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Forrest McDonald: A Constitutional History of the United States: Study Guide

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FORREST MCDONALD: A CONSTITUTIONAL HISTORY OF THE UNITED STATES: STUDY GUIDE, 1984-2002

Steven Alan Samson

PREFACE

Outline

- A. SURVEY OF AMERICAN CONSTITUTIONAL HISTORY (3-6)
 - 1. Reasons for This Approach
 - a. Need for a New Bottle for the New Wine of the Knowledge Explosion
 - b. Brevity and Simplicity of Conception
 - 2. Organization of the Text: Periodization of General Trends
 - 3. Personal Note: Point of View
 - a. Gladstone: Constitution Most Wonderful Human Work
 - b. Jefferson: Duty of All Branches and States to Guard the Constitution Against Encroachments
 - c. Hamilton: Need for a Loose Construction and Independent Judiciary

CHAPTER ONE: WE THE PEOPLE . . .

Outline

- A. INTRODUCTION (9-10)
 - 1. Original Intent: Government of Laws, Not Men
 - a. Arbitrariness of Old World Government
 - b. English Mixed Constitution: Improved But Still Inadequate
 - c. Failure of the Empire to Protect Against Arbitrary Rule
 - 2. Decision to Establish Written Constitutions: Implications
 - a. Decision Made Possible the Freest System of Government
 - b. Question: If Government Is to Be Controlled by Law, Who Determines What Law Shall Be?
- B. EVOLUTION OF THE COMPACT THEORY (10-17)
 - 1. Declaration of Independence: Lays Down Fundamental Principles
 - a. Proper *Function* of Government Is to Protect Natural Rights
 - b. Legitimate Source of Authority: Consent of the Governed
 - 2. Institution of a *Novus Ordo Seclorum*: Radical New Principles
 - a. Departure from Colonial Experience
 - b. Only Temporary Colonial Governments Had Been Created by Compact
 - c. None Was Based on Natural Rights Theory, Permanent, or Recognized under English Laws
 - 3. **Crown Alone was the Source of Legitimate Colonial Government**
 - a. Charter, Proprietary, and Royal Colonies
 - a. Colonies Mirrored Forms of Parent Government
 - b. But the Form of the Argument Virtually Precluded the Establishment or Preservation of Stable Government
 - 4. How Did a New Theory Come to Be Accepted by 1776?

- a. Absence of Legitimate Outlets for Protests
- b. Climax of These Arguments for Opposition in 1776
- 5. Steps in the Development of the Argument
 - a. **James Otis**, 1761: Opposition to **Writs of Assistance** in the Name of **Natural Law**
 - 1) Idea Popularized by **Emmerich de Vattel**
 - 2) Thomas Hutchinson Deferred the Decision
 - b. **John Dickinson's** Opposition to the Stamp Act, 1765: Rights of Englishmen
 - c. **Patrick Henry's** Virginia Resolves, 1765: Immunity from Parliamentary Taxation
 - d. Repeal of Stamp Act Accompanied by **Declaratory Act**, 1766: Authority to Bind the Colonies in All Cases Whatsoever
 - 1) Townshend Duties, 1767
 - 2) Constitutional Argument: Dickinson's Letters from a Pennsylvania Farmer (Based on Sir **Edward Coke's** Decision in Dr. Bonham's Case, 1604)
 - e. Obsolescence of the Bonham Decision
 - 1) **William Blackstone**: Modern Emphasis on Positive Law
 - f. Question of Whether Parliament's Authority Extended to the Colonies
 - 1) Colonies Conceded Regulation of External But Not Internal Affairs: **Thomas Hutchinson vs. John Adams**
 - 2) Two Views: Crown in Parliament vs. Separation of Powers (Montesquieu and Bolingbroke)
 - g. Logical Implication of the American View: Appeal to Crown for Help Against Parliament (Thomas Jefferson)
 - h. Non-Legal Argument: **Doctrine of Natural Rights**: John Locke, Thomas Paine
- C. THE FIRST WRITTEN CONSTITUTIONS (17-22)
 - 1. Lesson: Higher Law Must Be Set Down in Writing
 - 2. **Difficulties in Constitution Making Caused by the Declaration**
 - a. Obstacle to Stability: Civil Disobedience Justified by Government Trespass on Natural Rights
 - b. Jefferson's Discrediting of Executive Power Led to Mistrust
 - c. Ambiguity over Whether One or Thirteen Countries Resulted
 - 1) Plurality Rather Than Unity of Nation
 - 3. Articles of Confederation Handicapped by These Difficulties
 - a. League of Friendship Established by Multilateral Treaty
 - 1) Unicameral Congress Without an Executive Branch
 - 2) Foreign But Not Domestic Jurisdiction
 - 3) Exclusive State Taxation Power; Requisitions for Congress
 - 4. New State Constitutions Drafted, Except for Two Charter States
 - a. New Constitutions Were Republican in Form
 - 1) Confusion over the Meaning of Republicanism
 - 2) Emasculation of the Executive Branch, Except New York, Massachusetts
 - 3) Power Generally Lodged in the Lower House
 - b. Constitutions Established Radical Representative Democracy
 - 1) Abandonment of Mixed Government
 - 2) Limited Electorate
 - 3) Higher Property Qualifications for Office Holders
 - 4) Representation Based on Place of Residence [This is consistent with citizenship by residence (*ius soli*) rather than citizenship by blood (*ius sanguinis*)]
 - c. Conservative Goal: Preserve the Existing Power Structure
 - 1) Preponderance of Power Lodged in Upper, Middle Ranks
 - d. Question of Legitimate Right to Declare the Fundamental Law

- 1) Irregularity of Constitutional Drafting and Passage
- 2) Non-Binding **Bills of Rights** [Virginia's was the first]
- 3) Solution: Massachusetts Constitutional Convention Model
- 4) *Quock Walker v. Nathaniel Jennison* (Massachusetts, 1783: bill of rights given force of law)

D. **INADEQUACIES OF THE EARLY CONSTITUTIONS** (22-26)

1. Ineffectuality of the Confederation Congress
 - a. High Absenteeism
 - b. Irregular Foreign Loan Repayments: State Contribution Was Voluntary
2. **Sources of International Problems**
 - a. Barbary Coast Piracy
 - b. Spain's Closure of Mississippi River Navigation
 - c. British Trade Restrictions
3. Defeat of Three Proposed Constitutional Amendments: Regulation of International Commerce, Duty on Imports
4. **Articles Congress's Accomplishments**
 - a. Creation of Bureaucracy and Diplomatic Corps
 - b. Treasury Board
 - c. Northwest Territory and Northwest Ordinance of 1787
5. Excess of State Power
 - a. Suppression of Legal Rights of Suspected Loyalists
 - b. Wanton Confiscation of Private Property
 - c. High Taxes Levied
 - d. Jefferson's Critique of an "Elective Despotism"
 - e. Elbridge Gerry: Excess of Democracy
6. **State Accomplishments**
 - a. General Prosperity Despite Brief Recession of 1786-87
7. Growing Discontent
6. Movement for a Convention
 - a. Proposed Commercial Convention Threatened Fragmentation
 - b. Annapolis Convention and Hamilton's Resolution
9. **Two Dramatic Events Set the Stage for the Philadelphia Convention**
 - a. New York Rejects 1783 Revenue Amendment
 - b. Fears of an Insurrection Aroused by Shays' Rebellion

E. **THE PHILADELPHIA CONVENTION** (26-31)

1. Most Brilliant Assembly of Statesmen
2. Four Phases
 - a. Virginia and New Jersey Plans, Compromises, Fundamental Resolutions
 - b. Initial Draft by Committee of Detail
 - c. Great Debate
 - d. Committee on Style
3. Nature of the Constitution: A Law That Governs the Government
 - a. **Physical: Definition of Functions**
 - c. **Legal: Blackstone's Definition of Law**
4. Three Branches
 - a. Legislative Branch
 - 1) Connecticut Compromise
 - 2) Senate [Federal] Given Share of Executive Authority
 - 3) House [National]: Sole Power of Initiating Tax Laws
 - 4) Each Has Different Constituencies and Different Powers
 - b. Executive Branch
 - 1) George Washington's Indispensable Role

