certiorari instead of writs of error.[4] This change was made to provide the necessary review on constitutional questions, but at the same time to protect the already overloaded Court against a variety of other types of appeal. With this change, the Senate passed the bill, but the House failed to act on the Senate version. During 1913 the measure was crowded aside by the rush of administration legislation, but conservatives and liberals alike were agreed upon the desirability of the reform. Under the sponsorship of Senator Elihu Root of New York the bill quietly became law on December 23, 1914.

[4] In modern federal practice, a writ of certiorari is a device for requesting review by a higher court, in cases where the higher court has a discretionary right to accept or reject the appeal. A writ of error, on the other hand, is a means of securing review by a higher court where federal law grants the appeal as of right.

CONSTITUTIONAL REFORM IN THE STATES

Writing in 1914, a student of state government concluded "that it can no longer be doubted that a veritable constitutional revolution is sweeping through state government." Between 1900 and 1920 more than 1500 constitutional amendments were adopted in the various states of the Union, and in the period between 1900 and 1913 seven states adopted entirely new constitutions.

The driving force behind this movement was primarily the first article of the Progressives' faith: "let the people rule." Nearly all the constitutional changes adopted were designed to give the people a more direct share in popular government. Even staunch conservatives were affected by this attitude, as Elihu Root's speech before the New York state constitutional convention in 1915 bore witness. New York, Root said, had two governments, one the visible constitutional government of the people, the other the invisible government of party bosses. It was the invisible government that actually ruled the state. "The ruler of the state during the greater part of the forty years of my acquaintance with the state government has not been any man authorized by the Constitution or by the law." Instead, he said, the state had been ruled by Senators Roscoe Conkling and Thomas C. Platt, the latter for many years head of the New York state Republican machine. Root concluded that there was "a deep and sullen and long continued resentment at being governed thus by men not of the people's choosing," and he asked the convention to strip the "irresponsible autocracy of its indefensible and unjust and undemocratic control of government," and restore it to the people.

Root's words expressed a prevalent profound distrust of the established organs of state government and a belief that state legislatures could no longer be trusted with the control of public policy to the same extent as formerly. It will be recalled that early state constitutions were mere skeletal outlines of government, which had generally left the various assemblies free to do almost as they pleased. During the course of the nineteenth century there had been a growing tendency to impose constitutional controls upon the people's chosen representatives. In the last two decades of the century, in particular, a deep suspicion of legislative honesty and capacity, induced by repeated revelations of corruption and scandal

in legislative halls, had grown up in the public mind. Too often the people of a state had seen it demonstrated that their government was in reality controlled by a venal party machine subservient to the interests of a great railroad, an industrial corporation, or an urban boss. They had learned to their sorrow that many a seat at Albany, Richmond, Harrisburg, or Springfield had a price—a price which more than one special interest was willing to pay.

In an effort to check legislative dishonesty and "restore government to the people," the states after 1900 adopted a growing number of amendments which imposed large restrictions upon the scope of legislative authority, competence, and discretion, and which specified legislative procedure and function in great detail. Large areas of special legislation were withdrawn from the control of the assembly entirely. Thus quite generally the power to fix rates for public utilities was handed to special commissions. Other amendments fixed tax schedules and specified permissible kinds of taxation, while still others forbade the enactment of special legislation for private interest groups. There were new provisions which established county seats, drew the boundaries of assembly districts, or fixed the salaries of public officials. Other provisions set up state factory inspection systems, limited the length of the working day for women, or set up workmen's compensation systems. Thus the typical state constitution came to resemble a statute book, mainly because the people no longer trusted the legislature to protect their interests or to exercise the degree of discretion which had once been accorded it.

The mass of restrictive and statutory material written into state constitutions made these constitutions sometimes run to extraordinary lengths. The Virginia constitution of 1776 was but seven pages long. By contrast, the Oklahoma constitution of 1907 covered fifty-eight pages of fine print totaling nearly forty thousand words. Ohio's constitution of 1912 was more than twenty thousand words in length, and Michigan's constitution of 1908 was about the same size. Frequent amendment often greatly increased the length of the original document. For example, California's constitution of 1879 was amended eighty-three times between 1894 and 1914, so that by the latter date it had reached a length of more than forty thousand words, nearly double its original size.

Through the initiative and referendum, constitutional reformers

sought to encourage the people to write their own legislation directly over the heads of the assembly, or to veto the laws passed by their representatives. These twin instruments of direct popular participation in the legislative process were first advocated by the Populists and Bryan in 1896. In 1898, South Dakota wrote the initiative into its constitution by an amendment which permitted the people to present legislation to the assembly by petition. The legislature was permitted either to enact the law or to present an alternative proposal to the people. Oregon followed with a more famous reform in 1902, by which both constitutional amendments and ordinary legislation might be proposed by petition. These, in turn, were required to be submitted to the voters of the state for acceptance or rejection in a general election. This provision became a model for most states subsequently adopting the initiative and referendum. By 1914, eighteen states had adopted the initiative and referendum for ordinary legislation, and twelve of these permitted the device to be used for constitutional amendment as well.

Another device, the recall, was intended to place popular controls upon executive officers. A small percentage of the voters, usually about 8 per cent in statewide elections, could petition for a special election, in which the electorate could decide whether or not a specified official was to be removed from office. Oregon pioneered in this reform also, with a constitutional amendment adopted in 1908. By 1915, some eleven states had followed Oregon's lead, and seven of these permitted the recall of judges.

A highly effective instrument in the war against boss-dominated government was the party primary, developed after 1903 as a substitute for county and state nominating conventions. In the rural society of mid-nineteenth-century America the convention had been a fairly effective instrument of popular will, but in the great urban centers of a later day it became subject to manipulation and abuse. By 1900, state and local conventions were frequently controlled by the meanest type of local boss. The delegates, who usually included corrupt political hangers-on, saloon-keepers, brothel operators, and the like, were mere dummies assembled in convention to ratify the will of their masters.

A Wisconsin statute of 1903 abolished the state party convention as a nominating device and substituted the primary election, in which all the voters of a political party could nominate their chosen

candidates by ballot. The movement thereafter spread rapidly. By 1910, two-thirds of the states had adopted the reform. In most cases the primary election was established by an act of the legislature, no constitutional amendment being deemed necessary; yet the change altered drastically the "living constitution" of state government.

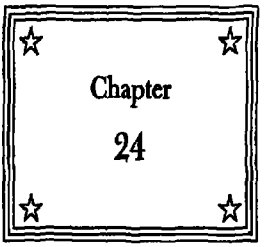
These "radical" experiments in direct democracy were destined to realize neither the hopes of Progressives nor the fears of conservatives. Many a Progressive leader looked upon the initiative and referendum, the recall, and the primary as the greatest constitutional reforms since the days of 1787; through them the rascals would be swept from office and the intelligent will of an enlightened people would find expression. Some frightened conservatives, on the other hand, thought that direct democracy heralded the end of lawful representative government. President Taft said of the initiative that the "ultimate issue" was "socialism," and he denounced the recall of judges as giving "enormous power for evil" *into the hands of corrupt bosses and "stirrers-up of social hate."*

Actually no decisive change for good or evil followed upon these democratic reforms. Ordinary legislative processes went on much as before, while the laws passed by the people through the initiative and referendum were on the whole neither better nor worse than those of an earlier day. As for the recall, it was seldom used to rid government of the scoundrel in office. The most successful venture in direct democracy was the primary election, which, although it did not guarantee the nomination of superior candidates for office, could at least disrupt the smooth-running machine of a party boss who outraged public opinion too flagrantly. There has been a general decline in the influence and importance of corrupt party "bosses" since 1900, and municipal politics are certainly less corrupt today than they were in 1890. The party primary and improved governmental machinery have been to some extent responsible.

It was perhaps a weakness of the Progressive movement that it concentrated too much upon the reform of the mechanics of government, and too little upon the deep-seated social and economic institutions which gave rise to governmental corruption. The party boss was too often mere scum upon the surface of urban poverty, and the corrupt or stupid legislator merely the too-accurate image

of special interest groups, organized minorities, or even deficient public intelligence or morality. These were not evils to be cured by stripping the Speaker of his powers or abolishing the party convention. Within its limits the Progressive movement accomplished certain desirable political and social reforms, but it did not bring about a wholesale regeneration of the entire social order, as certain ardent Progressives had hoped.

There was, in fact, little real radicalism in the Progressive era, in spite of the charges which frightened conservatives threw at liberal reformers. The Progressive movement expressed a widespread desire for certain controls upon great wealth and special interest, for certain mild social reforms, and for more direct democracy, but there was almost no wish to overturn the foundations of private property and constitutional government. There were no comprehensive theories damning the social order as totally beyond redemption. Rather the Progressive movement belonged to the stream of social reform which had begun in Jeffersonian Democracy and had found subsequent expression in the triumph of Jackson, the early Republican Party, and the Populist movement, and which would lead eventually to Wilson's New Freedom and ultimately to the New Deal. This tradition of reform accepted all the values of the "American dream" and sought to bring that dream closer to reality for the mass of Americans. Therein lay the source both of its weakness and of its recurrent vitality.



Woodrow Wilson and the New Freedom

THE RISE of the Progressive faction in the Republican Party was climaxed by an open break in Republican ranks on the eve of the 1912 presidential election. Theodore Roosevelt, in a dramatic return to the national political arena, bolted the Republican convention in Chicago, and presently accepted the presidential nomination of the newly formed Progressive or "Bull Moose" Party. The Republicans renominated Taft, but Roosevelt's candidacy divided the Republican vote at the polls and thereby assured the election to the presidency of the Democratic candidate, Woodrow Wilson.

Two developments of especial significance for constitutional history occurred in Wilson's first administration. First, Wilson developed a new technique of executive leadership in initiating and effecting the passage of legislation. Second, Wilson brought about the enactment of an extensive reform program which was at once the culmination and a partial refutation of the ideals of liberal nationalism.

WILSON'S CONCEPTION OF THE PRESIDENT AS A PRIME MINISTER

Wilson was a college president turned politician. His practical experience in statecraft was confined to a two-year term as governor of New Jersey, but he was a brilliant historian and political theorist, and he had strong convictions concerning the President's relations with Congress. In 1883, while still a young university professor, he had published his *Congressional Government*, a study of the federal legislature. He had concluded that Congress had failed in its task of public leadership and had shown itself incapable of coping with the complex problems of modern society. Wilson had also expressed the belief that an effective program of legislation would require presidential formulation and leadership. He had condemned the doctrine of the separation of powers as inhibiting strong presidential leadership in legislation and had expressed admiration for the British parliamentary system with its automatic co-operation between executive and legislature. Parliament, he had observed, did not really originate legislation; it merely ratified or rejected the Cabinet's recommendations, seldom refusing its assent. This resulted, Wilson had concluded, in strong concerted leadership in government and in an absence of the paralysis so frequently present in relations between the American President and Congress.

Once in the White House, Wilson undertook to model his relations with Congress upon the British principle of executive ascendancy in legislation. He believed that this involved no unconstitutional usurpation of power. On the contrary, he found his authority to control legislation in Article II, Section 3, of the Constitution, which instructs the President to recommend to Congress such measures as the President judges necessary. Obviously Wilson's capacity to imitate the British parliamentary system was limited by the fact that he could not prorogue Congress or "go to the country" if it failed to do his bidding. He believed, however, that his own prestige and the Democratic Party's eagerness to achieve a successful reform program would compensate for the constitutional limits upon his coercive power.

In accordance with the foregoing ideas, Wilson presented Congress with a series of positive legislative measures, each framed to deal with one of the various problems that he proposed to solve.

In co-operation with his intimate associates, various experts, and Democratic leaders in Congress, he worked out in careful detail a number of specific bills to cover each point in his program. The Federal Reserve Act, for example, was substantially the product of co-operation between Wilson, Representative Carter Glass of Virginia, and the economist H. Parker Willis, in consultation with various bankers, monetary specialists, and congressmen. The Underwood Tariff Act was evolved in numerous conferences between Wilson, Glass, Senator LaFollette, and Representative Oscar Underwood of Alabama. The Clayton Anti-Trust Act and the Federal Trade Commission Acts were worked out by Wilson with the assistance of his intimate personal adviser, Colonel Edward M. House, the labor leader Samuel Gompers, Glass, and various congressmen.

When an important bill was ready for action, Wilson customarily appeared in person before Congress, delivered a short incisive message dealing solely with the measure in question, and urged its immediate passage. In thus appearing in person before Congress, Wilson revived a practice in disuse for over a hundred years. Washington and Adams had appeared personally before Congress, but Jefferson and his successors had ceased to follow this practice. Wilson's return to the custom had the effect of demonstrating his sharp concern and his immediate interest in the legislation he recommended.

Immediately following such a message, administration supporters introduced the bill into both houses of Congress. Although the President technically could not introduce legislation into Congress, all concerned knew that the measure in question was largely Wilson's own. The term "administration bill," occasionally heard in Roosevelt's time, now became common to describe measures formulated by the President. An administration bill was given the right of way by steering committees in both houses, and hence stood every chance of emerging as law. Unless the Democratic members of Congress wished to break openly with their own President, they were obliged to support the proposal.

While an administration bill was in process of passage, Wilson maintained a steady pressure upon Congress through frequent conferences with Senate and House leaders. In the early days of his administration, when his great reform program was being enacted, he appeared several times in the President's Room, off the Senate

Chamber, to confer with Democratic leaders. It was plainly understood that he would not tolerate unreasonable delay or any substantial alteration in the text of a proposed law. When occasionally rebellion threatened an administration bill, Wilson did not hesitate to take the strongest measures to whip Congress into line. When, for example, he became convinced that various lobbyists were delaying the passage of the Underwood tariff bill, he went over the head of Congress to the people. In a dramatic message to the press, he attacked the "sinister interests" interfering with enactment of the law. Opposition to the measure thereupon collapsed, and the bill became law without further delay.

Wilson's theory of the President as a kind of prime minister worked out surprisingly well in practice, as even his opponents conceded. For a time he established something very like the British parliamentary system in Washington. Primarily, however, Wilson's success as a legislative leader rested upon his extraordinary capacity to rally national popular support to the ideals and the symbols he evoked, rather than upon his inadequate constitutional position. While Wilson made use of patronage and party discipline, he lacked the British prime minister's power to coerce the legislature with the threat of parliamentary dissolution followed by a general election. There is some evidence that Wilson considered the threat of his resignation as a coercive device when Congress in 1914 at first refused to pass his bill to equalize Panama shipping tolls, and again in 1917, when Congress rejected the armed merchant ship act. Resignation would at best have been an inadequate constitutional device with which to force his program upon Congress, but fortunately for Wilson's early success, his control of Congress before 1918 was so complete that his leadership was seldom challenged.

To many Americans the unprecedented position that Wilson exercised in the initiation and passage of legislation seemed at variance with the soundest traditions of the American constitutional system. Presidential control of legislation, they held, violated the principle of the separation of powers and usurped the functions of Congress. The ancient fear of executive prerogative and dictatorship was still very much alive in many minds, and a President who openly made his office more powerful than Congress seemed headed straight for dictatorship and despotism. From Wilson's time to the days of Franklin D. Roosevelt, many a politician de-

claimed against the new tyranny of the presidential office. Even those who recognized the necessity for strong presidential leadership at times experienced an uneasy feeling that a republic ought not to permit the concentration of so much power in the hands of one man.

In reality, Wilson's power was an expression of the strong forces of democratic nationalism at work in the nation. The common man had great aspirations and great fears—for his own welfare and for that of his country. He demanded that these be translated into some kind of positive political program, and he looked to Washington for statesmen who could do this. But as Wilson himself had observed, Congress was by its very nature incapable of responding to this demand. It was divided by partisan politics; and its various members, dependent upon local support for re-election, were for the most part concerned with local and sectional issues. They tended to view national issues not in the light of the total national welfare but in the light of sectional interest or the interests of constituents who might have influence upon their political fortunes.

A strong President labored under no such disabilities. He was elected by the whole people in a great contest staged every four years with such dramatic emphasis that the nation's very future seemed to turn upon its outcome. The President, along with the flag and the Constitution, had become a symbol of the sovereignty and greatness of the United States. It was not difficult for a strong President to turn this situation to his own advantage.

Theodore Roosevelt was the first President after Lincoln to recognize the full strength of his position. His stewardship theory, which held the President to be the supreme guardian and protector of the nation's welfare, was a realistic analysis of popular sentiment about the presidential office. Roosevelt had the dramatic qualities and forceful personality of a great leader. Had he possessed a clear, consistent, and positive program of national reform, he probably would have had little difficulty in forcing Congress to accept his demands.

Wilson never formally enunciated Roosevelt's stewardship theory, but it is clear that he accepted the idea completely. He had the same understanding of the manner in which the common man now looked to the President for leadership, and he, too, had remarkable abilities as a popular leader. Further, he did what Roose-

velt had failed to do—he presented Congress with a well-defined reform program, with the full understanding that his own prestige as a national leader was so great that the men on Capitol Hill could not refuse his demands. There was no intimation of despotism in Wilson's position, but many people, then and later, were slow to understand the profound difference between tyranny and strong executive leadership under responsible constitutional controls.

THE GROWTH OF EXECUTIVE ORDINANCE POWER

While Wilson successfully asserted in dramatic fashion the new technique of presidential leadership in legislation, other forces were at work to break down the doctrine of the separation of powers and to make the President a lawmaker in his own right. In theory, the execution of laws was a function entirely distinct from their enactment, and the legislature could not delegate any part of its lawmaking powers to the President. Actually, however, the line between lawmaking and administration had never been drawn so clearly as the niceties of constitutional theory appeared to require. It was impossible for Congress to draft a law in such detail as to cover every possible contingency arising under it. Congress had early recognized this fact by delegating a certain amount of minor "administrative discretion" to the President. Also, certain statutes, among them the Non-Intercourse Act of 1809, had made their enforcement contingent upon the appearance of certain conditions which the President was empowered to recognize. With a few important exceptions, however, congressional delegation of power to the executive had remained narrow in scope throughout most of the nineteenth century.

After 1890, however, there developed a trend toward the enactment of measures granting a much broader delegation of discretionary power to the executive. In addition, many of the new statutes carried with them a certain amount of authority to formulate policy. The reason for these developments has already been suggested: the modern problems of state were frequently so complex and so technical that they could be understood only by the expert. Furthermore, the administrative expert had to be granted a certain degree of discretion if he were to function efficiently. To meet these conditions Congress often found it advisable merely to sketch in the major objectives and policies aimed at in a statute, leaving the

choice of means as well as minor decisions of policy to the executive.

In a series of important decisions between 1892 and 1911 the Court recognized this situation and substantially enlarged the doctrine of administrative discretion. *Field v. Clark* (1892), the first case of this kind, arose out of a provision in the Tariff Act of 1890, providing for reciprocal trade agreements with various nations, under which the United States would permit the free importation of sugar, molasses, coffee, tea, and hides. The statute also authorized the President to suspend free import and to levy a prescribed schedule of duties against the goods of any nation whenever in his opinion he was satisfied that the country in question was imposing "reciprocally unequal or unreasonable" duties on imports from the United States. A number of importers presently attacked this last provision as unconstitutional, contending that the law delegated legislative power to the President, and was therefore invalid because it was in conflict with Article I, Section 1, of the Constitution, which states that "all legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."

Justice Harlan's opinion rejected this plea. He admitted that the outright delegation of legislative power was unconstitutional: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." But, said Harlan, the act in question did not violate this rule, for it left nothing "involving the expediency or the just operation" of the law to the President. The suspension of existing duties was absolutely required when the executive "ascertained the existence of a particular fact." Harlan concluded that "it cannot be said that in ascertaining that fact and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws."

Thus the Court gave formal recognition to a distinction long existing in practice—that between the mere ascertainment of fact and actual policy making. This distinction became a fundamental one in the Court's subsequent attempts to distinguish between lawful and unlawful delegations of authority to the executive.

In *Buttfield v. Stranahan* (1904) the Court recognized that Congress might lawfully delegate to the executive certain policy-making

decisions of a minor variety. The Tea Inspection Act of 1897 had given the Secretary of the Treasury the power to appoint a Board of Tea Inspectors, who were authorized to recommend certain standards in tea grading and to inspect and grade all imported tea. Tea which the board rejected as being below the standards thus established was to be denied entry by the customs authorities. This act went far beyond the delegation considered in *Field v. Clark*, for the executive was here empowered to fix standards which could then be enforced as law.

Did not this involve policy making, and hence an unlawful delegation of legislative power? The Court thought not. Congress, said Justice White, had fixed the "primary standard" and policy for the tea board to follow, and this was sufficient to insure the law's constitutionality. "Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted." In other words, the Court recognized that some policy making of a minor variety by the executive was legal "from the necessities of the case." It was sufficient for Congress to indicate its will and to fix the broad outlines of policy; the rest could lawfully be left to the executive.

In 1911, in the famous case of *United States v. Grimaud*, the Court extended the doctrine of administrative discretion to recognize that administrative rulings had the force of law and that violations of them might be punished as infractions of a criminal statute, if Congress should so provide. An act of 1891 had authorized the President to set aside public lands in any state or territory as forest reservations. In 1905, another statute transferred the administration of such lands to the Secretary of Agriculture and empowered him to make rules and regulations for their occupancy and use. The act further made violations of the secretary's rules subject to a fine of not more than $500 and imprisonment for not more than a year, or both. Under the authority of the 1905 act, the Department of Agriculture had issued certain regulations to limit grazing on such reserves. It was the constitutionality of these regulations which now came before the Court.

Justice Lamar in a brief opinion cited *Field v. Clark* and *Buttfield v. Stranahan*, and then concluded that "the authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative level to a legislative character because the violation thereof is punishable as a public offense."

In short, by 1911 the Court had accepted as constitutional the delegation of a large element of administrative discretion to the executive. In theory, to be sure, the doctrine of the separation of powers remained unimpaired, and in each case that thereafter came before the Court, it carefully distinguished between "administrative discretion" and outright delegation of legislative power, the latter still being pronounced unconstitutional. In fact, however, this carefully drawn distinction was weakened by the Court's willingness to accept as constitutional delegations of authority far broader than those in the early constitutional period. It is significant that the Court spoke repeatedly of the "practical necessities of the case," thereby implying that the complexity and technical character of modern administrative processes required that Congress merely state broad objectives and major elements of policy and leave both detail and minor policy determination to administrative discretion. The theory that outright legislative power could not be delegated was certainly not dead, however, as the Court's denunciation of the National Industrial Recovery Act in 1935 was to demonstrate.

THE NEW BOARDS AND COMMISSIONS

The tendency of Congress to delegate quasi-legislative authority to the executive greatly increased during Wilson's presidency. Several of the statutes in Wilson's reform program made large grants of discretion to certain agencies of the executive. In many instances Congress created new executive boards and commissions for the express purpose of exercising control over certain areas of policy of a quasi-legislative character. Resort to the commission was apparently inspired in part by the judicial blessing which the Supreme Court bestowed upon the Interstate Commerce Commission between 1907 and 1914 and by the success of the Commission in administering the rail rate structure during that period.

Wilson's administration saw the establishment of no less than seven important commissions, not including the various wartime emergency boards erected in 1917 and 1918. The Federal Reserve

Board, the first important new body to be established, was given extensive discretionary powers to control banking and credit, including the right to raise and lower the rediscount rate and to buy and sell federal bonds at its own discretion in order to control long-term credit operations.

The Federal Trade Commission, set up to administer antitrust legislation, was patterned closely upon the Interstate Commerce Commission. It had the same power to hold hearings, investigate complaints, and issue "cease and desist" orders to persons found to be carrying on unfair or monopolistic trade practices. Presumably, also, the act setting up the Board provided for narrow review, for the Board's findings of fact were to be considered prima facie true in any appeals to the courts.

The Federal Farm Loan Board, set up in 1916, was given extensive control over rural credits. The United States Shipping Board, erected in 1916, was given authority to construct and operate a merchant marine. The Railway Labor Board, established under the Transportation Act of 1920, had authority to mediate labor disputes. The Tariff Commission of 1916, on the other hand, was little more than an advisory body, for it could do nothing more than recommend certain policies to Congress. The Comptroller General of the United States, established by the Budget Act of 1920, was a kind of one-man commission supervising budgetary matters.

The anomalous and contradictory position of executive commissions, which exercised the functions of all three departments and yet belonged completely to none, shortly gave rise to a number of perplexing constitutional questions. Were the personnel of the various boards to be considered as a part of the executive department and as such subject to the President's orders and to his removal power? The members of the Interstate Commerce Commission, the Federal Reserve Board, the Federal Trade Commission, and the Farm Loan Board were appointed by the President with the consent of the Senate, and the boards in question were charged with the administration of the law. This implied that the boards were a part of the executive department and thereby subject to presidential control. However, the first Interstate Commerce Act had fixed the terms of commission members at seven years and had provided that they might be removed for "inefficiency, neglect of duty, or malfeasance in office." While this provision recognized the Presi-

dent's removal power, it placed limits upon it by enumerating the permissible causes for removal. Moreover, the fact that the statute fixed the term of office of members also constituted an implied limitation upon the President, since other subordinate executive officers were appointed for indefinite terms and for presidential pleasure. The acts creating the Federal Trade Commission and the Tariff Commission also fixed the commissioners' term of office and carried the same removal provisions as did the Interstate Commerce Act. The Federal Reserve Act, on the other hand, although it fixed the term of board members at ten years, said nothing about the President's removal power, while the act creating the Farm Loan Board fixed members' terms at seven years, but specified removal "for cause."

More significantly, the Transportation Act of 1920 made Railway Labor Board members removable for "neglect of duty or malfeasance in office, but for no other cause." This apparently implied congressional intent to confer upon the Board a large degree of independence from the President. The Budget Act of 1920 went even further and made the Comptroller General removable only by joint resolution of Congress; that official was thus placed entirely beyond presidential control.

The issue of presidential control over executive commissions ultimately involved a much broader constitutional question. If federal boards were mere subordinate executive agencies, not different in position from other government bureaus and officers, what was the point of creating them in the first place? Why not delegate power to a subordinate official in an already existing department? But if commissions were something more than mere subordinate agencies, was not the logical result an unconstitutional decentralization of executive power? Conceivably Congress could ultimately create a number of federal boards, charge them with the administration of the whole mass of federal law, and make the boards responsible to Congress rather than the President, thereby bringing about a revolutionary destruction of the President's powers and the establishment of a parliamentary government.

There is little evidence that the full import of these questions has ever been considered seriously, either by Congress or by the executive. There has been no inclination to drive the theoretical

issues inherent in commission government to their logical extremities. It has never appeared necessary to answer categorically the question of whether or not an independent commission constitutes a theoretical violation of the doctrine of the separation of powers.

WILSON'S REFORM PROGRAM: THE NEW FREEDOM

Wilson sounded the keynote of his economic philosophy when he asserted during the 1912 campaign that "a comparatively small number of men control the raw materials, the water power, the railroads, the larger credits of the country, and, by agreements handed around among themselves, they control prices." Wilson, in other words, had never reconciled himself to the new industrial order. He opposed all trusts and monopolies as thoroughly bad, and in particular he viewed the integrated control of industry and finance by the great banks of New York as an unmitigated evil. Obviously there was something of agrarian radicalism in Wilson's intellectual heritage: he was the spiritual descendant of Thomas Jefferson, John Taylor of Caroline, William Jennings Bryan, and the Populists.

Wilson believed firmly in the continuance of a *laissez-faire* economy and a free market in America. The continuance of such an economy, he argued, could be assured only by ruthlessly smashing the great trusts, monopolies, and financial concentrations, which had already made great inroads upon the old free market of small entrepreneurs. The great trusts must be broken up, and the control of the great New York financial houses over money and banking must be ended. Only in this fashion could free enterprise and economic democracy be restored and preserved.

Wilson's uncompromising hostility toward all trusts and financial concentration was sharply different from the Progressive position. Most Progressives did not condemn combination and monopoly as such, but rather the perversions of power practiced by certain "malefactors of great wealth." Roosevelt had drawn a distinction between "good" and "bad" trusts, a distinction accepted by the Supreme Court in the Standard Oil and American Tobacco cases. Most Progressives had been ready to recognize that certain giant combinations were inevitable, even desirable, provided only that they were subjected to appropriate governmental controls. But Wilson, like

Brandeis, thought bigness as such to be an evil, and he viewed great combinations of financial and industrial power as incompatible with a free economy and a free society.

Wilson was by training a constitutional conservative. Like Jefferson and John Taylor before him he feared centralized government as well as centralized economic power. This meant that he rejected the liberal nationalist argument for the steady expansion of the sphere of national sovereignty as a means to solving new social and economic problems. In his *Constitutional Government*, a series of lectures published in 1908, he deplored the tendency to create new spheres of federal sovereignty under the guise of old established constitutional powers. He also regarded the rise of a federal police power as a subtle and pernicious perversion of the limited and derived character of federal sovereignty. He agreed with Chief Justice Fuller that a steady expansion of national authority by indirection would end in the destruction of the federal nature of the Union.

In theory, constitutional scruples of this kind should have confronted Wilson with some difficulties, once he sought to translate his economic philosophy into a legislative program. This difficulty was partially resolved in practice, however, by Wilson's heavy emphasis upon tariff reform and monetary legislation as his principal weapons in the attack upon financial combination and monopoly. Wilson believed that general downward revision of the tariff would strike a severe blow at monopoly by reintroducing international competition. Monetary and banking reform he looked upon as necessary to break the control of the New York banks over the country's monetary and banking system. Neither tariff reform nor revision of the banking and monetary system offered serious constitutional difficulties even to a constitutional conservative. Passage of the Underwood Tariff law, revising tariff duties downward about 30 per cent, and of the Federal Reserve Act therefore became cardinal points in his program. It seems clear, also, that Wilson's constitutional difficulties were reduced by the fact that he became somewhat less conservative in his constitutional philosophy once he was confronted as President with a variety of imperative national problems which could be solved only by the liberal interpretation of federal sovereignty.

The Federal Reserve Act, sponsored by Wilson and introduced

into Congress in June 1913, became law on December 23, 1913, establishing extensive controls over the national banking system. The law created a seven-man Federal Reserve Board, which in turn exercised control over twelve district Federal Reserve Banks, each of which had extensive powers over money and national banking activities within its district. All national banks were required to become members of the federal reserve system, under penalty of the forfeiture of their charters should they refuse. Member banks were authorized to rediscount commercial paper at the federal reserve bank of their district under a carefully controlled system of reserves and rediscount rates. Manipulation of the rediscount rate by the various district federal reserve banks was expected to provide a method whereby the federal government could control the amount of commercial credit available and thereby exercise some control over the business cycle. Member banks were also authorized to issue federal reserve notes, secured by commercial paper and a gold reserve on deposit with the federal reserve bank in the district, a provision expected to furnish a desired elasticity to the monetary system.

The federal government's right to establish and control a national banking system rested upon constitutional precedents established in the days of Hamilton and Marshall and seemingly raised little constitutional difficulty in the twentieth century. Although a few die-hard strict-constructionist Democrats in both houses raised the old Jeffersonian plea against the constitutionality of any national bank, this archaic argument attracted little support.

The House accorded more attention to the contention of Representative S. F. Prouty of Iowa, who attacked the constitutionality of the provision requiring member banks to subscribe a sum equal to one-fifth of their stock or 5 per cent of their deposits as a working capital fund for the district reserve banks, or to surrender their charters as an alternative. This section, Prouty said, violated the due process clause of the Fifth Amendment, since it impaired the obligation of contracts. However, Representative Andrew T. Montague of Virginia pointed out that the National Bank Act of 1864 had expressly reserved the right to amend the provisions of the law. National banks chartered under this act could scarcely claim that their charters were immune to congressional controls. Moreover, Montague observed, the Supreme Court had explicitly held

in the *Sinking Fund Cases* (1879) that Congress had the right to place any reservations it wished upon the authority of any federal corporation created by act of Congress.

In the Federal Trade Commission Act and in the Clayton Anti-Trust Act, Wilson invoked the commerce power in his war against the trusts. The Federal Trade Commission Act, which became law on September 26, 1914, erected a five-man Federal Trade Commission, which was empowered to prevent "unfair methods of competition in commerce." Patterned after the Interstate Commerce Commission, the new board could receive complaints, hold hearings, gather evidence, compel the attendance of witnesses, and issue cease and desist orders where, after hearing, the Commission found unfair trade practices to exist.

The Clayton Anti-Trust Act, enacted on October 15, 1914, made unlawful a number of specific trade practices, notably price discrimination between different purchases of commodities, exclusive selling agreements, holding companies, and interlocking corporate directorates. Important, also, were Sections 6 and 20, intended to serve as a "Magna Charta" for organized labor. Section 6 asserted that "the labor of a human being is not a commodity or article of commerce," and declared further that nothing in the government's antitrust laws was to be construed as forbidding the existence of labor unions or agricultural organizations or the lawful activities thereof. Section 20 forbade federal courts to issue injunctions in labor disputes, except where necessary to prevent irreparable injury to property for which there was no adequate remedy at law; while it further specifically forbade the issuance of federal injunctions prohibiting such activities as strikes, assembling to persuade others to strike, carrying on primary boycotts, persuading others to boycott, peaceably assembling, or doing any other thing otherwise lawful under the statutes of the United States.

Both of the foregoing statutes were conservatively drawn, and they aroused comparatively little debate in Congress upon their constitutional aspects. Several men in both houses attacked the section in the Clayton bill prohibiting discriminatory price agreements on the ground that contracts of sale were in no sense interstate commerce, and hence were beyond the legislative capacity of Congress. Regulation of contracts was attacked also as a violation of freedom of contract, and therefore illegal under the Fifth Amend-

ment. Also, there was extended discussion of those sections of the Clayton bill empowering persons held for trial in federal contempt cases to ask for trial by jury. This provision was intended as a remedy against the arbitrary conduct of many federal judges who indiscriminately issued federal injunctions in labor disputes and then convicted strikers in summary contempt proceedings. Several representatives nevertheless condemned the section, on the ground that a provision for jury trial in contempt proceedings was unconstitutional. Injunction and contempt proceedings were in equity, and the equity jurisdiction of the federal courts was specifically provided for in the Constitution. Since equity proceedings had historically never included the right of trial by jury, Congress, the argument ran, could not establish jury trial by law, for it could not interfere with a grant made by the Constitution directly to the federal courts.

Representative E. Y. Webb of North Carolina pointed out the weakness of this argument. The lower federal courts were the "absolute creatures" of Congress under the Constitution. Congress could therefore do what it liked with lower federal court procedure. Precedent, it may be observed, was on Webb's side. Congress had repeatedly regulated and prescribed federal court procedure in equity jurisdiction, beginning with the Judiciary Act of 1789.

The Federal Farm Loan Act, passed on July 17, 1916, sought in a constitutionally conservative fashion to extend some relief to agriculture through federal control over money and banking. The law set up federal land banks in each of the federal reserve districts and provided for a system of long- and short-range credits for farmers who wished to purchase land or to refinance old mortgages. A Federal Farm Loan Board was to supervise the system, the act providing significantly that its decisions on policy were not to be subject to review in the federal courts. Constitutionally the statute was conservative; in practice, it was an important implementation of Wilson's agrarian sympathies.

THE ADAMSON EIGHT-HOUR LAW

Wilson's most notable concession to the doctrine of liberal nationalism was his sponsorship, in September 1916, of the Adamson Act, which established an eight-hour law for railroad labor.

Wilson took this step to avert a general railroad strike then im-

pending. Some months earlier the railway brotherhoods had presented to their employers a demand for a reduction of the standard working day from ten to eight hours, with payment of overtime at one and a half times the regular wage rate. The roads had refused this demand, whereupon their employees threatened to stage a general rail strike. Wilson then intervened with a proposal for arbitration. The roads accepted this offer, but their employees rejected it. The President thereupon suggested the general adoption of an eight-hour standard of work and wages, but the roads in turn refused to comply. At this point, the brotherhoods called a general strike on seventy-two hours' notice. Wilson believed that the impending strike threatened economic catastrophe, and to avert it he went before Congress and requested passage of a statute establishing an eight-hour day of work and wages as standard in railroad employment.

Congress responded with the passage of the Adamson Eight-Hour Act, which became law on September 3, 1916, in time to avert the strike. The statute provided that after January 1, 1917, eight hours should "be deemed a day's work" for purposes of reckoning wages on rail lines operating in interstate commerce. It further provided for presidential appointment of a three-man commission to "observe the operation and effects" of the eight-hour day, and to report its findings to the President. Pending report of the commission, the railroads were forbidden to reduce wages below the standards then in effect for the longer day. Shortly after passage of the act, the United States District Court for Western Missouri held that the law was unconstitutional, whereupon the government hastened an appeal to the Supreme Court.

In *Wilson v. New* (1917) the Supreme Court by a 5-to-4 majority reversed the lower court and held that the Adamson Act was constitutional. Chief Justice White's opinion emphasized the public character of rail transportation and the resultant extensive right of public regulation. The emergency character of the act, he said, did not make it less constitutional. While an emergency could not be made the source of new constitutional power, it nonetheless could furnish a proper occasion "for the exercise of a living power already enjoyed." Neither did the law violate due process. Although the act in effect fixed wages, evidently a matter of grave constitutional concern to all the justices, White emphasized that the wage-fixing

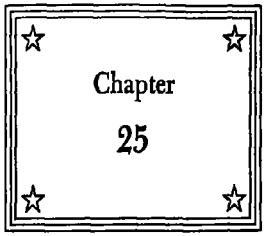
provisions were temporary and were adopted only after the parties concerned had failed to exercise their private bargaining right. The Chief Justice therefore found these provisions to be constitutional, although he was careful not to imply a general right in Congress to fix all rail wages.

The four minority justices, led by Justice Day, all thought that the wage-fixing provisions of the Adamson Act were unconstitutional, on the ground that they were contrary to the time-honored formula forbidding "the taking of the property of A and giving it to B by legislative fiat," and so violated due process of law under the Fifth Amendment. Justices Pitney, Van Devanter, and McReynolds also were of the opinion that the law was not properly a regulation of interstate commerce, and therefore outside the federal commerce power. The obviously narrow interpretation of the scope of interstate commerce held by these justices boded ill for further attempts at broad federal regulation of the economic system, should the present minority on the Court subsequently become a majority.

TERMINATION OF WILSON'S REFORM PROGRAM

Diplomatic crisis and war brought Wilson's great reform program to an abrupt end in 1917. Thereafter the administration's energies centered upon winning the war and upon the issues of the peace. So ended the most comprehensive attempt at reorienting the American economic order which had been set in motion up to that time. Events were to demonstrate that Wilson had failed to alter substantially the drift of American economic life toward great industry, massive financial concentrations, and protectionism. Most of Wilson's reform measures remained on the books: the Federal Reserve Act, in particular, represented a permanent innovation in federal control of the nation's monetary and banking system. But the Clayton law and the Federal Trade Commission suffered severely from neglect and from unfriendly judicial interpretation, and the low-tariff Underwood Act was later replaced by the unprecedentedly high tariffs of 1922 and 1930. Wilson had acted fundamentally within the Jeffersonian agrarian tradition in his attack upon the centralization of private monetary power, protectionism, and the control of government by banking and manufacturing interests; but

it was Hamilton's spirit, and not Jefferson's, which controlled national policy after 1920. Nevertheless, the ghost of Wilson's reform program was to rise again after 1933 to inspire several parts of the great program of controversial social legislation enacted under the second Roosevelt. The New Freedom was an important forerunner of the New Deal.



The Constitution and World War I

THE ENTRY of the United States into war in 1917 brought about an abrupt change in the political objectives of the Wilson administration. Internal economic reform ceased to be the country's main concern, as the country embarked upon an enthusiastic crusade to crush the German foe and save the world for democracy.

War at once brought into sharp relief three important constitutional problems, none of them altogether new. These were the conflict between a decentralized constitutional system and the requirements of wartime centralization, the conflict between executive war powers and congressional legislative power, and the conflict between war powers and the Bill of Rights.

FEDERAL POWER IN WARTIME

In 1917 the United States experienced for the first time the full impact of war upon the modern social order. War, the nation soon learned, was no longer an isolated state activity, divorced from civil affairs and of little interest to the common citizen. Instead it involved every part of the nation's social and economic life. Both

the Allies and the Central Powers had had this lesson driven home to them well before 1917, and the United States soon grasped the same reality. The imperative necessities of modern war posed a difficult constitutional issue: how could a total effort be reconciled with the limited extent of federal sovereignty? Did the war power suspend the federal system in wartime and so make constitutional the economic and social controls necessary to victory?

The extent of federal power in wartime became a major issue in Congress in June 1917, when the administration introduced the Lever Food Control Bill giving the federal government authority to deal with the impending food shortage and rising food prices. The preamble of this measure announced that for reasons of national defense it was necessary to secure an adequate supply and distribution of food and clothing. The food and clothing industries were therefore declared to be affected with a public interest and subject to federal regulation. It was made unlawful to waste, monopolize, fix prices, or limit production in foodstuffs. Whenever necessary, the executive was authorized to license the manufacture and distribution of foodstuffs, to take over and operate factories and mines, and to subject markets and exchanges to executive regulation. In "extreme emergencies" the President could impose schedules of prices upon any industry. The Lever bill was designed primarily to control food and fuel production, but its terms were so broad as to subject virtually the entire economic life of the nation to whatever regulation the President thought necessary for victory.

The bill at once precipitated a bitter debate in Congress, where much of the discussion hinged upon the federal war power. The bill's supporters contended that the war power could not be narrowly construed. Senator Frank B. Kellogg of Minnesota, for example, argued that in wartime the national government could "in fact do anything necessary to the support of the people during the war and to lend strength to the cause," an opinion concurred in by Senator Paul O. Husting of Wisconsin. More moderate was the position taken in the House by Representative Sidney Anderson of Minnesota, who contended simply that the federal government in wartime could do anything having a reasonable relationship to the war effort. This theory of the war power, it presently appeared, was accepted by a large majority in both houses of Congress.

The bill nevertheless drew fire from a vociferous minority in both

houses. Senator James Reed of Missouri, an intransigent Democratic opponent of Wilson, attacked federal price and production controls as a violation of the Tenth Amendment, which he contended threw the burden of proof upon the proponents of any particular federal right in question. No federal right, he said, could be established by broad interpretation. This was good Jeffersonianism, but the argument was a bit archaic, what with a hundred or more years witnessing the growing triumph of national ascendancy and broad construction.

Senator Thomas W. Hardwick of Georgia, also a Democratic enemy of Wilson, advanced a more moderate claim. He admitted that Congress could do anything immediately and directly connected with the prosecution of the war, but he insisted that the outbreak of war did not immediately break down all the reserved powers of the states. The difficulty with this position was that a large majority in and out of Congress recognized how necessary federal food control was to the successful prosecution of the war. The House reflected this attitude when it passed the Lever bill late in June after only a week of debate. The measure was delayed in the Senate through an attempt to establish a congressional committee to direct the war effort,[1] but the bill eventually passed the upper house and became law on August 10, 1917.

While the Lever Act was the most dramatic instance in the first World War in which the federal government used the war power to invade a sphere of sovereignty ordinarily reserved to the states, there were numerous other measures of a similar character. Thus by various statutes, Congress authorized the President to force preferential compliance with government war contracts, to take over and operate factories needed for war industries, and to regulate the foreign language press of the country. In the War Prohibition Act, passed on November 21, 1918, Congress forbade the manufacture and sale of alcoholic liquors for the duration of the war. Other statutes, such as those for the wartime operation of the railroads, the censorship of the mails, the control of cable and radio communications, and the regulation of exports, were in part justified by the war emergency; but they could also be adjudged constitutional by other specific powers of Congress, notably that over interstate commerce. The Selective Service Act of May 18, 1917, establishing a

[1] See pp. 659–660.

wartime military draft, rested in part upon the constitutional provision empowering Congress to raise and support armies as well as upon the war power.

The important decisions bearing upon the extent of the federal war power were made by Congress and the President without guidance of the Supreme Court. Most of the critical war measures never came before the Court; and with one exception, the few that did reached the Court well after the Armistice, when the constitutional issues involved were no longer of immediate significance. As in Civil War days, it would have been difficult or impossible for the Court to challenge successfully the constitutionality of a federal war activity while the war was in progress. One may assume that had the Court passed unfavorably upon vital war legislation while the war was still going on, ways and means would have been discovered to ignore or to circumvent the decision.

In the *Selective Draft Law Cases,* decided in January 1918, the Court unanimously upheld the constitutionality of the Selective Service Act of 1917. Chief Justice White found the constitutional authorization to impose compulsory military service in the clause empowering Congress to declare war and "to raise and support armies." He held that the power was derived, also, from the very character of "just government," whose "duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it." He then pointed to the long historical record of compulsory military service in English and colonial law and in the American Civil War, to bolster his assertion that the power to draft men into military service was a necessary incidence both of the federal war power and of federal sovereignty. The Court's decision was obvious and inevitable, since it was evident that an adverse ruling upon the constitutionality of the draft would have interposed the Court's will directly athwart the national war effort.

Later decisions also sustained a broad interpretation of federal war powers. In the *War Prohibition Cases,* decided in December 1919, the Court upheld the validity of the War Prohibition Act, although the law had been passed after the signing of the Armistice. Justice Brandeis in his opinion simply assumed the validity of the act under the federal war power and held further that the signing of the Armistice did not make the statute inoperative or void, since

the war power was not limited merely to insuring victories in the field but extended to the power to guard against renewal of the conflict. A few months later, in *Rupert v. Caffey* (1920), the Court again upheld the law. Brandeis' opinion rejected the plea that the act was an invasion of the states' police powers with the observation that "when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a state of its police power."

In *Northern Pacific Ry. Co. v. North Dakota* (1919) the Court passed favorably upon the provision in the Army Appropriation Act of August 29, 1916, authorizing presidential seizure and operation of the railroads in wartime. Speaking for a unanimous Court, Chief Justice White observed that "the complete and undivided character of the war power of the United States is not disputable." He added that wartime federal operation could lawfully brush aside intrastate rate controls normally binding upon the roads in time of peace, since to interpret the exercise of the federal war power "by a presumption of the continuance of a state power limiting and controlling the national authority was but to deny its existence." In other words, the federal war power here broke in upon state authority and set aside the normal division between state and national power.

In *United States v. L. Cohen Grocery Co.* (1921) the Court invalidated Section 4 of the Lever Act (as re-enacted October 22, 1919), which had made it illegal to impose any unreasonable charge for food. But the Court's reason for taking this step was not that it thought the federal government could not fix prices in wartime. Instead, Chief Justice White's opinion held the law unconstitutional on the ground that the statute had failed to fix any standards for what constituted unjust prices, had fixed no specific standards for guilt, and had forbidden no specific act, and so violated the Fifth and Sixth Amendments, which prohibited the delegation of legislative power to the courts, the punishment of vague and inadequately defined offenses, and deprivation of the citizen's right to be informed of the nature of the accusation against him. In short, the law was unconstitutional not because it fixed prices, but because it failed to do so with any clarity. White's opinion said nothing of the larger constitutional issues implicit in the Lever Act, the

Court presumably accepting as constitutional the main principle of the statute.

Thus the Court in several opinions recognized that the requirements of modern war left little of federalism in wartime. This was indeed little more than a judicial recognition of a condition already existing and of a truth so imperative that it would have been futile for the Court to deny its existence.

WILSON'S WAR DICTATORSHIP

Wilson has often been compared to Lincoln on the ground that both men were elevated to dictatorships by the exigencies of war. Yet the comparison must be made with some caution. Lincoln was faced with an internal war, for which there was no constitutional precedent, as well as a confusing constitutional problem growing out of the whole issue of secession. He solved the difficulties of his position by assuming certain arbitrary powers by virtue of his constitutional authority as commander in chief of the armed forces, and for several months he carried on a war against the secessionists by presidential fiat and without benefit of congressional authorization. Even after Congress had formally recognized the war, Lincoln took certain important steps—notably the Emancipation Proclamation and certain preliminary reconstruction decisions—without congressional authorization.

Wilson's position was somewhat different. The war was formally declared by Congress, and Wilson acted from the beginning by virtue of certain large grants of authority delegated to him by Congress. While he made frequent use of his authority as commander in chief, he was never obliged to take any fundamental step without the authorization of Congress.

If Wilson was in any sense a dictator, it was because Congress in certain spheres came close to a virtual delegation of its entire legislative power to the President for the duration of the war. Many federal war statutes merely described the objectives of the act in broad terms and then delegated to the President authority to enforce the law. Delegation of this kind went far beyond that considered in *Field v. Clark*, or *United States v. Grimaud*, for the war statutes in question erected no standards for executive guidance other than the general objectives of the law. Legislative delegation on this scale was unprecedented and little short of revolutionary.

This issue arose several times during the war, but was extensively discussed for the first time in the debates on the Lever Act. As already noted, the bill gave the President extraordinarily broad discretionary powers. He could license the manufacture and distribution of food and related commodities, take over and operate mines and factories, regulate exchanges, and fix commodity prices. No limits whatever were fixed upon his action in pursuance of any of these provisions so long as he deemed a particular step essential to secure the purposes of the act.

Administration supporters in both houses tried to defend delegation on this scale on the ground that adequate standards were erected by the announced purposes of the act. But as Senator Thomas W. Hardwick of Georgia pointed out in a discussion of the bill's price-fixing provisions, no standards whatever were provided except the general welfare and the successful conduct of the war. Most of the Republicans and a generous sprinkling of Democrats thought such delegation utterly unconstitutional. Representative George M. Young of North Dakota voiced this position when he denounced the bill as an attempt to create a presidential dictatorship by law, an opinion echoed in the Senate by James Reed of Missouri.

This attitude led to a Senate attempt to establish a Joint Congressional Committee on the Conduct of the War, with the intent to effect a general congressional directorship over all war operations. While the Lever bill was in the upper house, Senator John Wingate Weeks of Massachusetts introduced an amendment providing for a congressional war committee, to be composed of ten men, three Democrats and two Republicans from each house. It was to study all problems arising out of the war, and to confer and co-operate with the President and other executive heads. It was also to possess extensive powers of investigation into all phases of war activity.

The proposed committee was modeled after a similar body established by Congress in 1861. It will be recalled that the Civil War committee had been inspired by Republican radicals dissatisfied with Lincoln's war efforts and the President's extraordinary assumption of power. Under Ben Wade's leadership the committee had arrogated to itself large powers of executive supervision and control and had been a constant source of annoyance to Lincoln.[2] Obviously, then, Weeks intended to place heavy shackles upon Wilson's

[2] See the discussion of the Civil War committee on pp. 427–429.

war leadership. Ex-President Roosevelt, who bitterly distrusted Wilson and was now loud in his denunciation of the President, was in fact the principal inspiration for the Weeks amendment, but many congressmen of both parties, more than a little fearful of executive ascendancy, also supported the measure.

In the discussions on the Senate floor, both friends and enemies of the administration appealed to the authority of history to prove or disprove the wisdom of establishing another such committee. In an attempt to demonstrate that the Civil War committee had worked well, Republican Senators Joseph I. France of Maryland, Boies Penrose of Pennsylvania, and Laurence Y. Sherman of Illinois and Democratic Senators Reed and Hardwick quoted contemporary writers, the historians James Ford Rhodes and William H. Dunning, and even Wilson's historical works. In turn, Senator Lee Overman of North Carolina and Wilson's other supporters quoted John Hay, Gideon Welles, and Lincoln in an effort to show that the committee had worked badly and had embarrassed Lincoln's war effort. In the end, the Senate adopted a slight variant of the Weeks amendment by a vote of 51 to 31.

When the House took up the Senate amendments to the Lever bill, Wilson immediately made it clear that he regarded the proposed committee as an attempt to deprive him of executive leadership in the war. The committee would involve, he said, "nothing less than an assumption on the part of the legislative body of the executive work of the administration." He concluded with the warning that he would interpret the final adoption of the committee measure by Congress as a vote of lack of confidence in himself. Wilson's message killed the proposal, for the House eliminated it from the bill.

After the passage of the Lever Act on August 10, 1917, there was for the moment little further effective resistance to the delegation of broad legislative authority to the President. The Selective Service Act of May 18, 1917, had given the executive almost complete discretion to conscript an army as he saw fit. The Trading with the Enemy Act, which became law on October 6, 1917, gave the President discretionary authority to license trade with Germany, and to censor mail, cable, and radio communications with foreign states. A provision in the Army Appropriation Act of August 29, 1916, had already conferred upon the President the right to take

over and operate common carriers in time of war. A joint resolution of Congress enacted July 16, 1918, authorized him to seize and operate telephone and telegraph lines.

Not until the Overman bill came before Congress in the spring of 1918 did Congress make any further show of resistance to presidential ascendancy. This bill, an administration measure introduced on February 6 by Senator Lee Overman of North Carolina, was inspired by a desire to introduce some order and flexibility into the chaotic welter of wartime bureaus, commissions, and other special agencies. The bill authorized the President to "make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon any executive department. . . ." The act was to remain in force until a year after the close of the war, when all executive offices were to revert to their pre-war status. Thus the reorganization projected was not permanent, but merely a wartime emergency measure.

