Washington Law Review

Volume 20 | Issue 4

11-1-1945

The Dissolving Structure of Our Constitutional Law

Edward S. Corwin

WASHINGTON LAW REVIEW
and
STATE BAR JOURNAL

VOLUME XX NOVEMBER, 1945 NUMBER 4

THE DISSOLVING STRUCTURE OF OUR CONSTITUTIONAL LAW

EDWARD S. CORWIN

There is a story that once upon a time a doctor, an engineer, and a politician were debating which of these callings was the most ancient. The doctor rested his case on the contention that the removal of the rib from Adam's side was obviously a surgical operation; to which the engineer rejoined that before Adam had even appeared on the scene the world itself had to be created out of chaos, and that this was clearly an engineering operation. "Very true," chimed in the politician, "but who do you think created chaos?"

Accepting the Clausewitz thesis that "war is only an extension of policy," we are free to say that the politicians have created chaos in these latter days in a rather wholesale way. But that is another story. The World Revolution is not my topic, but the comparatively limited revolution which we have been witnessing in our own country the last few years in consequence of the New Deal and more recently of the war. How has this revolution affected conceptions of governmental power in the United States; how is it to be evaluated in terms of American Constitutional Law? For Constitutional Law has always been the most distinctive feature of the American system of government, the result of a unique infusion of politics with jurisprudence, of current opinion with established principles. Today this remarkable product of American political genius appears to be undergoing a fundamental revision—even to be in process of dissolution.[1]

What is "Constitutional Law?" As the term is employed in this country, it denotes a body of rules resulting from judicial interpretation of a written constitution, and particularly the interpretation of the Constitution of the United States by the Supreme Court at Washington. Its parental elements are, therefore, the Constitutional Document and the power of the Supreme Court to pass upon the validity of legislation both state and national in relation to that document—more briefly, Judicial Review. The latter is the active, generative element; the former is, *in theory*, the matrix, the receptive element.

Actually, when the subject is considered statistically, the theory that

[1] The writer is indebted to the Claremont Colleges, publishers of his CONSTITUTIONAL REVOLUTION, LTD. (1941) for the privilege of using some of the matter in that volume in the preparation of this paper.

the Constitutional Document contained in embryo from the outset the entirety of Constitutional Law puts credulity to a quite impossible test. First and last the Supreme Court has handed down some fifteen or sixteen thousand opinions, occupying in the published *Reports* probably 200,000 pages, large octavo; and of this total, probably one-third comprises cases involving points of constitutional interpretation. But even more striking is the fact that by far the greater number of these have arisen out of four or five brief phrases of the Constitutional Document, "power to regulate commerce," "obligation of contracts," deprivation of "life, liberty or property without due process of law" (which phrase occurs both as a limitation on the National Government and—since 1868—on the States), and out of three or four theories or doctrines which the Constitution is supposed to embody.

The latter are, in fact, the essence of the matter. That is to say, the effectiveness of Constitutional Law as a system of restraints on governmental power depends for the most part on the effectiveness of these doctrines as they are applied by the Court for that purpose. The doctrines to which I refer are (1) the doctrine or concept of Dual Federalism; (2) the doctrine of the Separation of Powers; (3) the doctrine and *practice* of Judicial Review; and finally, the substantive concept of Due Process of Law, by which Judicial Review has been put beyond statable limits both as to subject matter and also as to the considerations determining its exercise. What I propose to do is to take up each of these four doctrines in turn, briefly sketch its origins, and then project against that background a short account of what has been happening to it in recent years.

Federalism in the United States embraces the following elements: (1) as in all federations, the union of several autonomous political entities, or "States," for common purposes; (2) the division of legislative powers between a "National Government," on the one hand, and constituent "States," on the other; (3) the direct operation for the most part of each of these centers of government, within its assigned sphere, upon all persons and property within its territorial limits; (4) the provision of each center with the complete apparatus of law enforcement, both executive and judicial; (5) the supremacy of the "National Government" within its assigned sphere over any conflicting assertion of "State" power; (6) dual citizenship.