- 2) Electoral College: Larger Voice Given to States
- 3) Many Traditionally Executive Powers Vested in Congress
- 4) President as Paradox: Representative of States and People
- c. Judicial Branch
 - 1) Buck Passed to Congress
- 5. Supremacy Clause
- 6. Specific Commandments and Prohibitions
- 7. **Ultimate Source of the Supreme Power:** People of the Several States
 - a. People were Divided Because Bound by Prior Contracts
 - b. People of Each State Had to Authorize Requisite Adjustments
 - c. Adoption Procedure Bypassed Articles' Amendment Rules
- F. THE POLITICAL PHILOSOPHY OF THE CONSTITUTION (31-33)
 - 1. Order of Ratification
 - 2. Analyses and Other Evidences of Original Intent
 - a. *The Federalist*
 - 3. Political and Legal Philosophy
 - a. Bolingbroke-Montesquieu Description of the English Constitution
 - 1) **Separation of Powers** within **Mixed Government** Whose Branches Represent Groups Identified by Inherited Status
 - 2) American Misapplication of This Thesis
 - 4. Constitution's Solution: A Modified Separation of Powers System
 - a. **Federalism:** Power Distributed Along Vertical Axis
 - 1) Two Barriers to Potential Tyranny of Majority Rule
 - a) Different Methods of Selecting Officials
 - b) Time Barrier: Differing Periods of Incumbency
 - c) Result: Inability of People or Faction to Express Their Will Directly and Immediately
 - b. Separate But Overlapping Branches: Horizontal Axis
 - 1) Overlapping Functions and Ambiguity of Powers
 - 2) Power Free to Shift in Response to Power Struggles

Review

source of colonial government James Otis on the Writs of Assistance
 John Dickinson and Patrick Henry on the rights of Englishmen Coke vs. Blackstone
 difficulties in constitution-making created by the Declaration international problems
 characteristics of the new constitutions accomplishments of the Articles Congress
 state accomplishments events that led to the Philadelphia Convention of 1787
 legal sense of the constitution divisions of powers ultimate source of authority

CHAPTER TWO: EARLY CONSTITUTIONAL ISSUES AND THEIR RESOLUTIONS, 1789-1807

Outline

- A. INTRODUCTION (35)
 - 1. Defects in the Constitution
 - a. Omissions, Contradictions, Ambiguities
 - b. Need to Address Constitutional Questions: Who Determines When Government Is Acting Unconstitutionally? What Is the Remedy?

- c. Failure to Anticipate Political Parties
- B. FILLING IN THE CONSTITUTION: TASKS OF THE FIRST CONGRESS (36-42)
Four Broad Areas: Bill of Rights, Judiciary, Executive, Financial System
 - 1. **Bill of Rights** Added in the Form of Amendments: **James Madison**
 - a. Constitutional Convention and Federalist 84 Viewed It as Unnecessary Because Powers Were Delegated
 - 1) Problem: Art. I, sec. 9 Contains Prohibitions
 - b. Accepted Because of Desire to Increase Popular Support
 - c. James Madison Identified Eighty Recommended Amendments, Then Reduced the Number to Nineteen
 - d. Seventeen Sent to Senate, Made Non-applicable to States [cf. *Barron v. Baltimore*, 1833]
 - e. House-Senate Conference Committee Reduced Them to Twelve
 - f. Ratification of Ten by States
 - 2. **Creation of the Federal Judiciary: Oliver Ellsworth**
 - a. Procedural Problems: Lack of a National Common Law
 - 1) Incorporation of Connecticut Practice
 - b. Ideological Barriers: Extreme Nationalist vs. States' Rights Views
 - 1) Compromise: One District Court Per State Plus Circuit Courts and State Courts with Concurrent Jurisdiction
 - c. Problem of Jurisdiction: **Ambiguity of Art. III, sec. 2**
 - 1) Original Jurisdiction May Be Extended to "Other Cases" [Alternative View: Congress May Restrict Jurisdiction]
 - d. Judiciary Act of 1789
 - 3. Creation of Executive Departments
 - a. **Proposal: Appointment and Removal by President**
 - b. William Loughton's Proposal of Senatorial Approval for Removal [see **Federalist No. 77**] Defeated by Madison
 - 1) Danger That Semipermanent Ministries (a Cabinet System) Might Have Evolved
 - c. Creation of Separate State, War, and Treasury Departments
 - d. Fear That Treasury Secretary Might Evolve into a Prime Minister
 - 1) Solution: Secretary of Treasury Not Entrusted with Handling Public Funds, Made Responsible to Congress
 - 2) Result: Hamilton Drafted and Introduced Legislation [A power denied to the president, as Washington believed]
 - 4. **Creation of a National Financial System: Alexander Hamilton**
 - a. National and State War Debts: Devaluation of War Bonds and Resale to Speculators
 - b. Hamilton's Proposals
 - 1) Fund for Regular Interest Payments (But Not for Payment of the Principal) and Assumption of State Debts
 - 2) **National Bank** Incorporated: **Monetized Debt Used as Currency**
- C. CONSTITUTIONAL ISSUES SETTLED BY MEANS OTHER THAN ADJUDICATION (42-47)
 - 1. Two Questions Debated: Constitutionality of the Bank and Interpretation of the Constitution
 - a. Madison Cited Defeat of a Proposal at the Convention That Congress Be Able to Charter Corporations
 - b. President's Oath to Defend Constitution and Veto Power to Defend Against Congressional Encroachment
 - 1) Washington Asks for Written Opinions from Secretaries
 - c. Jefferson and Randolph: **Strict Construction** Guided by Tenth Amendment,

- c. Jeffersonians Expected Madison to Ignore a Writ of Mandamus
- d. Marshall's Adroit Maneuver: Article 13 Misread, Judicial Review Asserted, Jefferson and Madison Get Judicial Scolding
- e. Long-Range Result: Jurisdiction over Military Appeals Denied
- f. Short-Range Effect: Marshall's *Obiter Dicta* Antagonized Foes
- 6. Republican Attempt to Purge **Federalist Judges**
 - a. Impeachment of William Addison in Pennsylvania (Partisanship)
 - b. Impeachment of John Pickering (Insanity)
 - c. Impeachment of Samuel Chase (Exonerated)
- F. WHO DETERMINES CONSTITUTIONALITY? (60-61)
 - 1. Principle of Co-equality

Review

James Madison and the Bill of Rights	ambiguity of Article III, section 2
Oliver Ellsworth and the federal judiciary	issue of appointments and removals
<i>Federalist</i> no. 77	Alexander Hamilton and a national financial system
national bank and monetized debt	strict vs. loose construction
Genet Affair and advisory opinions	Jay's Treaty and the rise of political parties
introduction of judicial review	<i>Chisholm v. Georgia</i>
excise taxes and <i>Hylton v. United States</i>	Eleventh Amendment
Judiciary Acts	Sedition Act
	impeachment of federal judges
	<i>Marbury v. Madison</i>

CHAPTER THREE: THE CONSTITUTION AND THE NEW ECONOMIC ORDER

Outline

- A. INTRODUCTION (65-66)
 - 1. Jeffersonian Constitutional Settlement Prevailed until after Civil War
 - 2. Three Constitutional Pivots: Economic Development, Federal-State Relations, Slavery
 - 3. Reasons for Economic Growth: Territorial Expansion, Population Increase, War Profits, Manufacturing, Technological Innovation
 - 4. Constitutional Transformation
- B. THE ECONOMIC TRANSFORMATION (66-69)
 - 1. Traditional Property Rights as Deterrents to Development
 - a. **Realty vs. Personalty**: Shaky Legal Footing of the Latter
 - 1) Barriers to Free Exchange of Personal Property
 - b. **Property Held for Personal Enjoyment, Not as Productive Asset**
 - 1) Defective Title: **No Compensation for Improvements** [see also *Green v. Biddle*, p. 77]
 - 2) **Riparian Rights**
 - 2. Transformation of American Law by Legislatures and Courts
 - 3. Crucial Constitutional Issues
 - a. *Barron v. Baltimore* (1833): Takings Clause of Fifth Amendment Restricts Only National Government
 - b. **Eminent Domain** and Its Conveyance to Private Groups
- C. THE NATIONAL GOVERNMENT AS PROMOTER OF ECONOMIC DEVELOPMENT (69-74)
 - 1. **Protective Tariffs**: Basis Found in Constitution
 - a. Urban Manufacturers vs. Southern Planters, Import Merchants