Obviously the Overman bill proposed to delegate an extraordinary measure of legislative discretion to the President. So broad and sweeping was its phraseology that the President could, for example, have transferred all the functions of the State Department to the War Department, or the functions of the Federal Reserve Board to the Treasury Department. Since these and similar executive units had been created and their functions defined by acts of Congress, the bill thus empowered the President to suspend during the war all past congressional statutes organizing the executive. No limits on executive discretion were specified, and no standards were erected, other than the President's decision that any given step was necessary to the efficient prosecution of the war.

The Overman bill reached the Senate floor in March 1918, and there the principal discussion centered on the constitutionality of the measure. Overman and other administration supporters contended that the bill made no actual substantive grant of legislative authority to the President, since he could create no new functions but could merely transfer those already in existence. The bill was justified also, argued Senator James Hamilton Lewis of Illinois, by the extraordinary powers which the President could lawfully exercise as wartime commander in chief. Oddly enough, Republican Senator Henry Cabot Lodge of Massachusetts admitted that in his

opinion the President already possessed the powers delegated by the bill, since presidential war power existed by virtue of the Constitution, and not by act of Congress.

Some Democrats as well as Republicans joined in the attack on the constitutionality of the bill. Reed and Hardwick insisted that the bill could not be justified by the war power, since many departments and functions not related to the war could be affected by its terms. Republican Senator Frank B. Brandegee of Connecticut denounced the bill as an attempt to force Congress to "abdicate completely its legislative power and confer it upon the executive branch of the government," a sentiment concurred in by Senator Albert Cummins of Iowa. As in the debate on the Lever Act, the opposition emphasized the absence of adequate standards for executive guidance.

The Overman Act nevertheless passed the Senate on April 29, by a vote of 63 to 13, the size of the vote indicating that the great majority of senators were impressed with the need for the law and refused to allow constitutional doubts to interfere with the passage of the bill. But Senator Brandegee expressed the minority attitude in the Senate just before the voting began, when he offered an ironical amendment providing that "if any power, constitutional or not, has been inadvertently omitted from this bill, it is hereby granted in full." A few days later the House concurred in the passage of the bill, and it became law on May 20, 1918.

The Overman Act, like the Lever Act, demonstrated that all ordinary restraints upon the delegation of legislative power to the President were largely put aside for the duration of the war. The rule that standards and guideposts must be provided was simply not observed. The Supreme Court never had an opportunity to pass upon the Overman Act. Had it done so, it might have found the delegation of legislative power constitutional under the extraordinary range of authority vested in the President as a wartime commander in chief. In no other fashion, however, would it have been possible to reconcile the law with the well-established limits on the delegation of legislative authority.

Wilson did not personally exercise all the tremendous authority delegated by Congress to the President. Instead he used his ordinance-making powers to establish a whole series of commissions,

boards, bureaus, and government-owned corporations to carry on the multifarious wartime executive functions. Six major boards, each responsible to the President, exercised most of the vitally important functions incident to the conduct of the war. The Office of Food Administration, which in turn controlled the United States Food Administration and the Sugar Equalization Board, carried out the provisions of the Lever Act in managing the production and consumption of foodstuffs by price controls, licensing, and carrying out food conservation campaigns. The Office of Fuel Administration, which also derived its authority from the Lever Act, administered public and private consumption of coal during the war. The War Industries Board had complete authority over all war purchases and eventually came to exercise something like a complete dictatorship over all industry. The War Industries Board rested upon no statute whatsoever; it was created solely by virtue of the President's authority as commander in chief.

Carrier operation was eventually put under a Director General of the Railroads. The United States Shipping Board, created by Congress in 1916, acting through the Emergency Fleet Corporation, constructed and operated the necessary wartime merchant marine. The Export Trade Board, which derived its authority from the Trading with the Enemy Act, imposed general controls upon export and import trade. The Committee on Public Information, also created by the President solely by virtue of his war powers, exercised an informal censorship accepted voluntarily by the press, and it acted also as an information and propaganda bureau. In addition to these bodies there were a host of lesser committees, offices, and agencies, some authorized by law, some created by presidential fiat, some voluntary and informal, but all performing some wartime executive function.

Perhaps the principal significance of this extraordinary executive structure lay in the example it offered for later national emergencies. The first World War did much to accustom the American people to an enlarged conception of federal authority; and thus when the great economic crisis of the 1930's beset the nation, the country more readily accepted legislation which delegated various measures of legislative authority to the President and which invaded the traditional sphere of state authority. Still later, the President's power to

erect emergency offices, commissions, and bureaus based upon his constitutional authority as commander in chief was again prominently exercised in World War II.

THE WAR AND THE BILL OF RIGHTS

The war brought into the open once more the old conflict between the Bill of Rights and military necessity. For all the conflict over the Alien and Sedition Acts and over Lincoln's policies, the wartime status of the first nine amendments was, in 1917, still vague and confused. Two things, however, could be said with certainty. First, the state of war did not suspend operation of the Bill of Rights; in fact, the Third and Fifth Amendments specifically mentioned wartime conditions. Further, the efficacy of the Bill of Rights in wartime had been confirmed in *Ex parte Milligan* (1866).[3] With this precedent in mind, the Wilson administration in 1917 immediately renounced any intention of suspending the Bill of Rights for the duration of the war. Second, it was equally clear from Civil War practice that the guarantees in the Bill of Rights were not necessarily the same under wartime conditions as in peacetime. Between these two extreme positions there was a vague and confused area of conflict between civil rights and the federal war power.

To an even greater extent than in Civil War days, it was the First Amendment, with its guarantees of free speech, free press, free assembly, and petition that caused most difficulty. Certain restrictions on freedom of speech and of the press were recognized by military and governmental officials as imperatively essential, both because of military necessity and because of the requirements of public morale. Furthermore, controls were demanded by an overwhelming proportion of the people, who were in no mood to listen to those opposing war with Germany.

While Congress adopted no general censorship law during the war, it did enact two statutes which, among other matters, imposed certain limitations upon press and speech. The Espionage Act adopted on June 15, 1917, included certain provisions for military and postal censorship. The amendment to the Espionage Act, which became law on May 16, 1918, and was often referred to as the Sedition Act of 1918, was more comprehensive and general in character.

[3] See pp. 445–448.

The Espionage Act carried two principal censorship provisions. One section made it a felony to attempt to cause insubordination in the armed forces of the United States, to attempt to obstruct the enlistment and recruiting services of the United States, or to convey false statements with intent to interfere with military operations. The other established a postal censorship, under which treasonable or seditious material could be banned from the mails at the discretion of the postmaster general. A great many publications, including the *Saturday Evening Post* and the *New York Times*, as well as many radical and dissident periodicals and newspapers, were banned temporarily from the mails under this provision.

Under a broad interpretation of the federal war power, these provisions in the Espionage Act were undoubtedly constitutional, provided their application was not abused. Technically, a denial of the use of the mails does not constitute censorship, since the federal courts have several times held that the mails constitute an optional federal service, so that refusal to extend the facility does not deprive anyone of a constitutional right. As for the military censorship provisions, it may be observed first that it had never been supposed, either in 1791 or after, that the First Amendment created an absolute right of free speech under all circumstances. Freedom of speech, for example, does not protect a person who speaks in such a manner as to incite directly an illicit act. Freedom of speech and freedom of the press do not protect persons who commit libel or slander or who incite to riot. Presumably, then, freedom of speech and of the press could not protect a person who deliberately sought to obstruct the national war effort.

The difficulty in applying the law, however, arose from the fact that the statute sought to punish intent, and the definition of what constituted intent was exceedingly difficult to establish. In the past, common-law courts had attempted to establish intent in speech cases by inquiring into the degree of proximity between the spoken or written word and the illegal act supposed to have resulted. Most significantly, common law both in England and in America had since the eighteenth century rested upon the "rule of proximate causation." To prove intent under this rule, it was necessary to show a direct and immediate relationship between the spoken word and the illicit act. Printed or spoken statements of a general character remote from a particular illicit act were not illegal and did not make

the speaker or writer an accessory. Mere "bad tendency" or "constructive intent" had not been sufficient to constitute a breach of the immunities of free speech.

The Supreme Court first passed upon the military censorship provisions of the Espionage Act in *Schenck v. United States* (1919), in which the Court borrowed the "rule of proximate causation" to create the "clear and present danger doctrine." The case involved an appeal from a conviction in the lower federal courts on a charge of circulating antidraft leaflets among members of the United States armed forces. Appellant's counsel contended that the Espionage Act violated the First Amendment and was unconstitutional.

In reply Justice Holmes wrote an opinion, unanimously concurred in by the Court, upholding the constitutionality of the Espionage Act. The right of free speech, he said, had never been an absolute one at any time, in peace or in war. "Free speech would not protect a man in falsely shouting fire in a theatre, and causing a panic." When a nation was at war, he added, "many things that might be said in time of peace are such a hindrance to its [war] effort that their utterance will not be endured so long as men fight," and "no court could regard them as protected by any constitutional right."

But Holmes made it quite clear that the Espionage Act did not supersede the First Amendment. He carefully distinguished between permissible and illicit speech in wartime, and in so doing brought to bear the doctrine of proximate causation of illegal deeds. "The question in every case," he said, "is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

Thus the Espionage Act, so construed under the clear and present danger doctrine, prohibited immediate incitement to mutiny or disobedience in the armed forces. In this limited sense Holmes and his colleagues thought it constitutional, and the weight of legal opinion since 1919 has supported their conclusion.

About two thousand cases involving the Espionage Act arose in the lower federal courts during the war. Unfortunately, in nearly all of them the rule of proximate causation and the clear and present danger doctrine were ignored. Vague statements criticizing the war,

the administration, or the American form of government were usually accepted as having a "bad tendency" or constituting "intent" to bring about insubordination in the armed forces. Under the act, for example, pacifists were convicted for expressing a general opposition to all war; and a movie producer was convicted for showing a film on the American Revolution to a civilian audience. The Socialist leader, Eugene V. Debs, was convicted for merely exhorting an audience to "resist militarism, wherever found." If Holmes' later opinion in the Schenck case was correct, convictions of this character were based upon an incorrect interpretation of the law and were an unconstitutional infringement of the First Amendment.

In *Pierce v. United States* (1920) the Court overthrew the rule of proximate causation and adopted the rule of bad tendency. The case, the last of a series rising out of the Espionage Act, involved a Socialist pamphlet attacking conscription and the war. It could not be shown that there was intent to interfere with the draft, nor was it shown that circulation of the pamphlet had any proximate effect on the war. Yet the Court, speaking through Justice Mahlon Pitney, held that the pamphlet might well "have a tendency to cause insubordination, disloyalty, and refusal of duty in the military and naval forces of the United States." Brandeis, with Holmes concurring, dissented vigorously. Quoting the Schenck opinion, Brandeis argued that it was necessary to prove "clear and present danger," and that mere "bad tendency" was not enough.

The Sedition Law of 1918 was enacted at the insistence of military men and a general public alarmed at the activities of pacifist groups, certain labor leaders, and a few over-publicized "Bolsheviks" and radicals. The law made it a felony to "incite mutiny or insubordination in the ranks of the armed forces," to "disrupt or discourage recruiting or enlistment service, or utter, print, or publish disloyal, profane, scurrilous, or abusive language about the form of government, the Constitution, soldiers and sailors, flag, or uniform of the armed forces, or by word or act support or favor the cause of the German Empire or its allies in the present war, or by word or act oppose the cause of the United States."

This phraseology came dangerously close to that of the odious Sedition Act of 1798. However, there was a difference. The 1918 law penalized criticism of the government and of the symbols of

sovereignty when the criticism was made with intent to bring disrepute upon these symbols or to injure the nation's war effort. The act of 1798, on the other hand, forbade criticism of certain specific officers of the government—the President, members of Congress, and others named in the act. In short, the 1798 act prohibited criticism of individuals; the 1918 act, criticism of the government.

The Court had its first opportunity to pass on the Sedition Act of 1918 in *Abrams v. United States* (1919). Here the Court reviewed a conviction of appellants charged with violating the act by the publication of pamphlets attacking the government's expeditionary force to Russia. The pamphlets denounced the "capitalistic" government of the United States, called on the allied armies to "cease murdering Russians," and asked a general strike to achieve this purpose.

The majority opinion, written by Justice John H. Clarke, upheld the conviction and the statute. The purpose of the pamphlet, Clarke said, was to "excite, at the supreme crisis of the war, disaffection, sedition, riots, and . . . revolution." No such right could be protected by the First Amendment.

Justice Holmes, joined by Brandeis, dissented vigorously in the most eloquent and moving defense of free speech since Milton's *Areopagitica*. He thought that it had not been shown that the pamphlet had any immediate effect upon the government's war effort, or that it had been the appellant's purpose to have such effect. "Now nobody can suppose," he said, "that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so." If the sedition law were to be construed, he added, so as to prohibit all vigorous criticism of the government and its officials, there was clearly nothing to distinguish this law from the Sedition Act of 1798, long considered unconstitutional. He concluded with a powerful defense of the philosophy of free speech in a republican society:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition

by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas,—that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

The significance of the Pierce and Abrams decisions is evident. Thereafter, a general sedition act might be regarded as not unconstitutional under the First Amendment. In wartime the national government can probably punish as seditious any act which it regards as interfering in any manner with the war effort. The First Amendment, in short, does not altogether protect "open discussion of the merits and methods of a war." Whether this is a socially and politically desirable situation is hardly a legal or constitutional question. It involves rather the issue of the extent to which control of public opinion is necessary to the safety of the state in modern war.

Contrary to the situation in the Civil War period, there was little disposition in 1917–18 to interfere with the procedural guarantees of correct indictment and trial extended by the Fifth Amendment. The first World War was fought outside the boundaries of the United States, and the nation itself was not in the field of military operations. Senator George E. Chamberlain of Oregon did indeed introduce a bill declaring the entire United States "a part of the zone of operations conducted by the enemy," and providing for summary trial by military tribunal of any person publishing anything endangering the successful conduct of military operations. Though this bill was clearly unconstitutional under the dictum in

Ex parte Milligan, a few military leaders urged its passage. However, President Wilson formally condemned the measure as unconstitutional, and it did not come to a vote.

THE EIGHTEENTH AMENDMENT

The wartime atmosphere engendered a spirit of crusading reformism directly responsible for the passage of two constitutional amendments neither of which was directly concerned with the actual prosecution of the war. Both the Prohibition and the Woman Suffrage amendments, though the end products of long-prosecuted reform movements, finally triumphed because of the impetus given them by wartime psychology.

The prohibition movement antedated the Civil War, but it had made little lasting progress until caught up in the crusading enthusiasm for moral and social reform in the prewar liberal atmosphere. Only five states had adopted statewide prohibition acts before 1900, although by that time many other states had local option laws. Thereafter the movement spread rapidly, carried forward by the enthusiasm for reform characteristic of the Progressive era, by the entrance of women into public life, and by the political dexterity of the Anti-Saloon League, which lobbied effectively for its cause in state after state and in the halls of Congress. By 1916, nineteen states were entirely dry, and large portions of the remainder were dry under local-option laws.

Congress first recognized the prohibition movement with the passage of the Webb-Kenyon Act of March 1, 1913. This law, which forbade the shipment of liquor in interstate commerce into dry states, posed some serious constitutional questions. Whether or not the law took effect was dependent upon state acts, and the Webb-Kenyon act thus appeared to delegate congressional legislative power to the various states. The statute also posed the old question of a federal statute not applicable equally to all parts of the Union.

In *Clark Distilling Company v. Western Maryland Railway Company* (1917) the Supreme Court accepted the law as constitutional. Speaking through Chief Justice White, the Court ruled that the statute did not really delegate legislative power to the states, since Congress had fixed the conditions under which it went into effect. In this sense, also, it applied equally to all parts of the Union.

In 1913, the prohibitionists forced a constitutional amendment to a vote in the House of Representatives, where it was defeated. In 1917, Congress adopted prohibition by statute in the Lever Act as a wartime food-control measure, and on December 18 of the same year it voted to submit the Eighteenth Amendment to the states. Under the impetus of wartime enthusiasm and crusading fervor, the amendment was speedily ratified by the states, becoming a part of the Constitution on January 29, 1919. By the terms of the amendment, the manufacture, transportation, and sale of alcoholic liquor in the United States was prohibited, effective one year from the date of ratification. Congress and the states were given concurrent authority to enforce the amendment by appropriate legislation. The Volstead Act to provide for federal enforcement of the amendment became law on October 28, 1919.

The constitutionality of the Eighteenth Amendment was soon attacked in the courts. The situation was unique, for it was the first time that a constitutional amendment, presumably a part of the Constitution itself, had been attacked as unconstitutional. The case, *Rhode Island v. Palmer*, reached the Supreme Court in March 1920, where a large number of distinguished attorneys, among them Elihu Root, submitted briefs against the amendment.

The arguments offered against the amendment were extremely ramified; fundamentally, however, there were but two points at issue: First, counsel contended that the amendment had been illegally adopted. This point rested mainly upon the claim that the amendment had not been ratified by a valid two-thirds majority of both houses of Congress as required by the Constitution. The amendment had in fact passed each house by a two-thirds majority of those present, but counsel contended that the Constitution actually required passage by two-thirds of the total membership of each house. An additional count against the validity of ratification was the fact that Ohio had made ratification contingent upon a statewide referendum, whereas the Constitution specified that amendments must be ratified either by state legislatures or by conventions, as Congress might direct. This contention was extremely weak, as the amendment had been adopted by all but two states in the Union, and to reject Ohio's vote would have had no effect upon the required three-fourths majority of the states.

Also, counsel advanced the far more extravagant claim that the

very substance of the amendment was illegal and incapable of becoming a part of the Constitution. The Tenth Amendment, counsel argued, by specifically reserving the residual body of sovereign power to the states, had stated the very nature of the federal union, and was therefore unamendable, since the Constitution and the government it established would be destroyed were its substance altered. But the Eighteenth Amendment, they contended, constituted a radical invasion of the original police powers of the states in destruction of the Tenth Amendment, and thereby brought about a fundamental alteration in the distribution of powers between the states and the national government and a destruction of the original character of the Union, something that could not be done legally even by constitutional amendment. It was unconstitutional, counsel insisted, to use the process of amendment to destroy the very nature of the federal union.

This argument, though plausible was basically weak. Other amendments, notably the Thirteenth, Fourteenth, and Fifteenth, had altered the relations of the states and the national government. Moreover, neither the original Constitution nor the Tenth Amendment stated or implied any limits upon the amending power other than the provisions in Article V, which had prohibited any amendment altering the equal representation of a state in the Senate without its consent and which had also prohibited amendments abolishing the foreign slave trade before 1808.

Justice Van Devanter's opinion, handed down in June 1920, did not attempt analysis of any of these arguments; it merely dodged them. Without presenting any reasoning whatever to support his conclusions, Van Devanter said merely that passage of a constitutional amendment by two-thirds of a quorum in both houses was constitutional. He added that a state could not ratify by referendum, but that the amendment must nevertheless be considered as having been legally adopted and as being a valid part of the Constitution.

The Court, in short, displayed an apparent reluctance to be led into any discussion of the constitutionality of the amendment. This was undoubtedly a wise position, as an attempt by the Court to decide whether or not the substance of an amendment to the Constitution was valid would have gone far beyond any previously asserted right of judicial review. Such action would have implied that the Court could impose certain absolute limits upon the power of

the people to alter their form of government through constitutional processes and would have opened the way to judicial review of all subsequent constitutional amendments.

The adoption of the Eighteenth Amendment was nevertheless unfortunate from a standpoint of constitutional theory, for the amendment was founded upon a bad constitutional principle. Instead of delegating to Congress the power to regulate the manufacture, transportation, and sale of alcoholic liquor, the amendment made absolute prohibition mandatory, and thus stripped Congress of all discretion in the matter. The Constitution thereby became in this respect a statute book rather than a frame of government. Admittedly the Thirteenth, Fourteenth, and Fifteenth Amendments had also imposed outright prohibitions of a statutory character. However, there had been practically no chance that the nation would change its mind about slavery, civil rights, or the principles of manhood suffrage, whereas the liquor issue was highly controversial. The Eighteenth Amendment deprived Congress of the right to resort to something less than outright prohibition if it later became obvious that controls of a different variety were desirable. Unless, therefore, Congress willfully decided to disobey the Constitution or chose to ignore the subject altogether, it had no choice but to pass an absolute prohibition law. The only discretion left to Congress was the means of enforcement. Much grief could have been spared the nation if the amendment had given Congress the right to control the manufacture, transportation, and sale of alcoholic liquors, lodging the power of legislative discretion where it belonged—in the Congress.

THE NINETEENTH AMENDMENT

Like its predecessor, the Nineteenth Amendment was the end product of a century-long crusade, begun in the 1830's, in the days of Lucretia Mott and Margaret Fuller. Although the suffragettes were at first ridiculed, the drive to give women the vote gained strength after the Civil War. The suffrage movement was a reflection of the profound change that was taking place in the status of women in the social order. In the last half of the nineteenth century, women had won an improved legal status in marriage, in the business and professional world, and in higher education. It was natural that a demand for the franchise should accompany this change.

Wyoming Territory gave women the vote in 1869. Six years later the Supreme Court, in *Minor v. Happersett* (1875), ruled that the Fourteenth Amendment had not conferred the vote upon women. By the turn of the century, four states had given women full franchise privileges. Thereafter the movement scored rapid political successes. Many Progressives endorsed women's suffrage, and in 1912 Theodore Roosevelt as the candidate of the Progressive Party advocated a constitutional amendment granting women the vote. As a Republican presidential candidate Charles Evans Hughes adopted the same position in the 1916 campaign. By the latter date eleven states had given women the right to vote.

Women now had an appreciable vote in state and national elections, and politicians could no longer afford to be indifferent to the suffrage movement, which was rapidly attaining landslide proportions. President Wilson, who had a somewhat mid-Victorian conception of women's role in society, was personally hostile to the crusade. But with the United States at war, and with a great increase in the number of women engaged in business and industry, it became clear in 1918 that the state of public morale dictated the wisdom of a constitutional amendment. Wilson therefore went before Congress in September 1918 and asked for passage of a suffrage amendment. Several months of dramatic conflict ensued, during which suffragettes picketed the White House, staged hunger strikes, and rallied their congressional supporters with parades and mass meetings.

Congress passed the amendment on June 4, 1919. Tennessee was the thirty-sixth state to ratify the measure, and the amendment went into effect on August 26, 1920.

Many reformers were confident that women's entry into politics would have a strong cleansing effect upon statecraft. It had little or no effect of this kind. It was found that women had for the most part the same political virtues and failings as their menfolk and that they were divided along much the same party, class, and sectional lines. The amendment doubled the number of people entitled to vote, but the effect upon political processes was otherwise slight.

THE TWILIGHT OF LIBERAL NATIONALISM

There was a final expression of liberal national sentiment in the early postwar era. The war itself had emphasized national sov-

ereignty, and for the moment, also, the people had accepted strong federal controls over the economic system as a wartime necessity. The crusading spirit engendered by the war did not perish all at once, and there were certain evidences in the early postwar years of the old Progressive demand for national economic controls and federal reform legislation.

Congress, however, was without the strong executive leadership imposed by President Wilson earlier in his administration. Wilson, stricken dangerously ill in September 1919, was thereafter a broken man, incapable of asserting his former ascendancy over the legislature. For some months he was so completely incapacitated as to raise for the first time the serious question of the right of a Vice-President to assume office during a President's disability. The Constitution was silent on the question of how complete or how permanent the disability must be before the Vice-President was to assume power. It also said nothing of who was to decide the issues of fact involved. During Wilson's illness, Vice President Thomas Marshall made it clear that he did not care to accept the responsibility of assuming the office, and neither Congress nor the cabinet moved to confer its duties upon him. As a result, the nation was for some months virtually without a President. Secretary of State Robert Lansing settled certain current issues of policy by calling the cabinet together at intervals, an assumption of authority for which Wilson in indignation later forced his resignation.

Congress nonetheless enacted some important liberal national legislation between 1918 and 1921. The Transportation Act of 1920, enacted on February 28, 1920, was written altogether in the liberal national tradition. The law returned the railroads to private ownership and operation at the close of the war but at the same time confirmed in positive terms all the rate-setting powers of the Interstate Commerce Commission, which was now authorized to "initiate, modify, establish, or adjust rates," so that the carriers might earn a fair return under efficient management. The famous recapture clause authorized the Commission to recover one-half of all profits in excess of 6 per cent earned by any road. Recaptured earnings were to go into a revolving fund, out of which roads earning less than 4½ per cent were to receive additional compensation. The recapture provision went well beyond previous federal rail regulation, for it seriously modified the conception of the roads as private property.

There was but little objection in Congress to the passage of the statute, although a few members objected to recapture as a violation of due process. The notion of federal rail rate regulation was becoming firmly embedded in the political mind.

The liberal national tradition was also evident in the Packers and Livestock Act of August 15, 1921. The law was passed as a result of congressional inquiry into monopolistic conditions in meat packing, and it placed the meat packers' interstate business under strict federal control. Packers were forbidden to engage in "unfair, discriminatory, or deceptive practices in such commerce," or to attempt to establish a monopoly in business. The act also required all rates for handling livestock in the yards to be fair and nondiscriminatory. The Secretary of Agriculture was given authority to enforce the law through cease and desist orders, subject to appeal to the courts.

Although in 1918 the Supreme Court, in *Hammer v. Dagenhart*, had shown symptoms of a conservative reaction in invalidating the first child labor law, it nevertheless laid down a powerful statement of the doctrine of national supremacy in *Missouri v. Holland* (1920). This case involved the validity of the Migratory Bird Act of 1918 and ultimately the validity of a treaty of 1916 between Great Britain and the United States for the protection of migratory birds. In the treaty, the two powers had agreed to establish closed seasons on several species of birds migrating annually between Canada and the United States, and the statute had been enacted in pursuance of this agreement. The state of Missouri shortly attacked the constitutionality of the statute and eventually carried the case to the Supreme Court.

Counsel for Missouri contended that the subject matter of both treaty and statute went beyond the enumerated powers of the federal government, invaded the powers of the states, and violated the Tenth Amendment. They pointed to the Migratory Bird Act of 1913, a statute similar to the 1918 law except that it had not been enacted in pursuance of a treaty. A lower federal court had declared the earlier law void as beyond the powers of Congress. A treaty, they said, could not convey powers to the national government that it did not already possess by virtue of the powers of the Congress.

Justice Holmes, speaking for a majority of seven, rejected this

argument. The treaty power, he said, was broader than the enumerated powers of Congress. "Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States." He thought it "open to question whether the authority of the United States means more than the formal acts prescribed to make the convention." He then implied that there might be limits to the treaty-making power but that they could not be ascertained in the same manner as those controlling congressional legislative authority. Rather, he said, the treaty-making power must be construed in the light of America's development as a great nation, and it was not lightly to be assumed that the power was inadequate to meet a given contingency. "With regard to that, we may add," he continued, "that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience, and not merely in that of what was said a hundred years ago."

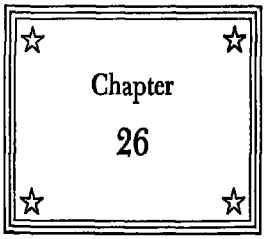
Justice Holmes concluded with a straightforward defense of national authority on the grounds of national welfare and national necessity. "Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with another power. . . . We see nothing in the Constitution that compels the government to sit by while a food supply is cut off and the protectors of our forests and of our crops are destroyed. It is not sufficient to rely upon the states. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act."

The theoretical implications of this decision were astounding. If a treaty could accomplish anything of a national character so long as its subject matter were plausibly related to the general welfare, what limits were there to federal authority, if exercised in pursuance of the treaty-making power? The decision, in fact, seemed to open a serious breach in the limited character of federal sovereignty.

The surprising concurrence of six other justices, including the conservative McReynolds, in the Holmes argument, is perhaps best explained by observing that the statute and treaty did not impair or damage the interests of any powerful vested right. The treaty in question did not touch upon the fundamentals of the social order, seriously involve the sanctity of private property, nor even work any very important practical change in the extent of federal power. The theoretical implications of the opinion were in fact not subsequently translated into reality. The national government has not since brought about any significant change in its authority through the treaty-making power.

THE END OF AN ERA

The liberal national spirit did not long survive in the postwar world. Symptoms of reaction were apparent even before the war ended. The Supreme Court, for example, had struck down the first child labor law in 1918, a good two years before Holmes wrote his opinion in *Missouri v. Holland*. America was rapidly entering upon a new era of postwar disillusionment, a period of material prosperity, fear of radicalism, and impatience with reform. A great revulsion against liberal nationalism was in the offing and was to find full expression after 1921.



Reaction and *Laissez Faire*

"AMERICA'S present need is not heroics but healing; not nostrums but normalcy; not revolution but restoration." These words, uttered by Warren G. Harding in 1920, sounded the keynote of the new era.

America was entering upon an era of reaction and conservatism. The nation had been crusading for a generation, and it was now morally and spiritually weary. Since Theodore Roosevelt's day, politicians and the public had been fighting for or against one reform after another. There had been successive battles over rail rates, trusts, meat packing, the white slave trade, child labor, the monetary system, and a variety of state and local reform movements. The United States had then intervened in the great European war, and Americans had marched off to battle with all the emotional fervor of the Crusaders. Now the high flame of patriotism and moral enthusiasm had burned down into the ash of disillusionment.

In 1919 the Senate rejected the Versailles Treaty, and there died forthwith the hope that the United States would participate actively in the peace and in a new world order. Thereafter the spirit of isolationism mounted steadily, fostered by a growing cynicism about European democracy, a nostalgic longing for the nineteenth

century, and a strong conviction that two great oceans had endowed America with an impregnable military security. Even before the war ended, a series of ugly conflicts had broken out between capital and labor, highlighted by a general strike in Seattle, the great steel strike of 1919, and the bloody Illinois coal wars of 1920–22. In 1919 a great Red scare began, inspired by Communist successes in Russia and central Europe. This fear was aggravated by the activities of a few bomb-throwing anarchists and of the Industrial Workers of the World, a small but lawless organization. The hysteria increased when, in the following year, 900,000 votes were polled by Eugene V. Debs, Socialist candidate for the presidency who was then in a federal penitentiary. In January 1919, Attorney-General A. Mitchell Palmer launched a gigantic two-year Red hunt, highlighted by mass arrests without benefit of habeas corpus, by hasty prosecutions, and by mass deportation of Communists and other radicals. Prohibition was a failure almost from the start, and in 1920 Americans began to hear of bootleggers, hooch, and home brew, and of the development of a sinister underworld of gangland conflict, erected on a foundation of misguided moral and constitutional reform.

Postwar prosperity also helped quench the last embers of reformist Progressivism. America was busy making money. After a brief economic recession in 1921, the United States entered an era of economic and industrial expansion unprecedented in all its booming history. National income, which in 1915 had been approximately thirty-five billion dollars, had risen by 1929 to more than eighty billions. Great new industries sprang up, pouring out a flood of goods and services on a scale formerly unknown. The production of durable consumption goods—a reliable index of the prosperity of the average man—increased 72 per cent between 1922 and 1929.

American political and constitutional philosophy in the twenties was formulated in direct response to the forces of reaction and prosperity. Most Americans now viewed reformers with suspicion and were inclined rather to listen with respect to the economic and political arguments of industrialists, financiers, and businessmen who had created the new deluge of wealth and material welfare. Business and industrial management asked above all that government refrain from disturbing the free play of creative individual initiative responsible for prosperity. Businessmen held that governmental con-

trols were bad because they interfered with natural economic laws. In theory, this constituted a demand for an economic policy of complete *laissez faire*. In fact, however, the business community sought not *laissez faire* but a minimum of restrictive legislation for management and a maximum of beneficent legislation for business enterprise. Thus the Republican high-tariff policy, which hardly comported with pure *laissez-faire* economic theory, was accepted as an integral part of American prosperity.

To some extent, all three departments of government shared in the task of translating the prevailing political and economic philosophy into state practice. In Congress there was a declining interest in reform legislation, reflected in the relative absence after 1921 of important new federal statutes regulating national economic life. President Calvin Coolidge, who often spoke the popular mind in the twenties, repeatedly attacked the doctrines of liberal nationalism. It was the Supreme Court, however, now generally regarded as the supreme arbiter of the constitutional system, that shouldered the task of translating dominant American political and economic beliefs into constitutional law. This fact gave the Court extraordinary prestige in the twenties, a prestige perhaps greater than it had ever enjoyed before. In 1924 President Coolidge expressed the prevailing attitude toward the Court when he called it the chief obstacle to the "deliberate and determined effort" then being made "to break down the guarantees of our fundamental law." The question, he added, "is whether America will allow itself to be degraded into a communistic and socialistic state, or whether it will remain American." The Court, he concluded, was the chief weapon in the patriot's battle to defend the American way of life.

It was in part historical accident, in part design, that caused the Supreme Court of the twenties to reflect so perfectly the prevailing political and economic milieu. Several of the judges appointed in the liberal national era emerged in the postwar period as the very embodiment of reactionary conservatism. Thus Justice James McReynolds, once Wilson's Attorney General, had originally fashioned a name for himself among liberals by the forthright character of his antitrust prosecutions; but after his appointment to the Court in 1914 he had gradually become more conservative and finally had emerged as a die-hard reactionary. Willis Van Devanter, a Taft appointee of 1910, had always been a somewhat unimaginative con-

servative except in matters that concerned Indian rights and conservation. Justice Joseph McKenna, a McKinley appointee of 1898, had once been a moderate liberal nationalist; now, however, he shifted with the times, and until his resignation in 1925 he supported generally if somewhat erratically the conservative majority.

These men were joined by several new appointees of conservative bent, named to the Court because the President understood and approved of their point of view. During his two and a half years in office, President Harding, who was completely in sympathy with his conservative Republican advisers, appointed four justices to the Court, all of whom were conservative property-minded lawyers. Ex-President William Howard Taft, undoubtedly the most able of the men appointed by Harding, was a staunch conservative who had always viewed the constitutional doctrines of liberal nationalism with some suspicion. In 1920, on the eve of his appointment as Chief Justice, he observed privately that it was of supreme importance to maintain the Court "as a bulwark to enforce the guarantee that no man shall be deprived of his property without due process of law." However, Taft was not an extreme reactionary. On occasion he seemed to recognize social reality, and he sometimes gave expression to a very genuine humanitarianism. George Sutherland, appointed in 1922, had been a conservative railroad lawyer and United States senator from Utah. Pierce Butler, a railroad attorney nominated the following year, was an extreme reactionary, blind to all the realities of social change. E. T. Sanford, appointed in 1923, had been a somewhat undistinguished federal district judge of southern Republican antecedents. Once on the Court, he assumed a consistently conservative position.

Two great jurists, Oliver Wendell Holmes and Louis D. Brandeis, were still present. The foundations of their legal and constitutional philosophy were decidedly different; yet the positions they adopted in actual cases before the Court were usually much the same. Brandeis, a progressive reformer and labor lawyer appointed by Wilson in 1916 over vigorous conservative protests, was not unwilling to write his liberal philosophy into his decisions. Father of the "Brandeis Brief," [1] he recognized and accepted the quasi-legislative capacity of the Court, and sought to make judicial decisions as liberal as possible. His opinions frequently were lengthy analyses of the eco-

[1] See p. 526.

nomic and social situation behind the case at hand. Holmes, on the contrary, was "essentially a skeptical conservative with a radical theory of judicial review." [2] Comparatively little interested in social reform as such, he nevertheless refused to believe it a function of the Court to write its brand of economics into the Constitution or to interfere with social experimentation. As a result he often aligned himself with Brandeis in voting to uphold state and national legislation condemned by the conservative majority.

Justice Harlan Fiske Stone, appointed by Coolidge in 1925 to replace McKenna, immediately became an important addition to the ranks of the minority. Stone was a New York corporation lawyer, a former dean of Columbia University Law School, and Coolidge's Attorney General, whose antecedents hardly suggested his subsequent liberalism. Soon after his appointment, however, he associated himself with Holmes and Brandeis in a series of dissents, and the notation "Holmes, Brandeis, and Stone dissenting" became a familiar one.

The conservative majority soon demonstrated its aptitude and enthusiasm for the task of translating contemporary political and economic ideas into constitutional law. It was not necessary for the Court to create constitutional theories out of whole cloth, for two important doctrines adaptable to the Court's immediate purpose already existed. These were, first, the doctrine of dual federalism and, second, the conception of substantive due process as a guarantee of private property rights.

THE REVIVAL OF DUAL FEDERALISM: THE SECOND CHILD LABOR CASE

The concept of dual federalism, a relic of Taney's time, had been in eclipse since the Civil War, although an occasional conservative justice had touched upon its thesis. This doctrine asserted that the Tenth Amendment had altered the nature of the American constitutional system, to abolish the unconditional supremacy of federal powers. Proponents of the doctrine held that the reserved powers of the states were inviolable, and could not be impaired or limited by the assertion of federal authority even under the powers specifically delegated to Congress under Article I, Section 8, of the

[2] This characterization is that of Professor Benjamin F. Wright, of Harvard University, in a note to the present authors.

Constitution. Thus federal sovereignty could never become an excuse for encroachment upon state functions, for within their sphere the states were also sovereign and inviolable. Nor could federal powers be reconstrued merely because new national problems, not originally foreseen by the constitutional fathers, had made their appearance. This argument had been advanced by Chief Justice Fuller in *United States v. E. C. Knight Co.* and had been reiterated forcefully by Fuller in his dissent in *Champion v. Ames*, when he had protested against the attempt to assert national authority in a field that had not long been recognized as lying within the federal province.

The revival, in the twenties, of the doctrine of dual federalism was occasional and sporadic rather than consistent. When it suited its purposes, the conservative majority on the Court still invoked the liberal national doctrines of national necessity, broad construction, and national supremacy. It then cited with approval the line of decisions originating in *Champion v. Ames*. On the other hand, when the Court was confronted with nationalistic legislation of a kind which was offensive to the prevailing conservative philosophy, the Court acted as though the nationalistic stream of precedents did not exist or was not relevant and cited instead those precedents imposing sharp limitations upon federal power. The Court seemed almost to have a split personality in the twenties; the same judges could without embarrassment enter upon a staunch championship of states' rights on one day and defend federal supremacy on the next.

A notable enunciation of dual federalism had occurred in *Hammer v. Dagenhart* (1918), in which the Court invalidated the Federal Child Labor Law of 1916. This statute, it will be recalled, had prohibited the movement of the products of child labor in interstate commerce.[3] Justice Day's opinion in that case had revived the old distinction between mere regulation and outright prohibition of commerce and had also condemned the law as illegal in purpose, on the grounds that it sought by subterfuge to invade the reserved powers of the states in violation of the Tenth Amendment.

Congress accordingly enacted the second Child Labor Act, which became law on February 24, 1919. This statute attempted to obviate the constitutional difficulties raised against the previous child

[3] See pp. 586–587.

labor law by employing the federal government's taxing power instead of interstate commerce as the basis for regulation. The law laid a tax of 10 per cent upon the net profits of any firm employing child labor. The term "child labor" was defined in the same terms as in the 1916 law.

There were good precedents for this attempt to use the taxing power as a regulatory device. It will be recalled that the Court had sustained a regulatory tax upon banknotes and a discriminatory tax upon oleomargarine. And in an opinion released in March 1919, six weeks after the passage of the second Child Labor Act, in *United States v. Doremus*, the Court sustained the Narcotics Act of 1914 imposing a license fee upon persons dealing in narcotic drugs, a fee or tax that yielded only a nominal revenue and that quite obviously was intended only as a constitutional device to make possible federal inspection and regulation of the narcotics trade.

In spite of these precedents, the Court in *Bailey v. Drexel Furniture Company* (1922) held the second Child Labor Law unconstitutional. Chief Justice Taft, speaking for the majority, held that there was a clear parallel between the present act and the first Child Labor Law: both were manifest attempts to regulate a matter reserved to the states. In the first act, the commerce power had been abused; in the second, the taxing power.

There was a difference, he said, between a tax and a penalty. In the first, the primary intent was the collection of revenue; in the second, the primary intent was regulation for some ulterior purpose. The present act was clearly of the latter character. Taft then distinguished the present law from earlier regulatory tax acts on the dubious grounds that the primary intent in former acts had been taxation; here, he said, the primary intent was regulation.

Taft's distinction between a tax and a penalty was a valid one, well recognized in constitutional law, but it neglected the fact that taxation as a regulatory device had long been recognized as constitutional. The various tariff statutes enacted from 1789 onward had obviously been regulatory in purpose, as had the taxes imposed upon state bank notes, oleomargarine, and narcotics. Taft was obliged to distinguish carefully between the present law and these precedents, for otherwise they would have destroyed his entire argument. Also, the contention that the present law was regulatory in intent made it necessary to inquire into congressional purpose and to invalidate

a law otherwise correct in form merely because the supposed legislative intent was subversive of the Constitution.

MAINTENANCE OF THE TRADITION OF NATIONAL SUPREMACY

In spite of the revival of dual federalism in the two child labor cases, the Court in most instances in the 1920's continued to accept the postulates of national supremacy and broad construction, especially where the statute in question was in accord with the justices' economic and social philosophy.

Thus in *Railroad Commission of Wisconsin v. C. B. and Q.* (1922) the Court unanimously sustained the Transportation Act of 1920, although the statute interfered seriously with the conception of the roads as private property and went unprecedentedly far in subjecting local rail traffic to federal regulation. Chief Justice Taft's opinion went well beyond the *Shreveport Rate Cases* in upholding intrastate regulation by the Interstate Commerce Commission. Reviewing a Commission order revising upward the Wisconsin intrastate rate structure, Taft said such regulation was valid, since it was the Commission's duty under the Transportation Act to secure to the roads a fair income. Were intrastate rates too low, the road would be obliged to charge excessive interstate rates to secure fair total income. Hence, when necessary, intrastate rates could be revised even when not in direct competition with interstate rates. The practical effect of the decision was to place all rail rates within the Commission's direct control, and virtually to obliterate the distinction between interstate rates and intrastate commerce as far as Commission control was concerned.

Two years later, in *Dayton–Goose Creek Railway Company v. United States* (1924), the Court upheld the recapture provisions of the Transportation Act. Taft, again speaking for a united Court, said that a carrier "was not entitled, as a constitutional right, to more than a fair operating income upon the value of its properties" devoted to transportation. The owner of a business "dedicated to the public service" must recognize, Taft said, that "he cannot expect either high or speculative dividends." Recapture was not confiscation, he added, because by law recaptured earnings had never been the road's property at all.

The spirit behind these two cases was very different from that

in the child labor opinions. A possible explanation is that railroads were, after all, "interstate commerce" in the narrowest possible construction of the term, and even conservative judges were willing to admit federal ascendancy in that sphere. Moreover, federal authority over the railroads was now so long established and so well recognized that the provisions embodied in the Transportation Act did little violence to the principles of conservative-minded men. The Court's function, in judicial eyes, might well be the protection of private property, but as Taft observed, a railroad was a public utility.

In *Stafford v. Wallace* (1922) the Court upheld the Packers and Stockyards Act of 1921. It will be recalled that this statute forbade unfair and discriminatory practices in interstate commerce, and also imposed certain controls upon commercial transactions at the stockyards. Basing his opinion upon *Swift and Co. v. United States*, Chief Justice Taft gave new emphasis to the stream of commerce doctrine. "The stockyards," he said, "are not a place of rest or final destination." They were "but a throat through which the current [of commerce] flows, and the transactions which occur therein are only incident to this current from the West to the East, and from one state to another." For the moment, the Court made little further use of the stream of commerce idea, but after 1937 the doctrine became the medium by which the Court escaped from the narrow transportation conception of interstate commerce and rationalized the federal control of production.

In *Brooks v. United States* (1925) the Court accepted the constitutionality of the National Motor Vehicle Theft Act of 1919. This statute forbade the movement of stolen automobiles in interstate commerce. It was clearly intended as a police measure, and like the first Child Labor Law, it laid an absolute prohibition upon the movement of things not in themselves harmful. Yet Chief Justice Taft's opinion, delivered for a unanimous Court, ignored the force of the child labor cases, and instead sustained the law with a brief reference to the pure food and drug and white slave cases as precedents.

Amusingly enough, the opinion actually stretched somewhat the meaning of interstate commerce, for it was open to some question whether or not the movement of stolen property by a thief was commerce in any real sense of the term. Actually, the law was an attempt to punish theft occurring before any movement took

place. However, Taft made it clear that he approved strongly of the moral purpose behind the law, and he emphasized the importance of the law in controlling automobile thievery. In short, the Court held the law to be constitutionally acceptable, in part at least because it regarded the objective of the law as socially desirable.

THE SHERMAN AND CLAYTON ACTS IN LABOR DISPUTES

The nationalistic conception of federal powers continued to show substantial vitality in a series of labor cases, where the Court used the Sherman and Clayton acts to protect employers from labor violence, secondary boycotts,[4] and similar practices which the Court interpreted as imposing unlawful restraints upon interstate commerce. The application of nationalistic constitutional doctrine in labor disputes had evident conservative implications for the protection of corporate property and vested right, and it is not surprising that the conservative majority on the Court sanctioned the continued resort to nationalism in this sphere.

As far back as 1908 the Court in *Loewe v. Lawlor* had ruled that secondary boycotts directed against an employer might constitute an unlawful interference with interstate commerce, and that persons resorting to such practices were liable under the Sherman Act. Resort to the Sherman Act to defeat labor union tactics had in turn inspired Congress to incorporate a number of provisions in the Clayton Anti-Trust Act of 1914 which were intended to protect labor unions from the limitations and penalties imposed in the federal antitrust laws. Thus Section 6 of the Clayton Act had provided that labor was "not a commodity or article of commerce," and that the antitrust laws should not be construed to forbid labor organizations as such nor their lawful pursuit of legitimate objectives. Section 20 had provided that "no restraining order or injunction shall be granted by any court of the United States . . . in any case between an employer and employees . . . unless necessary to prevent irreparable injury to property, or to a property right." This section also prohibited injunctions against peaceful persuasion of others to strike and injunctions against primary boycotts. All of these provi-

[4] A primary boycott is one in which a labor union attempts to induce its members and friends to sever business relations with an employer with whom the union has a dispute. A secondary boycott is one in which the union attempts to induce its members and friends to coerce third parties, not concerned with the labor dispute in question, to sever business relations with the offending employer.

sions were phrased somewhat vaguely and were somewhat general in character, and accordingly there remained some doubt as to the exact status of labor-union activities under the antitrust laws.

The Court did not pass upon the application of these provisions in the Clayton Act until 1921. Then, in *Duplex Printing Press Co. v. Deering* (1921), it held that certain labor-union practices might still constitute an illegal interference with interstate commerce and as such might be enjoined under the antitrust laws. The case involved a secondary boycott against an employer's product enforced in the New York area in order to win a strike against a factory in Michigan. Such a practice, said Justice Mahlon Pitney, had long been held to constitute an unlawful interference with interstate commerce. Section 6 of the Clayton Act, he pointed out, merely protected labor unions in "lawfully carrying out their legitimate objects"; since the secondary boycott was unlawful, it did not fall under the Clayton Act's protection.

Moreover, he held, the boycott was enjoinable under the antitrust laws, notwithstanding the provisions against labor injunctions in Section 20 of the Clayton Act. The restriction upon the right of injunction, said Pitney, must be construed very narrowly to apply only to the immediate parties concerned in the dispute—in this instance, to the men actually on strike. But the union calling the strike was not "substantially concerned" as an immediate party to the dispute, and its illegal boycotting activities in support of the strike were therefore enjoinable.

The practical effect of this opinion was to minimize the protections which the Clayton Act had thrown around labor unions in industrial disputes. "Unlawful" labor-union activity could still be enjoined and prosecuted under the antitrust laws. The anti-injunction provisions of the law had been gravely weakened, since the Court had ruled that a union conducting a strike was not an immediate party to the labor dispute in question and therefore was not entitled to the immunities of Section 20. Injunction proceedings and prosecutions against labor unions under the federal antitrust laws were thereafter fairly common throughout the 1920's.

In *Bedford Cut Stone Company v. Journeymen Stone Cutters' Association* (1927) the Court appeared to have forgotten completely the distinction between commerce and production laid down in *United States v. E. C. Knight Co.* In the Bedford case, the Court

reversed a lower court decree denying an injunction against a stonecutters' union which had instructed its locals not to work on stone which had been cut by non-union labor. Although the resultant refusal to work was directed against building enterprises, although the stone itself had ceased to move in interstate commerce, and although the "boycotts" complained of were conducted on a purely local scale, the Court nonetheless denounced the refusal to work as an interference with the stream of interstate commerce. Since interstate commerce was held to be directly affected, it followed that there was a violation of the antitrust laws. In other words, the Court was willing enough to recognize the effect of production upon interstate commerce when such recognition was necessary to protect a manufacturer against unreasonable interference by a labor union.

Thus, in the twenties there were two streams of constitutional thought upon the issue of national power. Sometimes the Court found itself in one, sometimes in the other. Its selection did not appear to be dictated so much by any logical constitutional principle as by the social and economic implications of the case at hand. When a nationalistic decision would serve the interests of conservative property rights the Court cheerfully cited precedents supporting the doctrines of national ascendancy. When a dual federalist decision appeared most appropriate, the Court cited *United States v. E. C. Knight Co.* and ignored the federal police power.

THE BUREAUCRATIC MONSTER

A contention frequently advanced by conservatives in the twenties was that the federal government was in some danger of becoming a gigantic bureaucratic monster which would swallow up the activities of states and private enterprise alike. This argument was generally reinforced by reference to the rapid growth of federal expenditures, a growth presumably indicative of a dangerous increase in federal regulatory activities. In 1925, for example, the proponents of this contention could point out that the federal budget now amounted to over $3,000,000,000, an increase of some 300 per cent over the budget of $760,000,000 for 1916. By 1930, federal expenditures had mounted to almost $3,500,000,000.

This contrast exaggerated to a considerable extent the actual increase in federal functional activities. During the twenties the decline in the purchasing value of the dollar had inflated the budgetary

figure. Calculated on the basis of the purchasing power of 1915 dollars, the federal budget in 1925 was but $1,791,000,000, and in 1930 just over $2,000,000,000. Moreover, nearly half the increase in federal expenditures of 1925 over 1915 went for non-functional purposes; that is, it was devoted to paying the interest and principal on the tremendous national debt incurred during World War I. Further, expenditures for national defense were now much greater than before the war, while expenditures for veterans' services had increased by more than 150 per cent.

The actual increase in federal functional expenditures, excluding monies expended for national defense, was a comparatively moderate one. In 1915, expenditures of this category had amounted to some 255 millions, while for 1925, if figured in 1915 dollars, they totalled 367 millions, and for 1930 some 513 millions, an increase of slightly more than 100 per cent in fifteen years.

This increase undoubtedly reflected a certain change in the functional character of the federal government. The government at Washington was becoming a huge service institution, performing countless informational, educational, and research activities for the general public and for special-interest groups. This type of activity had been increasing since 1900, and it continued to increase in the twenties, as private groups looked more and more to the federal government for various benevolent services which the separate states could not or would not undertake.

Thus, after 1920, there were significant increases in federal expenditures for services to business provided by the Department of Commerce, for federal conservation of natural resources, for direct aids to agriculture, and for grants-in-aid to the states for roads, maternity welfare, educational and vocational services, rural sanitation, and agricultural extension services. Services of this kind, once established, tended to expand rather than to contract. Not only were they convenient and useful to large numbers of citizens, but also they became vested interests of the bureaus which administered them and which worked for their continuance.

The constitutional basis for such services rested upon the federal power to spend money for the general welfare. The noncoercive character of most such services made it extremely difficult to bring their constitutionality before the courts, since they offered no opportunity to resist the assertion of federal authority. The old

Madisonian argument that Congress could not legally appropriate money for any purpose not within the enumerated powers of Congress was now seldom heard. Conservatives merely denounced the increase in federal services as contrary to the spirit of the American constitutional system without resting their position upon more precise legal grounds.

In spite of the prevailing spirit of *laissez-faire* conservatism, the twenties saw the creation of a few coercive and regulatory national agencies. Thus the Water Power Act of 1920 created a Federal Power Commission with authority to license and regulate power plants on the navigable streams of public lands. During the next decade, however, the board functioned so weakly that it was of little practical value or significance.

Radio broadcasting was another field into which the federal government extended its controls. Since 1912, radio transmission had been subject to extensive regulation and restriction, but the great growth of broadcasting after 1920 brought chaos to the ether and made additional controls imperative. The Radio Act of 1927 accordingly created a Federal Radio Commission, composed of five men appointed by the President for six-year terms. The commission was given extensive powers over radio transmission, including the right to classify radio stations, prescribe services, assign frequency bands, and regulate chain broadcasting. The act also gave the Secretary of Commerce a general right of inspection and regulation over radio operators and apparatus.