The third and fourth of the above-listed salient features of the American Federal System are the ones which at the outset marked it off most sharply from all preceding systems, in which the member states generally agreed to obey the mandates of a common government for certain stipulated purposes, but retained to themselves the right of ordaining and enforcing the laws of the union. This, indeed, was the system provided in the Articles of Confederation. The Convention of 1787 was well

aware, of course, that if the inanities and futilities of the Confederation were to be avoided in the new system the latter must incorporate "a coercive principle"; and as Ellsworth of Connecticut expressed it, the only question was whether it should be "a coercion of law, or a coercion of arms," that "coercion which acts only upon delinquent individuals" or that which is applicable to "sovereign bodies, states, in their political capacity." In Judicial Review the former principle was established, albeit without entirely discarding the latter, as the Civil War was to demonstrate.

The sheer fact of Federalism comes within the purview of Constitutional Law, that is, becomes a judicial *concept,* in consequence of the conflicts which have at times arisen between the idea of State Autonomy ("State Sovereignty") and the principle of National Supremacy. Exaltation of the latter principle, as it is recognized in the Supremacy Clause (Article VI, paragraph 2) of the Constitution, was the very keystone of Chief Justice Marshall's constitutional jurisprudence. It was his position that the "Supremacy Clause" should be applied literally, with the result that if an unforced reading of the terms in which legislative power was granted to Congress confirmed its right to enact a particular statute, the circumstance that the statute projected national power into an accustomed field of State power became a matter of complete indifference. State power, in short, was no ingredient of national power, and hence no independent limitation thereof.

Quite different was the outlook of the Court over which Marshall's successor, Chief Justice Taney, presided. That Court took as its point of departure the Tenth Amendment, which reads, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." In construing this provision the States Rights Court sometimes talked as if it regarded *all* the reserved powers of the States as limiting national power. At other times it talked as if it regarded certain "subjects" as reserved exclusively to the States, slavery being the outstanding instance.

But whether following the one line of reasoning or the other, the Court subtly transformed its function, and so that of Judicial Review, in relation to the Federal System. Marshal viewed the Court as primarily an organ of the National Government and of its supremacy. The Court under Taney regarded itself as standing outside of and above both the National Government and the States, and as vested with a quasi-arbitral function between two centers of diverse but essentially equal, because "sovereign" powers. Thus in *Ableman v. Booth,*[2] which was decided on the eve of the Civil War, we find Taney himself using this arresting language:

> This judicial power was justly regarded as indispensable, not merely to maintain the supremacy of the laws of the United

[2] 21 How. 406 (U. S. 1859).

> States, but also to guard the States from any encroachments upon their reserved powers by the general government. . . . So long . . . as this Constitution shall endure, this tribunal must exist with it, deciding in the peaceful form of judicial proceeding, the angry and irritating controversies between sovereignties, which in other countries have been determined by the arbitrament of force.

Other justices of the period committed themselves even more unqualifiedly to the "State Sovereignty" thesis.

It is the Taney Court, therefore, rather than the Marshall Court, which elaborated the concept of *Dual Federalism.* Marshall's federalism is more aptly termed *national* federalism; and turning to modern issues, we may say without exaggeration that the broad general constitutional issue between the Court and the New Deal in such cases as *Schechter Corp. v. U. S.* and *Carter v. Carter Coal Co.*[3] was, whether Dual Federalism or National Federalism should prevail. More narrowly, the issue in these cases was whether Congress' power to regulate commerce must stop short of regulating the employer-employee relationship in industrial production, that having been hitherto regulated by the States. We all know how this issue was finally determined. In the Fair Labor Standard Act of 1938[4] Congress not only prohibits interstate commerce in goods produced by substandard labor, but it directly forbids, with penalties, the employment of labor in industrial production for interstate commerce on other than prescribed terms. And in *United States v. Darby*[5] this act was sustained by the Court in all its sweeping provisions, on the basis of an opinion by Chief Justice Stone which purports to be based—and logically is based—on Chief Justice Marshall's famous opinions in *McCulloch v. Maryland*[6] and *Gibbons v. Ogden*[7] of 120 years ago. In short, as a principle capable of limiting the national legislative power, the concept of Dual Federalism is today at an end, with consequent aggrandizement of national power.