- b. Hamilton's Report on Manufactures Ignored
- c. Tariff of 1816
- d. Rising Tariffs and Emergence of Factory System: Free Labor vs. Slave Labor
- e. Southern Response: Nullification
- 2. **Subsidization of Internal Improvements: No Basis in Constitution**
 - a. Hamilton's Proposal of 1799
 - b. Gallatin's National Road; Extended under Adams and Jackson
 - c. Jackson's Veto [of the Maysville Road Bill]
 - d. Return of Surplus Revenues to States for Internal Improvements
 - e. Financing of Transcontinental Rail Lines in the 1850s through Land Grants
- 3. National Fiscal Policy: Funding of Public Debts Created Liquid Capital
 - a. Efforts to Retire the Public Debt
 - b. Bank Recharter Bill Effectively Vetoed by George Clinton, 1811
 - c. Disruption of Public Finance during War of 1812
 - d. Chartering of Second Bank, 1816
 - e. ***M'Culloch v. Maryland, 1819***: Constitutionality of Bank Act Upheld; State Law Overturned [Intergovernmental Tax Immunity]
 - f. Jackson Vetoed the Recharter Bill and the Bank Dissolved
- E. THE CONTRACTS AND COMMERCE CLAUSES UNDER THE MARSHALL COURT (74-83)
 - 1. Influence of Marshall on Joseph Story and Others
 - 2. Interpretation of the **Contract Clause** (Art. I, sec. 10)
 - a. Traditional Limitation: Just Price, Fair Value
 - 1) Concept of Intrinsic Worth
 - b. **Will Theory** of Contracts Replaces **Equity Theory**
 - 3. Expanded Meaning of Contracts
 - a. ***Fletcher v. Peck, 1810***: Yazoo Land Fraud
 - 1) Application of Clause to Public Contracts
 - 2) 1796 Act Repealing the Fraudulent Land Sale Unconstitutional
 - 3) Marshall's Reasoning: Rights of Purchasers, Judicial Self-Restraint on Political Questions [doctrine held until the 1960s]
 - b. Application to States: *Green v. Biddle, 1823*
 - 4. Corporations
 - a. ***Dartmouth College v. Woodward, 1819***: Corporate Charter a Contract
 - 1) Conversion of Corporate Form to Business Uses
 - 2) e.g., New York: First General Incorporation Law, 1811
 - 3) Joseph Story's Concurring Opinion Set Guidelines
 - 4) **Vested Rights** Concept Addressed Later (Charles River Bridge case)
 - b. *Providence Bank v. Billings, 1830*: No Immunity from Future Taxation
 - 5. Bankruptcy
 - a. *Sturges v. Crowninshield, 1819*: New York's General Bankruptcy Law Unconstitutional Due to Retroactive Application
 - b. *Ogden v. Saunders, 1827*: Divided Court Upheld New Law
 - 6. Commerce Clause Cases
 - a. ***Gibbons v. Ogden, 1824***: State Monopoly vs. Interstate Commerce
 - 1) Commerce Clause Defined and Interpreted Broadly
 - 2) Interstate Commerce
 - 3) Webster's Argument for Congress's Exclusive Power Sidestepped in Favor of Decision Based on 1793 Licensing Act
 - b. *Brown v. Maryland, 1827*: Original Package Doctrine
 - c. *Willson v. Black Bird Creek Marsh Company, 1827*: Dam Closing Off Navigable Waterway (Improvement)
 - 7. Police Power

- a. *New York v. Miln*: Posting Bond to assure That Immigrants Would Not Become Public Charges (Delayed for Lack of Ruling Quorum)
- F. ECONOMIC ISSUES AND THE TANEY COURT (83-89)
 - 1. Jacksonian Majority: Court Packing
 - 2. *New York v. Miln*, 1837: New York Immigration Law Upheld
 - 3. Bills of Credit Issued by States
 - a. *Briscoe v. Bank of Kentucky*, 1837: Bills of Credit Issued by State Bank Corporation Upheld
 - b. *Craig v. Missouri*, 1830: Loans Certificates Were Receivable for Taxes But Were Not Legal Tender
 - c. Consequence: Instability of the Money Supply until Passage of National Banking Act
 - 4. ***Charles River Bridge v. Warren Bridge*, 1837: Vested Property Rights**
 - a. **Competing Theories of Economic Development**: Certainty of Expectations vs. Competition
 - b. Issue of Changing Technology: Taney's Earlier Opposition to Monopolies
 - c. Rejection of Implied Monopoly
 - 6. Corporations
 - a. *Bank of Augusta v. Earle*, 1839: State Exclusion Laws Are Permitted But the Presumption Is Otherwise in Favor of Out-of-State Corporations
 - b. *Swift v. Tyson*, 1842: General Commercial Law of the United States
 - 7. **Commerce Clause**: Expanded National Authority over Foreign and Expanded State Authority over Interstate Commerce
 - a. *Propeller Genessee Chief v. Fitzhugh*, 1851: Extension of Admiralty Jurisdiction Upheld
 - b. *Passenger Cases*, 1849: Exclusive Power over Foreign Commerce
 - c. *License Cases*, 1847: State Liquor Laws and Taxes Upheld
 - d. *Cooley v. Board of Wardens*, 1851: Concurrent Jurisdiction Upheld
- G. THE DIRECTION OF CONSTITUTIONAL LAW CONCERNING THE ECONOMY (89-90)
 - 1. Development Replaced Enjoyment as Central Value
 - 2. Debate over Role and Authority of the Central Government
 - 3. Ideal of Common National Market vs. Multiple Bodies of Economic Law

Review

changing understanding of property rights

protective tariffs

M'Culloch v. Maryland

Fletcher v. Peck

Gibbons v. Ogden

Charles River Bridge v. Warren Bridge

competing theories of economic development

contracts clause

riparian rights

subsidization of internal improvements

will vs. equity theory of contracts

Dartmouth College v. Woodward

vested property rights

commerce clause

Cooley v. Board of Wardens

CHAPTER FOUR: FEDERAL-STATE RELATIONS

Outline

- A. INTRODUCTION (93-94)
 - 1. Division of Sovereignty into Spheres of Authority
 - 2. Views of Madison vs. Hamilton

- B. **DEFIANCE OF FEDERAL AUTHORITY TO 1816 (94-100)**
1. Excise Tax on Liquor, 1791: Backcountry Resistance
 - a. Militia Act of 1792
 - 1) Inadequacy of Federal Law Enforcement: Marshals, Coast Guard
 - b. Use of State Officials to Enforce Federal Laws (Fugitive Slave Act of 1793 and Neutrality Proclamation)
 - 1) Jurisdiction over Collection Disputes Placed in State Courts
 - c. **Whiskey Rebellion**, 1794: Western Pennsylvania
 - 1) President Washington Invokes Militia Act and Leads Troops
 2. **Alien and Sedition Acts** of 1798
 - a. **Virginia** (Interposition) and **Kentucky** (Nullification) **Resolutions**:
Two Expressions of the **Compact Doctrine**
 - b. Hamilton's Proposed Military Intervention Fails to Materialize
 3. New England Federalists' Flirtation with **Secession**
 - a. Louisiana Purchase, 1803: Josiah Quincy on Secession
 - 1) Threat to the Compact Theory
 - 2) Timothy Pickering's Secession Conspiracy Dissipated with Aaron Burr's Defeat for New York Governorship
 - b. **Embargo Act** of 1807: Widespread Resistance
 - 1) Pickering's **Nullification** Campaign
 - 2) Repeal of the Embargo Act, 1809
 - c. War of 1812
 - 1) Opposition: Massachusetts, Rhode Island, Vermont, Connecticut
 - 2) Hartford Convention, 1814: Attempt to Head Off Secession
- C. **STATE CHALLENGES TO THE MARSHALL COURT, 1816-1832 (100-06)**
1. Running Battle between **John Marshall and Spencer Roane**
 2. *Fairfax's Devisee v. Hunter's Lessee*, 1813
 - a. Claim of Fairfax's Heirs Upheld under Jay's Treaty
 - b. Virginia Court of Appeals Refuses to Accept Court's Jurisdiction, Holding That Article 25 of the Judiciary Act Is Unconstitutional
 3. *Martin v. Hunter's Lessee*, 1816: Constitutionality of Article 25 Upheld, Case Remanded to the Lower State Court
 4. **Cohens v. Virginia**, 1821: Legality of D.C. Lottery Sales in Virginia
 - a. Marshall Demolishes Compact Doctrine, Details the Doctrine of Divided Sovereignty, Settles Jurisdictional Issue
 - b. Ruling: Congress Did Not Authorize Sale Where Prohibited
 5. **Green v. Biddle**, 1823 (see p. 77): Virginia Accepted Court's Jurisdiction
 6. *M'Culloch v. Maryland*, 1819: Ohio Rejected Court's Decision
 7. *Osborn v. United States*, 1824: Eleventh Amendment and Jurisdiction
 - a. Court Upheld Trespass Charge against State Official Acting under Color of an Unconstitutional Act
 8. Georgia vs. Cherokees: Self-Government Resented; Gold Coveted
 - a. Georgia Nullifies Indian Treaties
 - b. Congress Passes Indian Removal Act; Cherokees Prepare Legal Challenge through William Wirt and John Sergeant
 - c. Trial of **Corn Tassel**: Stay of Execution by Supreme Court (citing the **Cherokee Treaty of 1791**) Nullified; Defendant Hanged
 - d. *Cherokee Nation v. Georgia*, 1831: Original Jurisdiction Rejected
 - e. *Worcester v. Georgia*, 1832: Oath of Allegiance Rejected; Exclusive Federal Jurisdiction over Indians; Enforcement Delayed
- D. **NULLIFICATION CONTROVERSY (106-09)**
1. Tariff of Abominations, 1828: Calhoun's Secret Nullification Document