More controversial were the several attempts during the twenties to extend federal authority over agricultural production. American agriculture was in a chronic state of depression throughout the decade. Much additional land had been brought under cultivation during World War I, and following the contraction of demand after the War, agricultural prices had suffered a collapse from which they had not recovered. Chronic overproduction of the great agricultural staples kept prices low, while America's high-tariff policy diminished the possibility of expanding the foreign market to absorb the surplus. In 1927 Congress yielded to heavy pressure from agricultural interests and from western and southern congressmen and on February 25 enacted the McNary-Haugen Farm Bill. The measure provided for a series of equalization fees, to be paid by the growers of certain staple crops to a Federal Farm Board. The Board

was empowered to use this money to dump crop surpluses abroad, to buy and sell agricultural products, and to make crop loans to farm co-operatives. The bill was clearly opposed to the prevailing temper of constitutional conservatism, for it extended national regulatory authority over agricultural production and thus not only invaded a sphere of authority traditionally reserved to the states but also interfered extensively with private property rights.

President Coolidge sent the bill back to Congress with a stinging veto, denouncing it as economically and constitutionally unsound. Attorney General John Sargent's opinion stated that the bill went far beyond the federal power over interstate commerce in attempting to fix commodity prices, and that it unconstitutionally put the federal government into the buying and selling of agricultural commodities. He was also of the opinion that equalization fees were unconstitutional. If the fees were taxes, they were invalid by virtue of the decision in the second Child Labor Case, for their purpose was not to raise revenue but to give the federal government illegal control over production. If they were not taxes, the fees took property without due process of law. Further, he said, in permitting farmers to determine when controls should be put into effect, the bill delegated congressional legislative power to private individuals and was unconstitutional upon this ground also. The veto was a typical expression of the Coolidge attitude toward the scope of federal authority, and the country at large appeared to agree with him. In 1928 Coolidge vetoed a second McNary-Haugen bill framed in the same general terms, and Congress sustained the veto.

In 1929, Congress enacted the less ambitious Agricultural Marketing Act. This law set up an eight-man Federal Farm Board and gave it authority to administer a $500,000,000 revolving fund to assist in the more effective marketing of agricultural commodities. The board was authorized to recognize private stabilization corporations and to make loans to the latter for the purchase and storage of surplus agricultural commodities. This statute did not attempt to regulate agricultural production, and it lacked any coercive character. As a price stabilization measure it was a failure.

The proposed Child Labor Amendment, adopted by Congress on June 3, 1924, represented the only serious attempt of the era to expand congressional authority by formal constitutional processes. This measure would have empowered Congress to regulate or pro-

hibit child labor by appropriate legislation. However, the proposed amendment encountered general public indifference, while manufacturers' associations and certain religious groups also opposed it. By 1930, the amendment had secured ratification in but five states, while more than three-fourths of the states in the Union had rejected it. After 1933 a number of other states ratified the measure, but the proposed amendment never secured the ratification of three-fourths of the states necessary for its adoption.[5]

FEDERAL GRANTS-IN-AID

The grant-in-aid was the instrument through which the federal government extended many important social services in its new capacity as a service state. The grant-in-aid was an appropriation by the federal government to the states for some special purpose, certain stipulations being attached to the grant. These were, first, the formal acceptance of the grant by the legislature of any state accepting the grant; second, federal supervision and approval of state activities under the appropriation; third, state appropriation of a sum of money at least equal to that advanced by the federal government; and fourth, federal right to withhold the grant from any state violating the stipulated agreement.

Federal appropriations to the states were not altogether new. Notable early examples were the distribution of the federal surplus in 1837, various land grants, and the Morrill Act of 1862 granting federal lands to the states for agricultural colleges. Grants to the states increased in frequency after 1880, but before 1911 they lacked the provisions for systematic federal control characteristic of the modern grant-in-aid.

The Weeks Act, passed in 1911, established perhaps the first modern grant-in-aid. The statute appropriated money to the states for forest-fire prevention programs. A participating state was required to accept the grant by legislative act, to establish a satisfactory fire protection system of its own, and to appropriate to it a sum of money at least equal to the federal grant in prospect. State officials were to supervise the fire protection system, which was nonetheless sub-

[5] The amendment has now become unnecessary by virtue of the extension of federal controls over production and acceptance of such controls by the Supreme Court. Congress prohibited child labor in the Fair Labor Standards Act of 1938, since held constitutional by the Supreme Court. See pp. 759–761.

ject to federal inspection and approval. The total congressional appropriation in the Weeks Act was but $200,000, but the law was the prototype of all subsequent grants-in-aid.

Several similar statutes were enacted during the next few years. These included the Smith-Lever Act of 1914, providing for state-federal agricultural extension work; the Federal Road Act of 1916, appropriating money for state highway programs; and the Smith-Hughes Act of 1917, granting money to the states for vocational education. In 1920 Congress enacted the Fess-Kenyon Act appropriating money for disabled veteran rehabilitation by the states, and in 1921 it passed the Sheppard-Towner Act subsidizing state infant and maternity welfare activities. After 1921, no important grant acts were passed for several years, although the annual appropriations under existing statutes of this type were greatly increased. In 1925 grants-in-aid to the states totaled some ninety-three million dollars, compared with approximately eleven million dollars in 1915. Nearly all of the increase went to highway construction and educational projects.

The postwar conservative atmosphere gave rise to considerable hostility to the grant-in-aid, conservatives attacking it strongly as a threat to the essential nature of the federal system. Governor Frank O. Lowden of Illinois, for example, warned in 1921 that the grant-in-aid implied "the gradual breaking down of local self-government in America," and President Coolidge in his annual message of 1925 in speaking of grants to the states said that "local self-government is one of our most precious possessions. . . . It ought not to be infringed by assault or undermined by purchase." The real basis of objection to grants-in-aid was in all probability the fact that most federal revenues were collected in the wealthy, populous Northeast, while the distribution of grants was based upon both population and state area, so that the poorer South and West received a disproportionate return on federal funds. Moreover, grants-in-aid often went for so-called "social frills"—maternity welfare, vocational education, and the like—of which conservatives did not approve.

Opponents of the grant-in-aid based their constitutional objections upon two arguments. One, not very often raised after 1920, was the old Madisonian contention that federal funds could lawfully be spent only in connection with the enumerated powers of

Congress. More frequently advanced was the assertion that the grant-in-aid was a subtle method of extending federal power and undermining state sovereignty. The device, constitutional conservatives said, enabled the national government to usurp functions properly belonging to the states. To the rebuttal that state acceptance of a grant was voluntary, they replied that state co-operation was not really voluntary, since the financial penalty for non-co-operation was so great as to force the states to accept the federal offer. If a state refused to co-operate, they said, its citizens nevertheless had to pay taxes to support the grant, and the funds were then paid out to the participating states.

In 1923 the Supreme Court had occasion to review this argument in *Massachusetts v. Mellon*, in which the state of Massachusetts challenged the constitutionality of the Sheppard-Towner Maternity Aid Act. Justice George Sutherland's opinion dismissed the suit for want of jurisdiction, on the grounds that the suit did not in reality arise between a state and citizens of another state. Instead, said Sutherland, it was an attempt on the part of the state to act as a representative of its citizens against the national government. "It cannot be conceded that a state, as parens patriae, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof." The Court also denied its jurisdiction on the ground that the constitutional issue raised by the state was a "political question," since the state was in effect asserting that Congress had invaded the realm of state power.

Though the Court thus denied its jurisdiction, Sutherland's opinion contained much obiter dicta implying that grants-in-aid were not coercive and were constitutional. "Probably it would be sufficient to point out," he said, "that the powers of the state are not invaded, since the statute imposes no obligation, but simply extends an option which the state is free to accept or reject." The statute did not "require the states to do or yield anything. If Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple expedient of not yielding."

While the Court thus impliedly sanctioned the constitutionality of the grant-in-aid, public opinion of the day was such that for some years after 1921 grants were not extended into any important new field. Yet undeniably the grant-in-aid held potentialities for a

large expansion of federal activities in fields ordinarily reserved to the states. After 1933, the number of grants-in-aid greatly increased and came to play an important part in the rise of a "new federalism."

THE APOGEE OF DUE PROCESS OF LAW

As with dual federalism, substantive due process reflected adequately the prevailing economic and social philosophy of the 1920's. Substantive due process, as the reader will recall, was a modern application of the doctrine of limited government, asserting the supremacy of natural law and natural right. In theory the conception of limited government had not altered since its formulation in the eighteenth century. Actually, however, it had altered subtly, with the introduction of an additional body of natural law, now regarded as supreme and fundamental. The new natural law was the law of *laissez-faire* economics.

The tendency to associate *laissez-faire* economics with natural right, and in turn with due process of law, had been evident since the evolution of substantive due process. In the twenties, however, the association between the two ripened into a firm alliance, as the Court gave the doctrine broader scope and freer application than ever before. According to Professor Benjamin Wright, the Court under Chief Justice Taft (1921–30) invalidated state legislation in 141 cases, almost two-thirds of which involved the Fourteenth Amendment and due process. By contrast, between 1899 and 1921, the Court had vetoed state legislation in 194 cases, only about 90 of which involved the Fourteenth Amendment.[6] It thus appears that the Court invoked due process of law to invalidate state legislation more than half again as frequently after 1921 as it had in the previous twenty-two years. Although the volume of cases was greater in the twenties, the Court was undoubtedly now much more willing to invoke due process against objectionable state legislation than it had been in the prior two decades. Some of the legislation struck down in the twenties would before 1920 undoubtedly have been accepted as constitutional.

Significant, also, was the frank manner in which the Court on occasion now scrutinized the social and economic postulates underlying both state and federal legislation. This does not mean that the

[6] Benjamin F. Wright, *The Growth of American Constitutional Law* (New York, 1942), p. 113.

justices accepted legislation only when they approved of its social objectives. On the contrary, most legislation continued to be accepted as constitutional regardless of its social implications. But a statute seriously violating conservative *laissez-faire* social postulates was unquestionably examined more sharply than one which did not, and there was a greater likelihood that a "socially unsound" law would be declared void.

In a substantial proportion of the due process cases that came before the Court in this period, the statute in question fell foul of "liberty of contract." Such legislation frequently dealt with hours, wages, and working conditions of labor. Hence by its very nature it contained restrictions on free contract and could be found constitutional or unconstitutional as the judges believed it to be reasonable or not. Since interference with free contract usually also imposed certain limitations upon the use of property, the rights involved in freedom of contract merged to all intents and purposes with other property rights guaranteed by due process of law.

Adkins v. Children's Hospital (1923) illustrates the manner in which freedom of contract was now applied to strike down social legislation. Here the Court was concerned with the constitutionality of a District of Columbia minimum wage law, enacted by Congress in 1918. The statute had established a District Wage Board, with discretionary power to fix minimum wages for women and children in the District of Columbia.

In a 5-to-3 opinion, the Court declared this statute void as a violation of due process and the Fifth Amendment. Justice Sutherland, speaking for the majority, gave unprecedented scope to the doctrine of free contract. While he admitted that "there is, of course, no such thing as absolute freedom of contract," such freedom was "nevertheless, the general rule and restraint the exception. . . ." There were, he said, but four general categories of permissible restraint on free contract: (1) statutes fixing rates in businesses affected with a public interest; (2) statutes relating to contracts for public works; (3) statutes prescribing the character, methods, and time of wage payments; and (4) statutes fixing hours of labor. Since minimum wage legislation did not fall within any of the prescribed categories, it was unconstitutional.

Justice Sutherland then cited *Lochner v. New York*, the ten-hour bakeshop case, as direct precedent for holding the present law void.

He was obliged to distinguish it from more recent cases in which the Court had accepted the constitutionality of statutes fixing hours of labor. In *Muller v. Oregon* (1908) the Court had validated a ten-hour law for women, and in *Bunting v. Oregon* (1917) the Court had presumably overruled *Lochner v. New York* entirely by accepting a statute imposing maximum hours of labor for both men and women. Sutherland rejected the two Oregon decisions as precedents on the ground that they dealt with hours of labor and not minimum wages. Why he could nonetheless cite *Lochner v. New York*, also an hours-of-labor case, as direct precedent, was not clear. He implied, however, that the Nineteenth Amendment granting the suffrage to women had destroyed the constitutional basis for special class legislation for women, since laws of this kind had rested upon the now discarded myth of "the ancient inequality of the sexes."

Sutherland then made a lengthy attack upon all minimum wage legislation as economically and socially unsound. It could not be demonstrated, he said, that such legislation actually raised wages, or that higher-paid women "safeguard their morals any more carefully than those who are poorly paid." Minimum wage laws also ignored the rights of the employer, leaving him "the privilege of abandoning his business as an alternative for going on at a loss." The good of society, he concluded, "cannot be better served than by the preservation against arbitrary restraints of the liberties of its constituent members."

Taft and Holmes in separate dissenting opinions both attacked the manifest legislative character of the majority opinion. Taft protested that "it is not the function of this Court to hold congressional acts invalid simply because they are passed to carry out economic views which the court believes to be unwise or unsound." Holmes added that "the criterion of constitutionality is not whether we believe the law to be for the public good." Both also attacked Sutherland's resort to *Lochner v. New York* as a precedent for the present decision, Taft asserting that it was impossible for him to reconcile the Bunting and Lochner cases. Both dissenting justices thought that there was no adequate constitutional distinction between regulating hours and regulating wages. Both justices also attacked Sutherland's implication that the Nineteenth Amendment had altered the constitutional status of class legislation for women. "It will take

more than the 19th Amendment," said Holmes, "to convince me that there are no differences between men and women and that legislation cannot take those differences into account."

Adkins v. Children's Hospital became the classic expression of the identification of *laissez-faire* economics with constitutional right. During the next few years the case was repeatedly cited as ample precedent for a broad interpretation of the scope of free contract. Under the precedent, several state minimum wage laws became inoperative on the plausible assumption that the Fourteenth Amendment imposed restraints upon the police power of the several states similar to those imposed by the Fifth Amendment upon the federal government. The decision served, too, as a general deterrent to state legislatures considering restrictive social legislation; for it was evident that laws of this variety could not now pass the Court's scrutiny, unless they clearly fell within one of the four criteria within which, according to Sutherland, limitation of the right of contract was constitutional.

DUE PROCESS AND STATE POLICE LEGISLATION

The Court's *laissez-faire* conservatism was evident also in a series of cases in which it invalidated state police statutes imposing "arbitrary" or "unreasonable" restrictions upon private property or business enterprise. In *Pennsylvania Coal Co. v. Mahon* (1922) the Court held void a Pennsylvania statute forbidding the mining of coal in such a way as to damage surface habitations. Justice Holmes' opinion held that the statute impaired the value of property in mines and so violated due process of law. In *Jay Burns Baking Co. v. Bryan* (1924) the Court struck down a Nebraska statute fixing standard weights for bread. The evident purpose of the law was to minimize fraud. But Justice Butler, speaking for the majority, said that practical conditions would make it difficult to comply with the statute, and that it imposed an "intolerable burden" upon bakers. The statute was therefore arbitrary, unreasonable, and a violation of due process. And in *Weaver v. Palmer Bros. Co.* (1926) the Court refused to accept a Pennsylvania statute prohibiting the use of shoddy in the manufacture of mattresses. Since shoddy could be effectively disinfected, Justice Butler argued that the law bore no reasonable relationship to the protection of public health; the statute was therefore "purely arbitrary" and in violation of due process.

The Court also employed the due process clause to protect business in its labor difficulties. Thus in *Truax v. Corrigan* (1921) the Court declared unconstitutional an Arizona statute forbidding state courts to grant injunctions against picketing. Chief Justice Taft said the statute violated due process by protecting palpable wrongful injuries to property rights. Moreover, since it singled out certain types of property (that involved in labor disputes) for exposure to wrongful injury, the law violated the equal protection clause of the Fourteenth Amendment. It is of some interest to observe that within a generation after this the Court was to hold that the right to engage in peaceful picketing was guaranteed by the Fourteenth Amendment.

In due process cases involving state police powers there was a strong disposition on the part of Justices Holmes and Brandeis and, after 1926, Justice Stone, to attack the Court for using due process to implement its *laissez-faire* conservatism. In *Truax v. Corrigan*, for example, Holmes protested that "there is nothing that I more deprecate than the use of the 14th Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect." In *Jay Burns Baking Co. v. Bryan* Brandeis declared flatly that the decision was "in my opinion, an exercise of the powers of a superlegislature,—not the performance of the constitutional function of judicial review." However, Brandeis and Holmes themselves on occasion subscribed to the practice they criticized so severely—particularly where the statute in question was offensive to their own social predilections.

DUE PROCESS AND CIVIL RIGHTS IN THE TWENTIES

The Court's concern for individualism extended not merely to the protection of property rights, but to a defense of personal liberty and freedom as well. In *Meyer v. Nebraska* (1923), for example, the Court held void a Nebraska statute prohibiting the teaching of modern foreign languages to children in the first eight grades. The liberty guaranteed by the Fourteenth Amendment, said Justice McReynolds, included the right to bring up one's children according to the dictates of individual conscience. The statute there-

fore invaded liberty in violation of due process. In the same vein the Court in *Pierce v. Society of Sisters* (1925) refused to accept as constitutional an Oregon statute requiring children between the ages of eight and sixteen to attend public school. Justice McReynolds said the law destroyed property rights in private schools and also violated the right of parents to raise their children as they saw fit.

In a series of cases of the greatest significance for individual rights, the Court, beginning in 1925, extended the meaning of the Fourteenth Amendment to include guarantees of free speech and freedom of the press. This in effect caused the First Amendment to become a limitation upon the several states, although formerly the Amendment had limited only the federal government. This process could conceivably be carried to the point where the entire federal bill of rights in the first eight amendments would become identified with the Fourteenth Amendment and so act as a limitation upon the states as well as the federal government.

The Court took its first step in this direction in *Gitlow v. New York* (1925). The case involved the validity of a New York statute defining and punishing criminal anarchy, commonly defined as "the doctrine that organized government should be overthrown by force or violence." The statute made it a felony to advocate such a doctrine by word of mouth or written or printed matter.

The statute evidently imposed certain restrictions upon freedom of speech and of the press. There was no specific provision in the federal constitution which had hitherto been interpreted as obligating the several states not to infringe freedom of speech and freedom of the press. But Justice Edward T. Sanford now proceeded to state specifically that the guarantees of the First Amendment were included within the broader scope of the Fourteenth. "We may and do assume," he said, "that freedom of speech and of the press—which are protected by the 1st Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the 14th Amendment from impairment by the states." In other words, the First Amendment would hereafter bind the states as well as the federal government. However, Justice Sanford found no difficulty in accepting the statute under review as constitutional, since it merely punished advocacy of behavior "inherently unlawful" under a constitutional

government, and the Court thought such a limitation upon freedom of speech a valid one.

Other cases followed confirming the new association between due process and the guarantees of the First Amendment. In *Whitney v. California* (1927) the Court upheld the constitutionality of a California statute defining and punishing criminal syndicalism—the advocacy of crime, sabotage, or terrorism as a means of accomplishing a political change or a change in industrial ownership. While Justice Sanford did not specifically mention the First Amendment in his opinion, he assumed that the Fourteenth Amendment extended a constitutional guarantee of freedom of speech as against state interference. But the statute in question, he held, was constitutional, since the essence of the offense denounced by the act partook of the nature of a criminal conspiracy, an activity outside the protection of free speech.

In *Stromberg v. California* (1931), the Court declared invalid a California statute prohibiting the display of the red flag as an emblem of anarchism or of opposition to organized government. "It has been determined," said Chief Justice Charles Evans Hughes, "that the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech." The statute in question, he held, was worded so broadly as conceivably to impose penalties upon peaceful and orderly opposition to government. It therefore violated due process of law.

And finally, at the same session the Court in *Near v. Minnesota* (1931) held unconstitutional a Minnesota statute providing for the suppression of any malicious, scandalous, or defamatory newspaper. Pointing out that the statute went well beyond existing standards of responsibility under libel laws, Chief Justice Hughes said the measure violated freedom of the press and hence the due process clause of the Fourteenth Amendment.

The new identity between the guarantees of due process in the Fourteenth Amendment and the guarantees of the first eight amendments was strengthened substantially in *Powell v. Alabama* (1932). This case involved an appeal from the Alabama courts on a conviction for rape, in which the petitioners claimed that they had been denied right of access to counsel both before and during the trial. Justice Sutherland, speaking for a majority of seven justices, pointed

out that the Sixth Amendment provided that in all criminal prosecutions, the accused shall enjoy the right of counsel, and he then went on to hold that failure of the Alabama trial court to give the defendants "reasonable time and opportunity to secure counsel was a clear denial of due process" as guaranteed by the Fourteenth Amendment.

This finding was in apparent contradiction to that in *Hurtado v. California* (1884), where the Court had specifically refused to identify due process as guaranteed by the Fourteenth Amendment with the full content of the Fifth Amendment, which included the requirement of indictment by a grand jury in all capital cases. Following the rule of construction that no part of the Constitution may be treated as superfluous, the Court in the Hurtado case had held that the guarantee of a grand jury must therefore not be included in the content of due process; otherwise the Fifth Amendment would not have extended the two guarantees separately. Obviously, by the same rule, none of the other guarantees of the first eight amendments would fall within the scope of the due process clause of the Fourteenth Amendment. While Sutherland did not specifically overrule *Hurtado v. California*, the authority of this precedent was for the time seriously impaired.

By 1932, therefore, the Court was embarked on an extension of the federal bill of rights as a limitation on state police power by incorporating certain of the first eight amendments in due process of law. How far this process might go in the future was as yet uncertain.[1]

DUE PROCESS AND THE CONCEPT OF PUBLIC INTEREST

It will be recalled that in *Adkins v. Children's Hospital*, Justice Sutherland had established four criteria for testing the constitutional validity of social controls, one being that of businesses affected with a public interest. The doctrine that a business affected with a public interest was subject to public regulation had first been formulated in *Munn v. Illinois* in 1877. In rendering that opinion, Chief Justice Morrison R. Waite had borrowed the idea of "public interest" from Lord Hale's seventeenth-century treatise *De Portibus Maris*.

Waite had refused to state categorically what constituted a "pub-

[1] For a discussion of more recent civil liberties cases see Chapter 29.

lic interest," but by his emphasis upon the monopolistic nature of the grain elevator business he had implied that public interest was an attribute associated with any inherently monopolistic enterprise. In *Budd v. New York* (1892) the Court had hinted at the importance of a "practical" as opposed to a legal monopoly in endowing a business with a public interest. On the other hand, in *Brass v. Stoeser* (1894) the Court had accepted regulation of a business where no legal or practical monopoly existed. Then finally, in a notable 1914 decision, *German Alliance Insurance Company v. Kansas*, the Court had directly rejected the monopoly conception of public interest. Justice McKenna had stated merely that there must be a "broad and definite public interest," and he had refused to restrict the conception further.

A constitutional doctrine so amorphous was clearly susceptible to further development. Although "public interest" had originally been called up as a justification for public regulation, it could easily become precisely the opposite—a reason for denying the right of regulation because public interest was not present. All that was necessary was a sufficient restriction of the scope of public interest, so that the Court could deny its applicability to any particular business brought under judicial survey.

The first evidence of such a development appeared in *Block v. Hirsch* (1919), in which the Court passed upon a congressional statute imposing emergency rent regulation upon wartime Washington. The majority justices, speaking through Justice Holmes, held that wartime rented property was vested with a vital public interest, and thus was subject to regulation. But McKenna, Van Devanter, and McReynolds, in a bitter dissent, denied that rentals were any matter of public concern and condemned the majority opinion as paving the way for socialism and the complete destruction of private property rights.

In *Wolff Packing Company v. Court of Industrial Relations* (1923) the Court returned to a narrow monopoly conception of public interest. Here the Court held invalid a Kansas statute declaring the food, clothing, fuel, transportation, and public utility businesses to be affected with a public interest, and vesting a three-man commission with the authority to settle wage disputes in these industries by fixing wages and other terms of employment. Speaking for a unanimous Court, Chief Justice Taft said the state could

not endow a business with public interest merely by a declaration that public interest existed. There were, he said, but three types of businesses affected with a public interest. First, there were those "carried on under authority of some public grant," which "expressly or impliedly imposes the affirmative duty of rendering a public service"—in short, public utilities. Second, there were certain occupations traditionally recognized as vested with a public interest, such as "keepers of inns, cabs, and grist-mills." And third, there were those businesses which "though not public at their inception, may fairly be said to have risen to be such, and have become subject in consequence to some government regulation."

Taft then went on to revive the public-utility-monopoly conception as the distinguishing characteristic of public interest. He admitted that in one sense all businesses were affected with a public interest, but added that in the legal sense the criterion was "the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation." Regulation of businesses not possessing this attribute was a violation of freedom of contract and of due process of law.

This conception of public interest constituted a return to the theory of *laissez-faire* economics in public regulation. It made a minor concession to the historical development of public regulation by admitting that certain unimportant businesses were traditionally vested with public interest. But for the rest it held that public regulation was justified only for chartered public utilities—that is, businesses in which the controls of natural economic law could not operate. The full social implications of Taft's opinion in the Wolff case became evident during the next decade, when the Court was to declare unconstitutional a series of state measures enacted to impose social controls upon a variety of private businesses.

Holmes and Brandeis remained silent in the Wolff case, but in *Tyson and Bros. v. Banton* (1927) they entered a powerful dissent against the majority justices' conception of public interest. In this case, the Court reviewed a New York statute declaring theater prices to be a matter affected with a public interest and regulating resale ticket prices. Sutherland, speaking for the Court, cited the three restrictive categories set forth in the Wolff case, pointed out that the theater business did not fall within any of them, and so held the law unconstitutional as a violation of free contract.

In a sharp dissent, Holmes attacked the doctrine of public interest as a conception now being invoked to destroy rather than to justify social controls. "I think," he said, "the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States, or of the State." The concept of public interest he considered to be a purely artificial one, "little more than a fiction intended to beautify what is disagreeable to the sufferers." Brandeis concurred in this opinion, while Stone wrote a separate dissent demonstrating how far the Court had now progressed in destroying the various criteria of social controls formerly accepted as valid. In substance, the minority justices were all virtually demanding that the entire conception of public interest be abandoned and replaced by a recognition of the general right of any state legislature to regulate private business whenever it thought the public welfare demanded it.

In *Ribnik v. McBride* (1928), the Court held unconstitutional a New Jersey statute licensing employment agencies and empowering a state commissioner of labor to refuse a license if the proposed schedule of fees were excessive. "An employment agency," Justice Sutherland said, "is essentially a private business." The Court, he observed, had already established that "the fixing of prices for food or clothing, or house rental or of wages to be paid, whether maximum or minimum" was beyond the legislative power, and he perceived "no reason for applying a different rule" to the regulation of employment agency fees.

In the same vein, the Court in *Williams v. Standard Oil Co.* (1929) invalidated a Tennessee statute authorizing a state commissioner of finance to fix gasoline prices within the state. Again Sutherland said simply that there was no power to fix prices unless the business was vested with a public interest, and in the present instance public interest was not present.

In *New State Ice Co. v. Liebmann* (1932) the Court went beyond the two foregoing cases to strike down an Oklahoma statute declaring the manufacture and sale of ice to be affected with a public interest and making a state license a prerequisite for engaging in the business. No issue of price fixing was involved here; however, the state was empowered by the law to withhold a license if the applicant could not show public necessity for his services. The

Court held the law unconstitutional on the ground that no public interest was present, and that in its absence restrictive licensing violated due process.

Not until *Nebbia v. New York* (1934) was the doctrine advanced in the theater ticket, employment agency, ice, and gasoline cases to be overturned and the entire conception of public interest as a judicial guidepost virtually abandoned. By 1930 the progressive expansion of due process and the concomitant shrinkage in the area of "public interest" had imposed unprecedented limitations upon state police power. Had this trend continued, there would before long have been little left of the former well-recognized right of the states to impose regulations upon private property in the interest of the public welfare. The identity between *laissez-faire* social philosophy and the prevailing interpretation of due process was very nearly complete. However, the economic cataclysm of the 1930's was to sweep away this tendency completely and replace it with a broad acceptance of state social legislation.

THE EXECUTIVE IN THE TWENTIES

Liberal nationalism had called for strong executive leadership; reaction now called for a passive presidency. Presidential leadership of the variety begun by Roosevelt and Wilson almost disappeared in the twenties. Harding, an ex-Senator, was nearly always willing to accept congressional leadership in legislation. Coolidge was less tractable; yet he had no positive program and offered Congress little leadership during his six years in office. He quarreled with Congress over taxation, the bonus, and agricultural relief, but in the end Congress usually had its way. In the swift years of economic decay after 1929, Hoover, too, was able to assert but little control over Congress. The Wilsonian conception of presidential leadership was thus largely discarded between 1921 and 1933.

It was during the Coolidge administration that the Supreme Court in *Myers v. United States* (1926) confirmed the existence of a separate presidential removal power. Frank Myers was a postmaster appointed by President Wilson in 1917, under the provisions of an act of 1876 providing that postmasters should hold office for four years unless sooner removed by the President with the consent of the Senate. President Wilson removed Myers from office in 1920 without asking the Senate's consent. Myers then sued in the Court

of Claims to recover his salary, on the ground that his removal was in violation of law, and therefore invalid. He lost this suit, and then appealed to the Supreme Court.

In a lengthy and detailed opinion, Chief Justice Taft denied the appeal and confirmed the removal. Taft rested his analysis principally upon the decision reached by the First Congress in 1789, when after long debate the Congress had voted to make the Secretary of State removable without the consent of the Senate. Congress had presumably thereby recognized a right of removal separate and independent from the appointive power, and not subject to legislative control. Taft now leaned heavily upon the argument advanced by Madison in the congressional debate of 1789 and again by Jackson in his fight with the Senate in 1833, that the President was charged with the faithful execution of the laws, and hence must be able to control his subordinates through removal if necessary.

Taft also cited with approval the contention advanced by Hamilton in his essay *Pacificus*, published in 1793, that the enumeration of executive powers, unlike that of congressional powers, was not restrictive, was intended for emphasis only, and did not exclude other prerogatives inherent in the executive. Legislative control of the executive, Taft held, ought always to be construed narrowly; to do otherwise was to violate the principle of the separation of powers. In other words, the President's removal power was an inherent part of executive prerogative, apart from any authority specifically delegated to him by the Constitution, and as such it could not be controlled or restricted by Congress, except where the Constitution specifically so provided.

Taft then dealt with the contention that the President's separate removal power extended only to cabinet officers and not to minor executive officers. Admittedly the congressional debate of 1789 had been concerned only with a cabinet officer. Moreover, the Constitution, in Article II, Section 2, provided that "Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of law, or in the Heads of Departments." In *United States v. Perkins* (1896), Taft recalled, the Supreme Court had held that this provision gave Congress the power to control the removal of inferior officers by heads of departments, in those instances where Congress had lodged the appointment in question with a department head. But, said Taft, when

Congress left the appointment vested in the President, it could not then arbitrarily arrogate to itself or others the executive's power over removals.

Taft's argument was an impressive one, but it was open to serious objections. Admittedly, the President must control higher policy-making officers of a political character, since they are his immediate agents in the formation of policy and the execution of law. But Taft's reasoning carried this proposition further and strained the precedent of 1789. The decision of 1789 had been attained by an exceedingly narrow majority, the casting vote of the Vice-President having been necessary to break a tie in the Senate. Furthermore, many members of both houses who had voted in 1789 to grant the removal power to the President apparently thought that Congress had merely decided to bestow a separate removal power in this instance by specific congressional action, and that it could lodge the removal power in the President or elsewhere any time it saw fit to do so. Taft also exaggerated when he asserted that Justice Joseph Story, Daniel Webster, Chancellor James Kent, and other statesmen had accepted the decision of 1789 as a permanent one. Apparently Story had disagreed upon principle with the decision, and had believed that Congress could revoke it at any time simply by legislating for removals.

A more important objection to Taft's argument, however, was that the 1789 decision was concerned with cabinet officials and not with inferior officers. As already observed, Article II, Section 2, of the Constitution provided that Congress may lodge the appointment of inferior officers in the President, heads of departments, or in the judiciary. Congress here has a specific grant of power to vest inferior appointments where it will. As Justice McReynolds and Brandeis pointed out in separate dissenting opinions, Congress had many times exercised the right to vest inferior appointments in the President or in cabinet officers, and had at the same time fixed the conditions of removal, frequently including a requirement for senatorial consent. Thus the appointment and removal of inferior officers had by long custom been closely associated, and it seemed unreasonable to assert that such precedent could be overridden merely by asserting that the President had a vague inherent prerogative superior to any specific authority granted to Congress.

The implications of the Myers decision were theoretically seri-

ous, but they were not realized to any extent in practice. It could be contended that as a result of Taft's argument, civil service legislation that guaranteed the tenure of inferior executive officials was unconstitutional, and that minor federal employees could be removed by the President at will without the consent of the Senate. In fact, however, no one attacked the civil service system of tenure as illegal. A further implication of the Myers decision was that the members of independent federal commissions were now subject to removal by the President at will, even though in most instances the conditions for their removal had been stipulated by Congress. However, in 1935, in *Humphrey's Executor v. United States*, the Court was to refute this idea.

FEDERAL ADMINISTRATIVE COMMISSIONS IN THE TWENTIES

The postwar reaction seriously damaged the prestige of federal administrative commissions. The Interstate Commerce Commission and the Federal Trade Commission, in particular, had been established in order to effect direct discretionary controls over certain phases of business activity. Public opinion in the postwar era, however, was sharply out of sympathy with the functions and methods of such boards.

After 1920 the Federal Trade Commission suffered a serious loss of authority through a series of unfavorable court decisions. It was the Supreme Court's unwillingness to grant the Commission broad administrative discretion and the Court's insistence upon "broad review" that did the most damage. The Federal Trade Commission Act of 1914 had attempted to vest broad discretionary authority in the Commission, which was empowered to define unfair trade practices in accordance with what it believed to be the public interest. The Commission's findings of fact were to be accepted prima facie by the court of review if supported by evidence; presumably a finding that a particular practice was unfair was such a finding of fact. This definition of the Commission's powers in relation to the courts followed closely the pattern for the Interstate Commerce Commission established in the Hepburn Act. It will be recalled that the Supreme Court in interpreting the Hepburn Act had followed a self-imposed policy of narrow review in appeals from the Commission's decisions, and there was therefore some reason to believe that it would now treat the Federal Trade Commis-

sion's decisions in the same manner. Instead, the Court, in a series of decisions after 1920, not only reserved to itself the right to define what constituted an unfair trade practice, but it also gravely impaired the Commission's capacity as a fact-finding body. The result virtually destroyed the Commission's usefulness as an administrative agency.

The significant opinion outlining the Court's attitude came in *Federal Trade Commission v. Gratz* (1920). The Commission had found the practice, engaged in by certain manufacturers of cotton ties, of refusing to sell their product unless the purchaser also agreed to buy specified amounts of cotton bagging, to be an unfair trade practice and had issued to the respondent firms an order to cease and desist. The United States Circuit Court of Appeals had reversed the ruling, whereupon the Commission had appealed to the Supreme Court.

Justice McReynolds' majority opinion began by stating that "the words 'unfair method of competition' are not defined by the statute, and their exact meaning is in dispute." He added that "it is for the courts, not the Commission ultimately to determine, as a matter of law, what they include." Thus, although the law specifically gave the Commission the right to define unfair trade practices and gave the findings of facts supporting such a ruling a prima facie validity, McReynolds stated that since the Court had final power to interpret the law it also had final power to decide what constituted an unfair trade practice. McReynolds then proceeded to overrule the Commission's finding of an unfair trade practice in the present case, on the ground that the practice involved was not actually a harmful one. The decision had the effect of destroying the Commission's capacity to demarcate new areas of unfair trade practice, and thus it forecast the virtual destruction of the Commission's administrative discretion.

Had the Court been willing to accept as final Commission findings of fact supported by evidence, the Commission would still have been able to function with some efficiency. In fact, however, the Court in subsequent cases assumed a right of general review of all the facts *de novo*, on the ground that it could not otherwise determine whether the Commission's findings of facts were actually supported by the evidence. Thus, in *Federal Trade Commission v. Curtis Publishing Company* (1923) the Court, in overturning a "cease and

desist" order against the publishing firm's exclusive sales contract, ignored the Commission's evidence in support of its findings that the exclusive sales contract in question was an unfair trade practice. Justice McReynolds in his opinion explained that "manifestly, the Court must enquire whether the Commission's findings of fact are supported by evidence. If so supported, they are conclusive. But, as the statute grants jurisdiction to make and enter, upon the pleadings, testimony, and proceedings, a decree affirming, modifying, or setting aside an order, the Court must also have power to examine the whole record and ascertain for itself the issues presented, and whether there are material facts not reported by the Commission." In short, the Commission's findings of fact had but little prima facie value, and the courts on appeal could consider the entire case anew.

In the decade after 1923, the Court in nearly all Federal Trade Commission cases followed its reasoning in the Gratz and Curtis opinions and so gave little weight to the Commission's findings of unfair trade practices and its findings of fact; instead it overturned the Commission's orders with monotonous consistency. The Commission thus occupied much the same relation to the courts as had the Interstate Commerce Commission before 1906. The Commission had little power, and the intent of Congress in erecting the body had been effectively frustrated.

To an extent this judicial tendency in the twenties to interfere with broad administrative discretion affected the Interstate Commerce Commission as well. In *St. Louis and O'Fallon Railway Company v. United States* (1929), for example, the Court reversed the Commission's ruling that a valuation of railroad assets in pursuance of the recapture clause in the Transportation Act of 1920 should be based upon original cost. Instead, the Court indicated that valuation must take into account reproduction cost. This decision the Court based on the argument that the Transportation Act required the Commission to estimate value in accordance with "the law of the land," and that the Court in *Smyth v. Ames* (1898) and in later cases had already decided that the law of the land required that replacement costs be considered.

In his dissent, Brandeis pointed out that the Commission was a fact-finding body whose duty was to weigh evidence and that the findings of fact by which it had arrived at a fair valuation were to be received, in the Court's own words, "with the deference due to

those of a tribunal 'informed by experience' and 'appointed by law.'" In his belief, the Court, in overruling the Commission's analysis of evidence behind its decision that rates should be based on original cost, had invaded the commission's fact-finding sphere, just as it had already done with the Federal Trade Commission. Further, Brandeis pointed out, the practical effect of the ruling was to defeat the evident intent of Congress in the Transportation Act—to provide the public with adequate rail service at "the lowest cost consistent with full justice to the private owners."

THE CONSTITUTION AND THE NEW PROSPERITY

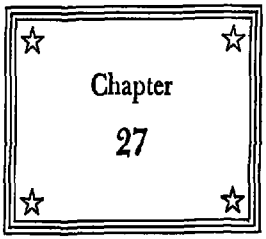
So it was that the vast prosperous, sprawling giant of American economy went its way comparatively unhindered by serious federal or state interference with the processes of business and industrial life. America's business and political leaders were practically unanimous in the belief that no new controls upon the economy were necessary. The constitutional system, in their opinion, wisely and correctly restricted the scope of federal activity and protected private property and free enterprise against unreasonable governmental interference. Most Americans shared these ideas. They were convinced that the nation's constitutional system, by thus protecting property, prepared the way for a new era of universal prosperity.

Thus inspired, a new wave of Constitution-worship swept the country. Statesmen, industrialists, financiers, and common folk frequently paid homage to a Constitution which they held responsible for America's wealth, happiness, and spiritual well-being. America's great charter was revered as an expression of certain eternal verities of good government, the more to be respected in an age when other nations seemed to be falling into the hands of Communist and Fascist despoilers of property and human liberty. Love of the Constitution as an uncrowned king was never so widespread as in the years after the first World War.

Thus the United States in the twenties moved on through a period of gigantic industrial, commercial, and financial development with but few effective controls upon the national economy. The ineffective character of federal trust controls inaugurated a period of dizzy combination in industry and finance. Holding companies mushroomed, especially in the fields of public utilities, railroads, and banking operations. Some of these were basically sound, but

others were visionary, unsound, or even fraudulent both in organization and operation. Many of them, like the Insull empire, were to come crashing in ruins in the debacle of 1929–33. Uncontrolled investment banking operations dumped upon the public hundreds of millions in foreign securities, most of which ultimately proved to be worthless. Heavy industry, freed of the threat of prosecution for combination and price fixing, partially abandoned the free competitive price system in favor of "price leadership" or outright price fixing. Industry was becoming more and more efficient in production, but quasi-monopoly held up prices so that in a majority of cases the savings effected by industrial efficiency were not passed on to the public. Wages rose, but they failed to keep pace with the rise in over-all industrial capacity to produce goods. At the same time, technological improvements threw men out of work faster than they could be re-employed. For these reasons, mass purchasing power did not expand rapidly enough to absorb the increase in industrial output. Surplus corporate profits and big incomes, seeking investment outlets, poured into the securities market, skyrocketing stock and bond prices and precipitating an unprecedented era of stock market gambling. Agriculture, on the other hand, was already in a state of partial collapse. Most farmers had overexpanded as a result of the extraordinary demands for agricultural commodities during World War I. Operating in a free competitive market closely approximating the theoretical conditions of pure free enterprise, the farmer consistently overproduced the staple farm commodities in the face of collapsing agricultural prices. Well before 1929, most farmers were experiencing a deep depression.

The storm signals were flying long before 1929, but most Americans ignored them. President Herbert Hoover, taking office in March 1929, confidently predicted the greatest era of material prosperity in the world's history. Even then, however, the clock was ticking out the final moments of *laissez-faire* prosperity.



The New Deal

In October 1929 the stock market wavered, broke, then crashed downward, inaugurating the most catastrophic economic collapse in American history. The dream of a new povertyless age was shattered; and in its place appeared a succession of ghastly economic nightmares. At first the Hoover administration and the nation's business leaders treated the great depression as no more than a passing flurry. But as unemployment passed the twelve-million mark, as industrial production fell below 50 per cent of the 1929 level, and as the entire banking structure threatened to collapse, it became evident that something was vitally wrong with the nation's economic life. According to orthodox economic theory, recovery should have set in automatically and in due course, but the expected development did not occur. The economic crisis inspired a great wave of social discontent which in turn produced a major political upheaval leading directly to what was to become a limited revolution in the American constitutional system.

As the depression continued its downward course, President Hoover recognized that the national government was properly concerned with the nation's welfare, and from time to time he initiated such relief measures as he believed advisable and within the sphere

of federal sovereignty. Thus, in 1931, he secured the adoption of a moratorium on international debt payments; in 1932 he brought about the enactment of legislation creating the Reconstruction Finance Corporation, intended to rescue commercial, industrial, and financial institutions that were in difficulty by direct governmental loans; and in the same year he somewhat reluctantly accepted the necessity of direct federal appropriations to state and municipal governments for relief purposes.

Yet Hoover's deep-seated faith in a highly individualistic *laissez-faire* economy made him fundamentally unwilling to countenance a broad governmental program for either relief or social reform. He was committed to the belief that bureaucratic controls of private business were pernicious, that governmental interference with natural economic law was unwise and unnecessary, and that economic recovery would come about in due course through the inevitable corrective processes inherent in a system of untrammeled free enterprise.

Hoover's constitutional position in the great crisis flowed quite naturally out of his individualistic social philosophy. The federal government must be exceedingly careful not to overstep the constitutionally prescribed limits of its power. Constitutional change "must be brought about only by the straightforward methods provided by the Constitution itself." That is, he could not recognize the economic emergency as an adequate reason for the assertion of new federal powers and controls, no matter how badly needed they might be. In particular, Hoover was opposed to a broad construction of the federal commerce power. "If we are to stretch the Interstate Commerce provision to regulate all those things that pass state lines," he once observed, "what becomes of that fundamental freedom and independence that can rise only from local self-government?" In short, Hoover's faith in *laissez-faire* economics and constitutional conservatism made it impossible for him to launch a large-scale national attack on the depression.

In the presidential election of November 1932 the Democratic candidate, Franklin D. Roosevelt, scored an impressive popular and electoral college victory over President Hoover in the latter's attempt to win re-election. The election, which swept the Republican party from power only four years after its one-sided victory of 1928, was a clear indication of how completely the people at large

had come to hold the President and the federal government responsible for the nation's economic welfare.

Hoover's defeat occurred largely because the electorate believed he had failed to deal adequately with the depression. Most voters ignored the Republican argument that the federal government had only a limited capacity to cope with the economic crisis, and in voting for Roosevelt they in effect demanded that the President and Congress assert sufficient national authority to deal with the emergency. Roosevelt's victory thus obviously implied a return to the constitutional postulates of liberal nationalism.

THE FIRST DAYS OF THE NEW DEAL

Franklin D. Roosevelt entered office in March 1933 with large Democratic majorities behind him in both houses of Congress and with a wave of public confidence in his capacity to deal with the emergency manifest in the country at large. He had once been a states' rights Democrat, and upon occasion had denounced the growth of federal power as "against the scheme and intent of our Constitution." In his inaugural address, however, he made it clear that he now believed in a flexible interpretation of the Constitution and in the legality of a federal program adequate to deal with the existing emergency. Accordingly, he at once initiated in Congress an extensive program of emergency reform legislation, establishing unprecedented controls over banking, finance, labor, agriculture, and manufacturing. A major portion of this program became law in an epoch-making "hundred days" after March 4, 1933.

At the moment Roosevelt entered office, a wave of bank failures of such proportion as to threaten the entire banking structure with complete collapse was sweeping the nation, while abnormal gold exports and panicky currency hoarding were undermining the stability of the monetary system.

To meet this situation, the President immediately declared a temporary "bank holiday" closing all banks in the nation. He also suspended gold exports and foreign exchange operations. He took these steps with but dubious legal authority, under certain provisions of the Trading with the Enemy Act of 1917. However, the Emergency Banking Act, rushed into law on March 9, 1933, ratified the President's action and made provisions for reopening banks under executive direction. The statute also required the surrender

of all gold and gold certificates to the Treasury Department, the holders to receive an equivalent amount of other currency. This step was intended to stop currency hoarding and to prepare for a mildly inflationary devaluation of the currency.

A rider attached to the Agricultural Adjustment Act, enacted on May 12, authorized the President to adjust the gold content of the dollar, though it specified that he could not reduce the content to less than 50 per cent of the current amount. This provision reflected a belief, widely entertained at the time, that a reduction in the dollar's gold content would lead to a much-desired rise in prices, since it would lower the dollar's theoretical value. In accordance with this provision Roosevelt issued successive proclamations progressively lowering the dollar's gold content below the original 25.8 grains. The Gold Reserve Act of January 30, 1934, provided that the President should not in any event fix the gold content of the dollar at more than 60 per cent of its original value; accordingly the President on January 31 fixed the gold content of the dollar at 15 5/21 grains.

The retirement of gold from circulation and the reduction in dollar gold content made imperative the Joint Resolution of June 5, 1933, by which Congress canceled the "gold clause" in private contracts and in government bonds. Contracts of this type called for payment of a fixed amount of gold by weight as a precautionary device against destruction of the debt's real value through inflation. Their enforcement was not only impossible now that gold had been withdrawn from circulation, but if creditors successfully attempted to enforce collection in devalued dollars and demanded enough new dollars to make up the original theoretical gold value of the contract, the result would be a vast and inequitable increase in public and private indebtedness.

It was at once apparent that abrogation of the gold clause would meet with very formidable objection on constitutional grounds. Should the Supreme Court be so minded, it might declare abrogation of the clause invalid for any one of several reasons—that it took private property without compensation, that it violated the due process clause of the Fifth Amendment, or that it constituted an unjustifiable invasion of the reserved powers of the states. All these arguments did in fact eventually appear in the legal attack upon abrogation.

A second major group of statutes was concerned with agricul-

tural relief. The most important of these measures was the Agricultural Adjustment Act of May 12, 1933, whose preamble declared that the prevailing economic crisis was in part the consequence of a disparity between agricultural prices and the prices of other commodities, a disparity that had broken down farm purchasing power for industrial products. This provision advanced, by implication, three different constitutional arguments to justify federal regulation of agriculture: the theory of emergency powers, the general welfare, and the effect of agriculture upon interstate commerce.

The announced purpose of the law was the restoration of agricultural prices to a pre-war parity level. This was to be accomplished by agreements between farmers and the federal government for reduction of acreage of production in seven basic agricultural commodities—wheat, cotton, corn, rice, tobacco, hogs, and milk —in return for federal benefit payments. Funds for benefit payments were to be secured by an excise tax to be levied upon processors of the commodity in question. The tax was to be at such a rate as to equal the difference between the current average farm price of the commodity and its "fair exchange" value, the latter being defined as that price that would give the commodity the same purchasing power as it had in the 1909–14 base period.

Thus the act made use of the federal taxing power and the right to appropriate for the general welfare as the constitutional basis of agricultural control. Whether or not this system of regulation would be accepted as constitutional depended upon three major considerations. First, would the Supreme Court consider the processing tax merely as a federal excise measure regardless of its implications for agricultural control? If so, it was clearly valid. On the other hand it could be argued that the tax was part of a system for federal regulation of agriculture, and therefore void under the precedent established in the second Child Labor Case. Second, did the tax violate due process and the Fifth Amendment? It was conceivable that the Court might so hold, on the ground that the tax was collected from one group and paid directly to a second private group, thereby violating the old rules against appropriating public monies for private purposes and against taking the property of A and giving it to B. Finally, were the proposed benefit payments valid under the general welfare power? They might be held so were the Court to accept Sutherland's obiter dictum in the Maternity

Act Case of 1923; but opponents of the law were certain to contend that appropriations in connection with crop reduction payments in reality constituted a coercive device for the regulation of agriculture and were hence invalid.

Other agricultural measures enacted at this time were intended to relieve the rural credit situation. A separate section of the Agricultural Adjustment Act authorized the Federal Land Banks to acquire farm mortgages and empowered the Federal Loan Commission to make loans to joint-stock land banks. In addition, the Farm Credit Act of June 16, 1933, authorized the Farm Credit Administration to create twelve "production credit" corporations, who were to invest funds in farmers' co-operatives authorized under the act. And the so-called Frazier-Lemke Act, enacted later, on June 28, 1934, permitted bankrupt farm mortgagors either to purchase the farm property in question over a period of six years, or to stay all proceedings for five years while paying rent for any portion of the property occupied, with the privilege of purchasing it at the expiration of the five-year period.

Perhaps the most famous New Deal statute enacted in the hundred days' emergency session was the widely heralded National Industrial Recovery Act of June 16, 1933. The introductory section declared that "a national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist." Thus the law cited the economic emergency, the relation between the economic crisis and interstate commerce, and the federal welfare power in an attempt to provide a constitutional foundation for federal regulation of industry.

The act then provided for "codes of fair competition" covering prices, wages, trade practices, and the like, to be drafted by trade or industrial groups and submitted to the President for approval and promulgation. Approved codes thereupon became the "standard of fair competition" in their respective trades or industries, an infraction of which was to be deemed a violation of the Federal Trade Commission Act. In other words, a promulgated code had the force of law. Section 7(a) of the measure required that every such code guarantee labor the right to collective bargaining, while still other sections provided for the regulation of interstate commerce in oil.

The statute thus contemplated the limited cartelization of American business and industry under a system of industrial self-government protected by federal sanctions. Needless to say, the underlying economic theory of the law was incompatible with previous federal trust policy, which had aimed at the preservation of a maximum of "free competition" in business.

The argument for the constitutionality of the National Industrial Recovery Act depended in part upon the contention that there was a "direct" relationship between the regulation attempted and the welfare of interstate commerce. Though the relationship might conceivably be demonstrated by application of the "stream of commerce" doctrine, the difficulty was that the act went so far as to break down nearly all distinction between interstate commerce and manufacturing.

The law also attempted the most extreme peacetime delegation of legislative power projected in American history. Power to draft an extraordinary number of detailed codes having the force of law was given not merely to the executive, but to groups of private individuals. Further, Congress had provided almost no fundamental policy or standards to guide the President and private business in the formulation of the codes. It was questionable whether the Court would accept such a statute as constitutional.

A variety of other laws intended to stimulate production or employment deserve but brief mention here, as they posed no serious constitutional issues. The acts creating the Civilian Conservation Corps, which established reforestation camps for unemployed youths, the Federal Emergency Relief Administration, which made direct relief appropriations to the states, and the Home Owners Loan Corporation, which provided for the refinancing of home mortgages through federal savings and loan associations, could all be justified under the federal power to appropriate money for the general welfare. Since they involved no coercive controls, it was difficult to attack them in the courts, and the judiciary thus had no opportunity to pass upon their constitutionality.

More controversial, however, was the act of May 18, 1933, creating the Tennessee Valley Authority. The T.V.A. was organized as a government corporation, whose three-man board of directors was to be appointed by the President. The corporation was authorized to construct dams, reservoirs, power lines, and the like; to

manufacture fertilizer and explosives for the War Department; and to sell all surplus power not used in its operations. The law in reality projected a gigantic rehabilitation and development program in the Tennessee Valley region, embracing flood control, power development, reforestation, and agricultural and industrial development.

Several constitutional arguments could be presented to justify the legality of the T.V.A. The corporation proposed to manufacture munitions for the government, presumably a valid activity under the federal war power, and the electrical power generated could be considered a surplus by-product of this operation. The program also contemplated improvement in navigable rivers, an activity related both to the war power and to interstate commerce. From a broader point of view, the entire project might be rationalized as lying within the federal power to appropriate for the general welfare.