This, however, is only a part of the story—perhaps even less than half of it. For in another respect even the great Marshall has been in effect overruled in support of enlarged views of national authority. Without essaying a vain task of "tithing mint, anise and cummin," it is fairly accurate to say that throughout the 100 years which lie between Marshall's death and the first New Deal cases, the conception of the federal relationship which on the whole prevailed with the Court was a *competitive conception,* one which pitted the National Government and the States against each other. It is true that we occasionally get some striking statements of contrary tendency, as in Justice Bradley's opin-

[3] 295 U. S. 495 (1935); 298 U. S. 238 (1936).
[4] 52 Stat. 1060, 29 U. S. C. § 201 (1938).
[5] 312 U. S. 100 (1941).
[6] 4 Wheat. 316 (U. S. 1819).
[7] 9 Wheat. 1 (U. S. 1824).

ion in 1880 for a divided Court in the *Siebold* case,[8] where is reflected recognition of certain results of the Civil War; or much later in a frequently quoted dictum by Justice McKenna, in *Hoke v. United States*,[9] in which the Mann White Slave Act was sustained in 1913:

> Our dual form of government has its perplexities, State and Nation having different spheres of jurisdiction . . . 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.

The contrary outlook is nevertheless the one much more generally evident in the outstanding results for American Constitutional Law throughout three-quarters of its history. Consider, for example, the doctrine of tax exemption which converted Federalism into a principle of private immunity from taxation, so that, for example, neither government could tax as income the official salaries paid by the other government. Consider, too, the paradox which is illustrated in the case of *Hammer v. Dagenhart*,[10] overruled in the *Darby* case, in which it was held that an attempt by Congress to exclude child-made goods from the channels of interstate commerce was not a regulation of commerce, but an invasion of the police powers of the States, although by other decisions then in good standing a similar attempt by a State would have been an invasion of Congress' power to regulate commerce. Thus was a realm of no-power created—a veritable *laissez faire* Utopia! And all such results sprang from a conception of the federal relationship which regards the National Government and the States as rival governments bent on mutual frustration, and on a conception of the judicial role which made it the supreme duty of the Court to maintain the two centers of government in theoretical possession of their accustomed powers, however incapable either might be in fact of exercising them. Indeed, maintenance of the Federal Equilibrium became—the Due Process clause aside—the be-all and end-all of Judicial Review.

By the *cooperative* conception of the federal relationship, on the other hand, the States and the National Government are regarded as mutually complementary parts of a *single* governmental mechanism all of whose powers are intended to realize the current purposes of government according to their applicability to the problem in hand. *This is the conception on which the New Deal rests.* It is, for example, the conception which the Court invokes throughout its decisions in sustaining the Social Security Act of 1935[11] and supplementary State legislation. It is also the conception which underlies Congressional legislation of recent years making certain crimes against the States, like theft, racketeering, kid-

[8] *Ex parte Siebold*, 100 U. S. 371 (1880).
[9] 227 U. S. 328 (1913).
[10] 247 U. S. 251 (1918).
[11] 49 Stat. 620, 42 U. S. C. 7 (1935).

naping, crimes also against the National Government whenever the offender extends his activities beyond State boundary lines. The usually cited constitutional justification for such legislation is that which was established more than a quarter of a century ago in the *Hoke* case, from which I quoted just previously.

It has been argued, however, that the cooperative conception of the federal relationship, especially as it is realized in the policy of federal subventions to the States, tends to break down State initiative and to devitalize State policies. Actually, its effect has, to date, usually been just the contrary, and for the reason pointed out by Justice Cardozo in *Helvering v. Davis,*[12] also decided in 1937, namely, that the States, competing as they do with one another to attract investors, have not been able to embark separately upon expensive programs of relief and social insurance. The other great objection to Cooperative Federalism is, however, much more difficult to meet. This is, that "Cooperative Federalism" spells further aggrandizement of national power. Unquestionably it does, for when two cooperate it is the stronger member of the combination who calls the tunes. Resting as it does primarily on the superior fiscal resources of the National Government, Cooperative Federalism has been, to date, a short expression for a constantly increasing concentration of power at Washington in the instigation and supervision of local policies.

The second great structural principle of American Constitutional Law is supplied by the doctrine of the Separation of Powers. How has this principle fared at the hands of recent tendencies, and more particularly, at the hands of the New Deal?