2. Tariff of 1832: Slight Reductions
 3. South Carolina's Nullification Convention and Legislative Enactment
 4. Jackson and Hayne Proclamations; Calhoun's Election to Senate
 5. Jackson's **Force Bill**
 6. **Henry Clay's** Compromise: Phased Tariff Reductions; Force Bill Passed
 7. Force Bill Nullified by South Carolina
 8. Jackson Refuses to Invoke Force Bill in Alabama Uprising against Army
- E. STATES' RIGHTS, SLAVERY, AND THE TANEY COURT (109-17)
1. State Defiance Avoided by Letting Them Do as They Wished
 2. Expansion of Suffrage; New Constitutions after Panic of 1837
 - a. Thomas Dorr vs. Rhode Island's Royal Charter of 1663
 3. **Luther v. Borden**, 1849: **Guaranty Clause** Is a Political Question
 4. Revitalization of Slavery: Cotton Gin
 5. Overrepresentation of Southern States Was Being Reversed
 6. Missouri Compromise, 1820
 7. Southern Fears of Northern Control and Abolitionist Movement
 - a. **Gag Rule**, 1836-1844
 - b. Abolitionist Propaganda Tracts in the Mails
 8. **Prigg v. Pennsylvania**, 1842: **Joseph Story** on the Unconstitutionality of Personal Liberty Law
 9. Mexican War: Attempts to Interfere with War and **Wilmot Proviso** Fail
 7. **Compromise of 1850**
 8. *Strader v. Graham*, 1850: Status of Slaves Based on State of Residence
 - a. Northwest Ordinance Ban on Slavery Superseded
 12. **Kansas-Nebraska Act**, 1854: Popular Sovereignty Issue
 13. **Scott v. Sandford**, 1857: Court Fragments on Slavery in the Territories
 - a. **Roger B. Taney** Rejects Citizenship for Descendants of Slaves
 - b. Slave's Status Determined by Laws of State of Residence
 - c. **Missouri Compromise** Ruled Unconstitutional: **Takings Clause**
 - d. Result: Court's Loss of Credibility
- F. BOOTH CASES (117-18)
- a. **Ableman v. Booth**, 1859: Supremacy of Federal Courts Asserted
 - b. Nullification Doctrines Spread Rapidly through the North

Review

Whiskey Rebellion	Virginia, Kentucky Resolutions	interposition
nullification	secession	Timothy Pickering
Embargo Act	John Marshall vs. Spencer Roane	
<i>Cohens v. Virginia</i>	<i>Green v. Biddle</i>	Corn Tassel
Cherokee Treaty of 1791	Nullification Controversy	Force Bill
Henry Clay	<i>Luther v. Borden</i>	guaranty clause
Gag Rule	<i>Prigg v. Pennsylvania</i>	personal liberty law
Joseph Story	Wilmot Proviso	Fugitive Slave Act
Kansas-Nebraska Act	[Dred] <i>Scott v. Sandford</i>	Roger B. Taney
Missouri Compromise	<i>Ableman v. Booth</i>	

CHAPTER FIVE: CIVIL WAR, RECONSTRUCTION, AND THE FREEDMAN

Outline

- A. INTRODUCTION (121)
 - 1. Belief in the Sacredness of the Written Constitution
 - a. Root of the Conflict: Intensity of That Belief
 - b. Willingness of Both Sides to Fight and Die for That Belief
- B. THE CONSTITUTIONAL NATURE OF THE WAR (122-25)
 - 1. Abolition of Slavery Was Not the Issue
 - a. **Proposed Unrepealable Amendment to Protect Slavery Where It Existed**
 - b. Ratification by Three States before It was Mooted by the War
 - 2. **States' Rights Was Not the Issue**
 - a. Northern States Plunged into the War as States
 - 1) Six States Recruited and Supplied Troops at Own Expense
 - 2) Indiana Used Its Own Sanitary Commission for Wounded
 - 3) Illinois Motto: State Sovereignty and National Union
 - 3. The Two Irreconcilable Constitutional Issues
 - a. **Slavery in the Territories**
 - 1) Abolitionist Hope to Overturn the Dred Scott Decision
 - 2) Southern Fear of Second-Class Citizenship
 - 3) Prospect of Federal Ban on Interstate Transfer of Slaves
 - b. **Secession**
 - 1) Constitutional Procedures Were Based on Compact Theory
 - 2) Northern States' Personal Liberty Laws Broke the Compact
 - 3) "Sectional Combination for Subversion of the Constitution"
 - 4. Confederate Constitution of 1861
 - a. Continuity with Constitution of 1787
 - 1) Prohibition on African Slave Trade Retained
 - 5. Public Opinion in the North Was Divided
 - 6. Lincoln's View: The Union Is Perpetual, Secession Is Insurrectionary
- C. CONSTITUTIONAL ISSUES OF THE WAR (125-31)
 - 1. Lincoln's Declaration of an Insurrection after Fort Sumter
 - a. Militia Troops Called into Federal Service
 - b. Congress Summoned into Special Session in July
 - 2. **Illegal Actions**
 - a. **Blockade of Southern Ports**
 - 1) Blockade Was Either a Tacit Recognition of the Right of Secession or a Violation of International Law
 - b. Call for Volunteers to Serve in the Army
 - 1) **Expenditure of Public Funds without Authorization by Congress**
 - c. **Suspension of Habeas Corpus: Constitutionality Issue**
 - 3. Constitutional Issues Complicated by Disrepute of the Supreme Court
 - a. *Ex parte Merryman*, 1861: Contempt Citation Ignored by Military Commander
 - b. Lincoln Refused Congress's Request for Information on Arrests
 - 4. Turnover of Personnel in the Supreme Court
 - 5. Congressional Authorization after the Fact
 - 6. Blockade Enforced over Protests of Foreign Governments
 - a. **Prize Cases**, 1863: Seizure of Ships Upheld
 - 7. Arrest of Southern Sympathizers Exceeded Legal Restraints
 - a. **Ex parte Vallandigham**, 1864
 - 8. Non-Judicial Determination of Constitutional Issues
 - a. Conscriptio Act and Draft Riots: No Case Reached the Court