The early days of the Roosevelt administration also saw the end of the great prohibition experiment. The Democratic platform of 1932 had called for the repeal of the Eighteenth Amendment, and Roosevelt as a candidate had also supported repeal. The overwhelming Democratic victory in November accordingly seemed to constitute a mandate, and the lame-duck Congress preceding Roosevelt's inauguration submitted, on February 20, 1933, the followed proposed amendment to the states:

> Section 1. The eighteenth article of Amendment to the Constitution of the United States is hereby repealed.
>
> Section 2. The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.
>
> Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by convention in the several states, as provided in the Constitution, within seven years from the date of the submission thereof to the states by Congress.

The proposed amendment was the first which Congress had submitted for ratification by conventions in the several states, and the exact procedure to be adopted in ratification became a matter of

some discussion and controversy. Although many constitutional lawyers argued that Congress must prescribe the conditions under which the several state conventions would meet and ratify the amendment, Congress failed to act upon any of the various bills introduced for this purpose, so that the exact procedure became a matter of individual state law. In certain states, delegates were elected at large; in others, the district system was used. In most states, the people voted for delegates pledged for or against ratification. The delegates therefore did very little or no debating in convention, but merely voted as they had pledged. Ratification proceeded rapidly, and the proposal was proclaimed a part of the Constitution as the Twenty-First Amendment on December 5, 1933.[1] Meanwhile Congress, at Roosevelt's suggestion, had hastened the demise of prohibition by the passage of the so-called Beer Act. This measure, which became law on March 22, 1933, permitted the manufacture of alcoholic beverages containing not more than 3.2 per cent alcohol.

Considered in its entirety, the emergency program enacted under Roosevelt's leadership constituted a more far-reaching assertion of federal authority over national economic life than had hitherto been dreamed of in responsible political circles. Judicial precedents for using the commerce and taxing powers to assert control over industry and to effect certain police regulations did indeed exist, and were the Court to examine the recovery program in the light of these precedents, nearly all of it could pass constitutional muster. However, if the Court reviewed the National Industrial Recovery Act, the Agricultural Adjustment Act, and the statute creating the Tennessee Valley Authority in the spirit of *United States v. E. C. Knight Co.* or the Child Labor cases, most of the New Deal's grand design was doomed. Roosevelt's reform program thus inevitably precipitated a tremendous struggle between two opposing conceptions of national authority, a struggle fought out immediately in the courts, but ultimately decided in the arena of politics and public opinion.

The early days of the New Deal witnessed the restoration of a type of executive leadership over Congress strongly reminiscent of

[1] For a discussion of the constitutional aspects of the operation of the amendment, see pp. 782–783.

that exercised in the first year of the Wilson administration. Roosevelt's personal prestige was at the moment tremendous; his confident assertion that the great depression could be conquered, that "the only thing we have to fear is fear itself," caught the popular imagination and rekindled the nation's faith in itself at a moment of almost universal panic and despair. The President also commanded a large Democratic majority in both houses of Congress, a majority which well understood how completely its position depended upon a successful presidential program. In addition, Republican opposition in and out of Congress was for the moment silenced and demoralized by an economic collapse so severe as to convince a large majority of the public of the desirability of a powerful reform program. The need for haste also entered into the situation; Congress could ill afford to debate at length while urgent recovery measures awaited enactment.

As a result, there was little debate on constitutional issues or on the economic implications of the great programs Roosevelt submitted to Congress. Proposed statutes were drawn up in conference between the President, the various experts—early dubbed the "Brain Trust"—whom Roosevelt called upon for advice, party leaders, and the special-interest groups involved. Thus the National Industrial Recovery Act was the product of lengthy discussions between Roosevelt and certain business leaders; the Agricultural Adjustment Act, of conferences between Roosevelt, Secretary of Agriculture Henry Wallace, economists George Peek and Mordecai Ezekiel, and farm bloc leaders. Once presidential measures were submitted to Congress, however, they became "must legislation." As in the British parliamentary system, a refusal to act would have been no less than a major rebellion against the executive.

Congress yielded to the exigencies of the moment, but it had not surrendered its prerogative. As in Jackson's and Lincoln's time, executive ascendancy soon inspired charges that the President was a dictator conspiring to destroy representative government. But the fallacy of the dictatorship cry was soon revealed in the independent spirit exhibited in Congress once the emergency had passed. While the President's influence in Congress remained very great, he eventually suffered major defeats on issues he regarded as of primary importance, notably in the great Court fight of 1937.

THE NEW DEAL BEFORE THE COURT

It was evident from the first that the Supreme Court's attitude toward the recovery program was a matter of extreme importance. Judges sympathizing with the New Deal social objectives and appreciating the liberal national tradition would find it easy to select a stream of precedents validating most of the New Deal measures. On the other hand, judges who sympathized with the conservative crescendo of protest against the New Deal's interference with private property rights and who accepted the traditions of *laissez-faire* economics and limited federal power would have little difficulty in finding justification for striking down as unconstitutional most of the important New Deal statutes.

The personnel of the Court now about to pass upon the constitutionality of the New Deal had not changed greatly since the mid-twenties. Four of the most consistent conservatives of the pre-depression era—George Sutherland, Willis Van Devanter, Pierce Butler, and James McReynolds—were still present. So also were Louis D. Brandeis and Harlan F. Stone, both of whom inclined strongly to the liberal national position.

The newcomers were Chief Justice Charles Evans Hughes and Associate Justices Benjamin Cardozo and Owen J. Roberts. Hughes had already enjoyed a long and distinguished career in law and politics when President Hoover nominated him to replace Chief Justice Taft in 1930. Successively Governor of New York, Associate Justice of the Supreme Court from 1911 to 1916, Republican presidential candidate in 1916, and Secretary of State from 1921 to 1925, he had achieved the feat of moving in conservative political circles and yet retaining much of his early reputation for liberalism. Cardozo, appointed in 1932, had served for years as a justice of the New York Court of Appeals and had a pre-eminent reputation as a legal scholar and a liberal. Roberts' position was less certain. He was a Pennsylvania Republican with a successful practice as a conservative attorney; yet he was thought to entertain Progressive sentiments, and President Hoover had named him as a liberal.

In the division between liberals and conservatives, Hughes and Roberts held the balance of power. Cardozo, Brandeis, and Stone could be counted on generally to vote in support of most New Deal measures. Van Devanter, Sutherland, McReynolds, and Butler were

certain to vote consistently against the New Deal. On those occasions when both Hughes and Roberts supported the liberal minority, the New Deal could reasonably expect to win a victory, although by only a 5-to-4 majority. On the other hand, whenever either Roberts or the Chief Justice voted with the conservatives, the New Deal would lose the day. On the whole, the conservative position was the stronger one, for as matters developed Roberts usually voted against the New Deal, and Hughes frequently did. It must be remembered, also, that there were certain constitutional issues upon which the judges were united in opposition to the recovery program. Thus the National Industrial Recovery Act was to be invalidated by a unanimous Court.

Two opinions of 1934 gave some evidence that a majority of the justices might view the New Deal with some sympathy. In *Home Bldg. and Loan Association v. Blaisdell,* decided in January 1934, a majority of five justices held the Minnesota moratorium law constitutional. The decision was significant, for the statute declared a limited moratorium on mortgage payments, and the Court might easily have decided that it violated the obligation of contracts clause. Instead, Hughes' opinion skirted close to the proposition that an emergency might empower government to do things which in ordinary times would be unconstitutional. An emergency, said the Chief Justice, could not create power, but it could furnish the occasion for the exercise of latent power. He then went on to deny the proposition that the Constitution could not be altered by a process of growth or that it must "be read with literal exactness like a mathematical formula." The Constitution, he thought, could have a different meaning today from that which it had for the men who framed it. Significantly, the four conservatives dissented and repudiated the emergency as an excuse for modifying the force of the contract clause.

Two months later, in *Nebbia v. New York,* the Court broke with tradition even more sharply than it had in the Minnesota moratorium decision. Here the Court sustained the validity of a New York statute setting up a state milk control board and empowering the board to fix maximum and minimum milk prices. This was precisely the kind of legislation which the Court had with some consistency struck down in the 1920's as a violation of due process, on the grounds that the business regulated did not fall within the narrow

conception of public interest then entertained by the Court. However, in a startling opinion Justice Roberts now chose to ignore the ice company and theater ticket precedents to lay down an extremely broad conception of public interest. "It is clear," he said, "that there is no closed class or category of businesses affected with a public interest." The touchstone, he added, was not state franchise or monopoly. Instead, he said, a state was in general free to adopt toward any business "whatever economic policy may reasonably be deemed to promote public welfare." The Court thus adopted the conception of public interest which had been advocated by the minority in the theater ticket and ice company opinions, and so virtually wrote an end to "affection with a public interest" as a constitutional issue. It was little wonder that McReynolds, speaking for the four minority justices, complained sharply that this was not due process as he had understood it and that the majority in his opinion was perverting constitutional law under stress of an emergency.

For the moment, then, the liberals on the Court held a precarious balance of power. A majority of the justices, including Hughes and Roberts, had in the Minnesota moratorium case accepted tentatively the doctrine of emergency power and the idea of dynamic constitutional change. In the Nebbia case that same majority had underwritten a statute going conspicuously far in imposing social controls upon vested property interests and had broken sharply with well-defined recent precedents in due process in order to do so. If the New Deal could command this same majority, much of its legislative program might be sustained.

Not until January 1935 did the Court finally review a New Deal statute. While this delay was not extraordinary, it is probable that the more important recovery measures might have come before the Court somewhat sooner if Attorney General Homer S. Cummings and his staff had not been maneuvering for time and an auspicious series of cases to argue before the Court. In the sixteen months after January 1935, however, the Court decided ten major cases or groups of cases involving New Deal statutes. In eight instances the decision went against the New Deal. Stricken down in succession were Section 9(c) of the National Industrial Recovery Act, the N.R.A. itself, the Railroad Pension Act, the Farm Mortgage law, the Agricultural Adjustment Act, the A.A.A. amendments, the Bituminous Coal Act, and the Municipal Bankruptcy Act. Only two measures,

the emergency monetary enactments of 1933 and the Tennessee Valley Authority Act, were given approval in carefully circumscribed and conditional terms. In short, the Court in sixteen months destroyed a very large portion of the Roosevelt program.

THE "HOT OIL" CASES

The Court's first invalidation of a New Deal law came in January 1935, in *Panama Refining Co. v. Ryan*, a case involving the so-called "hot oil" provisions of the National Industrial Recovery Act. Section 9(c), standing apart from the provisions of the Act dealing with codes of fair competition, authorized the President to prohibit the transportation in interstate commerce of oil produced or stored in excess of the limitations imposed by states in order to bolster faltering oil prices and to conserve oil resources. Precedents for federal co-operation with state law enforcement existed, notably in the Webb-Kenyon Act, which had prohibited interstate transportation of liquor into states banning liquor imports.

Chief Justice Hughes, speaking for eight of the nine justices, held Section 9(c) unconstitutional as an invalid delegation of legislative power, on the grounds that it did not set adequate standards for executive guidance. The section itself, said Hughes, "establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action. The Congress in §9(c) thus declares no policy as to the transportation of the excess production." Nor was Hughes able to discover in Title I, containing the act's general declaration of policy, any more specific restrictions upon executive discretion. He concluded, therefore, that executive orders issued by authority of Section 9(c) were "without constitutional authority."

The Court had thus for the first time held unconstitutional a statute which delegated quasi-legislative authority to the executive. Undoubtedly the discretion admitted in Section 9(c) was very large; yet it is questionable whether any considerable distinction existed between the provision and earlier instances of delegation already held constitutional. The Interstate Commerce Commission's discretion in rate setting, controlled only by the injunction that rates must be reasonable, was certainly as great, as was also the President's discretionary right to raise or lower tariff schedules under the Fordney-McCumber Tariff Act of 1922. Moreover, a stand-

ard for executive guidance was actually present in Section 9(c): the President could not proceed beyond the limitations imposed by the statute.

Hughes' opinion did not discuss other provisions of the Recovery Act; yet it seemed certain that if the Court was unwilling to accept the relatively modest delegation of legislative authority granted in Section 9(c), then the fate of the far-reaching and ramified delegations of power effected by the codes of fair competition was already sealed, and the entire statute was doomed.

THE GOLD CASES

Immediately after the Hot Oil decision, the government won a substantial victory in the Gold Cases. All of these cases were concerned with the right of Congress to nullify the gold clause in private and public contracts, as it had done in the Joint Resolution of June 5, 1933. *Norman v. the Baltimore and Ohio Railroad Co.* and a companion case, *United States v. Bankers Trust Co.*, arose in the lower federal courts out of bondholders' suits to enforce the gold clause against defendant railroads on outstanding bonds. Plaintiffs asked payment in an amount of devaluated currency equal in theoretical gold content to the original amount of gold stipulated in the contract, in effect a demand for a write-up of 69 per cent in the actual dollar value of the indebtedness. *Nortz v. United States* arose in the Court of Claims, where the plaintiff had sued to recover the theoretical difference between the gold content of some $10,000 in gold certificates which he had been forced to surrender to the government and the gold content of the money that had been issued to him in lieu of the certificates. In *Perry v. United States*, a case also certified from the Court of Claims, the owner of a ten-thousand-dollar government bond sued to recover the difference between the original theoretical gold value of the contract and its present gold value in new dollars.

The fundamental constitutional issue in all four cases was whether or not the national government could impair the obligation of contracts, public and private, in pursuance of the monetary power. Chief Justice Hughes, who wrote all three majority opinions, granted the government a substantial victory. In *Norman v. the Baltimore and Ohio Railroad Co.* he first decided the essential point that contracts for payment in gold were not commodity contracts

but were in reality contracts for payment in money and hence, by implication, fell within the federal monetary power. Relying extensively upon the *Second Legal Tender Case*, wherein the Court had sustained the constitutionality of Civil War greenback legal tender issues, the Chief Justices dwelt at length upon the broad and comprehensive nature of all federal power and asserted finally the government's right to abrogate private contracts when they stood in the way of the exercise of rightful federal functions.

This opinion provided the cue for *Nortz v. United States*. Gold certificates, the Chief Justice ruled, were in reality currency, and not federal gold warehouse receipts. The plain implication was that the government had a right to replace them with other currency. More important, Hughes pointed out that the plaintiff had suffered only nominal damages and hence had no right to sue in the Court of Claims. Holding this point to be decisive, the Court refused to consider whether or not gold certificates were an express contract with the United States, and whether the Emergency Banking Act in requiring their surrender took property in violation of due process.

In *Perry v. United States*, the government suffered a nominal defeat. Hughes held that government bonds, as distinct from private obligations, were contractual obligations of the United States government. Congress, he asserted, could not break its own plighted faith, even in the subsequent exercise of its lawful powers. Hence the Joint Resolution of June 5, 1933, insofar as it abrogated the gold clause in United States government obligations, was unconstitutional. Hughes hastened to add, however, that the plaintiff had suffered no more than nominal damages and was hence not entitled to sue in the Court of Claims. The aspersion cast upon the Joint Resolution was henceforth without practical meaning.

In one of the bitterest minority opinions ever recorded, Justice McReynolds expressed the dissent of the four conservatives for all four cases. "Just men," he said, "regard repudiation and spoliation of citizens by their sovereign with abhorrence; but we are asked to affirm that the Constitution has granted power to accomplish both." Congress, he continued, under the guise of pursuing a monetary policy "really has inaugurated a plan primarily designed to destroy private obligations, repudiate national debts, and drive into the treasury all the gold in the country in exchange for inconvert-

ible promises to pay, of much less value." Some of the language in McReynolds' oral opinion was too vitriolic for the formal record. At one point in his delivery he leaned forward and in a voice shaking with emotion proclaimed that "This is Nero at his worst. The Constitution is gone!"

It appears probable that the majority in the Gold Cases was more impressed by practical considerations than by theoretical issues of constitutional law. The government's emergency monetary policy was, in theory at least, a gigantic breach of obligation of contract. But the gold policy had failed of its intended result, and acceptance of its constitutionality would have no practical effects, whereas enforcement of gold contracts in devalued dollars would have had a catastrophic effect on national economy. This Chief Justice Hughes recognized, when he observed in the Norman case that "it requires no acute analysis or profound economic inquiry to disclose the dislocation of the domestic economy" which enforcement would produce. One cannot but wonder, on the other hand, what attitude Hughes and Roberts would have taken had the government's policy been successful and creditors suffered a heavy real loss. The precedents behind Hughes' opinion were few and not so convincing that they could not have been set aside. The *Second Legal Tender Case*, the most relevant precedent, had merely decided that greenbacks were legal tender in payment of debts, and the cases had not specifically sanctioned the abrogation of gold clauses. On the contrary, in *Bronson v. Rodes* (1869), the Court had specifically construed the Legal Tender Act as not invalidating contracts calling for gold payments. Hughes might very conceivably have ignored the Legal Tender Cases and have ruled that abrogation of the gold clause in private and public contracts violated the due process clause of the Fifth Amendment.

The government's victory may also be explained in part by the fact that the Gold Cases did not involve the most controversial issue of liberal nationalism, the exercise of federal control over various aspects of production. In a general way, the broad and comprehensive character of the federal monetary power was already well established, and the emergency measures under review in the Gold Cases contemplated the creation of no new sphere of federal activity. When such issues were not raised, the New Deal could command a majority.

SCHECHTER V. UNITED STATES: THE "SICK CHICKEN" CASE

In May 1935 the full weight of judicial disapproval of Roosevelt's program was released, as the Court struck down New Deal statutes in three cases and imposed serious limitations upon the President's removal power in a fourth.

On May 6 the Court, in *Retirement Board v. Alton Railroad Co.*, voted 5 to 4 to invalidate the Railroad Retirement Pension Act. Justice Roberts in the majority opinion held that certain mechanical details of the pension law were arbitrary and unreasonable and so violated due process and the Fifth Amendment. More significantly, however, Roberts was of the opinion that the whole subject of old age pensions had no real relationship to the safety or efficiency of rail transportation and so lay outside the federal commerce power. The extremely narrow definition of interstate commerce here implied, namely, that the power did not extend even to certain matters directly related to transportation itself, not only labeled any future federal pension law unconstitutional but also presaged clearly what the Court's attitude would be toward other federal statutes resting on a broad interpretation of the commerce power.

Three weeks later, on May 27, 1935, the Court in a unanimous decision held the National Industrial Recovery Act to be unconstitutional. The President's strategists had long viewed with anxiety the inevitable judicial inquiry into the N.R.A. Attorney General Homer S. Cummings and the Department of Justice accordingly had sought to postpone the day of reckoning, awaiting the moment when they might present the Court with as favorable a case as possible. They had pressed the "Hot Oil" case to a decision in the hope that the special circumstances surrounding the oil industry might make a favorable impression upon the Court and that a victory in this case would pave the way for validating the act in its entirety. Instead, the Court had held Section 9(c) unconstitutional; and the pointed questions on the codes of fair competition directed at counsel from the bench indicated only too well what several justices thought of the entire statute.

To add to the government's troubles, the N.R.A. was collapsing of its own weight. In the first few months after its passage, the Recovery Act undoubtedly had some beneficial effects; it had raised wages, eliminated many sweatshops, and bolstered business morale.

On the other hand, the codes of fair competition, though supposedly not monopolistic, had generally favored large enterprise and had injured the little businessman; moreover, many of the codes had been hastily drawn and were unworkable in detail. Once the immediate crisis had passed, the attempt to cartelize American business completely at one stroke also encountered much opposition. In short, the N.R.A. was crumbling, which meant that the Court would encounter comparatively little public reaction should it declare the law void. In these circumstances, the administration was obliged to move for a judicial decision or accept the statute's collapse through general disobedience. After striking one case from the docket, it finally carried *Schechter v. United States* through to decision, although a more unfavorable case for the government's purposes would have been difficult to imagine.

Schechter v. United States, destined to go down in Court history as the "Sick Chicken" case, involved an appeal from a conviction for violation of the code of fair competition for the live poultry industry of New York City. The defendants were slaughterhouse operators, who purchased on commission and sold to kosher retailers, the birds being slaughtered on their premises by schochtim in accordance with ancient Jewish ritual. The defendants had been convicted, among other counts, of violating the code's wage and hour provisions, ignoring the "straight killing" requirement, which prohibited selected sale to retailers of individual chickens from coops, and of selling an "unfit chicken."

Chief Justice Hughes' opinion took up three questions in succession: whether the law was justified "in the light of the grave national crisis with which Congress was confronted," whether the law illegally delegated legislative power, and whether the act exceeded the limits of the interstate commerce power.

Hughes settled the first question by observing that "extraordinary conditions do not create or enlarge constitutional power." He added that "such assertions of extraconstitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment." On this point Hughes' position was almost diametrically opposed to that in his recent opinion on the Minnesota moratorium law. Admittedly, in the Minnesota case the Court had been dealing with state power not subject to the limitations of the Tenth Amendment. Undoubtedly, however, Hughes viewed the Recovery Act

with extreme distaste and hence found no occasion to rationalize constitutional change.

Hughes then passed to the issue of legislative delegation. Had Congress in authorizing the codes of fair competition fixed adequate "standards of legal obligation, thus performing its essential legislative function . . . ?" The Chief Justice thought not. In reality, he said, the codes embraced whatever "the formulators would propose, and what the President would approve, or prescribe, as wise and beneficent measures for the government of trades and industries." In short, trade groups had been given a blanket power to enact into law whatever provisions for their business they happened to think wise. With some feeling, Hughes asserted that such a delegation "is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress." If the codes had any validity, he continued, it must have been because they were promulgated by the President. Yet the act also fixed no real limits upon the President's code-making power, so long as he sought the vague objectives set forth in the statute's preamble. It therefore illegally delegated legislative power to the executive, and was void.

Behind Hughes' argument one senses two additional powerful objections to the N.R.A.'s code-making features, though these objections were nowhere clearly stated. First, the Court was appalled by the unprecedented magnitude of the delegation of legislative authority projected in the law. Previously delegation had been on a comparatively small scale; in this case Congress had given the President authority to draft regulations governing the whole vast sweep of the nation's economic life. Cardozo expressed this difficulty more specifically in his concurring opinion, when he said that "this is delegation run riot."

Second, the Court viewed with evident distaste the fact that code making was in the first instance carried out not by the President but by private business groups, the President merely putting his stamp of approval upon the codes. The law thus came close to a delegation to private individuals. Technically, perhaps, there were no grounds for objection, since the President promulgated the codes, but the break with traditional methods of quasi-legislative delegation was plain enough.

Finally, Hughes found that the poultry code under review attempted to regulate intrastate commercial transactions and hence

exceeded the federal commerce power. He rejected the stream of commerce doctrine as not applicable, on the grounds that there was no "flow" in the Schechters' business, their transactions being conducted on a purely local basis. Hughes held also that the Schechters' business had only an indirect effect upon interstate commerce and so was beyond federal control. It will be recalled that the distinction between direct and indirect effect had first been raised in *United States v. Knight*, though Hughes himself nowhere referred to that somewhat discredited precedent. The distinction between direct and indirect effects, Hughes asserted, was "clear in principle," though he failed to assert what the distinguishing principle was. While the more realistic Cardozo observed that the distinction was merely one of degree, he nonetheless agreed that the connection between the Schechters' business and interstate commerce was remote in the extreme, and that if the local poultry business lay within interstate commerce, then all limitations upon federal authority were completely dissolved.

The Schechter case was in fact well calculated to expose all of the inherent weaknesses in the Recovery Act. It revealed the N.R.A.'s extreme detail of regulation and the extent to which the federal government had imposed regulation upon aspects of economic life which even the Court's liberals thought properly beyond federal control. And a prosecution for selling a "sick chicken" gave a touch of the ridiculous to the law. The New Deal certainly could have made a better showing had it been able to rest its case for the N.R.A. upon the steel or coal codes, where the industries were of national concern and obviously affected in considerable degree both interstate commerce and the general welfare. It is significant that the Court was unanimous in its stand upon the statute. Even Brandeis and Cardozo could not stomach the extraordinary delegation and minute regulation involved.

In *Louisville Bank v. Radford*, another opinion handed down on May 27, the Court declared the so-called Frazier-Lemke Act void. Justice Brandeis, speaking for a unanimous Court, first pointed out that unlike earlier federal and state laws, the Frazier-Lemke act compelled the mortgagee to surrender the property in question free of any lien without full payment of the debt. While the federal government could lawfully impair the obligation of contracts, it could not take private property, even for a public purpose, without just

compensation. Since the act destroyed pre-existing creditor property rights under state law, it violated the Fifth Amendment and was therefore void.

In *Humphrey's Executor v. United States*, also decided on May 27, the Court did not hold any statute unconstitutional, but it struck at the President's prestige. Humphrey, a member of the Federal Trade Commission, had been removed from office by President Roosevelt in October 1933. After his death in February 1934, his executor sued in the Court of Claims to recover Humphrey's salary as a commissioner for the period from his removal to his death, claiming that Humphrey's removal had been invalid. The Court held that the intent of Congress had been to confer upon the Commission independence of the President, and that the Commission was the agent of Congress and the judiciary, not of the executive. The Court refused to apply the dictum in *Myers v. United States*, holding that that precedent was limited to subordinate executive officers in the President's own departments. In other words, Roosevelt had not lawfully removed Humphrey from office.

The Court's rejection of the early New Deal measures was actually a stroke of fortune in disguise for President Roosevelt. The Schechter decision in particular relieved him of the embarrassment of junking an outworn recovery measure and at the same time provided him with political ammunition for the coming election and the great battle with the judiciary over constitutional reform already looming. A grim-lipped Chief Executive shortly told a press conference that the Court's reasoning took the Constitution "back to the horse and buggy days," and implied darkly that if the Court threw down the gauntlet on the issue of constitutional reform, he would gladly accept the challenge.

The administration, while discouraged by the outcome of the Schechter case, did not abandon its attempts to regulate industry. The summer of 1935 saw the passage of two landmarks in New Deal legislative policy, the National Labor Relations Act of July 5, 1935, and the National Bituminous Coal Conservation Act of August 30, 1935. Both of these acts imposed regulations upon industry in apparent defiance of the Schechter opinion and thus flung the issue of federal economic controls back at the Court. Roosevelt's position became even clearer when he wrote a letter to Representative J. Buell Snyder of Pennsylvania asking Congress to pass the coal bill

regardless of any doubts, "however reasonable," that it might have about the bill's constitutionality. On the basis of this letter the President was widely represented as urging Congress to disregard the Constitution. However, the Pension and N.R.A. decisions were not necessarily binding upon the Coal Act, whose constitutionality was at least open to question. Undoubtedly, however, the President was in part challenging the finality of the Court's interpretation of the Constitution.

UNITED STATES V. BUTLER: THE FALL OF THE A.A.A.

In January 1936 the Court invalidated the Agricultural Adjustment Act by a 6-to-3 vote, in a decision that revealed how bitterly divided the justices were on certain crucial constitutional issues involved in the New Deal.

United States v. Butler arose out of a district court order to the receiver for a bankrupt cotton-milling corporation directing the receiver to pay the processing taxes required under the A.A.A. Justice Roberts, who wrote the badly organized majority opinion, first observed that the so-called processing tax was properly not a tax at all but, like the tax in the Child Labor Case, was in reality but part of a system for the regulation of agricultural production. This did not necessarily mean, he added, that it was unconstitutional, but that it could not be held valid under the taxing power.

Roberts then inquired into the question of whether or not crop benefits could be justified under the general welfare clause, which authorizes Congress to "provide for the common defense and general welfare of the United States." He examined the theories advanced by Madison and Hamilton on the scope and meaning of the clause in question. Madison, he recalled, had asserted that the clause was merely introductory to the enumerated powers of Congress which followed it in Article I, Section 8, and that in itself it conferred no additional power upon Congress, since to admit otherwise would be to undermine the limited character of federal power. Hamilton, on the other hand, had argued that the welfare clause conferred a separate and distinct category of power upon the federal government beyond those enumerated in Article I, Section 8, and that in consequence of it, Congress had a general power to tax and appropriate for the general welfare. Summing up these arguments, Roberts concluded that Hamilton had been right: the fed-

eral government did indeed possess the power to appropriate for the general welfare apart from the other enumerated powers of Congress.

In the light of the foregoing conclusion, what now followed was little short of amazing. Crop benefits, Roberts declared, could not be justified under the welfare clause, because in reality they constituted a system of agricultural regulations projected under the guise of appropriations for the general welfare, in violation of the Tenth Amendment. The design for regulation was no less real because it was disguised under a system of voluntary crop controls. The farmer had no real choice but to accept benefits and submit to regulation. "The power to confer or withhold unlimited benefits is the power to coerce or destroy. . . . This is coercion by economic pressure. The asserted power of choice is illusory." Then followed the *argumentum ad horrendum:* The welfare power, if used in this fashion, could be used to impose federal regulation upon any phase of economic life, merely by purchasing compliance. Processing taxes were therefore void as part of an unconstitutional system of agricultural regulation.[2]

The heart of Roberts' argument lay in the limitations he imposed upon the general welfare clause. He admitted the separate right to appropriate for the general welfare, yet he denied that the government could impose any conditions upon those who accepted the grant. In short, he held that the government could give away its funds but that it could not stipulate how they should be used! This conclusion ignored the patent historical fact that in land grants and grants-in-aid the federal government had been "purchasing compliance" ever since 1802. The Court itself had answered Roberts' argument in *Massachusetts v. Mellon* (1923), in which Justice Sutherland had observed, concerning grants-in-aid, that a state could avoid submission merely by the process of not submitting, that is, by refusing the grant. Indeed, if Congress could not even stipulate how its own appropriations for the general welfare were to be used, then, as Justice Stone's dissent implied, the appropriations power was reduced to little more than inanity.

As Stone pointed out, Roberts was also in error in likening the

[2] A week later, in *Richert Rice Mills v. Fontenot,* the Court also voided the processing taxes provided for in the Agricultural Adjustment Act of August 1935, merely by following the Butler precedent.

processing tax to the penalty device considered in the Child Labor Case. The processing tax actually was not regulatory, and was not intended to be so. It was a mere revenue-raising device; regulation was effected by appropriation, not taxation. Stone might well have added that taxation for regulatory purposes lying outside the enumerated powers of Congress had more than once been accepted by the Court, the Child Labor Case to the contrary, as *McCray v. United States* and *United States v. Doremus* bore witness. He could have added the protective tariff, which also obviously was taxation for an ulterior purpose, the regulation of production. Roberts had, in fact, sought to meet the tariff analogy with the brief contention that the tariff had its basis in the commerce clause, not in the taxing power.

There was much spiritual comfort for New Dealers in Stone's sharp dissenting opinion. Not only did he expose mercilessly the weaknesses in Roberts' logic, but he also attacked the Court's tendency to legislate through the judicial power and so placed the onus of abusing constitutional interpretation squarely upon conservative shoulders. "A tortured construction of the Constitution," he observed, "is not to be justified by extreme examples of reckless congressional spending . . . possible only by action of a legislature lost to all sense of public responsibility. Such suppositions are addressed to the mind accustomed to believe that it is the business of courts to sit in judgment upon the wisdom of legislative action. Courts are not the only agencies of government that must be assumed to have the capacity to govern." These words took much of the sting from the often-reiterated conservative charge that the New Deal was engaged in a conspiracy to subvert the Constitution.

The administration also took heart from the fact that Stone, Brandeis, and Cardozo, three judges generally considered to be the most learned and intelligent men on the Court, had set their stamp of approval upon a New Deal reform of even more long-run importance than the Recovery Act. Moreover, the minority opinion in the A.A.A. case might in the future easily become a majority. A rumor given wide credence in Washington asserted that Chief Justice Hughes had at first believed the statute constitutional, but that he had ultimately voted with the majority only because he thought another 5-to-4 decision would seriously damage the Court's prestige.

One or two Roosevelt appointments, inevitable if Roosevelt should win re-election in 1936, could easily change the entire constitutional status of agricultural regulation.

Congress did not accept *United States v. Butler* as the final word in agricultural regulation. Seven weeks later it enacted a new agricultural relief measure, the Soil Conservation Act. The new law sought to avoid the charge of coercion by payments of benefits for soil conservation programs. Also, the act levied no taxes, and thus avoided the charge of regulatory taxation. But crop control was still the obvious purpose underlying the law, and the Court might well have taken warning, for here was evidence of a strong congressional determination to resist judicial fiat, an intention to force through the major New Deal objectives even at the risk of a head-on collision with the judiciary.

In February 1936 the New Deal won a limited judicial victory, when, in *Ashwander v. Tennessee Valley Authority*, the Court upheld the validity of a contract between the Tennessee Valley Authority and the Alabama Power Company for the sale of "surplus power" generated by Wilson Dam. Hughes' opinion pointed out that the dam in question had been built for national defense and for the improvement of navigation, both objects specifically lying within the scope of federal power. The federal government's right to dispose of property legally acquired, he added, could not be denied.

CARTER V. CARTER COAL COMPANY

Four months later, in May 1936, the Court struck at another New Deal attempt to regulate production, this time invalidating the Bituminous Coal Act of 1935. This law, more familiarly known as the Guffey Act, had attempted to restore some measure of prosperity to a prostrated industry of national importance. For twenty years the conflict between capital and labor in coal mining had been particularly savage. Wages played a high part in the cost of production, and there was consequently an unusually strong temptation for the operators to cut wages in depressions and to resist wage increases in good times. Moreover, after 1925 the industry steadily lost ground to new fuels and as a consequence suffered from "overproduction" and ruinously low prices. The great depression aggravated both labor and market difficulties, and by 1933 the industry was

in a state of collapse. The N.R.A. code brought some temporary relief, and the Guffey Act was an attempt to replace the N.R.A. with a new code.

The Guffey Act began by declaring that the coal industry was "affected with a national public interest," and that the production and distribution of coal directly affected interstate commerce and so made federal regulation necessary. The law created a National Bituminous Coal Commission and gave it authority to formulate a Bituminous Coal Code, regulating coal prices through district boards in various coal-producing areas. It also levied a tax of 15 per cent on all coal sold at the mine head, nine-tenths of which was to be remitted to producers who accepted the code provisions. A separate section, Part III, guaranteed collective bargaining and provided that wage contracts negotiated between operators producing two-thirds of the tonnage and half or more of the workers should be binding upon the entire industry. The Act specifically provided that the constitutionality of the labor and price-fixing sections should be considered separately and that neither should necessarily be invalidated should the other be declared void.

The act was immediately attacked in a stockholders' suit against an operating company, a procedure now become familiar for attacking federal legislation. Upon appeal, the Supreme Court, in *Carter v. Carter Coal Company* (1936), declared the entire act unconstitutional. Sutherland's opinion asserted that the "so called excise tax" was not a tax at all, but a penalty, and if validated would have to rest upon the commerce power. After a lengthy excursion into the nature of the federal Union, Sutherland declared the labor provisions of the act void on the grounds that they regulated an aspect of production having only an indirect effect upon interstate commerce. The difference between direct and indirect effects, he added, was one of kind and was absolute, not a matter of degree. His precedents, significantly, were the venerable *Kidd v. Pearson* and *United States v. Knight,* as well as *Schechter v. United States.* The stream of commerce doctrine, which might have applied, he discarded as inapplicable, on the grounds that the production in question had not yet begun to move at all. Sutherland concluded his argument against the labor provisions by remarking briefly that they also delegated legislative power to the executive, and were void under the precedent set in the Schechter case.

Having destroyed the labor sections, Sutherland now used this vantage point to invalidate the entire law. The act specifically provided that the voiding of either the price or the labor section of the act should not affect the constitutionality of the other section. Yet Sutherland contended that Congress would not have enacted the other sections of the law without the labor provisions, that the bone and sinew of the law was therefore gone, and that the price-fixing provisions were hence also unconstitutional. The act was thus void in its entirety.

The Carter case split the Court into three fragments. Butler, McReynolds, Van Devanter, and Roberts joined Sutherland in the majority opinion. Hughes wrote a concurring opinion agreeing that the labor provisions of the act were invalid, but holding that the Court erred in voiding the price-fixing provisions in defiance of the will of Congress. Cardozo wrote a sharp dissent, concurred in by Brandeis and Stone, contending that the price-fixing sections of the law regulated interstate commerce itself, and that even local coal sales directly affected interstate commerce. The difference between direct and indirect effects, he said, was merely one of degree, not of kind. In striking down the price-fixing sections of the law in defiance of the will of Congress, he added, the majority had seriously violated the "presumption of divisibility" in the law. In regard to the labor sections of the law, he thought the Court should not have passed upon these at all, since the case here anticipated a controversy that had not yet become real.

The most extraordinary thing about Sutherland's opinion was the absurdity of his contention that while the labor provisions of the act were only indirectly related to interstate commerce, they were nonetheless so intimately related to those portions of the law dealing with interstate commerce as to be inseparable from them. The inconsistency presented here merely revealed how hopelessly unreal was the attempt to draw any categorical distinction between direct and indirect effects upon commerce. Cardozo's contention that the difference was merely one of the degree of intimacy between commerce and the thing regulated was a far more realistic one.

Sutherland's position also came close to denying the supremacy of national powers over state powers. His argument, reduced to simplest terms, was that price fixing, which he nowhere denied was directly related to interstate commerce, was unconstitutional be-

cause it was unfortunately too closely bound up with matters directly reserved to the states. This line of reasoning, which would have pleased John C. Calhoun, was the direct opposite of that adopted by the Court in the *Shreveport Rate Cases* and in *Railroad Commission of Wisconsin v. C.B. and Q.*, where federal intrusion upon grounds reserved to the states had been allowed because the matter regulated was inextricably tangled up with a matter lying with the powers of Congress. In short, Sutherland had repudiated the entire argument for the supremacy of national powers and had ignored completely the great development in federal authority sanctioned by the Court itself since the Lottery opinion. Driven to choose between the logical implications of liberal nationalism and a return to categorical dual federalism, Sutherland had chosen the latter.

A week after the Carter decision, the Court in *Ashton v. Cameron County Water District*, in a 5-to-4 decision, voided the Municipal Bankruptcy Act of 1934. This law permitted municipalities and other political subdivisions of states to file petitions in voluntary bankruptcy. Although the statute required the assent of the state to such petitions, the Court, speaking through Justice McReynolds, nonetheless found it to be an interference with state finances, and an unconstitutional invasion of state sovereignty. Justice Cardozo, joined by Hughes, Brandeis, and Stone, dissented, protesting strongly that voluntary petitions to which the state itself gave assent could hardly be construed to invade state sovereignty. Again, however, Roberts' vote was decisive, and again the conservatives carried the day.

An appraisal of the New Deal's reception in Court reveals that the justices had three principal objections to the legislation they reviewed: First, the Court firmly rejected all attempts to extend federal authority over production. It denied in succession that interstate commerce, appropriations for the general welfare, or taxation could be used to this end. Second, the Court denied the constitutionality of legislative delegation to the executive on the scale attempted in the N.R.A. or the Guffey Act. Third, and more broadly, the Court refused to accept the conception of constitutional growth, either by evolution or through economic emergency.

The most important of these attitudes was the Court's stand on federal control over production; this issue evidently divided the

justices most sharply. Even the fiction of a static constitutional system might have been preserved, and most of the New Deal still validated, had the justices admitted that production "directly" affected interstate commerce, and that the welfare and taxing powers were positive instruments of federal authority.

There are two probable explanations of the Court's opposition to federal control over production. First, several of the justices vigorously disagreed with the New Deal's social philosophy. They viewed Roosevelt's program as an assault upon private property and contractual rights and upon the time-honored fundamentals of the American economic system. One may suppose that if more effective arguments had not been at hand, the Court might well have resorted more frequently to due process of law to outlaw the New Deal.

Second, it is evident that the New Deal did involve a tremendous extension of federal authority, much of it at the expense of functions hitherto exercised by the states. Whatever the available constitutional precedents advanced by the government—and they were many and impressive—the fact remained that the new laws constituted a substantial alteration in the scope of federal powers and in state-federal relations. Such an alteration, the majority felt, somehow violated the fundamental nature of the Union itself, and they willingly called up all available precedents of strict construction and of dual federalism to refute it. Only Brandeis, Cardozo, and Stone were willing to accept the logical implications of the liberal-national argument and recognize a wide extension of federal authority over production. In the Schechter case, it is true, the three liberals voted with the majority, holding that the extension of federal authority over production was so extreme as to be inacceptable. The A.A.A. and Carter decisions, however, demonstrated that they were willing enough to rationalize federal controls over production when matters of great importance and nationwide scope were involved and no other constitutional difficulties were present.

The majority's unwillingness to accept the idea of constitutional growth is readily understandable. The idea, if accepted officially, would go far to undermine the postulates of judicial review. The Court's capacity to rationalize its role as arbiter of the constitutional system rested in large part on the "slot machine" theory of the constitution and jurisprudence, which held that the Court's con-

stitutional findings were the inevitable result of the application of logic to a fixed written document.

The Court could present its findings as automatic and inescapable only as long as it insisted that the Supreme Law was absolute and fixed. Once the Court admitted the possibility of an evolving constitutional system, the question would inevitably arise: why is it the Court's peculiar duty and function to determine the degree to which evolution should be permitted? Are not the issues involved matters of public policy and are they not essentially legislative in character? It is significant that the three men most willing to accept federal power in new spheres of authority were also those who opposed the legislative conception of the Court's functions, as Stone's dissent in *United States v. Butler* made clear. They were willing to leave at least some of the crucial decisions involved in constitutional growth up to Congress and to the executive.

THE RISING CONSERVATIVE PROTEST

The Court's quarrel with the New Deal was only part of a larger conflict for which the lines of battle were forming even as the conservative justices made their viewpoint known. Whatever its constitutional orthodoxy, the New Deal was certainly a major assault upon the economic philosophy which had been in ascendancy in America since World War days. Franklin D. Roosevelt and his followers had flatly repudiated the notion of a self-regulated economic system and had accepted the thesis that the national welfare required extensive controls over big business, finance, and agriculture, as well as the use of governmental power to improve the lot of the socially unfortunate. If the President's followers were on occasion more than a little confused and divided about the methods to be adopted in reaching their objectives, there was little doubt about what economic groups in the population they favored. The New Deal had extended aid and comfort to organized labor, the farmer, and the unemployed. While certain of its enactments admittedly benefited business, it had imposed unprecedented controls upon banking, finance, and business management.

In short, the New Deal had drawn the lines of political conflict between clearly demarcated class interests. It rested its power upon the support of labor, agriculture, and the "little fellow," and although the President invited the support of all "honest" business-

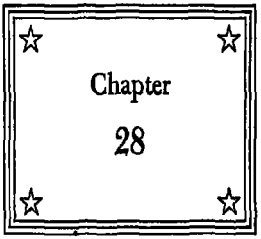
men, he specifically repudiated the support of the "economic royalists." To America's great industrialists, bankers, lawyers, and newspaper editors—the men who had directed America's economic destinies in the past—and indeed to the mass of the upper-middle-class Americans who in one way or another were associated with those who held economic power, Roosevelt's program was an anathema. Had the President not assaulted the very citadels of capitalism and free enterprise upon which America had grown great and powerful? Did he not seek to improve the lot of the poor at the expense of the wealthy? Long before the Court stated its constitutional objections to the New Deal, many conservatives had become convinced that the President was a dangerous radical and that his program involved heresies hardly less hateful than those propounded by the revolutionaries in Russia.

The conflict was thus one between classes and economic interests; but just as in the days of the Revolution and the slavery controversy, the American tendency to express economic conflicts in legal and constitutional terms asserted itself. Even before the Court revealed its differences with the New Deal, many conservatives had linked together the economic and constitutional arguments used to attack the recovery program. In 1934 the Liberty League, organized by groups of eastern financiers and industrialists, sounded the battle cry with a denunciation of Roosevelt for "tinkering with the Constitution." Early in 1934, ex-President Hoover, in his *Challenge to Liberty*, denounced the New Deal as an attack upon free private enterprise and limited constitutional government, the two fundamentals of the American social order. However, as the Supreme Court in successive decisions revealed its own disapproval of Roosevelt's program, more and more conservatives rallied to the Court and to the constitutional argument in their stand against the New Deal.

Whether the conservative constitutional position as formulated by the Court and championed by the administration's enemies would ultimately prevail over the constitutional ideas adopted by the New Dealers was in reality dependent upon the political fortunes of the Roosevelt administration. Should the President win re-election in 1936, his victory would constitute a popular ratification of his policies, would demoralize the conservatives, and would almost certainly give the President the opportunity to appoint several justices

of his own belief to the Court. The New Deal attitudes would then be written into constitutional law and the conservative constitutional argument would be discredited if not altogether destroyed. On the other hand, were Roosevelt defeated in 1936, at least a partial repudiation of New Deal policies would follow, while conservative control of the Supreme Court would be confirmed.

Thus the approaching election of 1936 took on the character of a national referendum on the Roosevelt policies whereby the New Deal's constitutional philosophy would either stand or fall.



The Constitutional Revolution in Federalism—1937–1947

In November 1936 the Democratic Party won an overwhelming victory at the polls. The election confirmed the Roosevelt administration in power and inspired the President to attempt a reorganization of the judiciary in order to win control of that last remaining outpost of conservative constitutionalism. Although the President's plan failed of its immediate purpose, the Court nevertheless capitulated. In a remarkable series of opinions beginning in 1937, it accepted all of the outstanding New Deal reform measures, including much legislation passed to replace that which the Court had invalidated before 1937. In so doing, the Court wrote a new body of nationalistic constitutional law, and seemingly ended definitively the clash between dual federalism and liberal nationalism.

THE ELECTION OF 1936

The Republican attempt to fight the election of 1936 on constitutional grounds was destined to failure. Denunciation of the New Deal as unconstitutional usurpation counted for little with the av-

erage voter when weighed in the balance against Roosevelt's enormous popularity, a degree of economic recovery, and the appeal of a positive national program.

Moreover, there was an inherent strategic weakness in the Republican constitutional argument. The party repeatedly attacked the New Deal program as unconstitutional; but the conservative constitutional philosophy behind this attack made it impossible for the party to advance at the same time any convincing national program of its own. Thus the Republican platform adopted at Cleveland accused the Roosevelt administration of usurping the powers of Congress, flouting the authority of the Supreme Court, insisting upon the passage of unconstitutional laws, and invading the sovereignty of the states. Yet to meet the challenge of the New Deal program the Republican policy makers could offer nothing more positive than concerted state action, interstate compacts, grants-in-aid, and federal appropriations—all patently inadequate devices to deal with an economic crisis of such magnitude as the one the country was still experiencing. The Republican nominee, Alfred M. Landon, labored under the same fatal contradictions of theory and policy as beset the party platform. He was obliged to denounce the New Deal in the large as an assault upon the American constitutional system; yet political strategy obliged him to admit the desirability of many specific New Deal reforms and to promise Republican measures of similar effectiveness.

The Democrats, on the other hand, had only to insist upon the constitutionality and the necessity of their own program. "We know," said the platform adopted by the Democratic convention at Philadelphia, "that drought, dust storms, floods, minimum wages, maximum hours, child labor and working conditions in industry, monopolistic and unfair business practices cannot be adequately handled exclusively by 48 separate State legislatures, 48 separate State administrations, and 48 separate State courts. Transactions and activities which inevitably overflow State boundaries call for both State and Federal treatment." The platform avoided a direct attack upon the Supreme Court, and stated merely that the party had sought and would continue to seek reform only "through legislation within the Constitution." However, the party promised clarifying constitutional amendments should these be necessary to national reform.

When Roosevelt in November won re-election by a vast majority—the Republican candidate carrying only Maine and Vermont—the American people had in fact made a great constitutional decision. They put their stamp of approval upon Roosevelt's policies and thereby assured the eventual triumph of the constitutional arguments upon which the New Deal rested. It was now evident that if the Court maintained its opposition to the New Deal constitutional theories, it would find itself without adequate popular support, either in Congress or in the electorate. Further, it now became a practical certainty that several of the elderly conservative justices would either die or resign before Roosevelt left office, and that new appointments to the Court would convert the liberal minority into a majority.

ROOSEVELT'S COURT PLAN

The Court's opposition to the New Deal had roused bitter anger in the administration and among its supporters. As in past conflicts between executive and judiciary, the Court's enemies proposed to place some sort of check upon the judicial power. A variety of suggestions for judicial reform, very few of them new, were advanced in administration and congressional circles. The most extreme was a proposal for a constitutional amendment abolishing the Court's power to declare acts of Congress unconstitutional. Less drastic was the proposed amendment submitted by Senator Joseph O'Mahoney of Wyoming on March 11, 1937, to require a two-thirds vote of the Court whenever it declared an act of Congress unconstitutional. An amendment introduced by Senator Burton K. Wheeler of Montana on February 17, 1937, would have permitted Congress to validate laws previously declared unconstitutional by repassing them with a two-thirds vote of both houses. Others suggested simply a congressional enactment, similar to that passed in Reconstruction days, restricting the Court's appellate power in cases involving certain constitutional issues, while still others suggested that Congress enact a statute formally depriving the Court of the power to invalidate federal legislation.

On February 5, 1937, the President suddenly broke a long silence on the Court question by presenting Congress with a bill to reorganize the federal judiciary. The bill provided that whenever any federal judge who had served ten years or more failed to retire within

six months after reaching his seventieth birthday, the President might appoint an additional judge to the court upon which the septuagenarian was serving. No more than fifty additional judges in all might be appointed under the act, and the maximum size of the Supreme Court was fixed at fifteen.

The message accompanying the bill deviously avoided the real purpose behind the proposal. The judiciary, Roosevelt said, was "handicapped by insufficient personnel" and by the presence of too many superannuated judges. Most old judges, the President added, were physically unable to perform their duties, and were antiquated in outlook—"little by little, new facts become blurred through old glasses fitted, as it were, for the needs of another generation."

The President's plan was in reality a more or less refined court-packing scheme. It possessed some merit, but many weaknesses, not the least of which was its sophistry. It dodged the main issue of judicial power upon which so many liberals would willingly have gone forth to battle, while its emphasis upon old age as the core of the Court problem was particularly unfortunate. The Constitution was indeed deficient in not making some provision for the retirement of superannuated judges, and there had been notable instances in the past where judges incapacitated through age had refused to resign. As of 1937, however, the President's argument that age bred conservatism was particularly inept, for the oldest man on the Court, Justice Brandeis, was also the Court's greatest liberal, while Butler and Roberts were both under seventy. The President's contention that the federal judiciary was overworked was also unconvincing. The Supreme Court's docket had once been swamped, but the Judiciary Act of 1925, which gave the Court greater authority to reject certain types of cases, had solved this problem.

The President's plan had the merit of avoiding a constitutional amendment, and also it was clearly constitutional, since Congress specifically had power to fix the size of all federal courts. Moreover, there were several precedents for altering the Supreme Court's size. Thus the Judiciary Act of 1789 had fixed the number of justices at six; this number had been successively altered to five in 1801, to six in 1802, to nine in 1837, to ten in 1863, to seven in 1866, and finally to nine in 1869. In a sense, also, the President's plan was conservative, for it did not attack the institution of judicial review as such. Its implication was that nothing was fundamentally wrong

with the judiciary beyond the present personnel of the Court, and this difficulty the plan would have corrected.

But from a standpoint of political expediency the plan was fatally weak. The thinly disguised court-packing plan evoked a powerful emotional response both in Congress and in the public against such an invasion of the sacred judicial precincts. The belief had long since grown up that the Court was an inviolable guardian of constitutional light and truth, holding forth far above the noisome sea of politics and secure against congressional meddling. The belief lacked historical reality; yet the public was unwilling to tolerate its violation. The conservative rallying cry—"hands off the Supreme Court"—was strong enough to build up a powerful sentiment of opposition not only among conservatives but among many liberals, who, though they acknowledged the Court's transgressions, still thought the plan wrong in principle.

The plan hopelessly split the Democratic majority in the Senate, despite yeoman work done by Senators Joseph Robinson of Arkansas and George W. Norris of Nebraska in support of the proposal. Democratic Senators Burton K. Wheeler of Montana, Carter Glass of Virginia, and Edward Burk of Nebraska led the attack upon the measure, while the Republican minority, presumably even more bitterly opposed to the plan, remained discreetly in the background.

Although it first appeared that the court plan would be enacted, several events decided the issue against the administration. Most important, between March and June the Supreme Court dramatically surrendered to the New Deal on several outstanding constitutional issues. In succession, the Court validated a state minimum wage law, the Farm Mortgage Act of 1935, the amended Railway Labor Act of 1934, the National Labor Relations Act of 1935, and the Social Security Act of 1935. It thus appeared that there was now no necessity for coercing the judiciary in order to push through the New Deal program, and that the Court bill could therefore be dropped.

The Court's spectacular reversal seems to have been a shrewdly calculated one. It is scarcely conceivable that Chief Justice Hughes and Justice Roberts, who deserted the conservative camp to join the three liberals in validating minimum wage legislation, the National Labor Relations Act, and the Social Security law, were unaware of the political implications of their move. This does not

suggest that they acted merely to defeat the Court plan. Neither Hughes nor Roberts was immune to a philosophy of social change, and they were doubtless aware of the long-range implications of the New Deal's overwhelming victory at the polls in November 1936. They realized that if the Court should block social change much longer, it would in all probability be the Court rather than the New Deal that would be broken.