The notion of three distinct functions of government approximating what we today term the legislative, the executive, and the judicial, is set forth in Aristotle's *Politics,* but it was "the celebrated Montesquieu" who by joining the idea to the notion of a "mixed constitution" of "checks and balances," in Book XI of his *Spirit of the Laws,* brought Aristotle's discovery to the service of the rising libertarianism of the eighteenth century. It was Montesquieu's fundamental contention that "men entrusted with power tend to abuse it." Hence it was desirable to divide the powers of government, first, in order to keep to a minimum the powers lodged in any single organ of government; secondly, in order to be able to oppose organ to organ. So vague a principle, nevertheless, was bound to take color from the institutional landscape against which it chanced to be projected. In England, where the principle formerly had currency in the "literary theory" of the British constitution, it early became subordinated to the doctrine of parliamentary sovereignty and to the Cabinet System. On the other hand, while the principle was formerly thought to support the accountability of administrative offi-

[12] 301 U. S. 619 (1937).

cials to the ordinary courts—the so-called "rule of law"—in France it was invoked from the outset in behalf of the contrasted system of *"droit administratif."* Nor is the explanation of the difference far to seek. Whereas England was made a nation by her law courts and her Parliament, France was the creation primarily of the Capetian administrative system.

In the United States libertarian application of the principle was originally less embarrassed by inherited institutions. In its most dogmatic form the American conception of the Separation of Powers may be summed up in the following propositions: (1) There are three intrinsically distinct functions of government, the legislative, the executive, and the judicial; (2) these distinct functions ought to be exercised respectively by three separately manned departments of government; which, (3) should be constitutionally equal and mutually independent; and which, (4) taken together, cover the entire field of governmental power.

Even prior to the New Deal this entire colligation of ideas had been seriously impaired by three developments in national governmental practice: first, the growth of Presidential initiative in legislation; secondly, the delegation by Congress of legislative powers to the President; thirdly, the delegation in many instances of like powers to so-called "independent agencies" or commissions, in which are merged "the three powers of government" of Montesquieu's postulate. The first two of these developments have been brought under the New Deal to a pitch not formerly approximated except temporarily during the war with Germany; the third development the Roosevelt administration resisted and even attempted to nullify in the interest of further concentration of power in the hands of the President, and during the war succeeded more or less in doing so through the creation of such agencies as WPB, WMC, OWI, etc. I cannot, of course, go into detail; I can only indicate certain achieved results.

When people talk about "Presidential autocracy" they are apt, especially under war conditions, to be thinking chiefly of those powers which the President gets directly from the Constitution. Actually, a vast proportion of the great powers which the President exercises even in wartime are the immediate donation of Congress. The reassurance afforded by this fact turns out on examination, nevertheless, to be rather meager. For the truth is that the practice of delegated legislation is inevitably and inextricably involved with the whole idea of governmental intervention in the economic field, where the conditions to be regulated are of infinite complexity and are constantly undergoing change. In this situation it is simply out of the question to demand that Congress should attempt to impose upon the shifting and complex scene the relatively permanent molds of statutory provision, unqualified by a large degree of administrative discretion.

Nor again, can the presidential role in the formulation of legislation for congressional consideration be reasonably expected ever to become less than it is today. One of the major reasons urged for governmental intervention is furnished by the need for gearing the different parts of the industrial process with one another for a planned result. In wartime this need is freely conceded by all; but its need in peacetime is conceivably even greater, the results sought being so immeasurably more complex.

So, both in the interest of unity of design and of flexibility of detail, presidential power today takes increasing toll from both ends of the legislative process—both from the formulation of legislation and from its administration. In other words, the principle of the Separation of Powers as a barrier preventing the fusion of Presidential and Congressional power is today pretty shaky if it is not altogether defunct.

To sum up the argument to this point: the New Deal, and the doctrines of Constitutional Law on which it rests, and the conception of governmental function which it incorporates, have all tremendously strengthened forces which even earlier were making, slowly, to be sure, but with "the inevitability of gradualness," for the *concentration of governmental power in the United States, first in the hands of the National Government; and, secondly, in the hands of the National Executive.* In the Constitutional Law which the validation of the New Deal has brought into full being the two main structural elements of government in the United States in the past, the principle of Dual Federalism and the doctrine of the Separation of Powers, have undergone a radical and enfeebling transformation which the war has, naturally, carried still further.