- b. British and French Recognition of the Confederacy Led to Abolition of Slavery
 - c. Confiscation Acts of 1861, 1862
 - d. Emancipation Proclamation
 - e. Several Proposed Constitutional Amendments Failed
 - 1) Ratification Issue
 - f. **Thirteenth Amendment**
- D. RECONSTRUCTION: POLITICAL (131-36)
- 1. Lincoln's Ten-Percent Plan
 - 2. Wade-Davis Bill, 1864: Killed by Pocket Veto
 - 3. Wade-Davis Manifesto and the Freedman's Bureau
 - 4. Andrew Johnson's Proclamations
 - a. Blanket Pardon to Rebels Who Took Loyalty Oath and Recognized Abolition
 - b. Recognition of States Based on Modified North Carolina Plan
 - 5. Southern Defiance: Reelection of Confederate Officials, Refusal to
 - a. Repudiate Debts or Secession, Passage of Black Codes
 - 6. Congress's Joint Committee of Fifteen: Thaddeus Stevens, Charles Sumner
 - a. Conditions for Recognition of States as Legal Entities
 - 7. Confrontation between Andrew Johnson and Congress: Civil Rights Act, Freedman's Bureau Act. Judiciary Act Amendments
 - 8. Proposed **Fourteenth Amendment**
 - 9. Midterm Congressional Elections, 1866
 - 10. Old Congress Calls New One into Special Session
 - a. Reconstruction Acts
 - b. Military Appropriations Act
 - c. Tenure of Office Act
 - 11. Firing of Edwin Stanton and **Impeachment of Andrew Johnson**
 - 12. Fifteenth Amendment
 - 13. Force Act of 1870
 - 14. Emergence of "**Redeemer**" **Governments** in the Southern States
 - 15. Executive and Congressional Corruption; Reemergence of Judiciary
- E. RECONSTRUCTION: THE COURTS (136-45)
- 1. *Ex parte Milligan*, 1866
 - 2. *Test Oath Cases*, 1867
 - a. *Cummings v. Missouri*
 - b. *Ex parte Garland*
 - 3. Reconstruction Acts
 - a. *Mississippi v. Johnson*, 1867: Ministerial vs. Executive Duties
 - b. *Georgia v. Stanton*, 1867
 - 4. ***Ex parte McCardle***, 1869
 - a. Court Acted on Basis of a Revision of the Judiciary Act
 - b. Meanwhile Congress Amended the Judiciary Act to Remove Court's Jurisdiction
 - c. Court Postponed the Case until the Next Term When It Finally Yielded
 - 5. ***Texas v. White***, 1869: Indestructible Union, Composed of Indestructible States
 - 6. *Ex parte Yerger*, 1869: Reconstruction Acts Sidestepped
 - 7. ***Slaughterhouse Cases***, 1870
 - a. Dual Citizenship (Majority)
 - b. Natural Rights (Dissenters)
 - 8. Consequence: Narrow Interpretation of the Privileges and Immunities Clause
 - a. *Bradwell v. Illinois*, 1873
 - b. *Bartemeyer v. Iowa*, 1874
 - c. *Minor v. Happersett*, 1875

9. Enforcement Act of 1870
 - a. *United States v. Cruikshank*, 1876
 - b. *United States v. Reese*, 1876
- F. CIVIL WAR AND RECONSTRUCTION: THE CONSTITUTIONAL OUTCOME (145)

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two constitutional issues	Lincoln Administration's unconstitutional actions
<i>Prize Cases</i>	<i>Ex parte Valandigham</i> Thirteenth Amendment
Fourteenth Amendment	impeachment of Andrew Johnson
"Redeemer" governments	<i>Ex parte McCordle</i> appeals from military tribunals
removal of Supreme Court jurisdiction	<i>Texas v. White</i>
<i>Slaughterhouse cases</i>	

CHAPTER SIX: THE CONSTITUTION IN THE AGE OF INDUSTRIALIZATION

Outline

- A. INTRODUCTION: NEW STRAINS (147-49)
 1. Population Growth and Change in Its Character
 - a. Ethnic Changes: New Immigrants Were Mostly Catholic, Jewish
 - b. Urbanization
 - c. Transformation of the Self-Employed Entrepreneur into the Employee
 2. Rise of Corporations
 - a. Rapid Economic Growth
 - b. Use of "Prime Movers"
 3. Disruption of Almost Every Aspect of American Life
 - a. Changing Work Day, Factory, National Food Market, Commodities Speculation, Corporate Giants
 - b. Panic of 1873, Radicalism, and Corruption
 4. Disruption of Government at Every Level
 - a. Court-Mandated Adjustments
- B. IN THE MATTER OF RACE (150-55)
 1. Economic Dimension of the Racial Problem
 - a. **Peonage** of Sharecropping
 - b. White Resentment of Blacks and Their Temporary Protectors
 2. **Civil Rights Act of 1875**
 - a. Unconstitutionality of Laws Barring Blacks from Juries
 - 1) *Virginia v. Rives*, 1880: Absence of Blacks from a Jury Upheld
 - b. Public Accommodations
 - 1) **Civil Rights Cases**, 1883: Discriminatory Acts by Individuals and Businesses Upheld
 3. Right to Vote
 - a. Partial Reversal of *Prigg v. Pennsylvania*, 1842
 - b. *Ex parte Siebold*, 1880: 1871 Civil Rights Act Upheld But Not on Fifteenth Amendment Grounds
 - c. Disenfranchisement of Blacks by Intimidation
 - d. *Ex parte Yarbrough*, 1884
 - e. Protection of Blacks by the Squirearchy in Return for Votes

- f. Efforts to Organize Poor Blacks and Poor Whites Led to
 - 1) Disfranchisement [Jim Crow Laws]
 - 2) Enactment of Poll Tax Requirements to Disfranchise Both
 - 3) **Grandfather Clause** and Literacy Tests
 - 4. **"Separate But Equal" Doctrine: Social Segregation by Law**
 - a. ***Plessy v. Ferguson*, 1896**
 - 1) Octoroon Is Legally a Negro
 - 2) Thirteenth Amendment Not Intended to Abolish Distinctions Based upon Color
 - 3) Segregation in Public Schools Was Accepted Practice: In Accordance with Established Usages, etc.
 - b. *Cumming v. County Board of Education*, 1899: Separate and Non-Existent Education Upheld
 - c. *Berea College v. Kentucky*, 1908: State Law Prohibiting Integration
 - 5. Consequence: A Caste System
- C. ECONOMIC REGULATION: THE STATES (155-60)
- 1. Three Types of State Powers to Promote, Regulate, Prohibit, or Otherwise Control Economic Activity
 - a. Two Restrictions Prior to Civil War: Contract Clause, Tax Restrictions
 - 2. Taxation Power: State and Municipal Subsidies Used to Attract Railroads, Industries
 - a. Repudiations during the Post-1873 Depression Led to Modification of Sanctity-of-Contracts Doctrines by Supreme Court
 - b. Supreme Court Held Railroads to Be Public Highways and That Taxes Levied to Support Them Were for Public Use
 - c. But Contract Clause Does Not Protect Bondholders When Taxes Are Used to Support "Ordinary Trades"
 - 1) *Loan Office Association v. Topeka*, 1874
 - 2) Retreat from *New Jersey v. Wilson*, 1812: Tax Immunity
 - d. Object: Prevent Legislatures from Bargaining Away Fundamental Powers
 - 3. Eminent Domain
 - a. *Pumpally v. Green Bay and Mississippi Canal Company*, 1872: Compensation for Damages to Property
 - 4. Police Power
 - a. Alabama Lottery case
 - b. *Stone v. Mississippi*, 1880
 - c. *Illinois Central Railroad Company v. Illinois*, 1892: Public Trust Doctrine Used to Reject Corrupt Legislative Grant
 - 1) Retreat from *Fletcher v. Peck*, 1810
 - 5. **Substantive Due Process** [Based on **Fourteenth Amendment**]
 - a. *Granger Cases*, 1877
 - 1) *Munn v. Illinois*, 1877: Grain Elevator Rates Subject to State Regulation (under State Police Powers); Irrelevance of Due Process Clause
 - b. Two Changes Result: Chaos of New Regulations, New Generation of Justices
 - c. Court Indicates a New Direction
 - 1) *Santa Clara County v. Southern Pacific Railroad*, 1886: Corporation Is a Legal Person
 - 2) *Wabash, St. Louis, and Pacific Railroad Company v. Illinois*, 1886
 - d. Reconsideration of States' Powers to Establish Rates
 - 1) Overruled Minnesota Law Denying Appeals of Rate Rulings
 - 2) Texas: Rates Must Be Reasonable
 - 3) *Smyth v. Ames*, 1898: Rates Must Permit a Fair Return