Justice Van Devanter resigned in May 1937, an event supporting the contention that the President would soon gain control of the Court without congressional intervention. The death of Senator Robinson soon thereafter deprived the administration of its Senate floor leader and also contributed to the defeat of the plan.

On June 14 the Senate Judiciary Committee reported out the bill unfavorably, by a vote of ten to eight. The majority report excoriated the plan's motives and methods. "The bill," it said, "applies force to the judiciary," and would "undermine the independence of the Courts." Its theory was "in direct violation of the spirit of the American Constitution," "and would permit alteration of the Constitution without the people's consent or approval. . . ." This report signaled the plan's demise, the Senate on July 22 rejecting the bill by voting, 70 to 20, to return it to the Judiciary Committee.

As a sop to the President, Congress enacted the Judiciary Reform Act, a mild and uncontroversial measure which became law on August 24. This statute provided that whenever any case arose in the federal courts involving the constitutionality of an act of Congress, the United States government might at its discretion become a party to the action, and that whenever a lower federal court declared an act of Congress unconstitutional an appeal might be taken immediately to the Supreme Court, to be heard and decided at the earliest possible time. These were desirable reforms, but they had little to do with the main issues of judicial power.

THE COURT ACCEPTS LIBERAL NATIONALISM

The President had lost a battle and won a war. In a remarkable series of decisions, beginning while the Court fight was at its height, the Court executed the most abrupt change of face in its entire history and accepted all the major constitutional postulates underlying the New Deal.

The first substantial intimation of the Court's new position came

on March 29, 1937, in *West Coast Hotel Co. v. Parrish,* when Hughes and Roberts joined the liberal bloc to sustain a Washington minimum wage law. Only the year before the Court in *Morehead v. New York ex rel. Tipaldo* (1936) had held unconstitutional a similar New York statute, on the authority of *Adkins v. Childrens Hospital.* But now Chief Justice Hughes, speaking for the majority, announced that the Adkins decision had been wrong and should be overruled. He thrust aside the embarrassing Tipaldo precedent of the previous year with the assertion that in the Tipaldo case the Court had not re-examined the constitutionality of minimum wage legislation because it had not been asked to do so. This statement evaded the real point: that Justice Roberts, who had lined up with the conservatives in the Tipaldo case to invalidate the New York law by a 5-to-4 vote, had now reversed his stand so that the minority of a year before had become a majority. In his dissent for the four conservatives, Justice Sutherland pointed out that the Washington statute was in all essential respects similar to that in the Adkins case, and he bitterly attacked the theory that the meaning of the Constitution could change "with the ebb and flow of economic events."

In April the New Deal scored a further great victory, as Hughes and Roberts again joined the liberals in five decisions sustaining the National Labor Relations Act. This law imposed extensive and detailed controls upon labor-management relations in industry. Although it thus plainly attempted to regulate a phase of production, Chief Justice Hughes in *N.L.R.B. v. Jones and Laughlin Steel Corporation* (1937) thrust aside the Schechter and Carter precedents as "inapplicable." Resting his opinion mainly upon the "stream of commerce" doctrine, Hughes pointed out that the respondent steel firm drew its raw materials from interstate commerce and shipped its products back into that commerce. He bluntly rejected the old categorical distinction between direct and indirect effects upon commerce, which Roberts had accepted in the Carter case, and instead adopted Cardozo's contention in that case, that "the question is necessarily one of degree." And he concluded in the full vein of the liberal national tradition: "When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial relations constitute a forbidden field into which

Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?"

The Court's findings in an accompanying case, *N.L.R.B. v. Friedman–Harry Marks Clothing Company* (1937), was even more significant. Here the respondent clothing firm was a small manufacturer whose production could not have had more than a negligible effect upon interstate commerce. Yet Hughes' opinion emphasized the interstate character of the clothing industry at large, and ignored the question of the actual effect production in the case at hand had upon commerce. McReynolds' dissenting observation that a "more remote or indirect interference with interstate commerce or a more definite invasion of the powers reserved to the states is difficult, if not impossible, to imagine," was an understandable one in the light of what the Court had said about the coal business the year before.

At the same time the Court held in *Associated Press v. N.L.R.B.* (1937) that the labor relations of newspapers and press associations were also subject to regulation under the Labor Relations Act. Petitioners had attacked the law as a violation of the First Amendment, on the ground that the statute permitted the federal government to dictate to the press the persons to be employed in preparing news and editorials and thus to control editorial policy, thereby curtailing freedom of the press. Justice Roberts' opinion rejected this contention as unsound and without relevance to the case at hand. The law, he said, did not regulate the press but only its labor relationships. "The publisher of a newspaper has no special immunity from the application of general laws," and the statute had "no relation whatever to the impartial distribution of news."

In May the Court reaffirmed its new-found nationalism in two opinions validating the Social Security Act. In *Stewart Machine Company v. Davis* (1937), the five liberal justices accepted the unemployment excise tax upon employers and the provisions for unemployment grants to states enacting satisfactory unemployment compensation laws. Cardozo's majority opinion contained an exceedingly nationalistic defense of the federal taxing power, which he held to be as comprehensive, except for specific constitutional limitations, as that of the states. And credits to the states, said Cardozo, were not an attempt to coerce the states, but were rather an instance of federal-state co-operation for a national purpose. Nor

did the requirement that the state law conform to certain conditions before the federal government granted the credits alter the law's non-coercive character, since Congress was entitled to some assurance that state legislation was what it purported to be. In any event, Cardozo said, Congress had not obliged the states to enact any law, and states accepting benefits of the security system could hardly be said to be coerced when they could enter or withdraw from the arrangement at pleasure. By inference, this reasoning constituted a repudiation of Roberts' argument in *United States v. Butler* on the coercive nature of conditional federal appropriations, a repudiation which Roberts himself now apparently accepted.

In the second Social Security Act case, *Helvering v. Davis* (1937), Cardozo upheld the statute's old age tax and benefit provisions. The old age tax, he said, was a valid exercise of the taxing power, while of the benefit provisions he observed merely that "Congress may spend money in aid of the general welfare." His precedent for the latter statement was, ironically, *United States v. Butler*. Cardozo's two opinions went far to repudiate the entire theory of dual federalism, which had reached its apogee in the Butler case.

The administration's somewhat precarious majority on the Court was presently confirmed and strengthened by a series of resignations and new appointments, beginning with Justice Van Devanter's retirement in May 1937. A momentary furor occurred in September, when Senator Hugo Black of Alabama, whom President Roosevelt named to fill the Van Devanter vacancy, was "exposed" as having once been a member of the Ku Klux Klan. The connection was certainly an incongruous one for a liberal, but Black's record in the Senate had in fact been consistently progressive. Although his one-time Klan connection had been exposed in his last Alabama senatorial campaign, the American Association for the Advancement of the Colored People had continued, in recognition of his liberalism, to lend him enthusiastic support. Justice Black's subsequent consistent liberalism on the Court soon silenced those who feared he might be a reactionary in disguise.

Other resignations and appointments soon followed. Justice Sutherland resigned in January 1938, his place being taken by Stanley Reed, who, as Solicitor General under Roosevelt, had repeatedly argued in defense of New Deal legislation before the Court. Justice Cardozo died in December 1938, and to the vacancy Roosevelt ap-

pointed Felix Frankfurter, a distinguished member of the Harvard Law School faculty and an informal adviser to the President. The Court lost another great jurist when age forced Justice Brandeis' resignation in March 1939. In his place, Roosevelt named William O. Douglas, formerly a Columbia Law School professor and member of the Security and Exchange Commission. The arch-conservative Butler died the following November, and to succeed him the President named Frank Murphy, former Philippine High Commissioner and Governor of Michigan. A year later, in February 1941, Justice McReynolds, the last remaining conservative opponent of the New Deal, submitted his resignation. The President filled the vacancy with Attorney General Robert H. Jackson, a staunch New Dealer who had attracted attention with his attacks upon "economic royalists."

Chief Justice Hughes resigned in June 1941, and the President thereupon paid tribute to Stone's long-standing liberal nationalism by appointing him to the Chief Justiceship. Stone's elevation broke through party lines, for the new Chief Justice had been a Republican and Attorney General under Coolidge. The vacancy occasioned by Stone's promotion went to Senator James Byrnes of South Carolina, long administration leader in the upper house. Justice Byrnes resigned in October 1942, and the President appointed Wiley Rutledge of Iowa to the vacancy in February 1943. Justice Roberts resigned in July 1945, and President Truman appointed Senator Harold H. Burton of Ohio to the vacancy in September. Chief Justice Stone died in April 1946, and in June President Truman named Fred M. Vinson, former federal judge, and then Secretary of the Treasury, to be Chief Justice. Thus within a nine-year period there occurred a ten-man turnover in the Court's personnel, and the liberal flavor of the Court seemed confirmed for many years to come.

THE NEW CONSTITUTIONAL LAW: FEDERAL REGULATION OF LABOR

Even while these alterations in personnel were occurring, the Court was engaged in laying down the broad outlines of a new constitutional law, confirming the revolution begun in the spring of 1937.

In one large group of cases, the Court fully confirmed the im-

plications of the initial labor board opinions with respect to federal controls over labor and production. In *Santa Cruz Fruit Packing Co. v. N.L.R.B.* (1938) the Court upheld the validity of a Labor Board order directed to a fruit-packing concern, only thirty-seven per cent of whose products moved in interstate commerce. Chief Justice Hughes, observing that the stream of commerce doctrine was not exactly applicable to the case, held that federal control was nonetheless valid, since labor disturbances at the plant had a substantial disruptive effect upon interstate commerce. Abandoning the old categorical distinction between direct and indirect effects, he said once more that the difference was "necessarily one of degree" and was not reducible to "mathematical or rigid formulas." Hughes' precedents were drawn from the earlier labor conspiracy cases, notably *Loewe v. Lawlor* (1908), and *United Mine Workers v. Coronado Coal Co.* (1922), wherein labor unions had been convicted of conspiracy to destroy interstate commerce, even though their activities had been immediately confined to stopping production.

In *Consolidated Edison Co. v. N.L.R.B.* (1938) the Court sustained federal control over the labor relations of a power company selling its output entirely within one state. Chief Justice Hughes pointed out that the company sold power to radio stations, airports, and railroads, which were in turn directly engaged in interstate commerce, and that the concern's relationship to interstate commerce was therefore sufficient to warrant federal control. Of like import was *N.L.R.B. v. Fainblatt* (1939), in which the Court sustained application of the National Labor Relations Act to a small-scale garment processor who delivered his entire output within the state. These cases meant that it was no longer necessary to show either an immediate stream of commerce or a large volume of business in order to establish federal authority. As long as a potential labor disturbance in the business in question would have a disruptive effect, however slight, upon interstate commerce, the labor relations of the business in question were subject to regulation.

The Court shortly employed the constitutional conceptions developed in the Labor Board cases to validate the Fair Labor Standards Act of June 25, 1938. This law prescribed an original minimum wage of twenty-five cents an hour and maximum hours of forty-four a week, subject to time and a half for overtime, for all em-

ployees engaged in interstate commerce or in the production of goods for interstate commerce.[1] In addition to those sections of the statute regulating wages directly, other provisions made it unlawful to ship in interstate commerce goods manufactured in violation of the minimum wage requirements of the statute. The act also prohibited the shipment in interstate commerce of the products of any establishment where child labor had been used in the previous thirty days. This provision constituted virtual re-enactment of the Child Labor Act of 1916. The statute thus plainly defied the dictum in the first Child Labor Case, as well as that in the Schechter and Carter opinions.

In *United States v. Darby* (1941) the Court found the Fair Labor Standards Act to be constitutional. The case involved a federal prosecution to enforce minimum wage standards upon an operator in the Southern lumber industry, in which wages in 1937 varied from ten to twenty-seven cents per hour, the average annual wage being $388.91. Justice Stone's opinion, for a unanimous Court, first analyzed and upheld the provisions prohibiting the movement of proscribed goods in interstate commerce. Formally overruling *Hammer v. Dagenhart* (1918), the first Child Labor Case, which he held to be a departure from sound principles, Stone said that the commerce power was complete, that Congress could lawfully employ absolute prohibition, and that the Court could not inquire into the motives behind an act of Congress. The sections by which Congress imposed direct federal regulation of wages were also valid, since Congress could "regulate intrastate activities where they have a substantial effect on interstate commerce." Stone's precedents here included the *Shreveport Rate Cases* (1914) and the recent Labor Board decisions. The Carter case he dismissed with the blunt observation that its dictum was limited by the other decisions cited. *Schechter v. United States* he did not even mention.

A year later, in *A. B. Kirschbaum v. Walling* (1942), another Fair Labor Standards Act case, the Court gave unprecedented scope to the conception of "production of goods for commerce." The employees in this case were not themselves engaged in production for commerce, but were employed merely in the maintenance and

[1] The law prescribed subsequent successive elevations of the minimum wage level to forty cents an hour, and in two years the maximum work week was to be reduced to forty hours.

operation of a loft building where tenants did produce and sell ladies' garments into interstate commerce. There was no touchstone, said Justice Frankfurter, to separate employees engaged in interstate commerce from those who were not. The judicial task was rather one of accommodation between the assertion of new federal authority on the one hand and the historic functions of the individual states on the other. He added the somewhat startling assertion that the scope of the statute in question was not coextensive with the limits of congressional power over interstate commerce, thereby implying that the limits of federal authority over interstate commerce might well extend even beyond those established in the statute in question. At any rate, he said, the law specifically applied to employees "necessary to production," and that meant building employees here.

The Kirschbaum opinion left but few employees outside the scope of the commerce power. Subsequent opinions have for the most part followed that dictum. Thus in *Warren-Bradshaw Co. v. Hall* (1942), the Court accepted application of the law to operators of oil-well drilling rigs, although the drillers did not themselves produce for commerce. In *Walton v. Southern Package Corporation* (1944), the Court ruled that the act extended to a night watchman in a veneer plant, while in *Borden Co. v. Borella* (1945) it interpreted the statute to cover porters, elevator operators, and watchmen in a New York office building. However, employees of certain purely local activities are still beyond the protection of the law. Thus in *Walling v. Jacksonville Paper Co.* (1943) the Court held the law inapplicable to employees of wholesalers who purchased goods outside the state but distributed locally without advance orders. And in *10 East 40th St. Building v. Callus* (1945), the Court refused to extend the law to cover workers in an office building 26 per cent of whose tenants had manufacturing plants located elsewhere.

In still another line of cases, the Court upheld the constitutionality of the Norris–La Guardia Anti-Injunction Act of 1932. This statute had prohibited the issuance by any federal court of injunctions in labor disputes, except where unlawful acts had been threatened or committed, and where substantial and irreparable injury would result were relief not granted. It will be recalled that Section 20 of the Clayton Act had prohibited the issuance of federal injunctions

in labor disputes unless necessary to prevent irreparable injury to property. However, in *Duplex Printing Press Co. v. Deering* (1921), the Court had virtually thrust aside Section 20 of the Clayton Act, with the opinion that the limitation upon injunctions must be interpreted very narrowly to forbid injunctions only against the actual employees involved in the dispute, so that the activities of the employees' union might in fact be enjoined. Further, the Court had pointed out in the Duplex case that the Clayton Act did not prohibit injunctions against "unlawful" labor activities. The Norris–La Guardia Act represented an attempt by Congress to undo the effect of the Duplex opinion and so restore the original intent of Congress in enacting Section 20 of the Clayton Act.

In *Lauf v. Shinner and Co.* (1938) the Court held briefly that the Norris–La Guardia Act was constitutional. There could be no question, said Justice Roberts, of the power of Congress to define the jurisdiction of the lower federal courts. The Court reached the same conclusion in *New Negro Alliance Co. v. Sanitary Grocery Co.* (1938), where Justice Roberts also noted that the evident purpose of Congress in passing the law had been to "obviate the results of the judicial construction" of the Clayton Act.

In *United States v. Hutcheson* (1941), the Court held that the Norris–La Guardia Act had in effect altered the status of criminal prosecutions against labor unions under the Sherman Anti-Trust Law. The case involved a criminal action under the Sherman Act against a carpenters' union which by a jurisdictional strike, picketing and boycotting a construction company, had allegedly interfered with interstate commerce. Justice Frankfurter's opinion infused the spirit of the Norris–La Guardia Act into Section 20 of the Clayton Act. He noted that under the Norris–La Guardia Act the union's activities would not be enjoinable in equity proceedings. It was absurd, he thought, to conclude that such action could still "become the road to prison" through criminal proceedings under the Sherman Act when it could not even be enjoined in equity proceedings. The Norris–La Guardia Act, he said, must be read broadly to alter the whole status of labor union activities under federal antitrust legislation.

However, in *Allen Bradley Co. v. Local Union No. 3* (1945), it became evident that certain types of labor union activity were still within the reach of the Sherman Act. Here an electricians' union

had signed closed-shop agreements with a number of manufacturers and contractors. Both the union and the contractors had then conspired to boycott non-union manufacturers of electrical goods. Speaking through Justice Black, the Court held that by combining with employers and manufacturers, the union had stepped outside the protection of the Clayton and La Guardia Acts, and that its action could be enjoined under the Sherman Law.

This dictum was shortly somewhat beclouded, however, by the Court's opinion in *Hunt v. Crumboch* (1945). Here a union had made a closed-shop agreement with a large grocery concern, whereby the concern agreed to require all trucking concerns that worked for it to make closed shop agreements with the union. Subsequently the union refused to negotiate with one of the trucking concerns, with the result that that firm was obliged to maintain an open shop and so lost its hauling contract with the grocery firm.

Justice Black, speaking for five justices, held simply that the union had not violated the Sherman Act, since laborers singly or in concert could sell or refuse to sell their labor as they chose. Justice Roberts, dissenting, argued that the sole purpose of the union had been to drive the trucking concern out of business, and that such action was "clearly within the denunciation of the Sherman Act."

FEDERAL REGULATION OF AGRICULTURE

In another series of important decisions, the new Court accepted several new statutes imposing far-reaching federal controls upon agricultural production. For all practical purposes the Court thereby swept *United States v. Butler* into the scrap-heap.

In 1938 Congress made bold to enact a new Agricultural Adjustment Act. This statute, which became law on February 16, followed the 1933 act in citing the effect of agricultural production upon interstate commerce as the constitutional foundation for the law. Also, as was the case in the earlier law, its object was the attainment of parity prices for several of the principal agricultural commodities. Unlike the 1933 act, however, the new statute levied no processing taxes, nor did it directly impose any production quotas upon farmers. Instead, it provided for a system of marketing quotas for cotton, wheat, corn, tobacco, and rice. Whenever the Secretary of Agriculture found that the supply of any one of the foregoing commodities was too great, he was empowered to impose

a marketing quota, subject to approval by referendum of two-thirds of the producers concerned. The act authorized the Secretary to assign individual quotas to each farm and fixed heavy penalties for marketing quantities in excess of such quotas.

In *Mulford v. Smith* (1939), the Court sustained the constitutionality of the new Agricultural Adjustment Act against an attack by several tobacco growers who sought to have their quotas set aside on the ground that the new law in effect regulated production and so invaded the reserved powers of the states in violation of the Tenth Amendment. But Justice Roberts, who had written the opinion in *United States v. Butler* invalidating the earlier Agricultural Adjustment Act, declared for the majority of the Court that the 1938 statute did not regulate production, but instead merely imposed market regulations at the "throat" of interstate commerce. Congress, he added, could lawfully limit the amount of any commodity to be transported in interstate commerce, even through the imposition of an absolute prohibition if it so desired. In this connection, he rejected the distinction so carefully drawn in *Hammer v. Dagenhart,* the first Child Labor Case, between things harmful in themselves and "ordinary" or "harmless" commodities. Answering the charge that the real purpose of Congress in enacting the statute was the regulation of production, he stated that "the motive of Congress in asserting the power to regulate commerce is irrelevant to the validity of the legislation." This repudiated the argument advanced in both the first and second Child Labor cases, that the Court could properly inquire into possible ulterior motives behind legislation that was otherwise constitutional and strike down the law if it discovered an intention to subvert the Tenth Amendment. Justice Roberts did not even mention *Hammer v. Dagenhart,* nor did he allude to *United States v. Butler,* wherein could be found his own lengthy exposition of the virtues of dual federalism.

It was evident that the precedent of the Butler case had now been discarded, even though it was not formally overruled. The practical effect of the imposition of marketing quotas was the regulation of agricultural production, the very thing attempted by Congress in the first Agricultural Adjustment Act and pronounced unconstitutional in the Butler opinion. Yet since the Court now refused to consider the motives of Congress in authorizing marketing quotas, the present statute was constitutional. In other words, Congress

could constitutionally regulate agricultural production through control over commerce and so could accomplish by indirection that which the Court in the Butler case had said could not be done without violating the Tenth Amendment. Needless to say, Justices McReynolds and Butler, the shattered remnant of the Court's conservative bloc, dissented.

Three months before the Court's opinion in *Mulford v. Smith*, the Court in *Currin v. Wallace* (1939) had used the stream of commerce doctrine to validate the Tobacco Inspection Act of 1937. This law had established federal inspection and grading at tobacco auctions designated by the Secretary of Agriculture. The Court in the Currin case said simply that tobacco sales in which most of the commodity was about to move in interstate commerce were as much a part of that commerce as were grain and beef sales, over which federal inspection had already been sustained. The Court ignored the fact that the product in question had not yet begun to move, a distinction that had been strongly emphasized in the Carter opinion.

Finally, in June 1939, the Court, in *United States v. Rock Royal Cooperative* and in *Hood v. United States*, sustained the Agricultural Marketing Agreement Act of 1937. This law empowered the Secretary of Agriculture to maintain parity prices for a variety of agricultural commodities through the imposition of marketing quotas and price schedules. The Rock Royal and Hood cases involved the validity of certain orders of the Secretary fixing the price of milk paid to farmers in the New York and Boston interstate milksheds. Again the Court, speaking now through Justice Reed, held that since most of the milk sold eventually crossed state lines the local sales transactions in question were the beginning of interstate commerce and hence subject to federal control. Citing the *Shreveport Rate Cases*, the Court held that intrastate as well as interstate commerce in milk could be regulated, since the two admittedly commingled in moving to market. McReynolds and Butler, dissenting, thought the decision a violation of the "ancient doctrine" that Congress does not have "authority to manage private business affairs under the transparent guise of regulating commerce."

Later decisions served to confirm the ideas expounded in the foregoing cases. Thus in *United States v. Wrightwood Dairy* (1942) the Court again sustained the Agricultural Marketing Agree-

ment Act, and held even that the federal government might lawfully regulate the price of milk sold wholly inside state lines and not commingled with interstate milk but merely sold in competition with it.

In *Wickard v. Filburn* (1942), the Court sustained the validity of the wheat-marketing quota provisions of the Agricultural Adjustment Act of 1938, even though Congress in 1941 had amended the statute to authorize the Secretary of Agriculture to fix marketing quotas for wheat which would include wheat consumed on the premises as poultry and livestock feed, as seed, and as household food, as well as for wheat sold into interstate commerce. Only wheat insulated by storage was exempt from the calculation of the total amount marketed and thus from the penalties imposed for marketing in excess of quotas. In a forceful opinion, Justice Jackson not only repudiated the old distinction between direct and indirect effects but also proceeded virtually to discard entirely the distinction between commerce and production as a constitutional touchstone. Questions of the power of Congress, he said, "are not to be decided by reference to any formula which would give controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity in question upon interstate commerce." And he continued, "Whether the subject of the regulation in question was 'production,' 'consumption,' or 'marketing' is, therefore, not material for purposes of deciding the question of federal power before us." The test of the power to regulate any local activity must hereafter, he said, be a practical economic one of the extent of economic effect the activity in question had upon interstate commerce. Applying this test, he found that wheat locally consumed did have an appreciable practical effect upon the price of wheat moving in interstate commerce; therefore wheat locally consumed was subject to federal regulation although it did not itself ever move in commerce at all. Jackson's words thus sounded the death knell of almost fifty years of categorical distinction between commerce and production and made it clear that in the future the Court would accept as constitutional the regulation of any activity, however local, if it could be demonstrated to have a practical economic effect upon commerce.

THE COMMERCE POWER AND COAL

In *Sunshine Anthracite Coal Co. v. Adkins* (1940), the Court accepted the Bituminous Coal Act of 1937, a statute that Congress had passed to replace the one invalidated in the Carter decision. The new act contained substantially the same provisions for price fixing and the regulation of competition as those in the old law, although in deference to the Carter opinion Congress had omitted the labor provisions of the earlier statute. Justice Douglas' opinion now held that fixing coal prices and establishing market rules was clearly written in the commerce power. As precedent he cited Justice Cardozo's dissenting opinion in the Carter case. As for the 19½ per cent penalty tax levied upon producers who failed to comply with the provisions of the law, Justice Douglas declared that it was clearly intended as a sanction to enforce the regulatory provisions of the statute, but it was not thereby unconstitutional, since Congress could lawfully "impose penalties in aid of the exercise of any of its enumerated powers." Asserting also that the act did not violate due process, Douglas observed: "If the strategic character of this industry in our economy and the chaotic conditions which have prevailed in it do not justify legislation, it is difficult to imagine what would." Douglas then repudiated definitively the existence of the "twilight zone," the area of sovereignty beyond the control of either state or national governments, with the observation that while there were evident limits on the power to regulate industry, "that does not mean that there is a no man's land between state and federal domains."

THE COMMERCE POWER AND FEDERAL REGULATION OF PUBLIC UTILITIES

Between 1938 and 1946 the government won important victories before the Court in support of the constitutionality of the Public Utility Holding Company Act. This statute, which had become law on August 26, 1935, had been enacted in an attempt to eliminate certain abuses in the utility industry, among them pyramided holding companies, fictitious and watered capitalization, and the imposition of excessive rates upon the public. The act required gas and electric companies using the facilities of interstate commerce

to register with the Securities and Exchange Commission under penalty of losing their right to use the mails or to engage in interstate commerce. Section 11, the so-called "death sentence" provision, required that after 1938 the Securities and Exchange Commission limit each holding company to the operation and control of a single integrated public utility system. Holding companies that were of a more complex structure were to be broken up into their integral parts through commission order.

After a protracted period of legal sparring in the lower courts, the Supreme Court in *Electric Bond and Share Company v. S. E. C.* (1938) upheld the registration provisions of the law. Chief Justice Hughes said that there was no serious question that the defendant companies were engaged in interstate commerce, since they operated in some thirty-two states, transmitted energy across state lines, sold energy in interstate commerce, and made continuous use of the mails and facilities of interstate commerce to carry on business. Registration, he added, was a legitimate instrument of congressional control over such businesses. The Court at the same time refused to be drawn into a larger discussion of the more controversial provisions of the statute. The constitutional point decided was in reality a narrow one, and the more vital "death sentence," Section 11, did not come before the Court until 1946.

Finally, in *North American Co. v. S. E. C.*, decided in April 1946, the Court upheld the constitutionality of Section 11 (b) (1) of the law. This provision, a portion of the "death sentence" section, authorized the Securities and Exchange Commission to act to bring about the geographic and economic integration of holding company systems engaged in interstate commerce in gas and electricity. To this end the provision empowered the commission to require holding companies engaged in interstate commerce to confine their activities to a stipulated area, and to dispose of their security holdings in other areas.

In the present case the Court was confronted with a commission order breaking up a public utility holding company controlling directly and indirectly some eighty corporations with an aggregate capital value of $2,300,000,000, doing business in some seventeen states and selling power across state lines. The appellant concern relied heavily upon the contention that it was merely an investment company and was not in itself engaged in interstate commerce.

But as Justice Murphy's opinion for a unanimous Court pointed out, this was substantially the same attempted distinction as that which the Court had rejected as invalid forty years earlier in the Northern Securities case. The holding company, he said, could not "hide behind the façade of a mere investor"; the company not only had a "highly important relationship to interstate commerce and the national economy," but was "actually engaged in interstate commerce." Justice Murphy then presented an interpretation of the extent of the commerce power so broad as to make the federal government's authority under interstate commerce virtually coincident with the requirements of adequate national regulation of any phase of the economic system. "This broad commerce clause," he said, "does not operate so as to render the nation powerless to defend itself against economic forces that Congress decrees inimical or destructive of the national economy. Rather it is an affirmative power commensurate with the national needs. . . . And in using this great power, Congress is not bound by technical legal conceptions. Commerce itself is an intensely practical matter. . . . To deal with it effectively, Congress must be able to act in terms of economic and financial realities. . . ." He added briefly that the requirement for disposal of subsidiary holdings did not violate due process, since the provision was not confiscatory and required equitable means of disposal.

The following November, in *American Power and Light Co. v. S. E. C.* (1946), the Court upheld the constitutionality of Section 11 (b) (2) of the Public Utilities Holding Company Act. Section 11 (b) (2), another portion of the "death sentence" provisions, authorized the Securities and Exchange Commission to take all necessary steps to insure that "the corporate structure or continued existence of any company in the holding company system does not unduly or unnecessarily complicate the structure. . . ." Justice Murphy's opinion held that this phraseology clearly gave the commission the power to order the dissolution of unnecessarily complicated holding company structures. Such power, he said, was clearly within the power of Congress to regulate interstate commerce. The evils associated with unduly complicated holding company systems were "so inextricably entwined around the interstate business of the holding company systems as to present no serious question as to the power of Congress under the commerce clause

to eradicate them." Citing the North American case, he reaffirmed "once more the constitutional authority resident in Congress by virtue of the commerce clause to undertake to solve national problems directly and realistically, giving due recognition to the scope of the state power." He added that Section 11 (b) (2) did not unlawfully delegate legislative power to the commission, since adequate standards for guidance were embodied in the act. Neither did it violate due process of law, since it was not confiscatory and provided for due notice and hearing.

THE INSURANCE BUSINESS AND INTERSTATE COMMERCE

On June 5, 1944, the Court handed down two highly significant opinions bringing the insurance business within the scope of the federal commerce power. In *Polish National Alliance v. N.L.R.B.*, the Court held unanimously that the activities of insurance companies affected interstate commerce and so were subject to regulation under the National Labor Relations Act. Justice Frankfurter's opinion carefully avoided any statement that the business of writing insurance contracts was in itself interstate commerce, a position that certain of his colleagues were unwilling to adopt. But in *United States v. Southeastern Underwriters Association* a majority of four justices went beyond the Polish Alliance opinion to hold that the insurance business was in itself interstate commerce, and so was subject to regulation under the Sherman Act. In reaching this conclusion the Court overturned a long series of Supreme Court decisions to the contrary beginning with *Paul v. Virginia* (1869). Justice Black, speaking for the majority, pointed out that all earlier decisions had been concerned with upholding state laws in the absence of federal regulation and that these decisions were therefore not conclusive as to the scope of federal power. He chose instead to cite historical evidence that the term "commerce" as of 1787 included insurance, and he cited, also, the sweeping language of Marshall's definition in *Gibbons v. Ogden*—"commerce is intercourse." Justice Black then argued at length that the business of insurance was so inextricably bound up with the processes of commerce that it must be considered as a part of that commerce in itself.

Justice Black held further that insurance contracts fell within the scope of the Sherman Act. He cited historical evidence that

insurance companies were looked upon as trusts in the eighties and nineties, and he cited the absence of any positive evidence that Congress had intended to exclude insurance companies from the scope of the law. He concluded, therefore, that insurance companies were subject to the Sherman Act and could properly be convicted for its violation.

In a strong dissent, Chief Justice Stone objected that a long series of opinions had settled decisively that the business of writing insurance contracts was not in itself commerce, and he argued that the immediate effect of the present decision would be to withdraw from the states the regulation of the insurance business and to place it in the hands of the national government, which had no system of regulation at all other than the limited controls of the Sherman Act. In a separate dissent, Justice Jackson expressed the conviction that the insurance business "as a matter of fact" was in itself commerce, but he thought the "legal fiction" to the contrary had become so well established as the basis of federal and state legislative action that it ought to be preserved. Frankfurter, also dissenting, thought Congress could regulate insurance but had not intended to do so in the Sherman Act. Outside the Court, there was widespread editorial and legal criticism of the majority justices for having overturned a long-standing rule of constitutional law by a 4-to-3 decision.[2]

Criticism of the majority opinion in the Southeastern Underwriters case tended to obscure the significant fact that the justices had been unanimous in the conviction that the business of insurance, if not in itself commerce, nonetheless substantially affected commerce and so was subject to federal regulation in so far as it had such effect.

One result of the Court's decision that insurance contracts were themselves interstate commerce was to throw doubt upon the validity of existing state laws for the regulation of the insurance business. It was with this situation in mind that Congress enacted a statute, which became law on March 9, 1945, providing that "the business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business," and further, that "no Act of Congress shall be construed to invalidate, impair, or supersede any

[2] For undisclosed reasons, Justices Roberts and Reed did not participate in the Southeastern Underwriters decision.

law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates" to such business. Another section of the act suspended application of the federal antitrust laws to insurance companies until January 1, 1948, after which the Sherman and Clayton Acts and the Federal Trade Commission Act were to be applicable to the extent that such business was not regulated by state law. The statute also specified that the National Labor Relations Act and the Fair Labor Standards Act were to continue to apply to insurance companies. Thus Congress in effect stated that the various states could regulate the insurance business until the national government saw fit to supersede them. For the time being, Congress made the various states federal agents in the enforcement of a federal power, a device now familiar to the student of modern constitutional processes.

THE COMMERCE POWER AND NAVIGABLE STREAMS

In another group of opinions, the Court sanctioned federal control over navigable streams well beyond ideas hitherto held as to the limits of that authority. Previous decisions upholding federal authority over waterways had been based upon the proposition that the waterways in question were navigable in interstate commerce. Federal control had been sustained even when navigation was sporadic and difficult, and when the waterway in question lay entirely within one state. By implication, however, federal authority did not extend to the control over entirely non-navigable waters. However, in *United States v. Appalachian Electric Power Co.* (1940) the Court accepted federal control over the non-navigable upper reaches of an interstate stream, the Near River in Virginia. Justice Reed's opinion said that since the stream might conceivably be made navigable by improvements, the Federal Power Commission could rightfully exercise control over dam-building, even though commercial navigation of this part of the stream was not at present feasible. Moreover, feasibility of navigation was not the only test of federal power over the stream. "Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control," while "water power development from dams in navigable streams is from the public's standpoint a byproduct of the general

use of the rivers for commerce." In other words, flood control and power development had a legitimate relationship to the commerce power. Federal authority over waterways was thus extended far beyond the incidence of navigation.

The Court extended this concept in *Oklahoma ex rel. Phillips v. Atkinson* (1941). This case was concerned with the validity of a federal statute authorizing construction of a dam for flood-control purposes in the non-navigable upper reaches of the Red River. The state of Oklahoma had alleged that the primary purpose of the dam was the generation of power rather than flood control and that the statute authorizing construction therefore violated the Tenth Amendment. The Court, speaking through Justice Douglas, upheld the statute upon two grounds. First, he pointed out that one purpose behind construction of the dam was the promotion of navigation downstream. Second, he held, flood control had a vital relationship to the broader aspects of the commerce power. There was "no constitutional reason," he said, "why Congress or the courts should be blind to the engineering prospects of protecting the nation's arteries of commerce through control of the watersheds. There is no constitutional reason why Congress cannot, under the commerce power, treat the watersheds as a key to flood control on navigable streams and their tributaries." Moreover, the fact that power production was one objective in authorizing construction of the dam did not invalidate the project, since "the fact that ends other than flood control will also be served, or that flood control may be relatively of lesser importance, does not invalidate the exercise of the authority conferred on Congress."

The Atkinson and Appalachian cases thus placed federal authority over waterways upon a far broader constitutional basis than formerly. Flood control and waterway development were now recognized as of equal validity with maintenance of navigation as constitutional objectives of Congress. Also, the fact that Congress may have had objectives other than navigation or flood control—such as power development—did not invalidate an improvement project so long as it was concerned at any point with navigation or flood control. Finally, since an entire watershed area could be treated as a unity, federal authority was now extended to a program for the entire watershed, not merely the navigable portions of streams in that watershed.

THE SPENDING POWER AND PUBLIC WORKS

The new Court also went far beyond its earlier cautious approval of the Tennessee Valley Authority to place federal spending and public works projects practically beyond constitutional attack. It will be recalled that in *Ashwander v. T.V.A.* (1936) the Court, citing both the commerce and war power, had sustained the constitutionality of the Wilson dam and the sale of surplus power from that project, but that it had carefully refrained from passing upon other constitutional aspects of the Tennessee Valley Authority program. However, in *Alabama Power Co. v. Ickes* (1938), the Court, speaking through Justice Sutherland, denied the plea of several state-chartered power companies that it enjoin federal loans to municipalities for power projects. The plaintiff corporations, Sutherland said, had no right to be free of competition, nor could they attack federal appropriations merely as taxpayers. Since the Court would recognize neither of these grounds for action, the power companies were unable to show any impairment of legal right, and they therefore had no standing in court to attack the municipal plants in question.

This opinion was reinforced a year later in *Tennessee Electric Power Company v. T. V. A.* (1939). In this case, eighteen state-chartered power companies sought to enjoin the T. V. A. from the distribution and sale of electric power. They attacked the constitutionality of the Tennessee Valley Act on the ground that Congress had attempted, under the guise of its war and commerce powers, to assert authority over the generation of electric power, a subject matter not granted to it by the Constitution. Again the Court, now speaking through Justice Roberts, held that the appellants had no right to be free from competition and could not therefore show material interest or damage to a legal right to serve as a cause of action.

These two cases meant that for all practical purposes the federal spending power and federal public works projects were beyond federal judicial control. Since opponents of such programs could gain no judicial standing in court as having a material interest in attacking the constitutionality of such legislation, it was impossible to get the Court to pass upon the theoretical constitutional merits of a great regional improvement program such as that of the Tennessee Valley Authority.

STATE TAX LEGISLATION AND THE FEDERAL COMMERCE POWER

In the course of broadening the scope of the federal commerce power, the Court after 1937 had occasion to pass upon a great variety of state statutes affecting interstate commerce, a majority of them involving the imposition of state taxes burdening interstate commerce or out-of-state business. In many instances, these statutes represented genuine attempts of hard-pressed local and state governments to find new sources of revenue. In most states returns from real and personal property taxes fell off drastically after 1929, while at the same time the expenses of municipal and state governments increased sharply, in large part because of the great rise in unemployment and poor-relief expenditures. The Court generally viewed sympathetically valid attempts to explore new sources of revenue, even where the tax in question went rather far in burdening interstate commerce. The Roosevelt-appointed justices who joined the Court after 1937 generally voted in favor of such legislation, in part apparently on the general principle of imposing as few limits upon governmental sovereignty as possible. The conservative justices remaining on the Court voted much more frequently to invalidate state legislation burdening commerce, but after 1937 they often found themselves in a minority.

However, many state tax laws enacted during the depression were in fact attempts to discriminate against interstate commerce or out-of-state business in favor of local business activity. Legislation of this kind occasioned considerable alarm among certain economic theorists, who foresaw the ultimate division of the United States into a number of more or less self-contained economic units—an eventuality rather dramatically described as "the Balkanization of the United States." This rather fearsome prospect remains decidedly remote; yet the tendency to discriminate by means of taxation against interstate commerce was undeniably a bad one, and was economically unsound. The Court invariably declared state legislation unconstitutional when the statute under review obviously represented a deliberate attempt to discriminate against out-of-state business or to erect an interstate trade barrier.[3]

[3] In passing upon state legislation burdening interstate commerce, the Court had available certain well-defined constitutional principles of long standing. Since *Willson v. Black Bird Creek Marsh Co.* (1829) and *Cooley v. Board of Wardens*

For example, in *Ingels v. Morf* (1937), the Court held unconstitutional a California tax on automobile "caravans," which imposed a fee of $15 on each vehicle transported into the state for sale. Justice Stone's opinion observed that a tax burdening interstate commerce could be justified only as payment for some police, inspection, or administrative service rendered by the state. The tax under review purportedly was in payment for policing vehicle caravans, but Justice Stone pointed out that the state collected far more revenue under the act than it expended in police and administrative services. The law therefore burdened interstate commerce unjustifiably, and was invalid. On the other hand, when California passed a revised statute lowering the license fee to $7.50 for a six-month permit for "caravaning" a vehicle on the California state highways, the Court in *Clark v. Paul Grey, Inc.* (1939) found the new law constitutional.

In *Hale v. Bimco Trading Co.* (1939), the Court invalidated an obvious attempt to discriminate against out-of-state business. Here the state of Florida had levied a tax of fifteen cents a hundredweight on cement imported from outside the state. Nominally the

(1851), it had generally been recognized that a state might, in the absence of federal legislation, impose certain local controls upon interstate commerce. It had also been well established, long before 1937, that a state might impose police controls or tax or inspection measures which incidentally restricted commerce to some degree, so long as the act in question was a bona fide police or revenue measure, did not unduly burden interstate commerce, and did not conflict with congressional regulation of the area of commerce in question.

However, state legislation which discriminated against interstate commerce under the guise of police regulations or revenue measures had long been held unconstitutional. For example, in *Ashbell v. Kansas* (1908), the Court had sustained the constitutionality of a Kansas Live-Stock Inspection Act which required a certificate of freedom from disease as a prerequisite for the transportation of cattle into the state, and in *Mintz v. Baldwin* (1903) the Court held constitutional a New York executive order that all cattle imported into the state for dairy and breeding purposes be certified free of Bang's disease. Further, in *Savage v. Jones* (1912), the Court upheld an Indiana statute requiring animal foods imported into the state to be inspected by a state chemist and labeled with a chemical description of content, and to pay an inspection license fee. All the foregoing were sustained as bona fide police statutes. On the other hand, the Court in *Minnesota v. Barber* (1890) held unconstitutional a Minnesota statute which made it illegal to offer for sale any meat other than that taken from animals passed by Minnesota inspectors within 24 hours of slaughter. Here the Court thought the law under review patently discriminated against meat products from other states and placed an undue burden upon interstate commerce. Likewise, in *International Text-Book Co. v. Pigg* (1910), a Kansas statute requiring a foreign corporation to file a business statement with state authorities as a condition precedent to carrying on business with the concern's customers within the state through the channels of interstate commerce was held unconstitutional as an attempted invasion of the federal commerce power.

tax was an inspection fee, but the state subjected domestic cement to no corresponding fee, while the statute in fact openly affirmed as its purpose the protection of the Florida cement industry against "unfair competition." Justice Frankfurter in holding the law void said that "no reasonable conjecture can here overcome the calculated discrimination against foreign commerce." Likewise, in *Best v. Maxwell* (1940) the Court held unconstitutional a North Carolina statute levying a $250 "privilege tax" upon any person, not a regular retail merchant of the state, who displayed samples in a hotel room or house rented temporarily for sales purposes. Justice Reed, speaking for a unanimous Court, said the tax "in practical operation" would work serious discrimination against interstate commerce, and was therefore invalid. On the other hand, in *Caskey Baking Co. v. Virginia* (1941), the Court accepted the constitutionality of a $100 annual fee imposed upon each vehicle used in peddling within the state, at other than the place of business of the vendor. The Court found the fee part of a comprehensive system of state taxation which did not discriminate against interstate commerce as such; hence the tax was valid.

Beginning with the depression, the retail sales tax became an important source of revenue for most state governments. This tax resulted in a number of important court decisions. Obviously it could not be levied upon goods that were indisputably moving in interstate commerce, but it was often difficult to distinguish precisely where the state's jurisdiction ended, the result being that a number of fine-drawn judicial decisions were necessary.

In *McGoldrick v. Berwind-White Co.* (1940), the Court held that a New York city sales tax on coal shipped into the city in interstate commerce, and there sold, was not unconstitutional. Justice Stone's opinion said that the only relation between the tax and interstate commerce was the fact that shipment had occurred immediately preceding the sale. The tax did not discriminate against interstate commerce and was legal. On the other hand, in *McLeod v. Dilworth* (1944), the Court held unconstitutional an Arkansas collection of a sales tax on a sale in Memphis, Tennessee, where the sale was consummated and title passed in Tennessee and the goods were subsequently shipped into Arkansas. Justice Frankfurter observed that Arkansas was attempting to exercise the prerogative of taxation beyond the jurisdiction of the state.

The tendency of many persons and firms to do business in interstate commerce in order to escape as far as possible from the burden of the sales tax led many states to enact so-called "use taxes" as a complementary levy. Here the state commonly levied a 2 or 3 per cent tax for the privilege of "use," on goods imported into the state and exempt from the sales tax. Although it appeared that the "use tax" was patently a device for evading the limitations upon taxing interstate commerce, the Court in *Nelson v. Sears Roebuck & Co.* (1941), held an Iowa use tax of 2 per cent valid when applied to out-of-state mail-order sales to persons within Iowa. Speaking through Justice Douglas, the Court emphasized that the state could properly tax use as distinct from the out-of-state sale. And in *General Trading Co. v. Tax Commission* (1944), the Court, speaking through Justice Frankfurter, held that the Iowa use tax could properly be applied to property shipped into the state of Iowa, even when both title and transaction had been consummated in Minnesota. Evidently in accepting the use tax, the Court was in part influenced by a sympathy for the revenue problems of the states and a determination not to infringe upon state prerogative any more than was absolutely necessary.

In *McCarroll v. Dixie Greyhound Lines* (1940), the Court invalidated an Arkansas statute which prohibited entry of any vehicle into the state having more than twenty gallons of gasoline in its tanks, without first paying the state gas tax on the balance in excess of twenty gallons. Justice McReynolds, speaking for the Court, said that while the state could levy a reasonable tax for the privilege of using state highways, the present tax could not be so construed, but instead must be interpreted as a simple tax on interstate commerce.

The case is notable because of the dissent of Justices Black, Frankfurter, and Douglas, who argued that judicial control of the taxation of interstate commerce had become unsatisfactory and that Congress ought to establish by statute a body of general rules for the states and courts to follow. "Spasmodic and unrelated instances of litigation," they said, "cannot afford an adequate basis for the creation of integrated national rules which alone can afford that full protection for interstate commerce intended by the Constitution." Justice Black was to repeat on other occasions his argument that state interference with interstate commerce was properly a subject

for congressional solution rather than erratic judicial interpretation, but to date Congress has not acted upon the suggestion.

STATE POLICE POWER AND THE FEDERAL COMMERCE POWER

In most instances the Court viewed with sympathy the attempts of the states to solve the variety of social problems confronting them by imposing local police regulations upon interstate commerce. Only in those instances in which state legislation deliberately interposed a discriminatory barrier to commerce, or in which state legislation intruded upon a sphere of commerce essentially national in character or pre-empted by Congress, did the Court refuse to accept state social legislation affecting interstate commerce.

In *Edwards v. California* (1941), the Court unanimously held unconstitutional the California "Okie Law," which made it a misdemeanor to transport an indigent person or pauper into the state. The obvious objective of the statute was to hold down the cost of the state's relief rolls. But Justice Byrnes, speaking for the Court, pointed out that the transportation of persons across a state line was interstate commerce, and went on to declare that the California act plainly erected "an unconstitutional barrier" to such commerce. No boundary to the permissible area of state police power, he said, "is more certain than the prohibition on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders." It might well be, he added, that a state could by such expedients escape temporarily a problem common to all of them, but as Justice Cardozo had remarked in *Baldwin v. Seelig* (1935), "The Constitution was framed under the dominion of a political philosophy less parochial in range."

The Court's opinion seemed to be in part at odds with the old precedent of *New York v. Miln* (1837), where the Court had sustained New York's regulation of foreign immigration in order to protect itself against "a moral pestilence of paupers, vagabonds, and possibly convicts." However, Justice Byrnes doubted whether the transportation into California of individual indigent paupers constituted "a moral pestilence," and he intimated that the Miln precedent was in any event archaic.

The Court was unanimous in holding the California statute in-

valid, but Justices Douglas, Black, and Murphy in a separate concurring opinion sought to rest the right of migration upon the "privileges and immunities clause" of the Constitution. Migration, they held, was one of the rights of national citizenship as distinct from citizenship in the several states, and no state could interfere with it. Justice Jackson, who wrote a concurring opinion of his own, adopted the same position in even more forcible language. The migration of a human being who "possesses nothing that can be sold and has no wherewithal to buy," does not, he said, "fit easily into my notions as to what is commerce." It was a much more fundamental human right which was involved, one associated with national citizenship, and the Court ought not to hesitate to invoke the privilege and immunities clause in defense of it.[4]

In *Cloverleaf Co. v. Patterson* (1942), the Court struck down part of an Alabama pure food act on the ground that the state statute came into conflict with federal control over the area of commerce and production in question. A section of the federal internal revenue code, enacted on August 10, 1912, had established a system of inspection for the manufacture and reprocessing of packing-stock butter and also had authorized the condemnation and confiscation in interstate commerce of the finished product, known as renovated butter,[5] if it contained deleterious or unwholesome materials. The Alabama statute authorized the seizure of packing-stock butter while in the process of manufacture. Justice Reed, speaking for a majority of the Court, held the state provision void on the ground that it interfered with a federal system of inspection for production in interstate commerce. He admitted that the federal law did not authorize the seizure of packing-stock butter, but only its inspection. However, Reed thought the entire process of manufacturing and distributing renovated butter had been subjected to such extensive federal regulation as to preclude further state regulation even of the production stage of the industry.

In an extremely vigorous dissent Chief Justice Stone charged that the majority decision appeared to him "to depart radically from the salutary principle that Congress, in enacting legislation within its constitutional authority, will not be deemed to have intended to strike down a state statute designed to protect the health and safety

[4] See the discussion of *Colgate v. Harvey*, p. 785 n., for the revival of the privileges and immunities clause.

[5] Packing-stock butter is bulk tub butter. When rancid or off-flavor, it may be reprocessed with fresh milk, and is then known as renovated butter.

of the public unless the state act, in terms or in its practical administration, conflicts with the act of Congress or plainly and palpably infringes its policy." He pointed out that the practical effect of the present decision was to deprive Alabama of the power to seize spoiled packing-stock butter, without conferring that right on any federal official. "Thus both the federal and the state governments are left powerless to condemn an article which is a notorious menace to health. . . ." In a separate dissent, Justice Frankfurter called the majority decision "an intrusion by this Court into a field that belongs to Congress, and which it has seen fit not to enter. . . ." The decision, he added, was "purely destructive legislation—the Court takes power away from the states but is, of course, unable to transfer it to the federal government." In effect the decision had created a "twilight zone" between state and federal pure food laws.

A decision of broad social significance came in *Morgan v. Virginia* (1946), in which the Court declared that the Virginia "Jim Crow" statute, requiring segregation of white and Negro passengers on public carriers within the state, was unconstitutional as applied to vehicles moving in interstate commerce. Prior attempts to invalidate Jim Crow laws had been prosecuted under the equal protection clause of the Fourteenth Amendment, and had been unsuccessful.[6] But in the Morgan case counsel rested their case solely on the premise that segregation laws placed an unreasonable burden upon interstate commerce, and they successfully pressed the contention upon the Court. Justice Reed, speaking for the Court, thought the Virginia act invalid under the general rule that state legislation is unconstitutional if it unduly burdens commerce in matters where national uniformity was necessary and desirable. Emphasizing the element of burden present in the Virginia statute, he pointed out that under the law an interstate passenger might be ordered repeatedly to change seats, a disturbing requirement. In addition, Justice Reed cited as precedent *Hall v. De Cuir* (1878), in which the Court had held invalid a Louisiana law *forbidding* racial segregation on public carriers, on the ground that the state statute interfered with the requirement of uniformity in the regulation of interstate commerce. Ironically, the De Cuir case now became a plausible constitutional precedent for invalidating a state segregation law.

The new Court in most instances willingly accepted as consti-

[6] See p. 492.

tutional state police statutes whose evident purpose was to protect the health and welfare of the community. Thus in *Milk Board v. Eisenburg* (1939), the Court declared constitutional a Pennsylvania law empowering a state milk board to license milk dealers and fix prices, including that of milk transported into the state in interstate commerce. Justice Roberts, speaking for the majority, admitted that the statute had an incidental effect on interstate commerce, but he held that the law was not necessarily unconstitutional on that account, since it did not discriminate against out-of-state milk nor place an undue burden upon commerce. In *California v. Thompson* (1941), the Court upheld a California statute requiring the licensing of agents who sold or negotiated for public transportation over the public highways of the state. Justice Stone called the law constitutional, under the rule enunciated in *Willson v. Black Bird Creek Marsh Co.* and *Cooley v. Board of Wardens*, whereby it had long been recognized that in the absence of federal intervention the states might constitutionally regulate certain matters of local concern which unavoidably involve some regulation of interstate commerce. And in *Parker v. Brown* (1943), Chief Justice Stone, speaking for the Court, passed favorably upon the validity of a California statute establishing an elaborate marketing control program for raisins. The law, he said, did not impose unduly restrictive burdens upon interstate commerce, nor did it violate the Agricultural Marketing Act or the Sherman Law.