We come now to Judicial Review. The matter of primary interest to us in connection with this unique institution is that it is not referable —as is, for example, the President's veto power—to a specific constitutional clause, but depends on a justifying *doctrine.* In brief, this doctrine claims for the courts the power to interpret with finality the standing law, of which the Constitution is a part—indeed, the supreme part. This is on the theory that when performed by a court in connection with the decision of a case, interpretation of the standing law is an act not of *will* or *power,* but of *knowledge;* and is hence preservative of the law, and so of the Constitution when that happens to be a part of the standing law which is applicable to the case under decision. As Chief Justice Marshall phrased the matter, "Judicial power, as contradistinguished from the power of the law, has no existence. Courts are the mere instruments of the law, and can will nothing."[13]

Now whether judicial interpretation of the Constitution does preserve —or on the contrary, does *not* preserve it—is frequently a question

[13] Osborn v. The Bank, 9 Wheat. 738, at 866 (U. S. 1824).

which lies outside the realm of verifiable phenomena, it being obviously impossible in this year of grace to know what *was* intended "by the Constitution," or by the framers or the ratifiers thereof, with regard to matters which did not exist in 1787. One is reminded of an old conundrum. Query: "Does your brother like cheese?" Answer: "I have no brother." Query: "But if you had a brother, would he like cheese?"

But the critics of Judicial Review have never been content with this agnostic position. The earliest of them, indeed, asserted that Judicial Review was itself a standing refutation of the proposition that it preserved the Constitution inasmuch as it was never intended by the framers of the Constitution—was, in other words, founded on usurpation. Although this thesis has produced a whole library either in reaffirmation or refutation thereof, it can be disposed of for our purposes fairly briefly.

The words of the Constitution itself make it amply clear that the framers intended that both State and national courts, and ultimately the Supreme Court, should be entrusted with the duty of maintaining the supremacy of the Constitution and of acts of Congress "made in pursuance thereof" against all conflicting State constitutional and legal provisions. Furthermore, there is evidence to show that many of the framers anticipated that the Supreme Court would be entitled, and hence obligated, to interpret and apply against acts of Congress direct prohibitions upon the national legislative power, as, for example, the provision against *"ex post facto laws."*[14] But at this point anything approaching certainty ends, inasmuch as the experience of the framers in 1787 with Judicial Review was much too fragmentary to enable them to foresee the problems to which the institution would give rise, much less, to provide adequate and binding solutions for such problems.

Even so, to characterize Judicial Review, or to characterize Chief Justice Marshall's opinion in the leading case of *Marbury v. Madison,*[15] as "usurpation," is an altogether extravagant use of that term. Besides, a usurpation which still stands after 142 years must long since have outgrown its original taint.

Today's critics of Judicial Review delve much deeper, and bring to the surface more fundamental issues. They assert that interpretation—and hence the judicial function—is not separable from the legislative, but is a continuation of it; that preservation of the law is a superstition, and a malignant one, in that the law must constantly change to meet social needs; and finally, that since it is the tendency of Judicial Review to hamper this process of change it is undesirable; while some add that it is incompatible with the underlying principle of democracy—that when the majority want change they are entitled to get it, and in short order.

[14] Art. 1, § 9, cl. 3.
[15] 1 Cranch 137 (U. S. 1803).

The thesis of the total disinterestedness of the judicial process was first brought into question by a critic whose own disinterestedness could not be challenged, in Oliver Wendell Holmes' *Common Law,* published in 1881. On the opening page of this famous work one reads: "The law draws all its juices of life from considerations which judges rarely mention, and always with apology, I mean considerations of what is expedient for the community concerned." A generation later, a friend of Justice Holmes, Professor John Chipman Gray of Harvard, enlarged upon the former's thesis in his *Law, Its Nature and Sources.* Gray, in fact, went to the extent of asserting that interpretation is *the* law—making function *par excellence,* and he quoted repeatedly and with gusto the assertion of a certain Bishop Hoadly of the 17th century that "Whoever hath an absolute authority to interpret any written or spoken law, it is he who is truly the law-giver . . . and not the person who first wrote or spoke them."

Then a few years ago Mr.—now Judge—Jerome Frank brought out his *Law and the Modern Mind.* Here the notion of the stability of the law is attacked as an old wives' tale, belief in which has been kept up by "the father complex," the inclination, that is, of most people—or so Judge Frank alleges—when they leave the paternal roof to seek security from some other source. In the last analysis, Judge Frank, enlarging on Gray, as the latter had enlarged before on Holmes, denies that even the interpreters of the law give us *law*—they give us only decisions, he says. The Supreme Court of the United States is, therefore, one must conclude, only an enlarged version of the wise man of primitive communities who, to keep the communal peace, dispensed a ready-made justice by the wayside to settle neighborhood quarrels.