- D. ECONOMIC REGULATION: THE FEDERAL GOVERNMENT (160-65)
1. Federal Regulation Questions Less Complex: Singularity, Small Scale
 - a. Two Chief Economic Activities: Protective Tariffs, Land Grants for Railroads
 2. Monetary and Tax Policies
 - a. Court Upheld Federal Tax That Drove State Banks out of Business
 - b. Court Reverses Itself in the *Legal Tender Cases*, 1870, 1871
 - c. Federal Income Tax Upheld But Then Struck Down in 1895 until Passage of Seventeenth Amendment, 1913
 3. **Interstate Commerce Commission**, 1887: Response to *Wabash Case*
 - a. Court Reduced ICC to Impotence until It Was Revitalized in 1906
 4. **Sherman Anti-Trust Act**, 1890
 - a. Absent a National Common Law, It Left Courts the Power to Write a National Antitrust Law through **Equity Jurisprudence**
 - b. Its Unrealistic Aim Illustrated by Rockefeller's Standard Oil: Use of Pools, Then Trusts, to Bring Order to the Industry
 - c. State Anti-Trust Laws Reflected Fear of Their Size
 5. **United States v. E. C. Knight Company**, 1895: Manufacturing Distinguished from Commerce
 - a. **Power to Regulate Production Belongs to States**
 - b. Effect: Sherman Anti-Trust Act Limited to Railroads
 6. Pullman Strike, 1894
 - a. Intervention by Gov. John Peter Altgeld to Protect Strikers
 - b. Injunction Brought by Attorney General Richard Olney on Grounds of Interference with Mail Delivery: Example of Equity Jurisprudence
 - c. Federal District Court Issued Injunction on Anti-Trust Grounds
 - d. *In re Debs*, 1895: Injunction Upheld; Broad Judicial Powers Asserted
- E. THE EXPANSION OF FEDERAL REGULATION (165-71)
1. *Knight* Ruling Stimulates Business Consolidations
 - a. Development and Rapid Growth of the **Holding Company**
 2. Energetic Presidency of Theodore Roosevelt
 - a. Support for Federal Regulatory Control vs. State Regulation
 - b. Dissolution of Northern Securities Company
 - c. **Northern Securities Case**, 1904: Vagueness of the Reasonableness Concept
 3. *Swift and Company v. United States*, 1905: "**Current of Commerce**" **Doctrine** Expanded Prospective Field of Antitrust Actions
 4. *Loewe v. Lawler*, 1908: Sherman Act Applied to Labor Disputes
 5. Congressional Actions: Prohibition of Interstate Transportation of Lottery Tickets, Tax on Oleomargarine
 - a. Court Upholds Assertion of **Federal Police Power**
 6. **Pure Food and Drug Act**, 1906: Public Health Measure That Resulted from Lobbying Efforts of Government Scientist and Businesses
 7. **Meat Inspection Act**, 1906: Catalyzed by **Upton Sinclair's *The Jungle***, It Helped Sale of Meat Overseas and Reduced Competition
 8. **Hepburn Act, 1906**: Strengthened ICC
 - a. **Elkins Act of 1903**: Forbidding Rebates Considered Weak
 - b. Weaknesses of Hepburn Act: ICC Prohibited from Determining Value of Assets, Unsuitable for Regulating Competing Railroads

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Civil Rights Cases
Plessy v. Ferguson

Civil Rights Acts of 1875
separate but equal doctrine

grandfather clause
Fourteenth Amendment

substantive due process	Sherman Anti-Trust Act	regulatory commissions
<i>United States v. E. C. Knight Company</i>		<i>Northern Securities</i> case
Upton Sinclair's <i>The Jungle</i>	Meat Inspection Act	Pure Food and Drug Act
Elkins Act	Hepburn Act	administrative discretion
regulatory commissions		

CHAPTER SEVEN: FOUNDATIONS OF A CONSTITUTIONAL REVOLUTION: 1910-1937

Outline

- A. INTRODUCTION (175-79)
 - 1. Changes in Two Not Entirely Compatible Directions: Greater Democratization vs. Government by Experts
 - 2. Democratization and Nationalization
 - a. **16th-21st Constitutional Amendments**
 - b. Actions of Vigorous and Popular Presidents
 - 3. **Government by Non-Elected Specialists: Progressive Reforms**
 - a. Primary Elections
 - b. Civil Service Laws
 - c. Increased Regulatory Activities
 - 1) Specialized Federal Agencies
 - 4. New Constitutional Problems
 - a. Specialization of Evidence
 - 1) Court's Deference to Experts
 - b. Doctrine of **Quasi-Legislative and Quasi-Judicial Powers**
 - 1) Administrative Discretion: Delegation of Powers
- B. ECONOMIC REGULATION (179-85)
 - 1. Public Utility Commissions: Principle of Natural Monopolies
 - 2. Manufacturing and Mining
 - a. Pioneers in Welfare Capitalism
 - b. ***Lochner v. New York*, 1905: Maximum Work Hours Law**
 - c. ***Muller v. Oregon*, 1908**
 - 1) **Brandeis Brief**
 - 3. New Barrier in the 1920s: State Regulatory Laws Permitted Where Businesses Are Affected with a Public Interest
 - 4. On-the-Job Injuries
 - a. Two Old Common Law Principles That Limited Liability of Employers: **Fellow-Servant Rule** and **Contributory Negligence**
 - b. Federal and State Workmen's Compensation
 - 5. Court's Different Attitudes toward Federal and State Regulation of Businesses and Working Conditions
 - a. William Howard Taft's Antitrust Suits
 - b. **Rule of Reason** and "Judicial Legislation"
 - 6. Clarification of the Sherman Act
 - a. **Clayton Antitrust Act: Price Discrimination and Secondary Boycotts** Forbidden; Labor Unions Exempted
 - b. Federal Trade Commission Act: Investigation of Interstate Business Except Railroads and Banks
 - c. Purpose of the Acts: Prevention of Wrongdoing through Annual Reports and

- Educational Programs ("Free Antitrust Insurance")
- 7. Congressional Expansion of Railroad Regulation
- 8. Social Legislation
 - a. Child Labor Laws
 - b. Injunctions against Secondary Boycotts by Unions
 - c. **Adkins v. Children's Hospital**, 1923: Minimum Wage for Women Rejected
 - d. Court's Arrogance: Sociological Jurisprudence, Judicial Legislation
- C. FOREIGN AFFAIRS (185-89)
 - 1. Emergence of United States as a World Power with the Spanish-American War: Supreme Court's Deference
 - a. *Downes v. Bidwell*, 1901
 - b. **Missouri v. Holland**, 1920: Treaties
 - c. **United States v. Curtiss-Wright Export Corporation**, 1936: Doctrine of Inherent Powers
 - 2. War Powers of the President
 - a. Wilson's Totalitarian View of War
 - b. **Conscription** [Total Mobilization]
 - 3. Mobilization at Home
 - a. Two Broad Areas: Economy and Public Opinion
 - 4. Organization of the Economy
 - a. War Shipping Board
 - b. Lever Act
 - 1) **Food Administration: Herbert Hoover**
 - 2) Fuel Administration: Harry Garfield
 - c. Seizure of Railroads
 - d. **Railroad Administration**
 - 5. Consequences
 - a. War Shipping Board
 - b. Distribution of War Contracts
 - c. **War Production Board: Bernard Baruch**
 - 6. Long-range Effects of Economic Mobilization
 - a. Farm Surpluses and Rural Depression
 - b. Dust Bowls
 - c. Consolidation and Mechanization of Coal Mines
 - d. **Transportation Act of 1920**
 - e. Standardization of Production and New Wave of Business Consolidations
 - 7. Mobilization of Public Opinion
 - a. **Espionage Act of 1917**
 - b. **Sedition Act of 1918**
 - c. Concentration Camps
 - d. **Committee on Public Information: George Creel**
 - e. State Councils of Defense: Vigilance Committees
 - f. Result: Controlled **Hysteria**, Totalitarian Democracy
- D. IN THE MATTER OF CIVIL LIBERTIES (189-93)
 - 1. Constitutionality of War Measures
 - a. Conscription Cases [Selective Service Cases, 1917: Constitutional Issues Concerning Use of Militias in Overseas Service Ignored; Draft Exemptions for Seminary Students Upheld]
 - b. *Northern Pacific Railroad v. North Dakota*, 1919
 - 2. Violations of Civil Liberties
 - a. **Schenck v. United States**, 1919: **Clear and Present Danger Test**
 - b. *Abrams v. United States*, 1919: [Bad Tendency Test] Dissents by