One category of state statutes discriminating against interstate commerce—those regulating the importation of liquor into a state —were held to be constitutional as a result of the adoption of the Twenty-First Amendment. This became clear in *State Board of Equalization v. Young's Market Co.* (1936), when the Supreme Court ruled favorably upon a California statute which imposed a license fee of $500 for the privilege of importing beer into the state. Justice Brandeis, speaking for the Court, observed first that before the adoption of the Twenty-First Amendment, such a law undoubtedly would have been unconstitutional as imposing a direct burden upon interstate commerce. He then went on to say that the adoption of the amendment had made legal state tariffs upon the importation of liquor. To the argument that the amendment had been intended only to confer police powers upon the state to control the liquor traffic and not to burden interstate commerce,

Brandeis replied that the Court could not rewrite the plain language of the amendment to give it that meaning. The Court reached the same conclusion in *Indianapolis Brewing Co. v. Liquor Control Commission* (1939), a case involving the constitutionality of a Michigan statute which forbade the sale within the state of beer manufactured in any state which discriminated against Michigan beer. Although the law admittedly discriminated against interstate commerce, the Court merely stated that since the Young case, a state's right to limit the importation of liquor was not controlled by the commerce clause.

The result of this interpretation of the Twenty-First Amendment has been to sanction a limited commercial warfare between the liquor businesses of the various states. Statutes discriminating against out-of-state liquor manufacturers through license or import duties or by outright prohibition have become common. There is no evidence that Congress intended to bring about this situation when it adopted the phraseology of the amendment; rather it seems probable that Congress intended merely to make it constitutionally possible for dry or partially dry states to protect their borders against a deluge of illicit liquor. However, the present condition does not seem to be remediable unless the Court in the future alters its interpretation of the amendment.

THE DECLINE OF SUBSTANTIVE DUE PROCESS OF LAW

After May 1937 the Court began a general retreat from the use of substantive due process as an instrument for the protection of vested interest and corporate property rights against state and federal social legislation. In the decade following the defeat of Roosevelt's court plan, the Court invalidated but one state statute imposing restrictions upon property or contractual rights as being contrary to the due process or equal protection clauses of the Fourteenth Amendment.

That instance occurred in *Connecticut General Life Insurance Co. v. Johnson* (1938) and was notable principally for Justice Black's dissenting opinion, in which he made an extraordinary attack upon the right of corporations to claim protection under the Fourteenth Amendment. The case involved the validity of a California statute taxing insurance premiums paid in Connecticut by foreign insurance companies doing business in California. All but Justice

Black concurred in Justice Stone's opinion that the law violated due process in that it taxed property and business activity lying outside the state's jurisdiction.

"I do not believe the word 'persons' in the Fourteenth Amendment includes corporations," said Justice Black in his dissent. "Neither the history nor the language of the Fourteenth Amendment justifies the belief that corporations are included within its protection." Justice Black then cited Justice Miller's Negro-protection theory of the Fourteenth Amendment as advanced in the *Slaughterhouse Cases*, as supporting evidence for his contention that the Court had erred in *Santa Clara County v. Southern Pacific Railroad* (1886), when it had held that the word "persons" as used in the amendment included corporations.

Justice Black's lone dissent was not dignified by attention from the eight other justices, and his outburst was widely condemned in the legal press. Historically there was considerable basis for Black's contention, but it was doubtful that the Court would now reverse its long-standing dictum that a corporation was a person within the meaning of the Fourteenth Amendment. Such a reversal would have upset a body of legal precedent accumulated over a period of sixty years. Many liberals would have preferred to see an attack upon substantive due process as a far sounder ground upon which to oppose judicial interference with social legislation. Presumably Black did not take this step because he regarded substantive due process as a useful judicial weapon for the protection of civil rights against state legislation, and in fact the Court was to use substantive due process repeatedly for this purpose in the next few years. At any rate Black did not again advance the idea that corporations did not come within the protection of the Fourteenth Amendment. Apparently he dropped the idea as impracticable.

In any event, Black's colleagues shared his belief that the Fourteenth Amendment ought not commonly to be invoked to protect property rights against state social legislation. A notable instance of this new attitude occurred in *Madden v. Kentucky* (1940), a case involving the recently revived privileges and immunities clause of the amendment. The issue was the constitutionality of a Kentucky statute imposing an ad valorem tax on citizens' bank deposits outside the state five times as high as that imposed on deposits within

the state. A Vermont income tax law involving a similar principle [7] had been held unconstitutional in *Colgate v. Harvey* (1936), in which Justice Sutherland had held that interstate business activity was one of the privileges and immunities of citizens of the United States and hence protected against state abridgment by the Fourteenth Amendment.[8] Now, however, Justice Reed specifically overruled *Colgate v. Harvey* to hold the Kentucky law valid. In passing, he observed that "in the states there reposes the sovereignty to manage their own affairs except only as the requirements of the Constitution otherwise provide." These words implied a far more generous view of state police power than that entertained by the Court before 1937.

The new determination not to use the justices' own social philosophy as a constitutional guidepost was perhaps best expressed by Justice Frankfurter, in *Osborn v. Ozlin* (1940), in the course of an opinion upholding a Virginia statute regulating insurance brokerage contracts. It was immaterial, said Justice Frankfurter, "that such state actions may run counter to the economic wisdom of Adam Smith or J. Maynard Keynes, or may be ultimately mischievous even from the point of view of avowed state policy. Our inquiry must be much narrower. It is whether Virginia has taken hold of a matter within her power, or has reached beyond her borders to regulate a subject which was none of her concern because the Constitution has placed control elsewhere." These words recalled Holmes' dissent in *Lochner v. New York*, and placed the new majority's stamp of approval upon the great justice's conception of the judicial power in relation to the Fourteenth Amendment.

Thus the Court's new sense of judicial self-restraint meant the

[7] The Vermont law had exempted from taxation income from money loaned within the state, but had levied a tax upon income from money loaned outside the state.

[8] Until *Colgate v. Harvey*, the privileges and immunities clause of the Fourteenth Amendment had lain dormant, because of Justice Miller's holding in the *Slaughter-house Cases* that the clause referred only to the privileges and immunities of national citizenship as distinct from that of the states (see pp. 502–506), and because of the Court's subsequent long-standing refusal to invoke the clause against state social legislation. In his dissent in *Colgate v. Harvey*, Justice Stone pointed out that "since the adoption of the Fourteenth Amendment at least forty-four cases have been brought to this Court in which state statutes have been assailed as infringements of the privileges and immunities clause. Until today, none has held that state legislation infringed that clause."

virtual end of substantive due process in relation to state social legislation. The Court never formally repudiated the doctrine of substantive due process, but only in the area of civil liberties cases did it retain any vitality.[9] By the same token, the Court's quasi-legislative function in passing upon the wisdom of state social experiments largely disappeared. The result was the widening of the practical field of authority open to state legislation, a development that occurred even as the Court, by its new interpretation of the commerce clause, was broadening the field of federal legislative power. This simultaneous expansion of state and federal power resulted in the elimination of much of the "twilight zone," the areas of sovereignty hitherto closed off to both governments by Court interpretation. An old grievance of liberals against the Court thus largely disappeared.

LONG-RANGE IMPLICATIONS OF THE NEW ERA IN FEDERALISM

The "great retreat" by the Supreme Court in the spring of 1937 marked the beginning of a new era in federalism. Sufficient time has elapsed since then to enable us to assess with some confidence what the long-range effects of the limited constitutional revolution under Franklin Roosevelt have been for the federal system.

First, it now seems indisputable that there has occurred a permanent enlargement in the extent of federal power. Entire new areas of sovereignty hitherto entrusted to the states or to no government at all are now the subject of extensive federal regulation and control. Agricultural production and marketing, the sale of securities, labor-management relations, and flood control are perhaps the most important new areas of federal sovereignty. While none of them has been entirely withdrawn from state control, it is nonetheless true that federal policy for each of them is of far more importance than the regulatory measures of any of the states. This enlargement in federal authority has apparently been accepted as permanent by both major political parties and all shades of opinion. It is significant, for example, that when a Republican Congress in the spring of 1947 sought to redress what it regarded as certain of the inequities of the National Labor Relations Act, it did not even con-

[9] Civil liberties cases after 1937 are discussed in Chapter 29.

sider lessening federal controls; instead the new Taft-Hartley Law imposed certain additional regulations upon labor unions.

It is probable that the New Deal worked a permanent alteration in the American people's conception of the federal government's responsibility for the operation of the national economic system. Earlier administrations had on occasion asserted the necessity for federal control over certain individual phases of the national economy—thus Theodore Roosevelt had preached trust-busting, conservation of natural resources, and rail rate regulation, and Woodrow Wilson had sponsored a broad program which included extensive regulation of the banking and financial system, tariff adjustment and tightening of the antitrust laws. But Franklin D. Roosevelt's administration was the first one to assume that it was the federal government's duty to assume responsibility for virtually all the important phases of the entire national economy—production, labor, unemployment, social security, money and banking, housing, public works, flood control, and the conservation of natural resources. It is true that this program was promulgated at a time of unprecedented economic crisis. But crisis appears to have become a characteristic part of the twentieth-century world, and federal responsibility for the solution of recurrent crises both in internal economy and in foreign affairs is something that most Americans now more or less take for granted. The public at large has at length accepted the validity of the old liberal national argument of Progressive days—that certain areas of economic activity are essentially national in character, that they are therefore beyond effective state control, and that only the federal government has the requisite prestige and nationwide authority to formulate policy and impose controls where they are needed.

"Dual federalism" is apparently dead beyond revival. This doctrine, it will be recalled, held that the federal government and the separate states constituted two mutually exclusive systems of sovereignty, that both were supreme within their respective spheres, and that neither could exercise its authority in such a way as to intrude, even incidentally, upon the sphere of sovereignty reserved to the other. The Court in *United States v. Darby* specifically repudiated this doctrine in favor of the doctrine of national supremacy—which points out that the Constitution makes federal law superior to state law and which holds accordingly that Congress

may not be estopped in the exercise of any of its delegated powers merely because the performance of those powers may break in upon an area of sovereignty hitherto reserved to the states. It is highly improbable that in the future any attorney in pleading a case in federal court will argue that the Tenth Amendment worked an alteration in the federal system and gave permanent immunity to the states against federal invasion of their "reserved sphere."

The enlargement in the scope of federal sovereignty and the death of dual federalism have not brought about the destruction of the federal system or of the several states as essential members of that system. Federal functions have admittedly increased greatly since 1933, but the sphere of state activities has not undergone a decline; on the contrary, state functions have increased substantially since the inception of the New Deal. The decline of substantive due process of law has opened up a whole new area for experimentation in state social legislation which had hitherto been closed. Moreover, much New Deal legislation has depended upon the states as agencies for its implementation, so that instead of thrusting the states aside it has created a new state-federal partnership for the attainment of a common legislative objective. The Social Security Act of 1935, which makes the states the custodians of a large section of the social security program, is perhaps the most important statute of this kind. The United States Housing Act of 1937 makes use of this same device, as do the numerous grant-in-aid programs continued and expanded under the New Deal. In short, the states have a vital role to play in the "new federalism" as agents of national policy.

Interstate treaties, permissible under the Constitution where the contracting parties obtain the consent of Congress, have opened up another sphere of state activity. Since 1920, they have been used to solve a number of regional problems of some importance, particularly in the field of water-power projects and flood control. Thus an interstate compact of 1925 apportioned the Columbia River's waters between Montana, Idaho, Washington, and Oregon. And in 1937, Connecticut, Vermont, Massachusetts, and New Hampshire signed a Connecticut River flood control compact.

Certain political theorists have in recent years advocated the abandonment of existing state lines and the substitution of a number of regional units more in conformity with existing economic

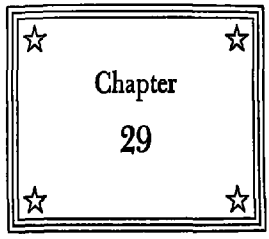
areas and with modern administrative requirements. This idea has secured a limited recognition in certain federal statutes, wherein the nation has been divided into regional districts for administrative purposes. The Federal Reserve Act of 1913 and the various federal communications acts, for example, have resorted to this device. However, the tradition of local and state government is obviously still far too strong to permit the outright destruction of existing states even were it desirable, and proposals for sweeping reorganization of state lines have received but little attention in practical politics.

A further probable result of the new constitutional era is a long-range decline in the importance of the Supreme Court in the American constitutional system. Briefly, the Court's "sovereign prerogative of choice" is gone. The renunciation of dual federalism greatly weakened the Court's capacity to choose between alternative sets of precedents when confronted with questions of federal power. For example, in passing upon the child labor laws of 1916 and 1918, the National Industrial Recovery Act, or the Agricultural Adjustment Act, the Court had at its disposal two bodies of precedent, one implying the constitutionality of the legislation at hand, the other implying its unconstitutionality. Since 1937, however, this choice of precedent has no longer been available, and to this extent the Court has surrendered its control over state-federal relations and the evolution of the federal system.

Moreover, the Court's opinions after 1937 indicated a deliberate retreat from the "legislative" function of judicial power. There was evident a conscious unwillingness to examine the social purposes behind state and federal legislation under review, and an insistence that the Court's sole function was to pass upon power and right, not upon social acceptability. This intent was clearly shown by the abandonment of substantive due process as a check upon state and federal legislation which impaired private property rights and vested interest.

However, this retreat from the "legislative" conception of judicial power did not mean that the Court had abandoned its position as guardian and interpreter of the Constitution. Rather the Court's hasty surrender of 1937 had saved the judicial power from congressional interference and perhaps even the destruction of the Court's traditional function. The Court after 1937 was still free

to check any radical departure from the recognized scope and technique of the American constitutional system. The post-1937 decisions created a new equilibrium in state-federal relations and a new equilibrium between Congress, the executive, and the judiciary, but at the same time a new body of precedent grew up which at some time in the future might well come into conflict with a new era of social change.



A New Era in Civil Liberties

It is one of the interesting constitutional anomalies of the decade from 1937 to 1947 that while the Court was engaged in sanctioning a tremendous expansion of federal and state power, it was at the same time occupied with the creation of an elaborate new constitutional law of civil liberties and private rights. In the world at large those ten years generally witnessed a culmination of the disintegration and the deliberate destruction by tyrannical governments of the ideals of individual rights and civil liberties which had been developed so painfully in Western culture over the last three centuries. The tyrannical despotisms of Fascism and Communism were utterly blind to the ideal of limited government. Not so the United States. It is one of the constitutional wonders of our time that even during World War II, while the American nation was engaged in an elementary struggle for very survival, the United States successfully preserved the main body of civil liberties against the requirements of totalitarian war. Except for the notorious and unhappy restrictions imposed upon the constitutional rights of American citizens of Japanese ancestry and the imposition of military government in Hawaii, the average American citizen enjoyed a larger measure of individual constitutional liberty during World

War II than he had during the great conflict of thirty years earlier.

A majority of the civil liberties cases coming before the Court after 1937 involved the constitutionality of state statutes under the Fourteenth Amendment. Even while the Court was engaged in virtually terminating the application of substantive due process to state social legislation, it was at the same time constructing a new law of substantive due process in civil liberties cases. This apparent inconsistency may explain why to some extent the Court tended after 1940 to invoke the guarantees of the Fourteenth Amendment in a broader and more general sense and to avoid specific citation of the due process clause.

Resort to the Fourteenth Amendment in state civil liberties cases rested upon a partial identity between the Fourteenth Amendment and the guarantees of the federal bill of rights as set forth in the first eight amendments to the Constitution. This identity, it will be recalled, had first been enunciated in 1925 in *Gitlow v. New York*, in which the Court had asserted that the due process clause of the Fourteenth Amendment included the guarantees of freedom of speech as set forth in the First Amendment. This new association between the Fourteenth Amendment and the federal Bill of Rights had been strengthened in *Stromberg v. California* (1931) and *Near v. Minnesota* (1931).[1]

The foregoing cases linked the First and the Fourteenth Amendment rather closely, but they left uncertain the question as to whether the Fourteenth Amendment now included all the guarantees enumerated in the first eight amendments. There was no logical solution of the problem immediately apparent. The due process clauses of the Fifth and Fourteenth Amendments presumably had the same meaning and content, except that they limited the federal and state governments, respectively. The Fifth Amendment would have been redundant within the Bill of Rights had it been construed to include freedom of speech—provided for in the First Amendment. Yet the Fourteenth Amendment was now held to include freedom of speech. How much more of the Bill of Rights was to be construed as redundant and included within the phrase, "due process of law"?

In *Palko v. Connecticut* (1937), the Court gave a partial answer to this question. The case was concerned with the constitutionality

[1] See the discussion of these cases on p. 703.

of a Connecticut statute permitting the state to take appeals from the decisions of lower courts in criminal cases, and it thus presented the issue of whether the Fourteenth Amendment embraced the guarantee against double jeopardy in the Fifth Amendment.[2] Justice Cardozo, speaking for the Court, answered in the negative. The Fourteenth Amendment, he said, did not automatically protect all the rights extended by the first eight amendments but instead guaranteed only those "implicit in the concept of ordered liberty" and those principles of justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental." Freedom of speech, for example, was such a right; trial by jury and immunity from double jeopardy were not. The Connecticut statute was therefore constitutional.

This interpretation restricted sharply the scope of the Fourteenth Amendment in civil liberties cases, but at the same time Cardozo's language opened the way for the development of a whole series of constitutional rights which the Court might find to be associated with liberty and democracy within a modern industrial society. Most of the original guarantees of the Bill of Rights were framed specifically to meet seventeenth- and eighteenth-century social and political conditions. There now emerged the possibility of "discovering" new fundamental guarantees of liberty related to twentieth-century conditions.

The new Court after 1937 proved strongly inclined to discover such rights. A majority of the justices appointed after 1937 were, broadly speaking, New Dealers, who wished to interpolate a philosophy of economic democracy into the substance of constitutional law. They could be expected, therefore, to modernize the Bill of Rights; to formulate constitutional guarantees associated with the activities of labor unions, such as strikes and picketing, and with the activities of left-wing politicians and labor leaders.

FREEDOM OF SPEECH AND THE RIGHT TO PICKET

A notable instance of the new Court's tendency to discover new civil rights in support of a philosophy of economic democracy appeared in a series of cases in which the Court held that picketing was a form of free speech protected by the Fourteenth Amendment.

[2] The Fifth Amendment provides, in part, that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb."

The Court took its first step in this direction in *Senn v. Tile Layers Union* (1937), in which it upheld the constitutionality of a Wisconsin statute legalizing peaceful picketing. Justice Brandeis, speaking for a majority of five justices, held that the act in question did not violate the Fourteenth Amendment. "Clearly," said Brandeis, "the means which the statute authorizes—picketing and publicity—are not prohibited by the Fourteenth Amendment. Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." This language not only affirmed the constitutionality of the permissive Wisconsin law, but it carried the implication that picketing was a form of free speech with which the state could not legally interfere.

How great was the difference between his point of view and that formerly entertained by the Court's majority was emphasized by Justice Butler's dissent for himself and Justices Sutherland, Van Devanter, and McReynolds. While he admitted that picketing by the parties to a labor dispute to better working conditions might be constitutional, he contended that peaceful picketing for an unlawful end was "beyond any lawful sanction." In the present case, the union had attempted to force an employer to cease working as a tile layer in his own establishment. Since the right to "carry on any of the common occupations of life" was guaranteed by the Fourteenth Amendment, Butler thought the union's objective unlawful and a statute guaranteeing picketing for such an objective in violation of due process. Butler relied heavily upon *Truax v. Corrigan* (1921), which the majority justices had thrust aside as outworn.

Justice Brandeis' intimation in the Senn case that peaceful picketing was a form of free speech was confirmed in *Thornhill v. Alabama* (1940), in which the Court held unconstitutional an Alabama statute prohibiting peaceful picketing. Justice Murphy, who wrote the majority opinion, held that the law under review was "invalid on its face." "In the circumstances of our times," he said, "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. . . . The merest glance at state and federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern. Free discussion concerning the conditions in industry

and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." [3] Here was a new "fundamental human right"—the right to picket—certainly one beyond the ken of the Joint Committee on Reconstruction which had drafted the Fourteenth Amendment in 1866.

Subsequent decisions of the Court marked out the constitutional boundaries of the right to picket. In *Milk Wagon Drivers Union v. Meadowmoor Dairies* (1941), the Court held that a state court might lawfully enjoin picketing marked by violence and the destruction of property. Justice Frankfurter's opinion for the majority observed first that "peaceful picketing is the workingman's means of communication," but he then added: "It must never be forgotten, however, that the Bill of Rights was the child of the Enlightenment. Back of the guarantee of free speech lay faith in the power of an appeal to reason by all the peaceful means for gaining access to the mind. It was in order to avert force and explosions due to restrictions upon rational modes of communication that the guarantee of free speech was given a generous scope. But utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution." Significantly, Black, Reed, and Douglas dissented, holding that the injunction in question improperly went beyond the mere prohibition of violence and cut off the right of peaceable expression upon matters of public concern. In other words, the minority wanted to separate the element of violence in picketing from the element of free speech and accept the validity of an injunction against the former while continuing to protect the latter.

In *American Federation of Labor v. Swing* (1941), decided the same day as the Meadowmoor case, the Court held that a state might not lawfully enjoin picketing merely because those carrying on the picketing were not parties to an immediate labor dispute. This case, which arose in Illinois, involved an unsuccessful attempt by a union to unionize a beauty parlor, and the picketing in ques-

[3] In *Carlson v. California* (1940), a companion case decided at the same time as *Thornhill v. Alabama*, Justice Murphy delivered an opinion declaring unconstitutional a California statute forbidding peaceful picketing. Justice McReynolds dissented without opinion in both cases.

tion had been accompanied by violence as well as by the use of false and libelous placards. Justice Frankfurter, speaking for the majority, observed that the case at first sight seemed to present a problem similar to that in the Meadowmoor case. However, the Court found that the Illinois court had issued the injunction in part on the ground that under Illinois law picketing was illegal when conducted by strangers to the employer. "Such a ban of free communication," Frankfurter declared, "is inconsistent with the guarantee of freedom of speech" and was therefore a violation of the Fourteenth Amendment.

A year later, in *Carpenters and Joiners Union v. Ritter's Cafe* (1942), the Court found that a state could lawfully prohibit the picketing of an employer not involved in a labor dispute in order to bring pressure upon another employer who was so involved. Justice Frankfurter, speaking for a majority of five justices, observed that "the right of the state to determine whether the common interest is best served by imposing some restrictions upon the use of weapons for inflicting economic injury in the struggle of conflicting industrial forces has not previously been doubted." Freedom of speech, he said, was not given "any greater constitutional sanction" nor did it become "completely inviolable" merely by the circumstance of its occurring in the course of a labor dispute. He went on to balance the general police power of the state against the constitutional right of free speech precisely as the Court had balanced the Fourteenth Amendment against state police power in all substantive due process cases before 1937. The state, Frankfurter held, might reasonably prohibit the "conscription of neutrals." To hold otherwise, he said, would be to "transmute vital constitutional liberties into doctrinaire dogma." This time, Black, Douglas, Murphy, and Reed dissented, contending that peaceful picketing, even against a neutral, was simple communication, and ought not lawfully to be enjoined.

Thus a "conservative" majority of five justices emerged on the picketing issue. Led by Justice Frankfurter, the conservatives willingly recognized the right to picket peacefully, even by persons not immediately parties to a labor dispute; but at the same time they believed that the peace, the security of property against violence, and the rights of neutrals against involvement in a dispute where they had no interest should be safeguarded. In subsequent decisions, the Court followed closely the outlines of this position.

THE FOURTEENTH AMENDMENT, PEACEABLE ASSEMBLAGE, AND PAMPHLET PEDDLING

The Court also used the Fourteenth Amendment to erect new safeguards around individuals holding public meetings, peddling pamphlets in the streets, and disseminating religious literature. The right of peaceable assemblage first came before the Court in *Hague v. C.I.O.* (1939), a case involving the constitutionality of a Jersey City, New Jersey, municipal ordinance requiring permits from a "director of public safety" for the conduct of public meetings. In the background of the case was a history of police violence in which labor union meetings had been broken up, the dissemination of printed material forcibly stopped, and union organizers "run out of town."

By a vote of five to two, the Court found the ordinance in question unconstitutional. Justices Roberts and Black held the right of assemblage to be one of the privileges and immunities of citizens of the United States guaranteed by the Fourteenth Amendment, and they cited *United States v. Cruikshank* in support of this position. Justice Stone, with whom Justice Reed concurred, agreed that the ordinance under review was invalid, but he thought the Court ought merely to hold that the ordinance violated the due process clause of the Fourteenth Amendment, and he protested against invoking the privileges and immunities clause. Chief Justice Hughes, who also concurred, thought the right to discuss the National Labor Relations Act was properly a privilege of United States citizenship, but he believed the record in the case better supported Stone's position otherwise. Justices McReynolds and Butler dissented, McReynolds expressing the opinion that "wise management of such intimate local affairs, generally at least, is beyond the competency of federal courts."

That the right of assemblage was not immune to reasonable regulation under the state police power became clear in *Cox v. New Hampshire* (1941), in which the Court unanimously upheld a New Hampshire statute requiring a permit and license for organized parades. Chief Justice Hughes observed that civil liberties implied "the existence of an organized society maintaining public order without which liberty itself would be lost in the excess of unrestrained abuses." He pointed out that regulation of the use of the

streets was a "traditional exercise of control by local government," and he noted further that the New Hampshire law, as construed, gave the licensing board no arbitrary or discretionary power to exclude applicants, and that its regulatory powers existed only to prevent confusion by overlapping parades and processions, to secure convenient use by other travelers, and to minimize the risk of disorder. Hughes thought that these were reasonable police requirements, and he therefore held the statute constitutional.

The Court had much more difficulty in defining exactly the area of constitutional liberty in the dissemination of pamphlets and religious literature. The justices took their point of departure on this problem in *Lovell v. Griffin* (1938), where they passed on the constitutionality of a city ordinance of Griffin, Georgia, prohibiting the distribution of pamphlets and literature without written permission from the city manager. The case was among the first of many involving "Jehovah's Witnesses," a religious sect whose difficulties with local and state police ordinances were to furnish much of the Court's raw material for the development of a civil liberties doctrine in the next few years.

Chief Justice Hughes, who wrote the opinion for a unanimous Court, held the Griffin ordinance to be invalid on its face. "Its character," he said, "is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship." He pointed out that it was precisely against the right to license publication that the original doctrine of freedom of the press had been evolved by John Milton and his contemporaries. Although the law in question limited distribution and not publication, it was nonetheless invalid, since liberty to publish without liberty to circulate "would be of little value."

The Court adopted a similar position in *Cantwell v. Connecticut* (1940). This case involved the constitutionality of a Connecticut statute prohibiting solicitation of money for any religious or charitable purpose without prior approval by the secretary of the public welfare council. Under the law this official had the power to determine whether the cause in question was a bona fide religious one before approving a solicitation. Justice Roberts' unanimous opinion declared the law void as a denial of religious liberty in violation of the due process clause of the Fourteenth Amendment. Jus-

tice Roberts admitted that the state had a general right to regulate solicitation, even for religious purposes, but he held that the secretary's general power to withhold approval if he found the cause not a religious one constituted an inadmissible "censorship of religion as a means of determining its right to survive."

Subsequently the Court found some difficulty in adhering to the position adopted in the Lovell and Cantwell cases. In *Jones v. Opelika* (1942), a majority of five justices upheld the constitutionality of a city ordinance of Opelika, Alabama, which required book peddlers to procure a ten-dollar city license before doing business.[4] The defendant had originally been arrested and convicted for selling religious pamphlets on the street in violation of the ordinance. Justice Reed's majority opinion pointed out that the constitutional rights guaranteed by the Fourteenth Amendment were "not absolutes to be exercised independently of other cherished privileges, protected by the same organic instrument." Instead it was necessary to balance them against the general right of the states "to insure orderly living, without which constitutional guarantees of civil liberties would be a mockery." He admitted that there was a general right of free expression, but there was a general right to limit that hearing to times, places, and methods "not at odds with the preservation of peace and good order."

The majority justices were undoubtedly much influenced by the commercial element present in the Opelika case. The defendants, members of Jehovah's Witnesses, combined religious expression with book selling in such a way that it was virtually impossible to separate the two activities. Justice Reed thought that the fact that agents offered books for sale gave the transactions a different character than the mere exercise of freedom of speech or religious ritual. "To subject any religious or didactic group to a reasonable fee for their money-making activities does not require a finding that the licensed acts are purely commercial. It is enough that money is earned by the sale of articles. A book agent cannot escape a license requirement by a plea that it is a tax on knowledge." The transactions, in short, were primarily commercial rather than religious in character. Reed then distinguished this case from *Lovell v. Griffin*

[4] Two companion cases, considered in the same opinion, involved the constitutionality of similar city ordinances of Fort Smith, Arkansas, and Casa Grande, Arizona.

on the ground that the earlier case had involved unjustifiable administrative discretion in the licensing power, an element not present here.

Chief Justice Stone wrote a vigorous dissent, in which Black, Murphy, and Douglas concurred. Stone thought the present case involved "more callous disregard of constitutional right" than that in *Lovell v. Griffin*. There at least, he said, the defendant "would not have been compelled to pay a money exaction for a license to exercise the privilege of free speech." And he charged the Court with ignoring the present defendant's plea that the cumulative effect of such licenses would clog and cut off entirely the mode of free expression at stake in the case.

A year later the dissenting minority again became a majority as the Court ruled in *Murdock v. Pennsylvania* (1943) that an ordinance licensing door-to-door sale and dissemination of religious tracts was unconstitutional. As in the Opelika case, petitioners were Jehovah's Witnesses engaged in door-to-door book sales. Justice Douglas, speaking for the new majority of five,[5] asserted that it "cannot be plainly said that petitioners were engaged in a commercial rather than a religious venture." While he admitted that religious groups were not "free from all financial burdens of government," the present tax in his opinion resembled one exacted from a preacher "for the privilege of delivering a sermon," and "the power to tax the exercise of a privilege is the power to control or suppress its enjoyment." Douglas added that *Jones v. Opelika* now stood overruled.

In *Martin v. Struthers* (1943), decided the same day as the Murdock case, the same majority held unconstitutional an ordinance prohibiting doorbell ringing, knocking on doors, and the like for the purpose of distributing religious tracts and advertisements. Justice Black's opinion observed that door-to-door solicitation to communicate ideas or to invite the residents to religious or political meetings had been a common practice for centuries. He added that freedom of the press "embraced the right to distribute literature." While he admitted that some police regulation of the right might on

[5] The minority of *Jones v. Opelika* became a majority in the Murdock case because Justice Byrnes, who voted with the majority in the Opelika case, resigned and was replaced by Justice Rutledge, who voted with Stone, Murphy, Black, and Douglas in the Murdock case.

occasion be legal, he insisted that the free distribution of literature was so "clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved."

There were lengthy dissents by Reed, Roberts, Jackson, and Frankfurter in both the Murdock and Struthers cases. Dissenting in the Murdock case, Justice Reed offered an extended historical interpretation of freedom of the press and religion, arguing that the authors of the Bill of Rights had merely intended to protect the right to be heard and the right to untrammeled ritual, and had never intended to grant a general immunity to either press or church from all incidence of taxation. In the light of the majority opinion he asked why a tax upon printing and publishing a newspaper could now be construed as constitutional when a tax upon the distribution of literature was not.

In his dissent in the Struthers case, Frankfurter observed that the legislature ought to be given the greatest possible area of discretion in protecting the community against abuse. The Court should not, "however unwittingly, slip into the judgment seat of legislatures." This was the old injunction against the substitution of judicial for legislative discretion in substantive due process.

The majority nevertheless continued to maintain its position. In *Follett v. McCormick* (1944), the Court held invalid a city ordinance of McCormick, South Carolina, licensing all book vending as applied to the peddling of religious books. The vending of religious books, said Justice Douglas, was essentially a religious occupation and could not be taxed. Justices Jackson, Frankfurter, and Roberts in dissent asked rhetorically, why not, then, exempt the press and all church property from taxation entirely, even though the property in question were commercially operated. Unmoved by this argument, the Court in *Marsh v. Alabama* (1946) upheld the right of a member of Jehovah's Witnesses to distribute religious tracts in a company-owned town (Chickasaw, Alabama), even where the property was posted as private property and solicitation prohibited, and in *Tucker v. Texas* (1946), the Court upheld the right of religious solicitation on a United States government owned and operated housing project.

In *Thomas v. Collins* (1945), the Court applied the "no license" principle enunciated in the Murdock, Martin, and Follett cases to

hold unconstitutional a Texas statute requiring labor organizers to register with state officials and procure an organizer's card before soliciting membership in labor unions. The state in arguing the case relied heavily upon the "business practice" theory: that it had a right to license commercial transactions and that the solicitation of union membership was essentially a business activity. It contended, also, that the registration was merely administrative and conferred no discretion upon the state official involved. But Justice Rutledge, who gave the opinion of the Court, pushed these arguments aside as unsound or immaterial. "The idea is not sound," he said, "that the First Amendment's safeguards are wholly inapplicable to business activity." The law in question, he said, impinged upon the right of free discussion in union meetings and so restricted the free trade in ideas guaranteed by the First Amendment. As for the state's right to demand non-discretionary registration, he said, "As a matter of principle a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly." [6]

SEPARATION OF CHURCH AND STATE: TAX SUPPORT FOR CHURCH SCHOOLS

It might well appear that a Court which had gone to great lengths to protect organized religion from interference and control even in its semicommercial activities would go to similar lengths to deny to the states the right to appropriate money for the support of organized religious activity. The same general political idea, the separation of church and state, lay behind the doctrine that the state ought not to control or suppress religious activity and the doctrine that it ought not to lend any church financial support. Indeed, it might be contended that support of religion by the state would eventually lead to state control.

Yet in *Everson v. Board of Education* (1947) the Court came

[6] The Court was in fact widely divided in the Collins case. Although Rutledge's opinion was announced as "the opinion of the Court," no other justice accepted it entirely. Douglas, Black, and Murphy, concurring, felt constrained to deny the contention that the freedom of speech enunciated in the case served labor alone and had been denied to employers in Labor Board cases. Jackson also concurred but thought that the Court was giving labor a degree of freedom of speech which it denied to employers. Justice Roberts wrote a dissenting opinion reiterating his belief in the right to license, in which Stone, Frankfurter, and Reed concurred.

extremely close to admitting that state tax support for a particular religious group might be constitutional under certain circumstances. More immediately, the issue in this case was whether or not the First Amendment forbade the expenditure by a state of tax money to reimburse parents for the transportation of children to parochial schools. A New Jersey statute of 1941 had authorized school boards to make contracts for the transportation of school children, including those attending private and parochial schools, except those private schools operated for profit. Pursuant to this law, a district school board had authorized reimbursement of parents who paid school transportation expenses either to public schools or to Catholic parochial schools. A taxpayer thereupon attacked the statute and board provision in the courts, contending, first, that the statute and provision violated the due process clause of the Fourteenth Amendment by authorizing the expenditure of public tax monies for a private purpose, and, second, that the statute and the provision forced payment of taxes in support of the Catholic church, contrary to the provision in the First Amendment that Congress shall make no law respecting the establishment of religion.

By a vote of five to four, the Court held the statute and the board provision constitutional. Justice Black's opinion for the majority first denied that reimbursement for school transportation was properly an expenditure of tax money for a private purpose. The Court, he pointed out, had only very rarely invoked the principle of *Loan Association v. Topeka*, that the expenditure of tax money for other than a public purpose was invalid.[7] The doctrine, he said, must be exercised with extreme caution; otherwise the states' capacity to authorize new types of public services might be impaired. The transportation of school children either to public or parochial schools was conceivably a matter of public concern.

Black then examined at length the contention that the New Jersey statute was a "law respecting the establishment of religion," and that it thereby violated the First Amendment, which, through its incorporation in the Fourteenth, now also limited the states. He made a detailed examination of colonial and early national relations between church and state and emphasized the steady growth of the belief that church and state should be entirely separate and that

[7] See the discussion of *Loan Association v. Topeka* on p. 512 and the cases on private purpose on pp. 535–537.

no one should be taxed for the support of any religious institution of any kind. He paid homage to the eloquence and conviction of Jefferson and Madison in bringing about the adoption of the Virginia Bill for Religious Liberty and the First Amendment. He concluded from his historical survey that the "establishment of religion" clause in the amendment ought to be interpreted very broadly, to mean at least the following:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state."

Having paid homage to the separation of church and state, Black then abandoned the apparent conclusion of his argument by holding that the New Jersey board provision was not, properly considered, a provision in support of religion. Rather, he said, it was in support of all schools, and of the protection of school children, since it aimed to provide them with safe transportation regardless of destination. The law, he admitted, might approach the verge of the state's constitutional power, but it did not cross the limits of that power. The statute and board rule were therefore constitutional.

Justices Jackson, Frankfurter, Rutledge, and Burton all dissented. Justice Jackson, with whom Frankfurter concurred, said the language of the majority opinion reminded him of Byron's heroine Julia, who "whispering 'I will ne'er consent,'—consented." The basic fallacy in the majority opinion, he thought, was "in ignoring the essentially religious test by which beneficiaries of this expenditure are selected." The important point, he said, was that the

Catholic religion benefited by the measure; other religions did not. In his opinion this was discrimination in aid of a particular religious group. He warned that aid to religion might ultimately logically be followed by regulation, and concluded by expressing the conviction that "the Court today is unconsciously giving the clock's hands a backward turn." Justice Rutledge also wrote a dissenting opinion, concurred in by all the minority, in which he reviewed at length the early history of the struggle to separate church and state, and concluded that the New Jersey statute and provision constituted "support for religion" as Jefferson and Madison would have construed that term, and that both statute and board provision were unconstitutional.

POLITICAL MINORITIES: REVIVAL OF THE CLEAR AND PRESENT DANGER DOCTRINE

The thirties and forties saw the enactment of a number of state statutes directed toward the suppression of dissident political groups and radical minorities. It was an era when the fundamentals of the American social order were seemingly threatened very powerfully —by economic crisis and catastrophe at home, and by the rise of totalitarian political systems abroad which challenged nearly all the established values of the American way of life. The sense of insecurity present in all ranks of society was exceedingly high, and it often expressed itself in intensified obeisance to the symbols of the established social order,[8] and in embittered attacks upon political radicals who dared to give expression to ideas widely at variance with the established patterns of political and economic orthodoxy. This was the day of the Dies Committee on Un-American Activities and of countless public and private exposés of Communist and Fascist activities. It was also a period of the enactment or renewed enforcement of criminal syndicalist laws and of rigorous judicial procedure against political radicals, out of which came a number of important constitutional decisions.

In passing upon the conviction of political dissidents, the Court was obliged to balance nicely the requirements of elementary public safety against the guarantees of the Bill of Rights. The Court refused to be swept into a hysterical acceptance of political persecu-

[8] Witness the growth of professional patriotic societies, flag worship, and oaths to the Constitution in the depression and postdepression years.

tion of radicals; at the same time it recognized the inherent right of the state to protect itself against sabotage and revolutionary activities. The need for a constitutional guidepost in making this distinction eventually led to a strong revival of the "clear and present danger" doctrine, first enunciated during the first World War.[9]

The Court's concern for the rights of political minorities was strongly evidenced in *De Jonge v. Oregon* (1937). Here Chief Justice Hughes delivered a unanimous opinion declaring unconstitutional a conviction under the Oregon criminal syndicalist law, where the defendant's sole offense as charged was that he had participated in a political meeting held under the auspices of the Communist Party. Hughes pointed out that there was no record that the defendant had advocated violence, sabotage, revolution, or criminal behavior at the meeting or elsewhere, nor was he charged with having done so. The meeting itself had been quiet and orderly. There was no precedent, said the Chief Justice, which went "to the length of sustaining such a curtailment of the right of free speech and assembly" as this application of the Oregon statute demanded. The states admittedly had an undoubted right to protect themselves against abuses of freedom of speech, freedom of the press, and the right of assembly. But, he went on:

> . . . The legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. . . .
>
> It follows from these considerations that, consistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime. . . . If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such

[9] See pp. 664–670.

offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge.

In support of his decision Hughes had drawn upon a general philosophy of constitutional liberty rather than upon any specific doctrine. However, in *Herndon v. Lowry* (1937), decided three months later, Justice Roberts took a step toward the revival of the "clear and present danger doctrine" of World War I civil liberties cases. This case involved the constitutionality of the conviction in the Georgia courts of a Communist Party organizer charged with violating a state statute against inciting to insurrection. The defendant had committed no act of violence and had not advocated violence, but when arrested he had in his possession a variety of Communist literature advocating working-class unity and, in particular, a pamphlet advocating the establishment of a Negro state in the "Black Belt" of the South.

Justice Roberts first cited with evident approval the "clear and present danger doctrine" that the defendant's conduct must involve some immediate incitement to violence or insurrection—as opposed to the "dangerous tendency" argument advanced by the state. He then pointed out that the evidence wholly failed to show that the accused had read the documents in his possession, approved of their contents, or had advocated violence and disorder. In effect, therefore, he had been convicted merely of membership in the Communist Party and the solicitation of party membership. So construed, the statute was "an unwarrantable invasion of the right of free speech."

Roberts also laid much stress upon the proposition that a statute construed so as to punish mere bad tendency would constitute an additional violation of due process in that it would furnish no sufficiently ascertainable standard of guilt. The law as applied in this instance, he said "amounts merely to a dragnet which may enmesh anyone who agitates for a change of government if a jury can be persuaded that he ought to have foreseen his words would have some effect in the future conduct of others." The statute as construed was therefore unconstitutional on two counts under due process of law, and was void. Justices Van Devanter, McReynolds, Sutherland, and Butler, dissenting, reviewed the revolutionary tendency of the appellant's conduct, and argued that it was properly punishable under the Georgia law.

FREE SPEECH AND EDITORIAL COMMENT V. CONTEMPT OF COURT

The Court gave additional recognition to the clear and present danger doctrine in *Bridges v. California* (1941). Here the majority decision reversed a conviction for contempt of court imposed upon several newspaper editors and labor leaders because of their published comment upon litigation pending before the California courts. Again citing Holmes' "clear and present danger" doctrine, Justice Black added that the evils in prospect must be both substantial and serious. The supposed substantive evils inherent in criticism of the courts, he observed, were two: disrespect for the judiciary, and disorderly and unfair administration of justice. As for the first, Black thought that the "assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion." As for disorderly administration of justice, Black thought that to imply that mere adverse editorial criticism would "have a substantial influence upon the course of justice would be to impute to judges a lack of firmness, wisdom, or honor,—which we cannot accept as a major premise." In a lengthy dissent, Justice Frankfurter protested that the majority opinion had altered the Fourteenth Amendment so as to impair the historic right of state courts to preserve the impartial administration of justice.

The Court reached a like decision in *Pennekamp v. Florida* (1946). This case involved the conviction for contempt of court of a newspaper editor who had printed several editorials attacking the Florida courts for obstructing the process of criminal justice. As in the Bridges case, certain of the cases criticized were still awaiting final disposition or review. Justice Reed's opinion, holding the conviction in violation of the Fourteenth Amendment, first observed that the Bridges case had fixed reasonably well-marked limits to the power of courts to punish newspapers and others for comments upon or criticism of pending litigation. Justice Reed admitted that it was not possible to define categorically what constituted a clear and present danger to the impartial administration of justice, but he held that editorial attempts to destroy faith in the integrity of judges and the efficiency of the courts did not constitute such a

danger, since "we have no doubt that Floridians in general would react to these editorials in substantially the same way as citizens of other parts of our common country"; that is, they would weigh them and disregard them if found unfair. In a lengthy concurring opinion Justice Frankfurter accepted the Court's decision but protested against the tendency to turn the "clear and present danger" doctrine into an "absolutist formula," as well as the implication that the principle of free speech ought to protect newspapers against all interference with their attempts to influence the administration of justice.

THE FLAG SALUTE CASES

The necessity for balancing the civil rights of a dissident minority against the coercive capacity of majority will as expressed in the state police power appeared also as the dominant issue in the flag salute cases. Here again the Court had some difficulty in settling upon a formula which would define adequately the exact area of individual freedom of expression; here, also, the Court finally adopted the "clear and present danger" doctrine as the best solution of the problem.

The flag salute issue first arose in *Minersville School District v. Gobitis* (1940), where the Court upheld the action of a Pennsylvania district school board in expelling two children from the public schools for refusal to salute the flag as part of a daily school exercise. The ritual in question was highly offensive to the members of Jehovah's Witnesses, who attacked the requirement as an infringement of religious liberty. Justice Frankfurter's majority opinion admitted that the case posed a nice dilemma between majority power and minority rights. But in this instance he thought the interests of the state more fundamental. Flag salute was intended to build up a sentiment of national unity, and "national unity is the basis of national security." And he added: "The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization." The legislative judgment that the flag salute was a necessary means

to this end ought therefore to be respected by the courts. "To stigmatize legislative judgment in providing for this universal gesture of respect for the symbol of our national life in the setting of the common school as a lawless inroad on that freedom of conscience which the Constitution protects, would amount to no less than the pronouncement of pedagogical and psychological dogma in a field where courts possess no marked and certainly no controlling competence." Justice Stone alone dissented.

The Gobitis opinion was clearly at variance with the prevailing spirit of the Court in broadening the area of civil liberties and defending the rights of dissident minorities against punishment or coercion by the state. The language of Justice Frankfurter's opinion makes it appear probable that the Court was at the moment deeply affected by the wave of patriotism and nationalism then sweeping the nation as the United States prepared to battle for its life against Germany and Japan.

Three years later, in *West Virginia State Board of Education v. Barnette* (1943), the Court voted 6 to 3 to overrule formally the Gobitis precedent and to declare unconstitutional a West Virginia statute similar in all essentials to the early Pennsylvania rule. The new majority reversing the Gobitis opinion came about mainly because of a change of opinion on the part of Justices Black, Murphy, and Douglas, who in their dissent in the Opelika case had already indicated a change of heart on the flag salute question. Stone had not changed his position. Justice Jackson, appointed in June 1941, and Justice Rutledge, appointed in January 1943, also voted against the West Virginia law. Justices Frankfurter, Roberts, and Reed retained their original opinion that compulsory flag salute legislation was constitutional.

Justice Jackson, speaking for the majority, first noted that the rights claimed by the appellees (the refusal to salute) did not at all interfere with the rights of other individuals. "The sole conflict," he said, "is between authority and rights of the individual." It was now a "commonplace," he added, "that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish." But the flag salute law went beyond even censorships, to require the affirmance of positive belief:

> It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence. But here the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression. To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to the public authorities to compel him to utter what is not in his mind.

Jackson then went on to assert that the right of legislative discretion, which Frankfurter had invoked in the Gobitis case, was much more restricted in its right to impose limitations upon civil liberties than it was to regulate public utilities or private property rights. Restrictions upon public utilities, for example, met the test of due process, if the legislature had any "rational basis" for adopting them. But restrictions upon the rights guaranteed by the First Amendment were permissible only to prevent "grave and immediate danger to interests which the State may lawfully protect." The present law, Justice Jackson said, could not meet this test and was void. Justice Frankfurter, dissenting at length, implied that the majority had substituted judicial fiat instead of recognizing the legislative right to a measure of discretion in imposing social controls.

In *Taylor v. Mississippi* (1943), decided the same day as the Barnette case, the Court held unconstitutional three convictions under a Mississippi sedition statute of 1942 which made it a felony to encourage disloyalty to the United States or to encourage refusal to salute the flag. In one case the defendant had been convicted only of encouraging refusal to salute the flag. Justice Roberts, speaking for a unanimous Court, referred briefly to the Barnette decision and added: "If the state cannot constrain one to violate his conscientious religious convictions by saluting the national emblem, then certainly it cannot punish him for imparting his views on the subject to his fellows and exhorting them to accept those views."

The two other defendants, also convicted of encouraging refusal to salute the flag, had in addition been convicted of encouraging disloyalty to the state and national governments. In accordance with their faith as members of Jehovah's Witnesses, they had preached that all nations, including the United States, were in the grip of demons, and they had attacked the war effort as sinful. Justice Rob-

erts held briefly that these convictions also must be set aside, since the statute so construed made it "a criminal offense to communicate to others views and opinions respecting governmental policies. and prophecies concerning the future of our own and other narions." Restrictions of this kind upon freedom of speech were not permissible, since the state had not shown that the appellants had incited subversive action or created any clear and present danger to American institutions or government.

These cases revealed a far greater determination to sustain the rights of individual conscience and freedom of dissident communication in wartime than the Court had exhibited during the first World War. However, *In re Summers* (1945) demonstrated that there was a limit to the Court's willingness to protect the right of free conscience against control by the state. The case involved the validity of an Illinois decision banning conscientious objectors to military service from admission to the state bar. In a majority opinion upholding the Illinois rule, Justice Reed pointed out that the federal government refused to grant citizenship to aliens who had refused military service, and he held that the Fourteenth Amendment accordingly could not be construed to prohibit a state from requiring willingness to perform military service as a condition for admission to the bar. Justices Black, Murphy, Douglas, and Rutledge dissented, contending that the state's action constituted an unreasonable intrusion upon freedom of opinion and religious liberty.

BILLS OF ATTAINDER AND THE CONGRESSIONAL APPROPRIATIONS POWER

In *United States v. Lovett* (1946) the Court invoked the seldom-used constitutional prohibition against bills of attainder in order to defend three government employees who had been made the victims of a political attack by the House Committee on Un-American Activities. In one of its various exposés of Communist activity in the United States, the committee had attacked three federal employees, Goodwin B. Watson, William E. Dodd, Jr., and Robert Morss Lovett, as guilty of subversive activities against the United States. After some debate Congress had adopted a provision in the Urgent Deficiency Appropriation Act of 1943 providing that no funds available under any act of Congress should be paid out as salary or other compensation for government service to the three

men in question, unless before November 15, 1943, the President should appoint them to office with the advice and consent of the Senate. The practical effect of this section was to force the removal of the three men from the federal payroll and eventually from federal employment. Lovett, Watson, and Dodd presently instituted action in the Court of Claims to recover unpaid portions of their salaries earned while still in federal employ. The Court of Claims ruled in their favor and the case was then certified to the Supreme Court.

Speaking through Justice Black, a majority of the Court held that the section in question was in effect a bill of attainder, and was therefore unconstitutional. "What is involved here," said Black, "is a congressional proscription of Lovett, Watson, and Dodd, prohibiting their ever holding a government job." He then recalled the Court's opinion in *Cummings v. Missouri*, defining a bill of attainder as "a legislative act which inflicts punishment without a judicial trial." Congress, Black held, had plainly intended to inflict punishment upon the three men in the form of a ban upon their holding federal office, although they had not been subjected to any judicial proceedings. The section in question therefore was unconstitutional and void as in violation of Article I, Section 9, of the Constitution, which states that "No bill of Attainder or ex post facto Law shall be passed." Justices Frankfurter and Rutledge concurred in the Court's decision that Lovett, Watson, and Dodd were entitled to recover back pay from the government, but they argued in a separate opinion that the Congressional section in question lacked an essential quality of all bills of attainder, in that it did not specifically adjudge the three men guilty of any offense, and did not stipulate that they were banned from office as punishment for that offense. The provision, they contended, should not have been declared unconstitutional, but instead should have been construed narrowly so as to permit the recovery of salaries through the Court of Claims.

THE JAPANESE MINORITY AND WORLD WAR II

The most discordant note in the expansion of civil liberties in the decade after 1937 was the treatment of the Japanese-American minority during the second World War. For the first and only time since the Civil War, the federal government carried out a broad program of administrative and legislative discrimination

against a minority of United States citizens distinguished solely by their racial identity. Some 112,000 persons of Japanese descent, more than 70,000 of whom were American citizens, were removed from their homes, separated from their jobs and property, and transferred to concentration camps, where they were forcibly detained for periods ranging from a few months to four years. The official excuse given for this program was that it was made necessary by the exigencies of war. Astoundingly, the Supreme Court accepted this argument and ruled large portions of the program constitutional, even though it seemingly violated in a flagrant fashion the fundamentals of due process of law.

Segregation and confinement of the Japanese-American minority had its origin on February 19, 1942, when President Roosevelt promulgated Executive Order No. 9066. This order authorized the Secretary of War and appropriate military commanders to prescribe military areas from which any or all persons might be excluded, and the rights of other persons to enter, leave, or remain might be subjected to whatever restrictions the Secretary of War or appropriate military commanders might think necessary. The constitutional basis of this order was somewhat dubious; the President had acted without specific statutory authority and had depended merely upon his war powers as commander in chief of the Army and Navy. Accordingly, on March 21, 1942, Congress enacted a statute making it a misdemeanor punishable by fine or imprisonment for any person to enter, remain in, or leave any military zone designated by the President, Secretary of War, or appropriate military commanders, contrary to the restrictions applicable to the zone as prescribed by military authority. This law provided virtually the sole statutory basis for the subsequent exclusion and segregation program.