Frank's avowed anarchism fluttered the dove-cotes even of many self-proclaimed "legal pragmatists," but it must be admitted that he has been vindicated by subsequent events in two respects at least. The demand for *social* security has today reached a volume which is utterly dismaying both because of the expectation which it voices and because of the decline in what Frank himself calls "the spirit of adventure." The second way in which Frank has been vindicated is more immediately relevant to our theme; I mean, by the extent to which the Supreme Court has overruled earlier decisions in upholding the New Deal legislation. Many of those earlier decisions were, to my mind, erroneous and needed to be overturned. Nevertheless, the confession by the Court of having committed error on such a scale and involving constitutional interpretations of such magnitude, has presented the thesis of the Court's preservative function with the sharpest challenge it has ever met.

More than that, however, when this confession of error and the consequent acts of restitution by the Court are set against the background of the ideological motivation of the New Deal legislation, they force

the conclusion that Judicial Review has today become, like Dual Federalism and like the principle of the Separation of Powers, a secondary and subordinate factor of national power, whether wielded by President or by Congress.

And this brings us to the fourth structural element of our Constitutional Law which has latterly undergone enfeeblement. I mean the doctrine of Substantive Due Process of Law.

The Due Process of Law clause of the Fifth Amendment reads: "nor shall any person . . . be deprived (that is, by the National Government) of life, liberty, or property, without due process of law." The clause derives, via a statute of Edward III's time, from the thirty-ninth chapter of Magna Carta (Chapter 29 of the issue of 1225). There the King promises that "no free man" shall be imprisoned or deprived of his estate, or otherwise despoiled except "in accordance with the judgment of his peers or the law of the land *(legem terrae)*." By the phrase *"legem terrae"* here was meant that mode of trial which eventually ripened into the grand jury—petit jury process of the common law; and there can be little doubt that it was the main concern of the men who were responsible for the Fifth Amendment to consecrate this process.

But the circumstances which render the Due Process clause a fundamental element of American Constitutional Law was the role it has played in articulating transcendental theories of private immunity with the Constitutional Document. Particularly did the framers subscribe to the notion that the property right, which they regarded as anterior to government, set a moral limit to the latter's powers. Yet could Judicial Review pretend to operate on a merely moral basis? Both the notion that the Constitution was an emanation from the *sovereignty* of the people, and the idea that Judicial Review was but a special aspect of normal judicial function, forbade the suggestion. It necessarily followed that unless judicial protection of the property right against legislative power was to be waived, it must be rested on some clause of the Constitutional Document; and, inasmuch as the Due Process clause, and the equivalent Law of the Land clause of certain of the early state constitutions, were the only constitutional provisions which specifically mentioned property, they were the ones selected for the purpose.

The absorptive power of the Due Process clause and the equivalent Law of the Land clause was foreshadowed as early as 1819 in a dictum by Justice William Johnson of the United States Supreme Court: "As to the words from *Magna Charta* . . . after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."[16]

[16] The Bank of Columbia v. Okely, 4 Wheat. 235 (U. S. 1819).

Thirty-eight years later the prophecy of these words was realized in the famous *Dred Scott* case[17] in which Section 8 of the Missouri Compromise, whereby slavery was excluded from the territories, was held void under the Fifth Amendment, not on the ground that the procedure for enforcing it was not due process of law, but because the Court regarded it as unjust to forbid people to take their slaves, or other property, into the territories, the common property of all the States. "Due Process of Law" came, in short, to mean the Court's idea of what was just.

Then with the adoption of the Fourteenth Amendment in 1868 the Court found itself presented with a vast new jurisdiction by the clause which forbits any *State* to "deprive any person of life, liberty, or property, without due process of law." Although at first the Court manifested the greatest reluctance to enter upon its tempting heritage, when it finally did so, about 1895, it discovered that the clause had meantime acquired a new dimension in the conception of liberty as *freedom of contract*. The Court now became for more than a generation the ultimate guardian, in the name of the Constitutional Document, of the *laissez-faire* conception of the proper relation of government and private enterprise—a rather inconstant guardian, however, for its fluctuating membership tipped the scales now in favor of business, now in favor of government, that is, of "the power of numbers," as Justice Matthews once put it. And in the New Deal cases, the latter tendency appears to have won out definitely. Due Process of Law in those cases means Congress' view of what is just, without ordinarily any correction by the Court.