Oliver Wendell Holmes, Jr. and Louis Brandeis

3. **Great Red Scare and the Palmer Raids**
 - a. Consequences: Lynchings, Race Riots, Immigration Restrictions
 4. Expansion of Civil Liberties Protections
 - a. ***Gitlow v. New York***, 1925: [First Application of **Incorporation Doctrine**]
 - Freedom of Speech and Freedom of the Press
 - 1) First Application of Substantive Due Process to a Non-Economic Case
 - b. [*Meyer v. Nebraska*, 1923; *Pierce v. Society of Sisters*, 1925: Restrictions on and Prohibitions of Private Schools Rejected]
 5. Landmark Decisions
 - a. *Stromberg v. California*, 1931: California "Red Flag" Law Rejected through Incorporation of Fourteenth Amendment Liberty Clause]
 - b. *Near v. Minnesota*, 1931: Suppression of a Newspaper Rejected
- E. THE CHALLENGE OF THE NEW DEAL (193-99)
1. Great Depression
 - a. Reasons for Federal Intervention: Momentum and Precedent Had Been Building Since Progressive Era
 2. Vigorous New Deal Measures: **TVA, NRA, AAA**
 3. Initial Supreme Court Acquiescence
 - a. Composition of the Court: "Four Horsemen of the Apocalypse," Three New Deal Sympathizers, Two "Swing" Members
 4. NIRA'S Codes of Fair Practices
 - a. First Petroleum Code Case Mooted
 - b. *Panama Refining Company v. Ryan*, 1935: Code Ruled an Unconstitutional Delegation of Power
 5. Gold Clause Cases: Resulting from Devaluation of Dollar and Prohibition of Private Possession of Gold
 - a. Legal Tender Law Upheld
 - b. James McReynolds' Comment: "Constitution . . . Is Gone"
 6. Court Goes on the Offensive
 - a. ***Schechter Poultry Corporation v. United States***, 1935: "Sick Chicken Case"
 - 1) Intrastate Commerce Ruled Out of Congress's Reach
 - 2) Court Struck Down NRA for Allowing President to Legislate
 - b. ***United States v. Butler***, 1936: Regulatory Taxation Permitted But Most of AAA Overturned
 - c. *Carter v. Carter Coal Company*, 1936
 - d. Municipal Bankruptcy Act Struck Down
 - e. Exception: ***Ashwander v. Tennessee Valley Authority***, 1936
 - f. Court's Defense against Critics
 7. Court-Packing Plan
 - a. Court's Surrender: **Owen Roberts [The Switch in Time That Saved Nine]**
 8. Reversal of Precedents
 - a. ***West Coast Hotel Company v. Parrish***, 1937: Freedom of Contract Doctrine Overturned
 - d. *National Labor Relations Board v. Jones and Laughlin Steel Corporation* (NLRB v. Jones): Commerce Clause Becomes a Blanket Grant of Power
 - d. *Helvering v. Davis*, 1937: General Welfare Clause as a Positive Grant of Power

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Sixteenth Amendment
Muller v. New York

Nineteenth Amendment
Brandeis brief

Lochner v. New York
rule of reason

Clayton Anti-Trust Act	<i>Adkins v. Children's Hospital</i>	<i>Missouri v. Holland</i>
<i>United States v. Curtiss-Wright Export Corporation</i>		Herbert Hoover
Woodrow Wilson's authorization of the arrest and detention of enemy aliens		
Railroad Administration	Food Administration	Bernard Baruch
War Production Board	George Creel	Committee on Public Information
anti-German hysteria	Great Red Scare	Oliver Wendell Holmes, Jr.
Louis Brandeis	A. Mitchell Palmer	<i>Gitlow v. New York</i>
incorporation doctrine	Agricultural Adjustment Act (AAA)	
National Industrial Recovery Administration (NRA)		"the switch in time that saved nine"
Owen Roberts	<i>Schechter Poultry Corporation v. United States</i>	
<i>United States v. Butler</i>	<i>Ashwander v. Tennessee Valley Authority</i>	
<i>West Coast Hotel Company v. Parrish</i>		Transportation Act of 1920

CHAPTER EIGHT: CONSTITUTIONAL REVOLUTION: 1937-1957

Outline

- A. INTRODUCTION (201-02)
 1. Decisive Swing toward National Power
 - a. Changes Were Moderate in the Context of the Revolutions in Europe
 - b. Broad Consensus of the Public Approved Them as a Trade-off
- B. THE NEW DEAL COURT (202-06)
 1. Change in Personnel
 - a. Four Horsemen Replaced by New Dealers from 1937 to 1939
 - b. **Philosophy of Judicial Restraint: Felix Frankfurter**
 2. Cyclical Pattern of Presidential vs. Judicial Assertiveness
 3. *Federal Power Commission v. Hope Natural Gas Company*, 1944: Confiscatory Rate Regulations Upheld
 - a. *Smyth v. Ames* Overturned
 4. New Pattern: Virtually All State and Federal Economic Reform and Social Welfare Legislation Upheld from 1937 through 1957
 - a. Previous Precedents, Such as "Stream of Commerce" Doctrine, *Adkins*, and Opinions in *Schechter* and *Carter* Cases Overturned
 - b. Doctrine of *Stare Decisis* Ignored
 - c. New AAA Upheld; *Butler* Reversed
 - d. Distinction between Intrastate and Interstate Commerce Abolished
 5. Other New Deal Measures Neatly Sidestepped
 - a. ***Nortz v. United States*, 1935: Repudiation of Gold-Redemption Requirements in Federal Bonds**
 - 1) **Congress Responded by Depriving Court of Jurisdiction**
 - b. Narrow Ruling in *Ashwander* Case (1936); Dismissal of Related Lawsuits on Technical Grounds
 6. No Reversals after 1937; Two Reversals during Truman Administration
 - a. *United States v. Lovett*, 1946: Denial of Federal Salaries to Suspected Communists Rejected as a Bill of Attainder
 - b. ***Youngstown Sheet and Tube Company v. Sawyer*, 1952: Seizure of Steel Mills Rejected**
 - 1) Essence of Judicial Restraint as Practiced by the New Deal Court: Joint Presidential-Congressional Sovereignty

- C. THE MUSHROOMING OF GOVERNMENT (206-10)
Three Broad Areas of Change:
1. **Subsidies**
 - a. Historical Background: Privileges, Tax Exemptions, Cash Awards for Economic Development
 - b. Qualitative and Quantitative Change
 - 1) Addition of Social Reform and Redistribution of Wealth
 - 2) Addition of Tax Exemptions and Low Interest Loans
 - c. Crash-Program Mentality: Increased **Dependency** on Federal Appropriations
 2. Relations with Big Business
 - a. Initial New Deal Emphasis on Anti-Trust Law
 - b. Intervention of World War Two
 - c. Regulation through War Production Board and War Labor Relations Board
 - d. **Permanent War Economy** a Product of the Cold War, 1947
 - e. Presidential Manipulation of Industries as Consumer-in-Chief
 3. Government Ownership and Operation of Business Enterprise
 - a. Reconstruction Finance Corporation
 - b. Fair Deal Expansion into New Areas
 - c. **Multiplication of Federal Agencies**
 - d. Wide Range of Services with Personal Freedom for Most Citizens
- D. THE PROBLEM OF CIVIL LIBERTIES (210-17)
1. ***Palko v. Connecticut***, 1937: Double Jeopardy
 - a. Restriction of Bill of Rights to “Fundamental Freedoms”
 - b. Consequence: Halt of Drift toward Civil Rights Expansion
 2. Japanese Internment: **Doctrine of Constructive Treason**
 - a. FDR’s War Relocation Authority
 3. Three Supreme Court Challenges
 - a. *Hirabayashi v. United States*, 1944: Curfew Upheld
 - b. ***Korematsu v. United States***, 1944: Relocation Order Upheld
 - 1) Murphy: “Legalization of Racism”
 - c. *Ex Parte Endo*, 1944: Release of Girl
 4. Cold War Curtailment of Civil Liberties
 - a. Taft-Hartley Act, 1947: Loyalty Oath Required; Check on Excessive Union Power That Resulted from the Wagner Act
 - b. ***American Communications Association v. Doud***, 1950: Unions Effectively Treated as Agents of Federal Government
 5. Korean War, 1950-1953
 - a. Smith Act of 1940
 - b. ***Dennis v. United States***, 1951
 - 1) Learned Hand’s “Sliding-Scale” Rule for Sedition Cases Replaces “Clear and Present Danger” Rule
 - c. McCarran Internal Security Act, 1950
 6. Joseph McCarthy’s Charges Led to New Loyalty Program
 - a. Standards for Measuring Security Risks
 - b. Previous Judicial Limitations on Investigations Ignored
 - 1) *McGrain v. Daugherty*, 1927, and *Sinclair v. United States*, 1929: Observe Procedural Rights, Pursue Legislative Intent
 - 2) Function of the Hearings: Publicity
 - c. **Loyalty Oaths** and Witch Hunts
 - d. Communist Control Act of 1954
 - e. Popular Opinion as a Danger to Constitutional Restraints
 7. Supreme Court Briefly Reverses Course after McCarthy Is Discredited