Meanwhile, on March 2, 1942, General J. L. DeWitt, commanding general of the Western Defense Command, designated by proclamation the entire Pacific coastal area as particularly subject to military attack and established Military Areas No. 1 and No. 2, comprising the entire region. The proclamation warned that subsequent notices would exclude certain classes of persons from the designated areas, or would permit them to remain only under suitable restrictions. On March 24, 1942, General DeWitt declared a

curfew between the hours of 8:00 P.M. and 6:00 A.M. for German and Italian nationals and all persons of Japanese ancestry, resident within Military Area No. 1, the coastal region.

There followed a series of exclusion orders directed against Japanese nationals and American citizens of Japanese descent. On March 27, 1942, Public Proclamation No. 4 recited the necessity of removing all such persons from the coastal area, and prohibited Japanese nationals and Americans of Japanese ancestry from leaving the area except under future orders. On May 9, 1942, the commander of the Western Defense Command formally decreed the exclusion of all persons of Japanese ancestry from the command area. Thus Japanese nationals and American citizens of Japanese ancestry were now under two contradictory orders—one prohibiting their departure except under future orders and a second excluding them from the area. Compliance was possible only by reporting to a number of designated Civil Control Stations, where Japanese were gathered together and shipped out of the area to a number of so-called "Relocation Centers."

The Relocation Centers were in fact concentration camps. They were controlled and operated by the War Relocation Authority, an executive agency created for this purpose by presidential order on March 18, 1942. In them, Japanese-Americans were detained for various periods up to four years and then resettled outside the Pacific coastal zone. The program thus forcibly tore thousands of American citizens from their homes, imposed upon them loss of jobs, property, and community position, and then subjected them to imprisonment at the discretion of military authority although they had been convicted of no offense whatsoever.

This program—astonishing in its constitutional implications—came in part before the Court in June 1943, in *Hirabayashi v. United States.*[10] The case concerned an appeal from the conviction of an American citizen of Japanese descent, who had been charged with violating the curfew restrictions imposed upon persons of Japanese ancestry and with failure to report to a designated Civil Control Station. The Court passed only on the constitutionality of the curfew restrictions and refused to consider the segregation program on the technical grounds that conviction for violation of the curfew or-

[10] A companion case, *Yasbui v. United States,* was decided the same day.

der was in itself sufficient to sustain the sentence imposed—since sentence under the two counts had been ordered to run concurrently.

Chief Justice Stone's opinion for a unanimous Court held that the act of Congress of March 21, 1942, had clearly authorized the curfew order and that the order lay within the combined congressional and presidential war powers and was constitutional. He emphasized the grave character of the national emergency confronting the country in 1942 and the appropriate character of the curfew as a device for controlling sabotage and for restricting assistance to the enemy in case of invasion or air attack. He emphasized further the supposed degree to which race and social segregation had marked off the Japanese-American minority and caused it to retain its Japanese loyalties. The Courts, he thought, ought not to challenge the conclusion of military authorities that the curfew was a necessary war measure, and he thought it imperative that the federal war power be interpreted as broad enough to make such a measure possible. The curfew, Stone added, did not violate the Fifth Amendment, which contained no equal protection clause. Discrimination based solely upon race was, he admitted, "odious to a free people whose institutions are founded upon the doctrine of equality," and it was for that reason that discrimination based upon race alone had in the past sometimes been held to violate due process. But in earlier cases, discrimination based upon race had been irrelevant to the national welfare and therefore a violation of due process, whereas in the present case, race was not an irrelevant factor, and Congress had a right to take it into account. Stone added briefly that the act of Congress of March 21, 1942, did not unlawfully delegate legislative power to the executive, and it was therefore also constitutional on that score.

Justices Murphy, Douglas, and Rutledge all wrote separate concurring opinions. Justice Murphy, in particular, made it clear that he entertained grave doubts about the restriction of minority right on a basis of race, even in wartime. "Distinctions based on color and ancestry," he observed, "are utterly inconsistent with our traditions and ideals. They are at variance with the traditions for which we are now waging war. We cannot close our eyes to the fact that for centuries the Old World has been torn by racial and religious

conflicts and has suffered the worst kind of anguish because of inequality of treatment for different groups. . . . Today is the first time, so far as I am aware, that we have sustained a substantial restriction of the personal liberty of citizens of the United States based upon the accident of race or ancestry." The curfew order, he thought, "bears a melancholy resemblance to the treatment accorded to members of the Jewish race in Germany and other parts of Europe." He thought discrimination here "dangerously approached" a violation of due process of law, and that only the critical military situation on the West Coast had justified the curfew order. It was obvious that Justice Murphy considered the relocation policy flagrantly unconstitutional and would vote against it when the occasion arose.

It was equally evident, however, that a majority of the justices were extremely reluctant to interfere with the Japanese relocation program. The key to their attitude lay in their obvious unwillingness to interfere with the conduct of the war, or to dispute the considered judgment of military commanders as to what was necessary to win that war. The loyalty of the Japanese minority; their potential danger as a source of sabotage or assistance to enemy forces; the feasibility of control programs other than the concentration camp policy—all these were questions of fact upon which the justices were unwilling to challenge the considered judgment of military commanders.

The validity of the West Coast exclusion orders finally came before the Court in December 1944 in *Korematsu v. United States*. Here the Court was confronted with an appeal from a conviction of a Japanese-American who had remained within the West Coast military area, contrary to the exclusion order of the Western Defense Command. Justice Black, speaking for the six majority justices, ruled very briefly that in the light of the principles enunciated in the Hirabayashi case the exclusion of Japanese-Americans had been within the federal war power of Congress and the Executive. Again he cited the army's plea of military necessity for instituting special controls over the Japanese-American population; it was imperative, he implied, to allow the army to make decisions of this kind in wartime. Admittedly the exclusion order worked hardship on the Japanese population. "But hardships are a part of war, and war

is an aggregation of hardships," and "when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger."

The Court avoided passing upon the validity of the relocation camp program by rejecting the appellant's contention that his exclusion from the West Coast area was bound up inextricably with his subsequent forced confinement and that exclusion and detention were inseparable parts of one program. Relocation and detention, Black said, posed separate constitutional questions not necessarily associated with exclusion from the West Coast. Exclusion was constitutional; relocation and subsequent confinement were not necessarily so. Black closed by insisting that Korematsu's exclusion did not constitute racial discrimination as such. Korematsu, he said, had been excluded not because of his race, but because of the requirements of military security.

Justices Roberts, Murphy, and Jackson all entered vigorous dissents. Justice Roberts thought the facts exhibited "a clear violation of Constitutional rights." The real issue, he said, was not merely one of Korematsu's exclusion from the West Coast area; on the contrary, he said, it was a plain "case of convicting a citizen as punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition toward the United States." The exclusion order, he insisted, could not realistically be separated from the relocation and detention orders. The appellant, he pointed out, had been under contradictory orders—one ordering him not to leave the area except under future instructions,[11] a second excluding him from the area and ordering him to report to a civil control station for relocation.[12] The two conflicting orders, said Roberts, "were nothing but a cleverly devised trap to accomplish the real purpose of the military authority, which was to lock him up in a concentration camp."

Justice Murphy wrote an equally vigorous dissent in which he attacked exclusion itself as an unconstitutional policy. Exclusion, he said, "goes over the 'very brink of constitutional power' and falls into the ugly abyss of racism." He admitted that the plea of military necessity carried great weight, but it was essential, he said,

[11] Proclamation No. 4, dated March 27, 1942.
[12] Civilian Exclusion Order No. 34, dated May 3, 1942.

"that there be definite limits to military discretion, especially where martial law has not been declared. Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support." The claim of military necessity, he thought, "must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled." The test of military necessity under which the government could validly deprive a person of his constitutional rights was "whether the deprivation is reasonably related to a public danger that is so 'immediate, imminent, and impending' as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger." Japanese exclusion, said Murphy, could not meet that test. There was no real evidence, he pointed out, of mass Japanese-American disloyalty or of any instances of attempted sabotage. Exclusion was in fact based, he concluded, upon an "erroneous assumption of racial guilt" and justified upon "questionable racial and sociological grounds not ordinarily within the realm of expert military judgment. . . ." In Justice Murphy's opinion, therefore, the relocation program flagrantly violated due process of law, and constituted an unwarranted "legalization of racism." Justice Jackson, in a curious dissent, virtually argued that war was an extra-constitutional activity above and beyond constitutional controls. He did not challenge, he said, the necessity of the Japanese relocation program, but the military ought not then to come before the Court and attempt to incorporate the program within the framework of constitutional right.

In *Ex parte Endo,* decided the same day as the Korematsu case,[18] the Court upheld the right of a Japanese-American girl, whose loyalty to the United States had been clearly established, to a writ of habeas corpus freeing her from the custody of the Tule Lake War Relocation Camp. Justice Douglas' opinion avoided any ruling upon the constitutionality of the confinement program in its entirety but instead held merely that the War Relocation Authority had no right to subject persons of undoubted loyalty to confinement or conditional parole. "The authority to detain a citizen or to grant him a conditional release as protection against espionage or sabotage is exhausted," he said, "at least when his loyalty is conceded."

By implication this finding, limited as it was, might have resulted

[18] December 18, 1944.

in a decision that the President's order authorizing the relocation program and the act of Congress of March 21, 1942, validating the President's order were unconstitutional in so far as they authorized the confinement of loyal persons. However, Douglas avoided this difficulty by pointing out that neither the President's order nor the statute anywhere specifically authorized detention. Presumably then, illegal detention had resulted from the abuse of presidential orders by subordinate executive officials—those of the War Relocation Authority—and the act itself was not unconstitutional. The larger constitutional issue—whether a citizen charged with no crime could be forcibly detained under orders of military authority—Douglas did not discuss at all. He dodged the embarrassing precedent of *Ex parte Milligan*, where the main issue had been the right of military authorities to confine persons and try them before military tribunals, by pointing out that in the present case confinement was at the hands of civilian authorities. The validity of the distinction which Douglas drew here was at least debatable, since confinement in the present case had taken place under orders from the military and without any proceedings in the civil courts.

There was no dissent in the Endo case, but Justices Murphy and Roberts wrote terse concurring opinions indicating that they did not altogether accept the majority's reasoning. Justice Murphy said unequivocally that detention in relocation centers of persons of Japanese ancestry was "not only unauthorized by Congress or the Executive" but was "another example of the unconstitutional resort to racism inherent in the entire evacuation program." He added that in his belief Mitsuye Endo was not only entitled to an unconstitutional release but also was entitled to move freely into California. Justice Roberts also attacked the Court's evasion of the constitutional issues inherent in the case. It was absurd, he said, to argue that Congress and the President had not sanctioned the relocation program. It ignored the obvious fact that Congress had after full hearings made repeated full appropriations for the Relocation Authority. The Court, he said, was "squarely faced" with an issue of constitutional right. "An admittedly loyal citizen has been deprived of her liberty for a period of years. Under the Constitution she should be free to come and go as she pleases. Instead, her liberty of motion and other innocent activities have been prohibited and conditioned. She should be discharged."

There are strong grounds for the conclusion that the Supreme Court blundered seriously in the Hirabayashi, Korematsu, and Endo cases. As a result of the Court's opinions it is now written into constitutional law that a citizen of the United States, set apart from his fellows only by race, may be expelled from his home, separated from his native community, forcibly transported to a concentration camp, and there detained against his will, at least until his loyalty has been established. It is true that the program occurred in the midst of a great war, and the Court rightly was unwilling to take any step which would interfere with the conduct of the war. But as Justice Murphy pointed out in the Korematsu case, it does not follow that the Court must accept blindly the unlicensed judgment of military commanders that any given impairment of the Bill of Rights is absolutely essential to national safety.

It is precisely upon this point that the Court appears to have failed in its duty most seriously—it refused to examine the relocation program in the light of military necessity. The preponderant weight of evidence points in fact to the conclusion that the program was not justified by military necessity. There is little or no evidence that any appreciable portion of the Japanese-American population was disloyal, and no evidence at all that the group was a potential source of sabotage or of assistance to the Japanese in case of invasion. There appears to be no reason whatever why the few potentially disloyal and seditious individuals in the Japanese-American population, practically all of whom were known to the Federal Bureau of Investigation and military intelligence, could not have been weeded out, put under special controls, and subjected to trial and imprisonment in extreme cases. This is in fact what was done with the German-American and Italo-American minorities, the great majority of whose members were permitted their unconditional liberty.

The Court's refusal to examine these considerations virtually established the principle that any portion of the Bill of Rights, no matter how fundamental, can be set aside in wartime merely upon the plea of military necessity. Admittedly, it has long been established that constitutional rights are relative and not absolute, and that government in war may impose many limitations upon individual liberty which would not be constitutional in peacetime. But the new relativism of "military necessity" established by these cases

swept away entirely the assurance of any wartime constitutional right. In future wars, no person belonging to a racial, religious, cultural, or political minority can be assured that community prejudice and bigotry will not express itself in a program of suppression justified as "military necessity," with resultant destruction of his basic civil rights as a member of a free society. Bills of rights and constitutions are written to protect society against precisely such emergencies, and in so far as they fail to do so they lose their meaning.

MILITARY GOVERNMENT IN HAWAII: DUNCAN V. KAHANAMOKU

A second major instance of the wartime suppression of civil liberties occurred in Hawaii, where the army erected a military government and for a time suspended all civilian governmental functions, including the writ of habeas corpus and the operation of the regular civil courts. Ultimately the Supreme Court held the imposition of military government in the Hawaiian Islands to have been illegal.

On December 7, 1941, immediately following the attack upon Pearl Harbor, the governor of Hawaii by proclamation suspended the writ of habeas corpus, placed the territory of Hawaii under martial law, and delegated to the commanding general, Hawaiian Department, his own authority as governor as well as all judicial authority in the territory. He took these steps under Section 67 of the Hawaiian Organic Act, adopted by Congress on April 30, 1900, which authorized such action "in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it."

General Short at once proclaimed himself military governor of Hawaii, and by order No. 4 of December 7 he established military courts to try civilians in cases involving offenses against the laws of the United States, the Territory of Hawaii, or the rules and orders of the military authorities. Sentences imposed by these tribunals were not subject to review by the regular federal courts, and all regular civil and criminal courts were closed. The commanding general shortly allowed the civil courts to reopen "as agents of the military governor," but civil courts were still prohibited from exercising jurisdiction in criminal cases and from empaneling juries. In February 1943 the President by proclamation partially restored the independent functions of the civil governor and the regular

courts. However, the writ of habeas corpus remained suspended, and military courts were still empowered to try civilians for violations of existing military orders. Military government was not terminated entirely until October 1944, at which time all threat of invasion had long since passed.

The Court did not pass upon the legality of the Hawaiian military government until February 1946, some months after the Japanese war had ended. Then in *Duncan v. Kahanamoku* it held, 6 to 2, that the establishment of military tribunals in Hawaii to try civilians had been illegal and unauthorized by Congress. The Court avoided passing upon the constitutionality of the suspension of the writ of habeas corpus, on the ground that the present appeals had been taken after the restoration of the writ in October 1944.

Justice Black's opinion for the majority held that the Hawaiian Organic Act of 1900 had not authorized military authorities to declare martial law and establish military courts other than under conditions of actual invasion and rebellion. On the contrary, he said, the act had specifically extended the Constitution to the territory, so that civilians in Hawaii were entitled to the constitutional guarantees of a fair trial to the same extent as persons in other parts of the United States. Asserting that the term "martial law" as used in the act had "no precise meaning," Black nonetheless found that military authority used constitutionally for police purposes must always be subordinated to civil government. He then reviewed the history of military tribunals in the United States, emphasizing that the military trial of civilians was contrary to the American constitutional tradition. Congress, he pointed out, had authorized it but once, in the Reconstruction Acts, and on that occasion President Johnson had challenged the system in a series of vetoes "as vigorous as any in the country's history." Surprisingly, Justice Black barely mentioned *Ex parte Milligan*, although that case had involved almost precisely the same issue as the one in question—the validity of the trial of civilians by military courts in areas other than the field of immediate military operations, and where the courts were open and functioning.

Justice Murphy in a concurring opinion took the Court to task for its failure to declare more powerfully that "these trials were forbidden by the Bill of Rights of the Constitution of the United States, which applies both in letter and spirit to Hawaii." He em-

phasized strongly the "open court" rule of *Ex parte Milligan*—that the military lacks any constitutional power in either peace or war to try civilians when the civil courts are open and operating in normal fashion.

Chief Justice Stone, also concurring, argued that the term "martial law" as used in the Organic Act did in fact have a precise meaning. Historically, he said, martial law had been related to conditions of invasion or grave public emergency, when the ordinary processes of civil government could not function. He did not agree with Black's contention that under martial law military authority was always properly subordinated to civil power. However, he thought the existence of a situation justifying the imposition of martial law was a question of fact properly subject to judicial determination. In the present case, no danger of invasion or public disorder had been shown to exist at the time of petitioners' trial; therefore military government at that time had been unconstitutional.

Justices Burton and Frankfurter, dissenting, thought the continued threat of invasion had been substantial enough throughout 1943 and 1944 to justify the continued imposition of military rule in Hawaii. Burton admitted the desirability of judicial review where martial law had been declared, but he thought it unwise to judge "past military action too closely by the inapplicable standards of judicial, or even military hindsight."

The most surprising aspect of *Duncan v. Kahanamoku* is the Court's reluctance to rely more heavily upon *Ex parte Milligan* as a deciding precedent. No doubt the explanation lies in the extent to which the Milligan decision has been criticized in recent years. It has been customary to point out that the exigencies of war leave little room for so large a play of civilian authority in a possible field of military operations as the Milligan case insisted upon; in other words, the "open court" rule may on occasion endanger national security. Also, the Milligan opinion has been said to lack realism, in that it came after the close of the Civil War and was therefore in a sense an indulgence in a "peacetime luxury." Apparently similar considerations motivated the Court in the Kahanamoku case. The decision was not rendered for an entire year after certiorari had been granted, quite possibly because the Court had been reluctant to decide the case during wartime. Obviously the justices were strongly aware of the fact that only the passing of the im-

minent danger of invasion in Hawaii had permitted institution of the present action, and they were equally aware that they had not condemned military government in Hawaii as unconstitutional until after the war had ended and the practical necessity for that government had ceased. In the face of these considerations, Justice Murphy alone was willing to insist that military trial of civilians was unconstitutional except under actual conditions of invasion. The other justices were far less self-confident about hampering the scope of military operations in wartime than their predecessors had been eighty years earlier.

MILITARY TRIAL OF ENEMY WAR CRIMINALS

The determination not to interfere with the conduct of the war was undoubtedly a large factor in the Court's refusal to extend the protection of the Bill of Rights to enemy nationals charged with committing violations of the laws of war. The question of the extent to which enemy military personnel could claim the protection of the Constitution and the Bill of Rights first arose in *Ex parte Quirin* (1942), a case growing out of the arrest of eight members of the German military forces who had entered the United States in disguise with intent to commit acts of sabotage against American war industry. Following their capture in June 1942, the President ordered the saboteurs tried before a specially constituted military tribunal, on charges of violating the laws of war. While their trial was still in progress, seven of the prisoners sought writs of habeas corpus before the district courts and the Supreme Court. Late in July the Court consented to hear arguments for the writ. It then immediately denied the appeal without publishing a full opinion explaining why it did so. In October the Court published a unanimous opinion written by Chief Justice Stone, setting forth at some length the reasons for its decision three months earlier.

Stone's opinion held that the saboteurs were not entitled to other than summary military trial. The Chief Justice examined and refuted in succession three contentions that counsel for the saboteurs had advanced before the Court. The first was that the offenses for which the petitioners were being tried—violation of the laws of war—were defined neither in the Constitution nor in any federal statute, and was therefore unknown to the laws of the United States. In reply, Stone held that the Fifteenth Article of War, which authorized

trial by military commission of offenses under the laws of war, was sufficient statutory authorization for the present charge. Also, he pointed to the long record of similar military trials of enemy personnel, extending from the Revolution to the current war.

Second, counsel for petitioners had argued that the President had been without adequate authority to create the military commission before which the petitioners were being tried, since the President in establishing the commission had departed slightly from the specifications of the Articles of War. Stone answered that the national war power, congressional and presidential combined, was adequate to establish the commission, and he refused to draw any line separating congressional war power from the President's powers as commander in chief. Stone's position here amounted to the somewhat startling assertion that the President by virtue of his military powers could amend and reinterpret the Articles of War, although Congress had enacted the Articles under a specific grant of authority in Article I, Section 8, of the Constitution.

Finally, counsel had argued that summary military trial of the saboteurs violated the guarantees of jury trial set forth in Article III, Section 2, of the Constitution, as well as the procedural guarantees of civil trial extended by the Fifth and Sixth Amendments. The main force of this argument rested on the contention that the present case was not one "arising in the land and naval forces" within the meaning of the Fifth Amendment. The amendment specifically exempts such cases from the requirement of grand jury indictment. By implication, it categorically extends the guarantees of civil trial and due process in all other cases, including, the petitioners' counsel argued, those involving enemy military personnel. In reply, the Chief Justices admitted that the present case was not one arising in the land and naval forces within the meaning of the Fifth Amendment. However, he immediately nullified the force of this admission by holding that the Constitution and the Fifth and Sixth Amendments had not been intended to guarantee civil trial to enemy military personnel. There was, he said, a "long continued and consistent interpretation" by Congress and the courts to the contrary. Military tribunals, he pointed out, had long been held not to be courts within the meaning of the Constitution, so that the Fifth and Sixth Amendments did not apply to them. It would be absurd, he concluded, to hold that the Constitution, which specifically

withheld trial by jury from members of the American armed forces, nonetheless extended that right to enemy military personnel. Accordingly, the Court denied the prisoners' plea. There was no dissent.

The extraordinary thing about the Court's opinion in *Ex parte Quirin* is that the justices had permitted themselves to be drawn into any discussion of the constitutional rights of enemy military personnel. The Court might well have dismissed the plea with the brief observation that enemy military personnel had no rights under the Constitution—that the Constitution did not extend its guarantees to them. Instead, Stone's entire opinion rests upon the implicit assumption that even though the saboteurs were prisoners of war in the hands of the military, they conceivably had certain rights under the Constitution. This was a highly dubious assumption. It appears probable that the members of the Constitutional Convention, many of whom were well acquainted with the contemporary international law of war, did not intend to extend constitutional rights to enemy military personnel. In any event, since 1776 the United States had always dealt with war criminals by summary military procedure, as have all other states in the history of organized warfare. In the light of these considerations, the Court's position was little short of astonishing. Perhaps the justices were interested in impressing upon the totalitarian world the extraordinary degree to which the American constitutional system threw safeguards around accused persons—particularly since their speedy disposal of the saboteurs' appeal did not interfere in the least with Draconian military justice.

The Quirin opinion paved the way for *In re Yamashita* (1946), in which a captured Japanese general appealed from his summary military trial and conviction for violating the laws of war. As in the Quirin case, counsel for the petitioner contended that the trial commission had not been lawfully established, that the trial court's procedure had in certain respects violated the Articles of War, and that as a consequence the petitioner had been deprived of a fair trial in violation of the Fifth Amendment.

Surprisingly, in this case Chief Justice Stone's opinion in substance denied that Yamashita had any constitutional rights at all. The Chief Justice did cite the Quirin case as precedent for his finding that the present trial commission had been lawfully estab-

lished. But the remainder of his opinion was in effect an assertion that Yamashita's conviction was subject to review only by higher military authority, and a denial that Yamashita had any standing in the civil courts under the Constitution. The Court thus silently overruled the major assumption implicit in *Ex parte Quirin.*

Justice Rutledge, dissenting, pointed out the discrepancy between the Court's present position and that in the saboteurs' case and went on to argue that the guarantees extended under the Constitution applied whenever and wherever the authority of the United States was exercised, except under actual conditions of combat. Justice Murphy, who also dissented, argued that failure to extend the guarantees of the Fifth and Sixth Amendments to Yamashita was not only grossly unconstitutional but also would hinder the "reconciliation necessary to a peaceful world." Justices Rutledge and Murphy certainly had the virtue of consistency on their side, but past American practice obviously accorded more closely with Chief Justice Stone's new stand.

THE FUTURE OF CONSTITUTIONAL DEMOCRACY

A survey of the growth of civil liberties in recent years makes it possible to conclude a constitutional history of the United States on an optimistic note. Constitutionalism—the doctrine of limited government—is evidently an ideal still possessed of immense vitality in our country. In the United States, if in few other places in the world, the conception that the individual possesses certain rights as against the state is still a fundamental part of the processes of government. Those rights are no longer conceived, as they were in the seventeenth and eighteenth centuries, as categorical absolutes derived from the immutable law of nature; rather, modern constitutional doctrine envisions private right as susceptible to growth and change in a process of continuous adjustment to the social order. Yet the individual's rights are no less vital to his freedom and happiness because their particular form is not frozen permanently into some static absolute legal system. Ultimately, our constitutional system still rests upon the values given expression by Jefferson in the Declaration of Independence—that government exists to protect and promote individual welfare and happiness. In brief, the state exists for the individual.

Throughout most of the remainder of the world the ideal of

constitutionalism is now dead—if indeed it ever had any real vitality.[14] Here one must distinguish carefully between the doctrine of limited government and a mere fetish of charter writing. The written constitution made its appearance in the eighteenth century as a device whereby the frame of government, the limits imposed upon it, and the rights reserved to the individual might be easily perceived and understood by all men. Ultimately, the idea of a written constitution spread around the whole world, so that today a variety of totalitarian despotisms—communist and fascist alike—possess written charters. But in a totalitarian state the written constitution lacks the inner meaning which it possesses in a constitutional democracy. It becomes instead a mere instrument of propaganda—a device for the exercise of power rather than a guarantee against the abuse of power.

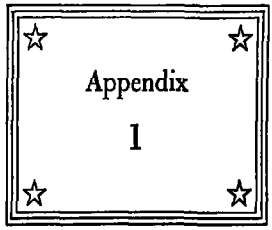
Throughout the totalitarian world it is the "plan," not the written constitution, which is the supreme expression of the aspirations of a people. Now a "plan"—if by that one means some all-inclusive totalitarian instrument of social progress which welds all private life into the pattern devised by the state—is in some respects the very antithesis of a written constitution. Ultimately, the Constitution exists to safeguard the individual against the state; whereas ultimately the "plan" exists to guarantee and assure the welfare of the state and progress of the total social order without immediate regard to the individual.

Here lies the great challenge to modern constitutional democracy. Can planned social objectives be reconciled with limited government? Can a constitutional government engage in social planning without destroying individual right? Can constitutional democracy deal with the recurrent crises of the modern world without adopting some comprehensive pattern of planning, which in turn may involve forcible adjustment of the individual's role to the total social order regardless of constitutional right?

A great majority of Americans are confident that the challenge is not unanswerable. Some few would have it that constitutional government makes it impossible for the state to play any role in

[14] Constitutionalism still has great vitality in Britain, the Dominions, Holland, Switzerland, and the Scandinavian states, and possibly some in France. It is totally dead or virtually so throughout the remainder of Europe and Asia, and it is doubtful whether much of Latin America accepts the doctrine fully.

social change—that constitutionalism cannot live except in an atmosphere of extreme individualism and *laissez-faire* economy. Another small minority would have it that "The Plan" has become so imperatively important that private right must be swept aside. But most Americans, whatever their immediate political faith, are still confident that a system of constitutional government and private rights can be reconciled successfully with intelligent social growth, achieved by private initiative, originality, and creative capacity combined with a certain amount of public planning and control. They believe that constitutional government and popular democracy make possible a state which will serve the ends of social welfare without falling victim either to its own weaknesses or to the all-consuming lust for power of a would-be dictator. It is true that these ideals are challenged all over the world today, but it is also true that the American faith in constitutional democracy still endows our government with an immense dynamic vitality.



Articles of Confederation

To ALL to whom these Presents shall come, we the undersigned Delegates of the States affixed to our Names send greeting.

Whereas the Delegates of the United States of America in Congress assembled did on the fifteenth day of November in the Year of our Lord One Thousand Seven Hundred and Seventyseven, and in the Second Year of the Independence of America agree to certain articles of Confederation and perpetual Union between the States of Newhampshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia in the Words following, viz.

"Articles of Confederation and perpetual Union between the States of Newhampshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia.

ARTICLE I. The stile of this confederacy shall be "The United States of America."

ARTICLE II. Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.

ARTICLE III. The said States hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

ARTICLE IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them.

If any person guilty of, or charged with treason, felony, or other high misdemeanor in any State, shall flee from justice, and be found in any of the United States, he shall upon demand of the Governor or Executive power, of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offence.

Full faith and credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and magistrates of every other State.

ARTICLE V. For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislature of each State shall direct, to meet in Congress on the first Monday in November, in every year, with a

power reserved to each State, to recall its delegates, or any of them, at any time within the year, and to send others in their stead, for the remainder of the year.

No State shall be represented in Congress by less than two, nor by more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States, for which he, or another for his benefit receives any salary, fees or emolument of any kind.

Each State shall maintain its own delegates in a meeting of the States, and while they act as members of the committee of the States.

In determining questions in the United States, in Congress assembled, each State shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress, and the members of Congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of the peace.

ARTICLE VI. No State without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any king, prince or state; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office or title of any kind whatever from any king, prince or foreign state; nor shall the United States in Congress assembled, or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No State shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the United States in Congress assembled, with any king, prince or state, in pursuance of any treaties already proposed by Congress, to the courts of France and Spain.

No vessels of war shall be kept up in time of peace by any State, except such number only, as shall be deemed necessary by the United States in Congress assembled, for the defence of such State, or its trade; nor shall any body of forces be kept up by any State, in time of peace, except such number only, as in the judgment of the United States, in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such State; but every State shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage.

No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay, till the United States in Congress assembled can be consulted: nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the kingdom or state and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in Congress assembled shall determine otherwise.

ARTICLE VII. When land-forces are raised by any State for the common defence, all officers of or under the rank of colonel, shall be appointed by the Legislature of each State respectively by whom such forces shall be raised, or in such manner as such State shall direct, and all vacancies shall be filled up by the State which first made the appointment.

ARTICLE VIII. All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to or

surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint.

The taxes for paying that proportion shall be laid and levied by the authority and direction of the Legislatures of the several States within the time agreed upon by the United States in Congress assembled.

ARTICLE IX. The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article—of sending and receiving ambassadors—entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever—of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated—of granting letters of marque and reprisal in times of peace—appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of Congress shall be appointed a judge of any of the said courts.

The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction or any other cause whatever; which authority shall always be exercised in the manner following. Whenever the legislative or executive authority or lawful agent of any State in controversy with another shall present a petition to Congress, stating the matter in question and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question: but if they

cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names as Congress shall direct, shall in the presence of Congress be drawn out by lot, and the persons whose names shall be so drawn or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination: and if either party shall neglect to attend at the day appointed, without showing reasons, which Congress shall judge sufficient, or being present shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the Secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence, or judgment, which shall in like manner be final and decisive, the judgment or sentence and other proceedings being in either case transmitted to Congress, and lodged among the acts of Congress for the security of the parties concerned: provided that every commissioner, before he sits in judgment, shall take an oath to be administered by one of the judges of the supreme or superior court of the State where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favour, affection or hope of reward:" provided also that no State shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil claimed under different grants of two or more States, whose jurisdiction as they may respect such lands, and the States which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall on the petition of either party to the Congress of the United States, be finally determined as near as may be in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States.

The United States in Congress assembled shall also have the sole

and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States—fixing the standard of weights and measures throughout the United States—regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated—establishing and regulating post-offices from one State to another, throughout all the United States, and exacting such postage on the papers passing thro' the same as may be requisite to defray the expenses of the said office—appointing all officers of the land forces, in the service of the United States, excepting regimental officers—appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States—making rules for the government and regulation of the said land and naval forces, and directing their operations.

The United States in Congress assembled shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated "a Committee of the States," and to consist of one delegate from each State; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction—to appoint one of their number to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years; to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses—to borrow money, or emit bills on the credit of the United States, transmitting every half year to the respective States an account of the sums of money so borrowed or emitted,—to build and equip a navy—to agree upon the number of land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State; which requisition shall be binding, and thereupon the Legislature of each State shall appoint the regimental officers, raise the men and cloath, arm and equip them in a soldier like manner, at the expense of the United States; and the officers and men so cloathed, armed and equipped shall march to the place appointed, and within the time agreed on by the United States in Congress assembled: but if the United States in Congress assembled shall, on consideration of circumstances judge proper that any State should not raise men, or should raise a smaller

number of men than the quota therof, such extra number shall be raised, officered, cloathed, armed and equipped in the same manner as the quota of such State, unless the legislature of such State shall judge that such extra number cannot be safely spared out of the same, in which case they shall raise officer, cloath, arm and equip as many of such extra number as they judge can be safely spared. And the officers and men so cloathed, armed and equipped, shall march to the place appointed, and within the time agreed on by the United States in Congress assembled.

The United States in Congress assembled shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defence and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war, to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander in chief of the army or navy, unless nine States assent to the same: nor shall a question on any other point, except for adjourning from day to day be determined, unless by the votes of a majority of the United States in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months, and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances or military operations, as in their judgment require secresy; and the yeas and nays of the delegates of each State on any question shall be entered on the Journal, when it is desired by any delegate; and the delegates of a State, or any of them, at his or their request shall be furnished with a transcript of the said journal, except such parts as are above excepted, to lay before the Legislatures of the several States.

ARTICLE X. The committee of the States, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States in Congress assembled, by the consent of nine States, shall from time to time think expedient to vest them with; provided that no power be delegated to the said

committee, for the exercise of which, by the articles of confederation, the voice of nine States in the Congress of the United States assembled is requisite.

ARTICLE XI. Canada acceding to this confederation, and joining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union: but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.

ARTICLE XII. All bills of credit emitted, monies borrowed and debts contracted by, or under the authority of Congress, before the assembling of the United States, in pursuance of the present confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States, and the public faith are hereby solemnly pledged.

ARTICLE XIII. Every State shall abide by the determinations of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State.

And whereas it has pleased the Great Governor of the world to incline the hearts of the Legislatures we respectively represent in Congress, to approve of, and to authorize us to ratify the said articles of confederation and perpetual union. Know ye that we the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said articles of confederation and perpetual union, and all and singular the matters and things therein contained: and we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the United States in Congress assembled, on all questions, which by the said confederation are submitted to them. And that the articles

thereof shall be inviolably observed by the States we respectively represent, and that the Union shall be perpetual.

In witness whereof we have hereunto set our hands in Congress. Done at Philadelphia in the State of Pennsylvania the ninth day of July in the year of our Lord one thousand seven hundred and seventy-eight, and in the third year of the independence of America.

The Constitution of the United States

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE. I.

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section. 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained

to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Man ner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section. 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the

Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section. 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof, but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section. 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of

either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section. 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section. 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjourn-

ment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—— And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section. 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law, and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall,

without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section. 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE. II.

Section. 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat

of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President, neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall

not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section. 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section. 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE. III.

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section. 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving

them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE. IV.

Section. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section. 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section. 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section. 4. The United States shall guarantee to every State in this

Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of it's equal Suffrage in the Senate.

ARTICLE. VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE. VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independance of the United States of America the Twelfth. In witness whereof We have hereunto subscribed our Names,

G° WASHINGTON—Presidt
and deputy from Virginia

New Hampshire	John Langdon Nicholas Gilman
Massachusetts	Nathaniel Gorham Rufus King
Connecticut	Wm Saml Johnson Roger Sherman
New York	Alexander Hamilton
New Jersey	Wil: Livingston David A. Brearley. Wm Paterson. Jona: Dayton
Pensylvania	B Franklin Thomas Mifflin Robt Morris Geo. Clymer Thos FitzSimons Jared Ingersoll James Wilson Gouv Morris
Delaware	Geo: Read Gunning Bedford jun John Dickinson Richard Bassett Jaco: Broom
Maryland	James McHenry Dan of St Thos Jenifer Danl Carroll
Virginia	John Blair— James Madison Jr.
North Carolina	Wm Blount Richd Dobbs Spaight. Hu Williamson
South Carolina	J. Rutledge Charles Cotesworth Pinckney Charles Pinckney Pierce Butler.
Georgia	William Few Abr Baldwin

Amendments to the Constitution

ARTICLES IN ADDITION TO, and Amendment of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth Article of the original Constitution.

ARTICLE I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ARTICLE II.

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

ARTICLE III.

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the

Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

ARTICLE VII.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

ARTICLE VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

ARTICLE X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States re-

spectively, or to the people. [The first ten amendments went into effect November 3, 1791.]

ARTICLE XI.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State. [January 8, 1798.]

ARTICLE XII.

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-

President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States. [September 25, 1804.]

ARTICLE XIII.

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation. [December 18, 1865.]

ARTICLE XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citi-

zens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article. [July 28, 1868.]

ARTICLE XV.

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude——

Section 2. The Congress shall have power to enforce this article by appropriate legislation.——[March 30, 1870.]

ARTICLE XVI.

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration. [February 25, 1913.]

ARTICLE XVII.

The Senate of the United States shall be composed of two senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any senator chosen before it becomes valid as part of the Constitution. [May 31, 1913.]

ARTICLE XVIII.

After one year from the ratification of this article, the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission thereof to the States by Congress. [January 29, 1919.]

ARTICLE XIX.

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

The Congress shall have power by appropriate legislation to enforce the provisions of this article. [August 26, 1920.]

ARTICLE XX.

Section 1. The terms of the President and Vice-President shall end at noon on the twentieth day of January, and the terms of Senators and Representatives at noon on the third day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the third day of January, unless they shall by law appoint a different day.

Section 3. If, at the time fixed for the beginning of the term of the President, the President-elect shall have died, the Vice-President-elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President-elect shall have failed to qualify, then the Vice-President-elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President-elect nor a Vice-President-elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice-President shall have qualified.

Section 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice-President whenever the right of choice shall have devolved upon them.

Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission. [February 6, 1933.]

ARTICLE XXI.

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by convention in the several States, as provided in the Constitution, within seven years from the date of the submission thereof to the States by the Congress. [December 5, 1933.]

Selected Readings

WORKS OF GENERAL VALUE

Andrew C. McLaughlin, *A Constitutional History of the United States* (1935), contains excellent material on the period from the Revolution through Reconstruction but relatively little on constitutional developments after 1885. Homer C. Hockett, *The Constitutional History of the United States, 1826–1876* (1939), 2 vols., is somewhat old-fashioned constitutional history emphasizing political developments. Carl B. Swisher, *American Constitutional Development* (1943), presents much valuable material on 20th-century constitutional problems. Benjamin F. Wright, *The Growth of American Constitutional Law* (1942), is a valuable synthesis of judicial-constitutional development. Association of American Law Schools, ed., *Selected Essays on Constitutional Law* (1938), 4 vols., hereinafter referred to as *Selected Essays*, comprises a collection of notable essays in constitutional law and history gathered from the nation's legal periodicals. Charles Warren, *The Supreme Court in United States History* (1937), 2 vols., contains a wealth of material on the Court's role in politics and history.

Henry S. Commager, ed., *Documents of American History* (1943) is the modern documentary source book for the student of constitutional history. William MacDonald, ed., *Select Documents Illustrative of the History of the United States, 1776–1861* (1897), and *Documentary Source Book of American History, 1606–1913* (1916), include additional documentary material. F. N. Thorpe, ed., *The Federal and State Constitutions, Colonial Charters and Other Organic Laws* (1909), 7 vols., is a convenient collection of colonial charters and state constitutions. Lawrence B. Evans, *Cases on Constitutional Law* (1938), is a collection of case material. Robert E. Cushman, *Leading Constitutional Decisions* (1946), is a brief collection of extracts from principal Supreme Court opinions on constitutional issues.

United States Supreme Court reports are available in three principal editions. The official Government Printing Office publication of the reports, *United States Reports*, is cited more briefly as *U.S.* Example: 274 *U.S.* 179. The *Supreme Court Reporter* is cited as *Sup. Ct.* Example: 65 *Sup. Ct.* 847. The *Lawyers' Edition* is cited as *L. Ed.* Example: 69 *L. Ed.* 234. Until 1882, Supreme Court decisions were published by private reporters and commonly cited by their names. Examples: 1 *Cranch* 38; 3 *Peters* 136; 7 *Wallace* 94.

CHAPTER 1. ENGLISH AND COLONIAL BACKGROUNDS

Charles M. Andrews, *The Colonial Period of American History* (1935–39), 4 vols., is predominantly political and constitutional in content. H. L. Osgood, *The American Colonies in the Seventeenth Century* (1904–1907), 3 vols., is an older work with a similar approach. A detailed study on the joint-stock companies can be found in W. R. Scott, *The Constitution and Finance of English, Scottish and Irish Joint Stock Companies to 1720* (1910–12), 3 vols. Charles P. Lucas, *Beginnings of English Overseas Enterprise* (1917), is a good brief study. W. F. Craven, *Dissolution of the Virginia Company* (1935), has pertinent constitutional material. A. C. McLaughlin, *Foundations of American Constitutionalism* (1932), contains essays on the joint-stock company and on the influence of early Separatism in colonial constitutional theory. G. P. Gooch, *The History of English Democratic Ideas in the Seventeenth Century* (1898), is a study of Puritan political theory. Jean Moura and Paul Louvet, *Calvin: A Modern Biography* (1932), is useful for its treatment of certain phases of political theory. H. D. Foster, "The Political Theories of Calvinists before the Puritan Exodus to America," *American Historical Review*, XXI (April 1916), is worth reading, as is H. L. Osgood, "The Political Ideas of the Puritans," *Political Science Quarterly*, VI (March, June, 1891). George M. Trevelyan, *England under the Stuarts* (1930), is enlightening both on religious controversy and on Stuart colonial policy. Godfrey Davies, *The Early Stuarts, 1603–1660* (1937), is a study of considerable merit. A detailed constitutional study of a proprietary colony is William R. Shepherd, *History of Proprietary Government in Pennsylvania* (1896). J. S. Bassett, *The Constitutional Beginnings of North Carolina, 1663–1729* (1894), is old but still valuable. Louise P. Kellogg, "The American Colonial Charter," *American Historical Association Reports, 1903*, Vol. I, discusses Stuart proprietary policy. Relevant charters are in Henry S. Commager, ed., *Documents of American History* (1943), and in William MacDonald, ed., *Select Documents Illustrative of the History of the United States, 1776–1861* (1897), and *Documentary Source Book of American History, 1606–1913* (1916).

CHAPTER 2. A CENTURY OF COLONIAL GOVERNMENT

H. L. Osgood, *The American Colonies in the Eighteenth Century* (1924). 4 vols., is devoted to political and constitutional development. Mary P. Clarke, *Parliamentary Privilege in the American Colonies* (1943), is a good treatment of colonial legislative organization and procedure. A. E. McKinley, *The Suf-*

frage Franchise in the Thirteen English Colonies in America (1905), is still a rewarding study on colonial voting requirements. B. F. Wright, "The Origin of Separation of Powers in America," *Economica*, XIII (May 1933), is an admirable brief survey. Malcolm P. Sharpe, "The Classical American Doctrine of the Separation of Powers," *University of Chicago Law Review*, II (April 1935), contains valuable theoretical observations. T. F. Moran, *The Rise and Development of the Bicameral System in America* (1895), is a detailed study. L. W. Labaree, *Royal Government in America* (1930), is mainly a study of the royal governors. L. W. Labaree, *Royal Instructions to British Colonial Governors, 1670–1776* (1935), provides an excellent collection. E. B. Greene, *The Provincial Governor* (1898), is a useful work. There is good material on the colonial courts and judiciary in Richard B. Morris, *Studies in the History of American Law, with Special Reference to the Seventeenth and Eighteenth Centuries* (1930), and in Charles Warren, *A History of the American Bar* (1911). Paul S. Reinsch, *English Common Law in the Early American Colonies* (1899), emphasizes the slow acceptance of English legal practices and ideas. Benjamin F. Wright, *American Interpretations of Natural Law* (1931), contains two excellent chapters on colonial political theory. Alice M. Baldwin, *The New England Clergy and the American Revolution* (1928), shows the prevalence of natural-law theory and the doctrine of limited government in eighteenth-century New England. There are sketches of Roger Williams, Thomas Hooker, and other colonial political theorists in Vernon Parrington, *Main Currents in American Thought* (1927), Vol. I. S. H. Brockunier, *The Irrepressible Democrat: Roger Williams* (1940), is a biography of the great Rhode Island Separatist. James Ernst, *Roger Williams* (1932), is a study in political ideas. E. S. Corwin, "The 'Higher Law' Background of American Constitutional Law," *Harvard Law Review*, XLII (December 1928; June 1929), reprinted in *Selected Essays*, I, contains a survey of the development of natural-rights theory in Europe and America. The significance of the Writs of Assistance Case is discussed in O. M. Dickerson, "Writs of Assistance as a Cause of the American Revolution," in *The Era of the American Revolution* (Studies Inscribed to E. B. Greene) (1939), and in Theodore F. T. Plucknett, "Bonham's Case and Judicial Review," *Harvard Law Review*, XL (Nov. 1926), reprinted in *Selected Essays*, I.

The over-all development of the British imperial system is traced and analyzed in G. L. Beer, *Origins of the British Colonial System* (1908), and in G. L. Beer, *The Old Colonial System* (1912). O. M. Dickerson, *American Colonial Government, 1696–1765* (1912), is a good study of the Board of Trade. Mary P. Clarke, "The Board of Trade at Work," *American Historical Review*, XVII (Oct. 1911), is also useful. C. M. Andrews, "The Royal Disallowance," American Antiquarian Society, *Proceedings* (October 1914), and Elmer B. Russell, *The Review of American Colonial Legislation by the King in Council* (1915), are helpful in their treatment of disallowance. George A. Washburne, *Imperial Control of the Administration of Justice in the Thirteen American Colonies, 1684–1776* (1923), is a study of the Privy Council's func-

tion in the review of appeals from colonial courts. E. R. Turner, *The Privy Council of England in the Seventeenth and Eighteenth Centuries* (1928), is detailed and specialized. A. M. Schlesinger, "Colonial Appeals to the Privy Council," *Political Science Quarterly*, XXVIII (June, September, 1913) is a useful brief survey. Ella Lonn, *The Colonial Agents of the Southern Colonies* (1935), and James J. Burns, *The Colonial Agents of New England* (1935), are both detailed studies. A. C. McLaughlin, "The Background of American Federalism," *American Political Science Review*, XII (May 1918), presents the British Empire as a great federal state.

CHAPTER 3. THE AMERICAN REVOLUTION

Edward Channing, *History of the United States* (1912), Vol. III, presents a good general history of the Revolution, emphasizing political and constitutional developments. R. Frothingham, *The Rise of the Republic of the United States* (1899), is also a political and constitutional study of the revolutionary era. C. H. Van Tyne, *The Causes of the War of Independence* (1922), and John C. Miller, *Origins of the American Revolution* (1943), are studies of a more general character. S. E. Morison, ed., *Sources and Documents Illustrating the American Revolution, 1764–1788* (1923), is a brief source book on the period. Allen Nevins, *The American States During and After the Revolution 1775–1789* (1924), furnishes a mass of political, social, and constitutional material. Charles F. Mullett, *Fundamental Law and the American Revolution* (1933), is a competent general study of constitutional ideas. C. H. McIlwain, *The American Revolution: A Constitutional Interpretation* (1923), defends the view that the colonies were not properly subject to Parliament's authority. R. L. Schuyler, *Parliament and the British Empire* (1929), disputes this analysis. Randolph G. Adams, *Political Ideas of the American Revolution* (1922), provides a comprehensive discussion of the theories of dominion status. For a general account of the crisis of 1774–76 Carl Becker's *The Eve of the Revolution* (1920) is a competent treatment. Julian Boyd, *Anglo-American Union; Joseph Galloway's Plans to Preserve the British Empire* (1941), presents a sympathetic interpretation of the Galloway plan. J. M. Leake, *The Virginia Committee System and the American Revolution* (1917), is a study of the committees of correspondence in that state. E. C. Burnett, *The Continental Congress* (1941), comprises the definitive work of scholarship on that body. H. A. Cushing, *History of the Transition from Provincial to Commonwealth Government in Massachusetts* (1896), and J. Paul Selsam, *The Pennsylvania State Constitution of 1776* (1936), are the best studies of the constitutional aspects of revolution within a state. C. H. Lincoln, *The Revolutionary Movement in Pennsylvania* (1901), and H. J. Eckenrode, *The Revolution in Virginia* (1916), are more general in character. By far the most brilliant work on the philosophy and content of the Declaration of Independence is Carl Becker, *The Declaration of Independence* (1922). Herbert Friedenwald, *The Declaration of Independence* (1904), is useful. John H. Hazelton, *The Declaration of Independence* (1906), is a detailed specialized study.

CHAPTER 4. THE ESTABLISHMENT OF CONSTITUTIONAL GOVERNMENT

Allen Nevins, *The American States During and After the Revolution, 1775–1789* (1924) contains material on the adoption of various state constitutions between 1776 and 1783. Fletcher M. Green, *Constitutional Development of the South Atlantic States, 1776–1860* (1930), analyzes the early Southern state constitutions. Benjamin F. Wright, "The Early History of Written Constitutions in America," *Essays in History and Political Theory in Honor of C. H. McIlwain* (1936), is a brief summary of theory and ideas behind early state constitutions. W. F. Dodd, "The First State Constitutional Conventions, 1776–1783," *American Political Science Review*, II (November 1908), summarizes the conventions and their work. H. A. Cushing, *History of the Transition from Provincial to Commonwealth Government in Massachusetts* (1896), and Samuel E. Morison, "The Struggle over the Adoption of the Constitution of Massachusetts, 1780," Massachusetts Historical Society, *Proceedings*, L (Oct. 1916; June 1917) include essential material on Massachusetts constitutional development. Selsam, *The Pennsylvania Constitution of 1776*, is a good constitutional study for that state.

E. S. Corwin, "The 'Higher Law' Background of American Constitutional Law," *Harvard Law Review*, XLII (Nov. 1928; Jan. 1929), reprinted in *Selected Essays*, I, is a historical summary of the ideas which gave rise to judicial review. E. S. Corwin, "The Progress of Constitutional Theory between the Declaration of Independence and the Meeting of the Philadelphia Convention," *American Historical Review*, XXX (April 1925), includes a discussion of the emergence of judicial review in the Revolutionary era. A. C. McLaughlin, *The Courts, the Constitution and Parties* (1912), has some material on early judicial review. Charles G. Haines, *The American Doctrine of Judicial Supremacy* (2nd ed., 1932), is a scholarly study of the origins and development of judicial review. Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (1836), 5 vols., includes the congressional debates on adoption of the Articles of Confederation. A. C. McLaughlin, *The Confederation and the Constitution* (1905), is a classic treatment of the Confederation era. A more recent study which views the Articles as an experiment in democracy is Merrill Jensen, *The Articles of Confederation: An Interpretation of the Social-Constitutional History of the American Revolution* (1940). John Fiske, *The Critical Period of American History* (1888), although outmoded, presents an interpretation which may be compared to advantage with that in Jensen's work. H. B. Adams, *Maryland's Influence upon Land Cessions to the United States* (1885), is still the authoritative study on this topic. Jennings B. Sanders, *Evolution of Executive Departments of the Continental Congress, 1774–1789* (1935), is a scholarly work. Charles C. Thach, *The Creation of the Presidency, 1775–1789* (1922), also contains material on the Confederation executive. The judicial function of the Confederation Congress is discussed in J. C. B. Davis, "Federal Courts Prior to the Adoption of the Constitution," 131

U.S. appendix, and in J. F. Jameson, "The Predecessor of the Supreme Court," *Essays in the Constitutional History of the United States* (1889).

CHAPTER 5. THE CONSTITUTIONAL CONVENTION

Max Farrand, ed., *The Records of the Federal Convention of 1787* (1911, 1937), 4 vols., contains Madison's notes as well as other contemporary source material and is indispensable to any study of the Convention. A. C. McLaughlin, *The Confederation and the Constitution* (1905), emphasizes the essentially nationalistic character of the Convention's work. Max Farrand, *The Framing of the Constitution of the United States* (1913), treats personalities and political issues rather than the problem of sovereignty. Charles Warren, *The Making of the Constitution* (1929), is virtually a day-by-day study of the Convention. Max Farrand, *The Fathers of the Constitution* (1913), is a brief survey of the Convention. Charles A. Beard, *The Supreme Court and the Constitution* (1913), probably exaggerates the number of delegates who regarded judicial review favorably. Charles Warren, *Congress, the Constitution and the Supreme Court* (1925), presents somewhat the same conclusions. E. S. Corwin, *Court over Constitution* (1938), subjects Beard's findings to criticism. Madison's attitude toward judicial review is discussed in E. M. Burns, *James Madison, Philosopher of the Constitution* (1938). Charles A. Beard, *An Economic Interpretation of the Constitution* (1913), a highly controversial work, attacks the patristic interpretation of the convention and interprets the actions of the delegates as motivated primarily by economic and class interest. A. C. McLaughlin, *A Constitutional History of the United States* (1935), contains a criticism of Beard's thesis.

