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

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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
      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)
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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
   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
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]

   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,
Restricted View of "Necessary and Proper" Clause

d. Hamilton: **Loose Construction** Based on Inherent Sovereignty
e. Result: Washington Signed Bank Bill But Abandoned Procedure

2. Washington Seeks **Advisory Opinions** from Court on **Genet Affair**
a. Court's Refusal to Answer Set Precedent for Strict Separation

3. **Indian Treaties**
a. Washington's Embarrassment in the Senate Chambers
b. Senatorial Advice Portion Becomes Dead Letter

4. **Formation of the Cabinet**
a. No Constitutional Provision for an Official Advisory Council
b. Formal Meetings Held without Washington in Attendance

5. **Rise of Political Parties**
a. Framers Had Sought to Inhibit the Growth of National Parties
b. Jefferson and Madison's Republican Faction Opposed Bank
   1) Existing Precedent: Treaties Routinely Carried into Effect

6. Twelfth Amendment: Remedy for 1796 and 1800 Election Problems

**D. JUDICIAL DETERMINATION OF CONSTITUTIONAL ISSUES (48-55)**

1. Idea of **Judicial Review**
   a. **Rutgers v. Waddington** (NYC Mayor's Court, 1784)
   b. **Trevett v. Weeden** (Rhode Island, 1786)
   c. Federalist 78
   d. **Champion and Dickason v. Casey** (1792): Rhode Island Debt Law Unconstitutional
   e. **Chisholm v. Georgia** (1793): Sovereign Immunity Rejected (Contrary to Federalist 81)
   f. **Eleventh Amendment**: Sovereign Immunity Affirmed

2. Fierce Currents of Partisan Politics
   a. **Ware v. Hylton** (1796): Virginia Debt Law Unconstitutional

3. All-Out Republican Attack during "Anti-French Phrenzy"
   a. Use of Common Law Indictments in Absence of Criminal Code
      1) See Note on Questions Concerning a Federal Common Law [see also **Swift v. Tyson**, p. 87]
   d. Republican Objection Was to National Rather Than State Suppression of Seditious Libel
      1) Tactic of Jury Nullification Rejected by Courts

**E. THE MARBURY CASE AND THE ATTACK ON THE COURTS (55-60)**

1. Strict vs. Loose Construction by Republicans
   a. Repeal of Sedition Act, Presidential Pardons, Restoration of Fines with Interest
   b. Dismantling of Hamilton's Financial System
   c. But Also: Common Law Prosecutions and Louisiana Purchase

2. **Judiciary Act of 1801**; Court-Packing ["Midnight Appointments"]

3. Repeal of Act of 1801 Followed by **Judiciary Act of 1802**
   a. Constitutional Issue: Firing of New Circuit-Court Judges

4. **Stuart v. Laird** (1803): Hamilton's Dilemma and Escape
   a. Full Court Affirmed Act of 1802 (Indirectly: Repeal Act)

5. **Marbury v. Madison** (1803)
   a. Madison Withheld Some Midnight Appointment Commissions
   b. Marbury's Suit Based on Article 13 of Judiciary Act of 1789
Jeffersonians Expected Madison to Ignore a Writ of Mandamus


Long-Range Result: Jurisdiction over Military Appeals Denied

Short-Range Effect: Marshall's *Obiter Dicta* Antagonized Foes

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)

WHO DETERMINES CONSTITUTIONALITY? (60-61)

1. Principle of Co-equality

James Madison and the Bill of Rights ambiguity of Article III, section 2
Oliver Ellsworth and the federal judiciary issue of appointments and removals
*Federalist* 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 *Chisholm v. Georgia* Eleventh Amendment
excise taxes and *Hylton v. United States* Sedition Act
Judiciary Acts impeachment of federal judges *Marbury v. Madison*

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
   4. Constitutional Transformation

B. THE ECONOMIC TRANSFORMATION (66-69)
   1. Traditional Property Rights as Deterrents to Development
      a. Realty vs. Personality: 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
      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

   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
      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
   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

F. ECONOMIC ISSUES AND THE TANEY COURT (83-89)
1. Jacksonian Majority: Court Packing
3. Bills of Credit Issued by States
   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
   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
   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

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changing understanding of property rights riparian rights
protective tariffs subsidization of internal improvements
M’Culloch v. Maryland will vs. equity theory of contracts
Fletcher v. Peck Gibbons v. Ogden Dartmouth College v. Woodward
Charles River Bridge v. Warren Bridge vested property rights
competing theories of economic development commerce clause
contracts 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

   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

   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
- **Cohens v. Virginia**
- **Green v. Biddle**
- Corn Tassel
- Cherokee Treaty of 1791
- Nullification Controversy
- Force Bill
- Henry Clay
- **Luther v. Borden**
- guaranty clause
- Gag Rule
- **Prigg v. Pennsylvania**
- personal liberty law
- Joseph Story
- Wilmot Proviso
- Fugitive Slave Act
- Kansas-Nebraska Act
- [Dred] **Scott v. Sandford**
- Roger B. Taney
- Missouri Compromise
- **Ableman v. Booth**

**CHAPTER FIVE: CIVIL WAR, RECONSTRUCTION, AND THE FREEDMAN**
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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)
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   b. Congress Summoned into Special Session in July
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   b. Lincoln Refused Congress’s Request for Information on Arrests
4. Turnover of Personnel in the Supreme Court
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   b. Recognition of States Based on Modified North Carolina Plan
5. Southern Defiance: Reelection of Confederate Officials, Refusal to
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6. Congress's Joint Committee of Fifteen: Thaddeus Stevens, Charles Sumner
   a. Conditions for Recognition of States as Legal Entities
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10. Old Congress Calls New One into Special Session
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    c. Tenure of Office Act
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5. Substantive Due Process [Based on Fourteenth Amendment]
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   b. Two Changes Result: Chaos of New Regulations, New Generation of Justices
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   a. Court Upheld Federal Tax That Drove State Banks out of Business
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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
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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


7. Meat Inspection Act, 1906: Catalyzed by Upton Sinclair’s The Jungle, It Helped Sale of Meat Overseas and Reduced Competition

   a. Elkins Act of 1903: Forbidding Rebates Considered Weak
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   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
      c. Purpose of the Acts: Prevention of Wrongdoing through Annual Reports and
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7. Congressional Expansion of Railroad Regulation
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5. Landmark Decisions
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3. Initial Supreme Court Acquiescence
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5. Gold Clause Cases: Resulting from Devaluation of Dollar and Prohibition of Private Possession of Gold
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      c. New AAA Upheld; Butler Reversed
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   5. Other New Deal Measures Neatly Sidestepped
         1) Congress Responded by Depriving Court of Jurisdiction
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   6. No Reversals after 1937; Two Reversals during Truman Administration
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   b. Intervention of World War Two
   c. Regulation through War Production Board and War Labor Relations Board
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