- a. *Yates v. United States*, 1957: Sliding-Scale Abandoned
- b. *Watkins v. United States*, 1957: Tentative Return to Earlier Views
- 8. Restrictive Period Followed by Sharp Turn toward Civil Libertarianism
- E. NEGRO RIGHTS RECONSIDERED (217-24)
 - 1. Court Promotes Major Social Changes for American Blacks
 - a. History of Racial Discrimination
 - b. *Missouri ex rel. Gaines v. Canada*, 1936: Law School Admissions
 - c. ***Smith v. Allright***, 1944: All-White Primary Struck Down
 - d. Persistence of Poll Taxes and Literacy Tests
 - 2. Higher Education Cases
 - a. *Sipuel v. Oklahoma*, 1948: Separate But Equal Law schools
 - b. *Sweatt v. Painter* and *McLaurin v. Oklahoma State Regents*, 1950
 - c. *Henderson v. United States*, 1950: Interstate Railroads
 - 3. Challenge to *Plessy v. Ferguson*
 - a. Thurgood Marshall and the NAACP
 - b. Oliver and Linda Brown
 - c. Supreme Court Review, 1952, Followed by Rescheduling
 - d. Thurgood Marshall's Strategy
 - e. Earl Warren's Strategy
 - f. ***Brown v. Board of Education***, 1954: Beginning of End of Racial Caste System
 - 4. Unfortunate Implications of the *Brown* Ruling
 - a. Substitution of Social Science for Law and Constitution
 - b. Court Disregarded Its Own Standards for Legal Remedy
 - c. Racist Assumption That Segregation Only Affected Black Children
- F. THE BRICKER AMENDMENT (224-26)
 - 1. Growth of Executive Power
 - a. Twenty-Second Amendment: Two-Term Limitation
 - 2. Impact of Foreign Relations upon Domestic Affairs
 - a. ***Missouri v. Holland***, 1920: Treaties as Source of Power
 - b. ***United States v. Curtiss-Wright***, 1936: Inherent Powers
 - c. *Belmont*, 1937 and *Pink*, 1942: Executive Agreements
 - d. International Covenant on Human Rights, 1950
 - 3. Proposed **Bricker Amendment**, 1952
 - 4. Court Upholds Judicial Review of Treaties
 - 5. Constitutional Revolution, Ltd., Appeared Complete by 1957

Review

philosophy of judicial restraint	Felix Frankfurter	<i>Nortz v. United States</i>
suits against federal repudiation of the gold clauses		removal of Supreme Court jurisdiction
<i>Youngstown Sheet and Tube Company v. Sawyer</i>		three broad areas of change
<i>Palko v. Connecticut</i>	doctrine of constructive treason	<i>Korematsu v. United States</i>
<i>American Communications Association v. Doud</i>		<i>Dennis v. United States</i>
loyalty oaths	<i>Smith v. Allright</i>	<i>Brown v. Board of Education</i>
<i>Missouri v. Holland</i>	<i>United States v. Curtiss-Wright</i>	Bricker Amendment

CHAPTER NINE: BREAKDOWN

Outline

- A. INTRODUCTION (229-30)
 - 1. Iatrogenic Disease of Government
 - a. Tendency to Create a New Program on Top of an Old One
 - b. Crash Programs of the 1960s: Remedies Created New Problems
 - c. Lost Capacity to Govern in the Constitutional Sense
- B. OF THE PEOPLE (230-34)
 - 1. Self-Proclaimed Spokesmen for a Right of Preferential Treatment
 - 2. Origin of This Process and the Paralysis It Has Caused
 - a. New Deal Promises; Fair Deal Pursuit of Them; *Brown* Decision
 - 1) ***Brown II***: Call for Desegregation “with All Deliberate Speed”
 - 2) Resistance by Southern School Boards
 - b. Federal Intervention
 - 1) Montgomery Bus Boycott
 - 2) Creation of Civil Rights Commission, 1957
 - 3) Confrontation in Little Rock, 1957
 - c. Consequences
 - 1) Black Migration to the North and West; Ghettoization
 - 2) Increase of Civil Rights Activism in the South
 - 3) Federal Support and Encouragement of Civil Disobedience
 - 3. Mob Action and Its Spillover into Public Policy
 - a. Mass Demonstrations, 1963
 - b. “Long Hot Summer” of Riots, 1964
 - c. **Civil Rights Acts** of 1964, 1965, 1968
 - d. Mass Demonstrations Against the Vietnam War
 - e. Arrogance, Self-righteousness of Student Demonstrators
 - f. Capitulation of College Administrations
 - 4. Kent State University and Jackson State College, 1970
 - a. End of the Politics of Confrontation
 - b. “The Movement” Redirected Its Energies into Earth Day
 - 5. Persistence of the Politics of Accusation and Demand
 - a. Crusaders for Women’s Rights, Gay Rights, Indian Rights, and Chicano Rights
Climbed Aboard the Bandwagon in the 1970s
- C. OF THE LEGISLATIVE BRANCH (234-37)
 - 1. Orgy of Major Legislation, 1964-1973
 - a. Lyndon Johnson’s **Great Society Program** and **War on Poverty**
 - b. Motor Vehicle Air Pollution Control Act of 1965
 - c. National Traffic and Motor Vehicle Safety Act of 1966
 - d. **Clean Air Act** of 1970
 - 2. Congressional Carelessness
 - a. Wholesale Meat Act
 - b. **Endangered Species Act** of 1973
 - c. Heavy Increase in Congressional Workload
 - d. “What Makes You Think We *Read* the Bills?” [1970s Book Title]
 - 3. New Pattern of Legislation
 - a. Emergence of the **Iron Triangle** System
 - 1) Congress Loses Capacity to Fulfill Constitutional Roles
 - b. Consequences
 - 1) Increase in Volume, Decrease in Quality of Legislation
 - 2) Necessitation of Bureaucratic Rule Making (Administrative Law) and Judicial Legislation
 - 3) Staggering Increase in Transfer Payments
 - 4) Astronomical Increase in Overall Spending and Taxation

- D. OF THE EXECUTIVE BRANCH (237-41)
1. Federal Bureaucracy Run Amok
 - a. *Federal Register* and the Paper Trail
 - b. Ineffectuality and Paralysis
 - c. Red Tape: FDA, EPA, ICC, FPC, DOE
 2. Loss of Potency in the Presidency
 - a. Increasingly Cumbersome Bureaucracy
 - b. Deliberate Weakening of the Presidency
 - c. Ouster of Richard Nixon
 - d. War Powers Resolution
- E. OF THE JUDICIARY (241-46)
1. Constitution Ceases to Be a Fundamental Law for Government
 - a. Increasingly regarded as a Table of the Rights of Citizens
 2. Evolution of the Court's Interpretation of Minority Rights
 - a. From Desegregation (1954, 1964) to Integration (1966)
 - b. *Green v. County School Board*, 1968: Call for Integration
 - c. ***Swann v. Charlotte-Mecklenburg Board of Education***, 1971: Busing
 3. Compensatory or Preferential Treatment (Affirmative Action)
 - a. Provisions of the Civil Right Act Ignored
 4. Reverse Discrimination Cases
 - a. ***Regents v. Bakke***, 1978
 - b. *Kaiser Aluminum v. Weber*, 1979
 - c. *Fullilove v. Klutznick*, 1980
 - d. Divided Court
- F. OF THE FEDERAL SYSTEM AND THE SEPARATION OF POWERS (246-52)
1. Substitution of the Court's Own Notions of Social Justice
 - a. ***Engel v. Vitale***, 1962: Regents Prayer Case
 - b. ***Roe v. Wade***, 1973
 - c. ***Escobedo v. Illinois***, 1964, and ***Miranda v. Arizona***, 1966
 - d. Hard-Core Pornography
 2. Erosion of Federalism
 - a. Federal Aid to Education; Revenue Sharing; Abuses by HEW
 3. Erosion of the System of Checks and Balances
 - a. Review of Political Questions: *e.g.*, Reapportionment
 - 1) *Gomillion v. Lightfoot*, 1960: Disfranchisement of Blacks
 - 2) *Baker v. Carr*, 1962: Disproportionate Representation
 - 3) ***Reynolds v. Sims***, 1964: One Person, One Vote
 - 4) *Wesberry v. Sanders*, 1964: Congressional Districting
 - 5) Congressional Response Was Ineffectual
 - 6) Reapportionment Orders
 4. Emergence of a Bigger, More Meddlesome, Arbitrary, and Capricious Government Than Any Ever Dreamed by George III

Review

<i>Brown II</i>	Civil Rights Acts	Great Society
War on Poverty	Clean Air Act	Endangered Species Act
iron triangle	<i>Swann v. Charlotte-Mecklenburg Board of Education</i>	
<i>Regents v. Bakke</i>	<i>Engel v. Vitale</i>	<i>Roe v. Wade</i>
<i>Escobedo v. Illinois</i>	<i>Miranda v. Arizona</i>	<i>Reynolds v. Sims</i>