CHAPTER 6. RATIFICATION OF THE CONSTITUTION

Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (1836), 5 vols., gives the debates in the various state ratifying conventions. *The Federalist* is available in a number of editions; that edited by Paul L. Ford (1898) is well annotated; however, the most convenient modern volume is the Home Library Edition of 1937. Nearly all important contemporary literature on the ratification controversy is gathered together in Paul L. Ford, ed., *Essays on the Constitution . . . (1787–1788)*, (1892), and in *Pamphlets on the Constitution (1888)*. O. G. Libby, *The Geographical Distribution of the Vote of the Thirteen States on the Federal Constitution, 1787–1788* (1894), is indispensable for an understanding of sectional alignment for and against the Constitution. There are a number of studies of state ratification controversies. Most valuable are Samuel B. Harding, *The Contest over the Ratification of the Federal Constitution in the State of Massachusetts* (1896); Joseph B. Walker, *A History of the New Hampshire Convention . . . 1788* (1888), reprinted in *Massachusetts Historical Society Collections*, 5th series, II, III, 6th series, IV; F. G. Bates, *Rhode Island and the Formation of the Union* (1898); C. E. Miner, *Ratification of the Federal Constitution by the State of New York* (1921);

J. B. McMaster and F. D. Stone, *Pennsylvania and the Federal Constitution, 1787–1788* (1888); and L. I. Trenholme, *Ratification of the Federal Constitution in North Carolina* (1932). Edward P. Smith. "The Movement toward a Second Constitutional Convention," in J. F. Jameson, ed., *Essays in the Constitutional History of the United States* (1889), provides a study of a little-remembered trend. On the general significance of the Constitution in American history and life see the collection of essays in Conyers Read, ed., *The Constitution Reconsidered* (1938).

CHAPTER 7. ESTABLISHING THE NEW GOVERNMENT

Among the general surveys which include constitutional developments are J. S. Bassett, *The Federalist System, 1789–1801* (1906), and Edward Channing, *A History of the United States*, Vol. IV (1917). J. A. Krout and D. R. Fox, *The Completion of Independence* (1944), reveals the continuing social conservatism of the Federalist period. Vernon Parrington, *Main Currents of American Thought*, I, presents brilliant analyses of the constitutional philosophies of such leaders as Hamilton, Jefferson, and John Adams. Congressional discussion of constitutional issues as well as the formulation of legislation can be traced in detail in the official *Annals of the Congress of the United States* (1834–1856), 42 vols., for the period from 1789 to 1824. For the messages and proclamations of the early Presidents J. D. Richardson's *A Compilation of the Messages and Papers of the Presidents* (1914), 20 vols., is convenient. Lloyd M. Short, *The Development of National Administrative Organization in the United States* (1923), describes the organization of the early executive departments. E. S. Maclay, ed., *The Journal of William Maclay* (1890), throws light on certain aspects of the organization of the new government. E. S. Corwin, *The President: Office and Powers* (1940), presents an analysis of the development of presidential authority and functions, beginning with Washington's administration. Wilfred E. Binkley, *President and Congress* (1947), is a brief but comprehensive historical study of the complex relationships between the executive and legislative branches of the government. Some of the important constitutional implications of foreign policies are treated in C. M. Thomas, *American Neutrality in 1793: A Study in Cabinet Government* (1931), and S. F. Bemis, *Jay's Treaty: A Study in Commerce and Diplomacy* (1923), while E. S. Corwin, *National Supremacy* (1913), discusses the extent of the treaty-making power. A thorough analysis of the adoption of the Judiciary Act of 1789 can be found in Charles Warren, "New Light on the History of the Federal Judiciary Act of 1789," *Harvard Law Review*, XXXVII (November, 1923), reprinted in *Selected Essays*, III. Charles G. Haines, *The Role of the Supreme Court in American Government and Politics, 1789–1835* (1944), contains a detailed discussion, sympathetic to the Jeffersonians, of the important part played by the federal courts in the constitutional and political development of this period. Charles Warren, *The Supreme Court in United States History* (1937), 2 vols., in general supports the Federalist position. Ernest S. Bates, *The Story of the Supreme Court* (1936), is a brief popular history. The doctrine of vested rights during the

early history of the Supreme Court is clearly developed by E. S. Corwin, "The Basic Doctrine of American Constitutional Law," *Michigan Law Review*, XII (February 1914), reprinted in *Selected Essays*, I. There is a good discussion of the early development of the theory and practice of judicial review in Charles G. Haines, *The American Doctrine of Judicial Supremacy* (2nd ed., 1932).

CHAPTER 8. THE RISE OF JEFFERSONIANISM

The most comprehensive general treatment of the Jeffersonian period is still Henry Adams, *History of the United States during the Administrations of Jefferson and Madison* (1890–91, 9 vols. Edward Channing, *The Jeffersonian System, 1801–1811* (1906), integrates constitutional developments with political history. Claude Bowers, *Jefferson in Power* (1936), is partisan to Jefferson and his colleagues. Charles A. Beard, *Economic Origins of Jeffersonian Democracy* (1915), emphasizes the economic and social cleavage during the 1790's which was the foundation of the Jeffersonian movement. The philosophy of agrarianism, which was an important element in Jeffersonianism, receives careful analysis in Eugene T. Mudge, *The Social Philosophy of John Taylor of Caroline* (1939). A. O. Craven, *Democracy in American Life* (1941), contains a stimulating discussion of Jefferson's contribution to the growth of American democracy. Charles M. Wiltse, *The Jeffersonian Tradition in American Democracy* (1935), discusses Jefferson's ideas and some of their effects upon later political development. The organizational aspects of the Republican opposition to the Federalists is discussed in Eugene P. Link, *Democratic-Republican Societies* (1942). The Kentucky and Virginia Resolutions are analyzed in F. M. Anderson, "Contemporary Opinion of the Virginia and Kentucky Resolutions," *American Historical Review*, V, (October 1899, July 1900). The standard work on the Twelfth Amendment of the Constitution is Lolabel House, *A Study of the Twelfth Amendment of the Constitution of the United States* (1901). Everett S. Brown, *The Constitutional History of the Louisiana Purchase* (1920), discusses the various constitutional issues involved in the acquisition of the Louisiana Territory.

CHAPTER 9. THE TRIUMPH OF JEFFERSONIAN REPUBLICANISM

Albert J. Beveridge, *The Life of John Marshall* (1916), 4 vols., is both an outstanding biography of the great Chief Justice and a comprehensive study of the Supreme Court and its role in the constitutional history of the first third of the nineteenth century. Volume III covers the period from 1801 to 1815 and reflects the viewpoint of Marshall and his Federalist colleagues in their struggles with the Republicans. Charles Warren, *The Supreme Court in United States History* (1937), 2 vols., presents much background material and generally defends the position of the Federalist justices. A recent critical treatment, more favorable to the Republicans, is Charles G. Haines, *The Role of the Supreme Court in American Government and Politics, 1789–1835* (1944). The Republican partisan position in these controversies is revealed in W. C. Bruce, *John Randolph of Roanoke, 1773–1823* (1922), 2 vols. A brief

but well-written account is in E. S. Corwin, *John Marshall and the Constitution* (1919).

All of the above authors discuss *Marbury v. Madison.* The significance of the case in the development of judicial review is ably discussed in E. S. Corwin, *The Doctrine of Judicial Review* (1914); Charles G. Haines, *The American Doctrine of Judicial Supremacy* (2nd ed., 1932); Charles A. Beard, *The Supreme Court and the Constitution* (1913); and A. C. McLaughlin, "Marbury v. Madison Again," *American Bar Association Journal,* XIV (March 1928). E. S. Corwin, *Court over Constitution* (1938), emphasizes the distinction between the judicial review of Marshall's day and that which emerged in the late nineteenth century. Louis Boudin, *Government by Judiciary* (1932), 2 vols., is an elaborate but extremely hostile treatment of the growth of judicial review. Henry S. Commager, "Judicial Review and Democracy," *The Virginia Quarterly Review,* XIX (Summer 1943), argues effectively that judicial review has had a tendency to retard the development of democracy.

W. F. McCaleb, *The Aaron Burr Conspiracy* (1903), is a comprehensive treatment of this famous episode. There is a competent study of the law of treason in Willard Hurst, "Treason in the United States," *Harvard Law Review,* LVIII (Dec. 1944; Feb., July, 1945).

Louis M. Sears, *Jefferson and the Embargo* (1927), is primarily a political study, but it contains some constitutional material. Important Federalist states' rights materials are in Henry Adams, ed., *Documents Relating to New England Federalism, 1800–1815* (1877), and H. V. Ames, ed., *State Documents on Federal Relations* (1906). The Hartford Convention is discussed in S. E. Morison, *The Life and Letters of Harrison Gray Otis* (1913), 2 vols.

CHAPTER 10. NATIONALISM VERSUS SECTIONALISM

The slow development of American nationalism during this period is carefully analyzed in Merle Curti, *The Roots of American Loyalty* (1946). Frederick Jackson Turner, *The Significance of Sections in American History* (1932), is a collection of his interpretative essays on sectionalism. Turner's *Rise of the New West, 1819–1829* (1906), is a well-balanced account of the influence of sectional forces upon national development. The personal contributions to the constitutional controversies of the postwar period are clearly revealed in biographies of the leading statesmen: Gaillard Hunt, *The Life of James Madison* (1902); Glyndon G. VanDeusen, *The Life of Henry Clay* (1937); Charles M. Wiltse, *John C. Calhoun, Nationalist, 1782–1828* (1944); C. M. Fuess, *Daniel Webster* (1930), 2 vols.; B. C. Clark, *John Quincy Adams; "Old Man Eloquent"* (1932); and William P. Cresson, *James Monroe* (1946).

A detailed account of the bank controversy is contained in R. C. H. Catterall, *The Second Bank of the United States* (1903). A good brief analysis of the sectional clashes over federal land policies can be found in Roy M. Robbins, *Our Landed Heritage: The Public Domain, 1776–1936* (1942). E. S. Corwin, "The Spending Power of Congress—Apropos the Maternity Act," *Harvard Law Review* XXXVI (March 1923), reprinted in *Selected Essays,* III, discusses the issue of Congress' power to spend federal money for internal im-

provements and its later significance. J. S. Young, *A Political and Constitutional Study of the Cumberland Road* (1904), also treats the constitutional aspects of the internal improvement program.

Homer C. Hockett, *The Constitutional History of the United States, 1826–1876*, Vol. II, (1939), contains a detailed account of the constitutional aspects of the whole slavery controversy, including the Missouri Compromise. To appreciate fully the comprehensive scope of constitutional arguments as well as the intensity of sectional feelings over Missouri, one should follow the debates in the *Annals of Congress*. Jesse Carpenter, *The South as a Conscious Minority* (1930), emphasizes the effect of the Missouri controversy upon the constitutional doctrines of Southern spokesmen. C. R. King, ed., *The Life and Correspondence of Rufus King* (1894–1900), 6 vols., throws additional light on the Northern constitutional position regarding Missouri. Another work on this subject is F. C. Shoemaker, *Missouri's Struggle for Statehood, 1804–1821* (1916).

CHAPTER 11. JOHN MARSHALL AND JUDICIAL NATIONALISM

A clear analysis of constitutional development and interpretation during the Marshall period is contained in E. S. Corwin, *John Marshall and the Constitution* (1919). Albert J. Beveridge, *The Life of John Marshall* (1916), Vols. III and IV, provides an interesting account of Marshall's public life and a thorough discussion, sympathetic to Marshall, of the important constitutional decisions of the period. Charles Warren, *The Supreme Court in United States History* (1937), 2 vols., has much background material and generally presents the Supreme Court in a favorable light. Charles G. Haines, *The Role of the Supreme Court in American Government and Politics, 1789–1835* (1944), takes exception to Beveridge's and Warren's conservative and nationalist interpretation of Marshall and the Court and argues that a Jeffersonian interpretation of the Constitution during this period might well have had a salutary effect upon later American development. Louis Boudin, *Government by Judiciary* (1932), 2 vols., is extremely critical of much of the constitutional interpretation of this era. Joseph Story, *Commentaries on the Constitution of the United States* (1891), 2 vols., is a classic on the American constitutional system and reveals Story's scholarship, conservatism and nationalism. John T. Horton, *James Kent: A Study in Conservatism* (1939), is an admirable study of another great jurist. Donald G. Morgan, "Mr. Justice William Johnson and the Constitution," *Harvard Law Review*, LVII (January 1944), contains an analysis of the justice who most consistently adhered to the Jeffersonian interpretation of the Constitution.

Benjamin F. Wright, *The Contract Clause of the Constitution* (1938), contains a valuable discussion of the issues raised in the contract cases. Robert L. Hale, "The Supreme Court and the Contract Clause," *Harvard Law Review*, LVII (April, May, July, 1944), is devoted to the same subject. Early interpretation of the commerce power is ably analyzed in Felix Frankfurter, *The Commerce Clause under Marshall, Taney and Waite* (1937), and in John B. Sholley, "The Negative Implications of the Commerce Clause,"

University of Chicago Law Review, III (June 1936), reprinted in *Selected Essays*, III. Information on Virginia's conflict with the Supreme Court is contained in Eugene T. Mudge, *The Social Philosophy of John Taylor of Caroline* (1939), and W. E. Dodd, "Chief Justice Marshall and Virginia, 1813-1821," *American Historical Review*, XII (July 1907). Curtis Nettels, "The Mississippi Valley and the Federal Judiciary, 1807–1837," *Mississippi Valley Historical Review*, XII (September 1925), describes the attitude of the West toward Marshall's nationalism and conservatism.

CHAPTER 12. THE NULLIFICATION CONTROVERSY

The background of Southern discontent is presented in A. O. Craven, *The Coming of the Civil War* (1942); J. G. VanDeusen, *Economic Bases of Disunion in South Carolina* (1928); R. S. Cotterill, *The Old South* (1936); and Charles S. Sydnor, *The Development of Southern Sectionalism, 1819–1848* (forthcoming). Craven's book emphasizes the extent of agricultural depression in the old South between 1800 and 1832. Good comprehensive treatments of the Indian removal controversy are Wilson Lumpkin, *Removal of the Cherokee Indians from Georgia* (1907), 2 vols., and U. B. Phillips, *Georgia and State Rights* (1902), while Marion L. Starkey, *The Cherokee Nation* (1946), emphasizes the lack of constitutional protection afforded the Indians. Albert J. Beveridge, *The Life of John Marshall* (1916), 4 vols., analyzes the Supreme Court's position on the Indian issues.

Thorough discussions of the nullification episode are contained in C. S. Boucher, *The Nullification Controversy in South Carolina* (1916), and in D. F. Houston, *Critical Study of Nullification in South Carolina* (1896). Calhoun's transformation from nationalist to states' rightist is analyzed in Charles M. Wiltse, *John C. Calhoun, Nationalist* (1944). His role in the entire nullification controversy receives detailed treatment in Arthur Styron, *The Cast-Iron Man: John C. Calhoun and American Democracy* (1935), and Gaillard Hunt, *John C. Calhoun* (1908). His important writings are in Richard Crallé, ed., *The Works of John C. Calhoun* (1864), 6 vols. An able analysis of Calhoun's constitutional position from a nationalistic viewpoint is in A. C. McLaughlin, *Foundations of American Constitutionalism* (1932). Vernon Parrington, *Main Currents of American Thought*, II, has a stimulating discussion of Calhoun's constitutional philosophy as a defense of the minority position of the South. The difference between Calhoun's concept of the Union and that of Madison in 1798 is discussed in E. S. Corwin, "National Power and State Interposition, 1787–1861," *Michigan Law Review*, X, (May 1912), reprinted in *Selected Essays*, III.

CHAPTER 13. DEMOCRACY AND JACKSONIANISM

A most penetrating and stimulating study of the Jacksonian period is Arthur M. Schlesinger, Jr., *The Age of Jackson* (1945). Schlesinger draws his material very largely from eastern sources and argues persuasively that the economic as well as the ideological basis of Jacksonian democracy was in the Northeast and not in the West. Frederick J. Turner, *The United States, 1830-*

1850 (1935), is a good survey of the period, emphasizing sectional influences, while his *The Frontier in American History* (1920), contains his now famous essays on the significance of the frontier in the growth of democracy. This point of view is criticized by Benjamin F. Wright in "American Democracy and the Frontier," *Yale Review*, XX (Winter 1931). National political developments are discussed in William Macdonald, *Jacksonian Democracy, 1829–1837* (1906), which is critical of Jackson, and Claude Bowers, *Party Battles of the Jackson Period* (1922), which is highly favorable to the Jacksonians. Alexis de Tocqueville, *Democracy in America* (most recent American edition, 1945), a contemporary Frenchman's account, has come to be recognized as a classic portrait of American democracy. Merle Curti, *Growth of American Thought* (1943), is a careful appraisal of the equalitarian forces operating during the Jacksonian period. R. H. Gabriel, *The Course of American Democratic Thought* (1940), has a stimulating analysis of the basic elements of the American democratic faith.

One of the most valuable studies of the growth of democracy as reflected in state constitutions is Fletcher M. Green, *Constitutional Development in the South Atlantic States, 1776–1860* (1930). Benjamin F. Wright, "Political Institutions and the Frontier," D. R. Fox, ed., *Sources of Culture in the Middle West* (1934), argues that the East preceded the frontier West in the development of constitutional democracy. A. O. Craven, *Democracy in American Life* (1941), stresses the contributions of the West to democracy. K. H. Porter, *A History of Suffrage in the United States* (1918), contains an account of the movement for suffrage extension. Bayrd Still, "An Interpretation of the Statehood Process, 1800 to 1850," *Mississippi Valley Historical Review*, XXIII (September 1936), contrasts the state constitutions around mid-century with earlier ones, emphasizing the tendency to limit legislative authority. Other valuable sectional and state studies of the growth of democracy are T. P. Abernethy, *From Frontier to Plantation in Tennessee* (1932); A. B. Darling, *Political Changes in Massachusetts, 1824–1848* (1925); T. C. Pease, *The Frontier State, 1818–1848* (Centennial History of Illinois, II, 1918); and F. P. Weisenburger, *The Passing of the Frontier, 1825–1850* (The History of the State of Ohio, III, 1941). The attempts to democratize the federal Constitution by amendment are discussed in H. V. Ames, *The Proposed Amendments to the Constitution of the United States during the First Century of Its History* (1896).

A. C. McLaughlin, *The Courts, the Constitution and Parties* (1912), has a discussion of the significance of political parties in the American constitutional system. Marquis James, *Andrew Jackson: Portrait of a President* (1937) is a thoughtful interpretation of Jackson's role in enhancing the importance of the presidential office, while J. S. Bassett, *Life of Andrew Jackson* (1911), 2 vols., correlates political and constitutional developments. George Poage, *Henry Clay and the Whig Party* (1936), is useful for an understanding of the position of Whigs on the issues of the day. Vernon Parrington, *Main Currents of American Thought*, II, analyzes the constitutionalism of Webster and Story. Carl B. Swisher, *Roger B. Taney* (1935), is a careful study of the Chief

Justice which does much to counteract former unfavorable interpretations. Other studies of Jacksonian judges are Charles W. Smith, Jr., *Roger B. Taney, Jacksonian Jurist* (1936); F. P. Weisenburger, *The Life of John McLean: A Politician on the United States Supreme Court* (1937); and A. A. Lawrence, *James Monroe Wayne: Southern Unionist* (1943).

Benjamin F. Wright, *The Growth of American Constitutional Law* (1942), shows that the Jacksonian judges did not overthrow as much of Marshall's constitutional law as earlier historians have pictured. Benjamin F. Wright, *The Contract Clause of the Constitution* (1938), also minimizes the difference between Taney's and Marshall's interpretation of the contract clause. E. S. Corwin, *The Commerce Power versus States Rights* (1936), argues effectively that the comprehensive federal commerce power incorporated into the Constitution in 1787 was progressively undermined by states' rightist statesmen and jurists after 1830. Also valuable for judicial interpretation are Felix Frankfurter, *The Commerce Clause under Marshall, Taney and Waite* (1937), and G. C. Henderson, *The Position of Foreign Corporations in American Constitutional Law* (1918).

CHAPTER 14. THE SLAVERY CONTROVERSY AND SECTIONAL CONFLICT

A. B. Hart, *Slavery and Abolition* (1906), contains a general account of the early antislavery movement. Dwight L. Dumond, *Antislavery Origins of the Civil War* (1939), and G. H. Barnes, *The Antislavery Impulse, 1830–44* (1933), are more recent appraisals, emphasizing the importance of the Middle West in the movement. Alice Adams, *The Neglected Period of Anti-Slavery in America (1808–1831)* (1908), is a study of local antislavery sentiment, much of it in the South, before the rise of the abolitionist movement. H. T. Catterall, *Judicial Cases Concerning American Slaves and the Negro* (1926–1937), 5 vols., contains source material on personal liberty and sojourner laws. J. C. Hurd, *The Law of Freedom and Bondage* (1862), 2 vols., includes much material on these topics, but it is badly organized. Clement Eaton, "Censorship of the Southern Mails," *American Historical Review*, XLVIII (Jan. 1943), is a scholarly appraisal. H. von Holst, *The Constitutional and Political History of the United States*, II (1888), contains a good account of the gag-rule conflict. W. H. Siebert, *The Underground Railroad* (1898), discusses the early fugitive slave act and the personal liberty laws, while Allen Johnson, "The Constitutionality of the Fugitive Slave Acts," *Yale Law Journal*, XXXI (Dec. 1920), is a careful analysis. The most comprehensive treatment of the sectional conflict from 1846 to 1857 is Allen Nevins, *Ordeal of the Union* (1947), 2 vols. M. M. Quaife, *The Doctrine of Non-Intervention with Slavery in the Territories* (1910), is exhaustive and scholarly. A. C. McLaughlin, *Lewis Cass* (1899), contains material on popular sovereignty, including Cass' Nicholsen letter. A. O. Craven, *The Coming of the Civil War* (1942), written from what most historians would regard as a Southern point of view, has an account of the crisis of 1850. A. C. Cole, *The Whig Party in the South* (1913), also contains material on the background of the Compromise of 1850. "The Correspondence of Robert Toombs, Alexander H.

Stephens, and Howell Cobb," American Historical Association, *Report*, II (1911), is one of the best single sources for Southern constitutional theories on slavery and the Union.

CHAPTER 15. CRISIS AND SECESSION

T. C. Smith, *Parties and Slavery, 1850–1859* (1906), presents a well-balanced account of political and constitutional conflict in the fifties. James Ford Rhodes, *History of the United States from the Compromise of 1850* (1900–1928), 9 vols., Vol. I, *1850–1854*; Vol. II, *1854–1860*, is good literary history and has valuable constitutional material, somewhat biased in favor of the North. A. O. Craven, *The Coming of the Civil War* (1942), summarizes from a Southern point of view. F. H. Hodder, "The Railroad Background of the Kansas-Nebraska Act," *Mississippi Valley Historical Review*, XII (June 1925), is useful for an understanding of the motives behind Douglas' bill. G. F. Milton, *The Eve of Conflict* (1934), defends Douglas' constitutional doctrines and policies. H. T. Catterall, "Some Antecedents of the Dred Scott Case," *American Historical Review*, XXX (October 1924), is a study of the case before it reached the Supreme Court. There are good discussions of Taney's opinion in Carl B. Swisher, *Roger B. Taney* (1935), and in Charles W. Smith, Jr., *Roger B. Taney, Jacksonian Jurist* (1936). E. S. Corwin, "The Dred Scott Decision in the Light of Contemporary Legal Doctrines," *American Historical Review*, XVII (Oct. 1911), emphasizes the distinction between Taney's opinion and Calhoun's constitutional doctrines. F. H. Hodder, "Some Phases of the Dred Scott Case," *Mississippi Valley Historical Review*, XVI (June 1929), discusses the role of McLean and Curtis in influencing the Court to pass on the question of slavery in the territories. F. P. Weisenburger, *The Life of John McLean: A Politician on the United States Supreme Court* (1937), and G. T. Curtis, *The Life and Writings of Benjamin Robbins Curtis*, I (1879), also have passages throwing light on McLean's and Curtis' part in the case. Lincoln's important role in the secession crisis as well as his constitutional philosophy receives judicious appraisal in J. G. Randall, *Lincoln the President: Springfield to Gettysburg* (1945), 2 vols., and in D. M. Potter, *Lincoln and His Part in the Secession Crisis* (1942). Ollinger Crenshaw, *The Slave States in the Presidential Election of 1860* (1945), Reinhard H. Luthin, *The First Lincoln Campaign* (1944), and D. F. Dumond, *The Secession Movement, 1860–1861* (1931), are all useful on the crisis of 1860–1861. A. C. Cole, "Lincoln's Election an Immediate Menace to Slavery in the States," *American Historical Review*, XXXVI (July 1931), and J. G. de R. Hamilton, "Lincoln's Election an Immediate Menace to Slavery in the States," *American Historical Review*, XXXVII (July 1932), argue the constitutional interests.

CHAPTER 16. THE CIVIL WAR

The most comprehensive single-volume treatment of the Civil War is J. G. Randall, *The Civil War and Reconstruction* (1937). Briefer but valuable is C. R. Fish, *The American Civil War* (1937). A. C. Cole, *The Irrepressible Conflict* (1934), is a good analysis of social and economic conditions in both

North and South, before and during the war. E. Merton Coulter, *The Confederate States of America, 1861–1865* (forthcoming), promises a thorough and balanced study of the heroic struggle for Southern independence. F. L. Owsley, *State Rights in the Confederacy* (1925), shows that the Confederacy contained to a large degree the seeds of its own destruction. For an appreciation of the constitutional philosophy of the South, A. H. Stephens, *A Constitutional View of the Late War Between the States* (1868–1870), 2 vols., though a partisan defense, is still valuable. Likewise John Nicolay and John Hay, *Abraham Lincoln: A History* (1890), 10 vols., is a detailed, strongly Union account, containing much source material. The most penetrating studies of Lincoln as a great war leader struggling to maintain the Union and the American constitutional system are J. G. Randall, *Lincoln the President: Springfield to Gettysburg* (1945), 2 vols., and Carl Sandburg, *Abraham Lincoln: The War Years* (1939), 4 vols.

For strictly constitutional issues and developments J. G. Randall, *Constitutional Problems under Lincoln* (1926), contains a careful and thorough analysis. Fred Shannon, *The Organization and Administration of the Union Army, 1861–1865* (1928), 2 vols., reveals how states' rights sentiments and practices in the Northern states interfered seriously with the creation of a national army. E. S. Corwin, *The President* (1940), emphasizes Lincoln's expansive conception of the presidential office, while Wilfred E. Binkley, *President and Congress* (1947), discusses Lincoln's unusual relationship with Congress. The attempts of the Radicals to obtain for Congress a more important part in the direction of the war program is ably discussed in T. Harry Williams, *Lincoln and the Radicals* (1941). Wood Gray, *The Hidden Civil War: The Story of the Copperheads* (1942), and George F. Milton, *Abraham Lincoln and the Fifth Column* (1942), have good accounts of the constitutional issues raised by Northern opposition to Lincoln and the Union government. The part played by the Supreme Court in deciding constitutional issues is described in Charles Warren, *The Supreme Court in United States History* (1937), 2 vols.; Carl B. Swisher, *Roger B. Taney* (1935), and *Stephen J. Field, Craftsman of the Law* (1930); and Charles Fairman, *Mr. Justice Miller and the Supreme Court, 1862–1890* (1939). Charles Fairman, *The Law of Martial Rule* (1930), is a good discussion of military arrests and martial law. R. H. Gabriel, *The Course of American Democratic Thought* (1940), and A. O. Craven, *Democracy in American Life* (1941), show the impact of the Civil War upon the development of democracy.

CHAPTER 17. PRESIDENTIAL RECONSTRUCTION

W. A. Dunning, *Reconstruction, Political and Economic, 1865–1877* (1907), is a good general survey of the Reconstruction era. James G. Randall, *The Civil War and Reconstruction* (1937), is a competent general study, and G. F. Milton, *The Age of Hate* (1930), is also valuable. H. K. Beale, *The Critical Year* (1930), is a study of the political crisis of 1866. W. A. Dunning, *Essays on the Civil War and Reconstruction* (1904), has valuable analytical material on Johnson's program. W. A. Fleming, *Documentary History of*

Reconstruction (1906), 2 vols., contains virtually all significant constitutional documents. Benjamin B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction* (1914), throws light on the evolution of the Fourteenth Amendment. H. E. Flack, *Adoption of the Fourteenth Amendment* (1908), is adequate and scholarly. A. C. McLaughlin, "The Court, The Corporation and Conklin," *American Historical Review*, XLVI (Oct. 1940), analyzes the conspiracy theory of the Fourteenth Amendment. J. H. Graham, "The Conspiracy Theory of the Fourteenth Amendment," *Yale Law Journal*, XLVII, XLVIII (Jan., Dec., 1938) the first section of which is reprinted in *Selected Essays*, I, deals with this same topic, as does L. B. Boudin, "Truth and Fiction about the Fourteenth Amendment," *New York University Law Quarterly Review*, XVI (Nov. 1938).

CHAPTER 18. RADICAL CONGRESSIONAL RECONSTRUCTION

Paul H. Buck, *The Road to Reunion* (1937), W. A. Dunning, *Reconstruction, Political and Economic, 1865–1877* (1907), and J. G. Randall, *The Civil War and Reconstruction* (1937), contain surveys of congressional reconstruction, while W. A. Dunning, *Essays on the Civil War and Reconstruction* (1904), includes valuable interpretative materials. The military reconstruction acts may be found in Walter L. Fleming, *Documentary History of Reconstruction*, Vol. II (1906–1907). J. M. Mathew, *Legislative and Judicial History of the Fifteenth Amendment* (1909), tells the story of the amendment's adoption and its subsequent career in the courts. D. M. Dewitt, *The Impeachment of Andrew Johnson* (1903), is a detailed and scholarly work. Charles Fairman, "Mr. Justice Bradley's Appointment to the Supreme Court and the Legal Tender Cases," *Harvard Law Review*, LIV (April, May, 1941), is a study of the "court-packing" charge. Allen Nevins, *Hamilton Fish: The Inner History of the Grant Administration* (1936), presents good evidence that Grant knew Bradley and Strong would vote to sustain the Legal Tender Act, though he exacted no pledge of them. P. L. Haworth, *The Hayes-Tilden Disputed Election of 1876* (1906), is an objective study.

CHAPTER 19. THE REVOLUTION IN DUE PROCESS OF LAW

The early history of the doctrine of vested rights is discussed in E. S. Corwin, "The Basic Doctrine of American Constitutional Law," *Michigan Law Review*, XII (Feb. 1914). On the relationship between the doctrine of vested rights and the obligations of contract clause, see Benjamin F. Wright, *The Contract Clause of the Constitution* (1938). The early history and meaning of due process of law are treated in C. H. McIlwain, "Due Process of Law in Magna Charta," *Columbia Law Review*, XIV (Jan. 1914), and in E. S. Corwin, "The Doctrine of Due Process of Law Before the Civil War," *Harvard Law Review*, XXIV (March, April, 1911), both reprinted in *Selected Essays*, I. R. L. Mott, *Due Process of Law* (1926), has useful chapters on early due process. Walton H. Hamilton, "The Path of Due Process of Law," in Conyers Read, ed., *The Constitution Reconsidered* (1938), makes significant comments upon the development of due process between the *Slaughterhouse Cases*

and *Smyth v. Ames*. C. G. Haines, "Judicial Review of Legislation in the United States and the Doctrine of Vested Rights," *Texas Law Review*, II, III (June, Dec., 1924), reprinted in part as "The History of Due Process after the Civil War," in *Selected Essays*, I, is a good survey. S. J. Buck, *The Granger Movement* (1913), is a study of the economic and social background of *Munn v. Illinois* and the other Granger Cases. B. P. McAllister, "Lord Hale and Business Affected with a Public Interest," *Harvard Law Review*, XLIII (March 1930), reprinted in *Selected Essays*, II, discusses the relationship of *Munn v. Illinois* to the public interest doctrine. Ernst Freund, *The Police Power* (1904), includes a discussion of *Munn v. Illinois*. Carl B. Swisher, *Stephen J. Field, Craftsman of the Law* (1930), treats Justice Field's role in the emergence of substantive due process. Charles Fairman, *Mr. Justice Miller and the Supreme Court, 1862–1890* (1939), is also important. Bruce R. Trimble, *Chief Justice Waite, Defender of the Public Interest* (1938), is somewhat immature. On liberty of contract, see C. E. Shattuck, "The True Meaning of the Term 'Liberty' in Those Clauses in the Federal and State Constitutions Which Protect Life, Liberty, and Property," *Harvard Law Review*, IV (March 1891); Roscoe Pound, "Liberty of Contract," XVIII, *Yale Law Journal* (May 1909); and Charles Warren, "The New Liberty under the Fourteenth Amendment," *Harvard Law Review*, XXXIX, (Feb. 1926), all reprinted in *Selected Essays*, II.

CHAPTER 20. THE NEW DUE PROCESS AND JUDICIAL REVIEW, 1890–1920

R. L. Mott, *Due Process of Law* (1926), is an adequate general survey of substantive due process before 1926. One of the most concise summaries of the new due process is to be found in Benjamin F. Wright, *The Growth of American Constitutional Law* (1942). Felix Frankfurter, *Mr. Justice Holmes and the Supreme Court* (1939), has an appendix tabulating and describing briefly all cases before 1939 in which the Supreme Court held state action invalid under the Fourteenth Amendment. Ray A. Brown, "Police Power–Legislation for Health and Personal Safety," *Harvard Law Review*, XLII (May 1929), is a valuable study of the balance between the police power and state social legislation. Felix Frankfurter, "Hours of Labor and Realism in Constitutional Law," *Harvard Law Review*, XXIX (Feb., 1916), is a detailed survey of maximum hours cases before 1916. Sir Frederick Pollock, "The New York Labor Law and the Fourteenth Amendment," *Law Quarterly Review*, XXI, is a contemporary critique of the Lochner opinion. Thomas Reed Powell, "The Judiciality of Minimum Wage Legislation, *Harvard Law Review*, XXXVII (March 1924), reprinted in *Selected Essays*, I and II, is very useful as is Breck P. McAllister, "Public Purpose in Taxation," *California Law Review*, XVIII (January, March, 1930), reprinted in *Selected Essays*, I. Maurice H. Merrill, "Jurisdiction to Tax—Another Word," *Yale Law Journal*, XLIV (February 1935), reprinted in *Selected Essays*, I, is a study of the application of due process to the taxation of out-state property. Charles G. Haines, *The American Doctrine of Judicial Supremacy* (2nd ed., 1932), is a good general study of judicial review as a constitutional,

political and social institution. R. E. Cushman, "The Social and Economic Interpretation of the Fourteenth Amendment," *Michigan Law Review*, XX (May 1922), discusses the role of due process in the new judicial review. A. M. Kales, "New Methods in Due Process Cases," *American Political Science Review*, XII, reprinted in *Selected Essays*, I (May 1918), calls the Supreme Court an American House of Lords. The social and economic implications of judicial review are also treated in Max Lerner, "Constitution and Court as Symbols," *Yale Law Journal*, XLVI (June 1937), reprinted in *Selected Essays*, I; in Roscoe Pound, "The New Feudal System," *Kentucky Law Journal*, XIX (November 1930), reprinted in *Selected Essays*, II; and in R. L. Hale, "Judicial Review versus Doctrinaire Democracy," *American Bar Association Journal*, (1924) reprinted in *Selected Essays*, I. Felix Frankfurter, *Mr. Justice Holmes and the Supreme Court* (1939), is an excellent short study of Holmes' legal and constitutional philosophy. Many of Holmes' constitutional ideas emerge in the Holmes-Pollock Letters (1941), the correspondence between Holmes and Sir Frederick Pollock, 1874–1932. Max Lerner, ed., *The Mind and Faith of Justice Holmes* (1943), contains extracts from Holmes' opinions, speeches and letters, as well as excellent brief commentaries. Felix Frankfurter, ed., *Mr. Justice Brandeis* (1932), is a valuable collection of essays on Brandeis' thought and work. A. T. Mason, *Brandeis, A Free Man's Life* (1946), is a scholarly biography. The same author's *Brandeis: Lawyer and Judge in the Modern State* (1933), is a useful brief study.

CHAPTER 21. THE FIRST ERA OF NATIONAL ECONOMIC REGULATION

I. L. Sharfman, *The Interstate Commerce Commission*, (1931–1937), 5 vols., a detailed and technical work, has much material on the early history of the commission. John Moody, *The Railroad Builders* (1930), is a good elementary study of railroad practices and abuses between 1870 and 1910. John Moody, *The Truth About the Trusts* (1904), and H. D. Lloyd, *Wealth against Commonwealth* (1894), are useful in throwing light upon contemporary liberal and agrarian resentment toward the trust movement. W. H. Hamilton and Douglass Adair, *The Power to Govern* (1937), contends that in 1787 the term "commerce" generally comprehended all business activity including manufacturing. Felix Frankfurter, *The Commerce Clause under Marshall, Taney and Waite* (1937), traces the evolution of the interstate commerce power in the nineteenth century. E. S. Corwin, *The Commerce Power versus States Rights* (1936), analyzes certain theoretical limitations on the commerce power, including "direct" and "indirect" effects upon commerce. Allen Nevins, *Grover Cleveland* (1932), includes a discussion of the Pullman strike. The Debs case is discussed in Felix Frankfurter and N. V. Greene, *The Labor Injunction* (1930), and in Charles O. Gregory, *Labor and the Law* (1946), both very useful works. John D. Hicks, *The Populist Revolt* (1930), is the best general treatment of the agrarian political upheaval that led to passage of the income tax law of 1894. Sidney Ratner, *American Taxation* (1942), contains a good account of the legislative history of the 1894 law and

of its subsequent history in the courts. E. S. Corwin, *Court over Constitution* (1938), includes a chapter analyzing the Pollock decisions. Louis B. Boudin, *Government by Judiciary* (1932), 2 vols., a decidedly partisan study of judicial review, has a highly critical analysis of the same cases. Nevins, *Grover Cleveland*, contains an appendix discussing the question of what justice shifted his vote in the cases. The same matter is touched upon in Charles E. Hughes, *The Supreme Court of the United States* (1928).

CHAPTER 22. THE ERA OF LIBERAL NATIONALISM

Henry Pringle, *Theodore Roosevelt* (1931), presents a good general account of Roosevelt's administration. E. S. Corwin, *The President: Office and Powers* (1940), discusses Roosevelt's stewardship theory. On Justice Holmes' attitude toward federalism, see again Felix Frankfurter, *Mr. Justice Holmes and the Supreme Court* (1939). F. B. Clark, *Constitutional Doctrines of Justice Harlan* (1915) emphasizes Harlan's nationalism. Corwin, *The Commerce Power versus States Rights*, analyses the Lottery case at some length. Robert E. Cushman, "Social and Economic Controls through Federal Taxation," *Minnesota Law Review*, XVIII (June 1934), reprinted in *Selected Essays*, III, is a survey of taxation as an instrument of federal police power. H. U. Faulkner, *The Quest for Social Justice, 1898–1914* (1931), discusses the passage of the Pure Food and Livestock Acts. C. C. Regier, *The Era of the Muckrakers* (1932), contains material on the background of federal police statutes. B. H. Meyer, *History of the Northern Securities Case* (1906), is detailed and scholarly. A. H. Walker, *History of the Sherman Law* (1910), is a study of early anti-trust cases. I. L. Sharfman, *The Interstate Commerce Commission*, (1931–1937), 5 vols., discusses the Hepburn Act and the commission's subsequent revival.

CHAPTER 23. THE PROGRESSIVE REVOLT

Claude Bowers, *Beveridge and the Progressive Era* (1932), is a colorful study of Progressive personalities and issues. H. F. Pringle, *The Life and Times of William H. Taft*, (1939), 2 vols., includes material on the fight between Progressives and conservative Republicans in Congress. Ratner, *American Taxation* (1942), has a section on the passage of the income tax amendment. G. B. Haynes, *The Senate of the United States: Its History and Practice* (1938), tells the story of the Seventeenth Amendment. P. D. Hasbrouk, *Party Government in the House of Representatives* (1927), analyzes the Reed rules and the rebellion against Cannon. W. F. Willoughby, *Principles of Legislative Organization and Administration* (1934), has a chapter on the speakership. E. S. Corwin, *Court over Constitution* (1938), is a more recent critique. The origins of the judiciary act of 1914 are discussed in Felix Frankfurter and J. M. Landis, *The Business of the Supreme Court* (1928). E. P. Oberholtzer, *The Referendum in America* (1911), and W. B. Monroe, *Initiative, Referendum and Recall* (1912), have valuable contemporary material on these reforms.

CHAPTER 24. WOODROW WILSON AND THE NEW FREEDOM

Ray Stannard Baker, *Woodrow Wilson: Life and Letters*, (1927–1939), 8 vols., is a detailed and exhaustive study. Baker, *The Public Papers of Woodrow Wilson* (1925), 3 vols., is a convenient source of Wilson's messages and state papers. W. E. Dodd, *Woodrow Wilson and His Work* (1925), is a good short biography. Woodrow Wilson, *Congressional Government* (1885), and Woodrow Wilson, *Constitutional Government in the United States* (1908), are indispensable to an understanding of the development of Wilson's constitutional ideas. Robert E. Cushman, *The Independent Regulatory Commissions* (1941), is an illuminating study of the constitutional and administrative aspects of federal commissions. Joseph P. Chamberlain, *The Judicial Function in Federal Administrative Agencies* (1942), is a useful work. E. S. Corwin, *The President* (1940), also discusses constitutional issues involved in commission government. Carl McFarland, *Judicial Control of the Federal Trade Commission and the Interstate Commerce Commission Trust and Corporation Problems* (1929), includes material on the Federal Trade Commission Act and the Clayton Act. W. O. Weymouth, *The Federal Reserve Board* (1933), contains sections on the passage and constitutional aspects of the Federal Reserve Act. Passage of the Adamson Act and its constitutional aspects are considered in Edward Berman, *Labor Disputes and the President* (1924).

CHAPTER 25. THE CONSTITUTION AND WORLD WAR I

F. L. Paxson, *America at War, 1917–1918* (1939), contains much detail on wartime constitutional problems. Ray Stannard Baker, *Woodrow Wilson: Life and Letters* (1927–1939), 8 vols., is also valuable. Wilson's war powers are discussed in Corwin, *The President* (1940). William F. Willoughby, *Government Organization in War Time and After* (1919), is a study of wartime agencies. Harold A. Van Dorn, *Government-Owned Corporations* (1926), includes a discussion of federal wartime corporations. C. B. Swisher, "The Control of War Preparations in the United States," *American Political Science Review*, XXXIV (December 1940), treats various constitutional aspects of federal wartime activity. C. R. Van Hise, *Conservation and Regulation in the United States During the World War* (1917), is a valuable contemporary analysis of food-control. James R. Mock, *Censorship, 1917* (1941), is a somewhat general non-technical discussion. Zachariah Chaffee, *Free Speech in the United States* (1941), has a penetrating discussion of wartime civil liberties cases. C. B. Swisher, "Civil Liberties in War Time," *Political Science Quarterly*, LV (September 1940), is also useful. The history of the women's suffrage movement and adoption of the Nineteenth Amendment is treated exhaustively in Elizabeth Cady Stanton et. al., *The History of Woman Suffrage*, 6 vols. (1887–1922). *Missouri v. Holland* is analyzed in Julian P. Boyd, "The Expanding Treaty Power," *Selected Essays*, III, and in Wm. B. Cowles, *Treaties and Constitutional Law* (1941).

CHAPTER 26. REACTION AND LAISSEZ FAIRE

R. G. Fuller, *Child Labor and the Constitution* (1929), discusses the two child labor opinions. Discussion of the constitutional aspects of Supreme Court labor decisions in the twenties may be found in Gregory, *Labor and the Law;* in Edwin E. Witte, *The Government in Labor Disputes* (1932), and in Edward Berman, *Labor and the Sherman Act* (1930). H. Wooddy, *The Growth of the Federal Government, 1915–1932* (1934), analyzes the expansion of federal functions in the twenties. The statistics on federal growth and expenditures in President's Research Committee, *Recent Social Trends in the United States* (1933), are pertinent to this subject. Federal Agricultural programs of the twenties are treated in John D. Black, *Agricultural Reform in the United States* (1929). V. O. Keys, Jr., *Administration of Federal Grants to States* (1937); H. J. Bitterman, *State and Federal Grants in Aid* (1938); and A. F. MacDonald, *Federal Aid: A Study of the American Subsidy System* (1928), are all competent studies of the grant-in-aid. The history of the spending power is analyzed in E. S. Corwin, "The Spending Power of Congress Apropos the Maternity Act," *Harvard Law Review,* XXXVI (March 1923). T. R. Powell, "The Supreme Court and State Police Power, 1922–1930," *Virginia Law Review, XVII, XVIII* (April, May, June, November, December, 1931; January, 1932), is a general survey of due process in the twenties. T. R. Powell, "The Judiciality of Minimum Wage Legislation," *Harvard Law Review,* XXXVII (March 1924), reprinted in *Selected Essays,* II, discusses the Adkins case. The new identity between due process and the First Amendment is discussed in Charles Warren, "The New 'Liberty' under the Fourteenth Amendment," *Harvard Law Review,* XXXIX (Feb., 1926), while George Foster, Jr., "The 1931 Personal Liberties Cases," *New York University Law Quarterly Review* (September 1931), and Harvey Shulman, "The Supreme Court's Attitude on Liberty of Contract and Freedom of Speech," *Yale Law Review,* XLI (December 1931), both reprinted in *Selected Essays,* II, are also very useful. The concept of public interest in the twenties is ably treated in Maurice Finklestein, "From Munn v. Illinois to Tyson v. Banton: A Study in the Judicial Process," *Columbia Law Review,* XXVI, (November 1927). Walton H. Hamilton, "Affectation with a Public Interest," *Yale Law Journal,* XXXIX (June 1930), and Breck P. McAllister, "Lord Hale and Business Affected with a Public Interest," *Harvard Law Review,* XLIII (March 1930), both reprinted in *Selected Essays,* II, are profitable reading. E. S. Corwin, "Tenure of Office and the Removal Power under the Constitution," *Columbia Law Review,* XXVII (April 1927), reprinted as "The President's Removal Power under the Constitution" in *Selected Essays,* IV, is a thoughtful treatment of the Myers case. James Hart, *Tenure of Office under the Constitution* (1930), discusses the Myers case at length, and there is also pertinent material in Corwin, *The President* (1940), in Paul McFarland, *Judicial Control of the Federal Trade Commission and the Interstate Commerce Commission* (1932), and in Myron W. Watkins,

"An Appraisal of the Work of the Federal Trade Commission," *Columbia Law Review*, XXXII (February 1932).

CHAPTER 27. THE NEW DEAL

A good general survey of the New Deal, with much emphasis on constitutional issues, is contained in Charles A. and Mary Beard, *America in Mid-Passage* (1939). Louis Hacker, *Short History of the New Deal* (1934), catches much of the spirit of the early New Deal. *The Public Papers and Addresses of Franklin D. Roosevelt* (1938), 5 vols., comprises a valuable source collection. Corwin, *The Commerce Power versus States Rights* (1936), is an analysis of the conflicting interpretations of the commerce power that lay in the background of the New Deal constitutional crisis. Robert H. Jackson, *The Struggle for Judicial Supremacy* (1941), tells the story of the conflict between the New Deal and the Court from the standpoint of one of the participants. Robert L. Stern, "The Commerce Clause and the National Economy, 1933–1946," *Harvard Law Review*, LIX (May, July, 1946), written by a government lawyer, is an excellent general treatment of the New Deal's program in the courts. E. S. Corwin, *Constitutional Revolution, Ltd.* (1941), presents an account of changing constitutional doctrines under the New Deal, and of their ultimate acceptance by the Supreme Court. The constitutional ideas behind the Minnesota moratorium case are analyzed in Jane Perry Clark, "Emergencies and the Law," *Political Science Quarterly*, XLIX (June 1934). V. D. Paris, *Monetary Policies of the United States, 1932–1938* (1938), contains much material on the constitutional aspects of New Deal monetary policy. John P. Dawson, "The Gold-Clause Decisions," *Michigan Law Review*, XXXIII (March 1935), is profitable reading. The Schechter case is analyzed at length in E. S. Corwin, "The Schechter Case—Landmark or What?," *New York University Law Quarterly Review*, XIII (January 1936), and in Thomas Reed Powell, "Commerce, Pensions, and Codes," *Harvard Law Review*, XLIX (November, December, 1935). J. A. C. Grant, "Commerce, Production, and the Fiscal Power of Congress," *Yale Law Journal*, LXV (March, April, 1936) is also pertinent. Russell L. Post, "Constitutionality of Government Spending for General Welfare," *Virginia Law Review*, XXII (November, 1935), is a good general examination of the constitutional issues in the A.A.A. case. Chas. S. Collier, "Judicial Bootstraps and the General Welfare Clause: the AAA Opinion," *George Washington Law Review*, IV (January 1936), and John W. Holmes, "Federal Spending Power and States Rights," *Michigan Law Review*, XXXIV (March 1936), are also valuable. Helen Martell, "Legal Aspects of the Tennessee Valley Authority," *George Washington University Law Review*, VII (June 1939), is a good constitutional study of the federal power program. Certain general observations on the Court's constitutional position under the New Deal may be found in E. S. Corwin, *The Twilight of the Supreme Court* (1934), and in Dean Alfange, *The Supreme Court and the National Will* (1937).

CHAPTER 28. THE CONSTITUTIONAL REVOLUTION IN FEDERALISM—1937–1947

Joseph Alsop and Turner Catledge, *The 168 Days* (1938), is an accurate account of the struggle in Congress over Roosevelt's Court plan. Charles A. and Mary Beard, *America in Mid-Passage* (1939), also gives a good account of the conflict. Robert L. Stern, "The Commerce Clause and the National Economy, 1933–1946," *Harvard Law Review*, LIX (May, July, 1946), traces the history of New Deal commerce legislation in the courts. Corwin, *Constitutional Revolution, Ltd.*, provides an excellent general interpretation of the Court's acceptance of the New Deal after 1937. Carl B. Swisher, *The Growth of Constitutional Power in the United States* (1946), presents a series of general interpretative lectures, for the most part dealing with constitutional developments since 1937. There is an able chapter on the post-1937 judicial history of the New Deal in Benjamin F. Wright, *The Growth of American Constitutional Law* (1942). The history of the Fair Labor Standards Act in the courts is treated in detail in E. Merrick Dodd, "The Supreme Court and Organized Labor, 1941–1945," *Harvard Law Review*, LVIII (September 1945), and in E. Merrick Dodd, "The Supreme Court and Fair Labor Standards, 1941–1945," *Harvard Law Review*, LIX (February 1946). A. L. Humes, "Trend of Decisions Respecting Power of Congress to Regulate Interstate Commerce," *American Bar Association Journal*, XXVI (November 1940), is valuable on post-1937 developments in the regulation of interstate commerce. The Polish Alliance and Southeastern Underwriters cases are discussed in T. R. Powell, "Insurance as Commerce," *Harvard Law Review*, LVII (September 1944). The problem of state interference with interstate commerce is treated in great detail in a series of articles under the title, "Governmental Market Barriers; a Symposium," in *Law and Contemporary Problems*, VIII (April 1941). E. W. Adams, "State Control of Interstate Migration of Indigents," *Michigan Law Review*, XL (March 1942), is also useful. E. S. Corwin, "Dissolving Structure of our Constitutional Law," *New Jersey Law Journal*, LXIX (March 1946), makes important generalizations about the trends of American federalism and constitutionalism.

CHAPTER 29. THE NEW ERA IN CIVIL LIBERTIES

There is a significant chapter on recent developments in civil liberties cases in Carl B. Swisher, *The Growth of Constitutional Power in the United States* (1946). The wartime aspects of recent civil liberties cases are analyzed in E. S. Corwin, *Total War and the Constitution* (1947). R. E. Cushman, "Some Constitutional Problems of Civil Liberties," *Boston University Law Review*, XXIII (June 1943), is a general review. L. Teller, "Picketing and Free Speech," *Harvard Law Review*, LVI (October 1942), and E. M. Dodd, "Picketing and Free Speech: A Dissent," *Harvard Law Review*, LVI (January 1943), debate the relation of free speech to picketing from opposite points of view. Two other studies of value are A. S. Resnik, "Freedom of Speech and Commercial Solicitation," *California Law Review*, XXX (September 1942), and J. K. Lindsay, "Council and Court; The Handbill Ordinances,

1889–1939," *Michigan Law Review*, XXXIX (February 1941). F. L. Schuman, "Bills of Attainder in the Seventy-Eighth Congress," *American Political Science Review*, XXXVII (October 1943), is a discussion of the congressional politics lying behind the Lovett case. E. V. Rostow, "The Japanese-American Cases—A Disaster," *Yale Law Journal*, LIV (June 1945), is a vigorous indictment of the federal government's treatment of Japanese-Americans during World War II.

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