In short, the same dissolving tendency is seen to be operating today upon the Due Process clause as upon the Separation of Powers principle and the Dual Federalism principle, in favor of legislative power and in limitation of Judicial Review.

The fundamental elements of American Constitutional Law reduce, therefore, to a single element, Judicial Review, and this has gradually emancipated itself from all documentary and doctrinal restraints, and even from the restraint which was originally implicit in common law jurisdictions in the judicial function as such—the principle of *stare decisis*. But now the result of this self-achieved emancipation has been to extend and at the same time to obliterate the frontier between Constitutional Law and policy; and without a definite boundary to defend, Judicial Review itself becomes an instrument of policy, and thereby exposes itself more and more to political criticism.

The consequence is that today American Constitutional Law appears to be in a highly deliquescent state. The old hard-and-fast distinctions are no more. As the final oracle of Due Process of Law the Court is still able to defend certain values like fair trial and freedom of utterance

[17] Scott v. Sanford, 19 How. 393 (U. S. 1857).

against local prejudices and unfairness; but national legislative power itself tends to become a due process of law which is coextensive with an already nationalized social and industrial life.

The question naturally arises whether these changes in the structure of our Constitutional Law are likely to persist. Considering their reach and scope, the answer would seem, on the face of things, to be yes; but there is an even more compelling reason for holding that they will endure and even be enlarged in the future. This is that they spring from a common underlying cause, one moreover which transcends juridical concepts and permeates popular outlook itself. I mean, of course, that altered conception of governmental function to which I have previously referred. American Constitutional Law came to maturity under, and received those characteristic features which I have been sketching, from the notion that government exists simply for the purpose of supplementing and reinforcing the non-political controls of society, and especially those which rest on social superiority and economic power. The theory to which our present-day Constitutional Law testifies increasingly is that government should correct these non-political controls from the point of view of the theory of the equality of man. Fusion of governmental functions translates to an increasing extent into a policy of social levelling.

Although the statement is subject to important correction at points —the case of the tariff furnishing the outstanding instance—yet it can be fairly said that from the fall of the Federalist Party in 1801 to the capture of the government at Washington by the New Deal 132 years later, the Jeffersonian, libertarian conception of governmental function generally prevailed in this country, the demand for equality meantime finding satisfying expression in purely political terms, more especially in the establishment of white manhood suffrage. Nor is the reason for this far to seek; it was stated indeed by the younger Pinckney in the Federal Convention in these words: "There is more equality of rank and fortune in America than in any other country under the sun, and this is likely to continue as long as the unappropriated western lands remain unsettled. . . . I lay it therefore down as a settled principle that equality of condition is a leading axiom of our government."

So when the great panic of 1837 stimulated demands for governmental intervention, these demands met a confident rebuke from the shrewdest politician of the period. I quote from President Van Buren's message of September 4, 1837, dealing with the then burning issue of banks and currency:

> All communities are apt to look to government for too much. Even in our own country, where its powers and duties are so strictly limited, we are prone to do so, especially at periods of sudden embarrassment and distress. But this ought not to be. The framers of our excellent Constitution and the people who

> approved it with calm and sagacious deliberation acted at the time on a sounder principle. They wisely judged that the less government interferes with private pursuits the better for the general prosperity. It is not its legitimate object to make men rich or to repair by direct grants of money or legislation in favor of particular pursuits losses not incurred in the public service.

What, therefore, the Government ought to do, Van Buren urged, was not to revive the defunct Bank of the United States, but get out of the banking business altogether—and this in due course is just what it did do.

What a contrast is this picture to what happened 96 years later! That the contrast is due to an important extent to difference in political leadership is no doubt true, but political leadership does not function in a vacuum. The fact is that the *New Deal came to power because it appealed to an altered outlook on the part of a large section of the American people toward the nature and purpose of government,* to an altered expectation on their part of what government can do if it only tries hard enough. Nor did this change in outlook come in a day—it was in its inception a gradual development. Yet there can be no doubt that the collapse of 1929 and the succeeding depression strengthened and confirmed this change in outlook immensely. By the same token, the new outlook is likely to persist, as is shown for example in the confident talk about 60 million jobs and the commitments which many of our public men have assumed in this connection.

So again we must conclude that the changes in the structure of our Constitutional Law which this article traces will be on the whole permanent ones. In Thomas Wolfe's poignant words, "We can't go home again"—if indeed we should wish to.