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FEDERALISM

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Federalism

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American constitutional federalism emerged from a complex matrix comprised by multiple intellectual, institutional, and experiential sources: from political theorists ranging from Machiavelli to Montesquieu and from Harrington to Hume; from colonial analogies to other dominions connected to the English realm through a common monarch, such as Ireland and 17th-Century Scotland; and from an assortment of colonial customs, practices, and formal and informal institutional arrangements that were varied, fluctuating, contested, and in many respects underspecified.[1] The multiplicity and diversity of these conceptual and historical inputs insured that the nature and implementation of the federal idea would be matters of continuing political and theoretical debate.

Though the Supreme Court of the United States has played a preeminent role in the liquidation of the federal idea, its contours have been shaped by contributions from multiple centers: by state and federal legislators in decisions whether to initiate or enact legislation; by state and federal executives determining whether to approve or veto legislation with which they were presented; by state and federal judges reviewing legislation for constitutionality or

[1] See, e.g., Alison L. LaCroix, The Ideological Origins of American Federalism (2010); Edward A. Purcell, Jr., Originalism, Federalism, and the American Constitutional Enterprise: A Historical Inquiry (2007); Daniel J. Hulsebosch, Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830 (2005); Mary Sarah Bilder, The Transatlantic Constitution: Colonial Legal Culture and the Empire (2004); John Phillip Reid, Constitutional History of the American Revolution (abridged ed., 1995); Jack P. Greene, Negotiated Authorities: Essays in Colonial Political and Constitutional History (1994); Samuel H. Beer, To Make a Nation: The Rediscovery of American Federalism (1993); Jack P. Greene, Peripheries and Center: Constitutional Development in the Extended Polities of the British Empire (1985); John Phillip Reid, In a Defiant Stance: The Conditions of Law in Massachusetts Bay, the Irish Comparison, and the Coming of the American Revolution (1977); J.G.A. Pocock, The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition (1975); Douglass Adair, Fame and the Founding Fathers (1974); Gordon S. Wood, The Creation of the American Republic, 1776-1787 (1969).

determining which rules of decision to apply in cases coming before them; by eloquent statesmen and commentators motivated by combinations of high principle and immediate interest; and by the people by whom such officials were elected to or retired from office. Much of the work of constructing a working federal system has been performed incrementally, as actors in each of the branches of government, and judges most particularly, have sought in the context of particular cases or issues to find solutions to the practical problems arising from the coexistence of two semi-autonomous levels of government within a single territory. Though the subjects addressed by this accumulative process have varied from generation to generation, many of the themes and tensions have proven remarkably durable. Still, the fallout from two exogenous shocks to the federal system have fundamentally reoriented the trajectory of American constitutional federalism. The first was the Civil War and the Reconstruction that followed; the second was the Great Depression and the resulting New Deal, which in the domain of political economy transformed American federalism from a regime constituted by a set of judicially-enforced rules into a system constituted by a collection of political values entrusted to the democratic process. In the domain of civil rights, meanwhile, the "rights revolution" saw the federal judiciary claim authority to decide questions previously left to state and local governments.

This chapter proceeds in four parts. Part I discusses salient developments in American constitutional federalism between the ratification of the Constitution and the Civil War. Part II examines the impact of the Civil War and Reconstruction on the federal equilibrium, particularly with respect to the domain of civil rights. Part III explores the intricate body of constitutional doctrine that the post-Civil War Court constructed to address the complex governance issues presented by a rapidly integrating and industrializing economy in a federal system, and the

disintegration of that body of doctrine during the crisis of the Great Depression. Part IV analyzes the evolution of American constitutional federalism in the post-New Deal era.

The Antebellum Period

The Constitution that emerged from the Philadelphia Convention created a federal government of limited and enumerated powers. The powers of Congress were listed in Article I, Section 8, and included authority to regulate commerce among the several states and with foreign nations, to tax and spend for the general welfare, and to establish lower federal courts. In addition, the Section's final provision granted Congress power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." The Bill of Rights, ratified in 1791, imposed a series of affirmative limitations on federal power dealing principally with freedom of speech, of the press, and of religion; the right to keep and bear arms; takings or deprivations of private property; and matters concerning the investigation, prosecution, and adjudication of alleged criminal offenses. The Tenth Amendment provided that "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." Article I, Section 10 imposed limitations on the power of state governments to engage in foreign policy, tax foreign trade, regulate currency, and enact retrospective laws, and the Supremacy Clause of Article VI bound state judges to enforce the federal Constitution, valid federal statutes, and national treaties, even where they conflicted with a state constitution or state law. In other respects the Constitution left the states with broad legislative, executive, and judicial powers.

The Supreme Court's assertion and establishment in the early years of the Republic of the power to review state and federal legislation for its compliance with the Constitution brought to

the Court a series of litigants claiming that either a state or the federal government had transgressed limitations imposed by the national charter. During the antebellum period, the justices settled a handful of important questions concerning the nature of the federal republic that ratification of the Constitution had created. Several of these had to do with the jurisdiction of the federal courts. In *Martin v. Hunter's Lessee*,[2] the justices upheld the constitutionality of Section 25 of the Judiciary Act of 1789, which conferred upon the Supreme Court appellate jurisdiction over certain state court decisions involving the Constitution, treaties, or federal statutes. In *Cohens v. Virginia*,[3] the Court extended this holding to cases in which one of the states was a party. These two decisions consolidated the vision of a national judicial system in which the state courts would serve in some respects as lower federal courts.

Three significant restraints on federal judicial power emerged from different sources. The ratification of the Eleventh Amendment in 1795 overruled the Court's decision in *Chisholm v. Georgia*,[4] which had provoked fierce objections from the states, and established that the federal courts did not have jurisdiction in cases in which a citizen of one state sued another state. In *United States v. Hudson & Goodwin*,[5] a narrowly divided Court declined to follow the path blazed by several lower court decisions in the 1790s, and declared that the lower federal courts had no jurisdiction to try cases charging criminal offenses at common law. Such courts could exercise jurisdiction only where the infraction alleged had been made criminal by congressional statute. And in connection with efforts by Georgia officials to force the Cherokee from the state to the western Indian Territory, the Court held in *Cherokee Nation v. Georgia*[6] that Native

[2] 14 U.S. 304 (1816).
[3] 19 U.S. 264 (1821).
[4] 2 U.S. 419 (1793).
[5] 11 U.S. 32 (1812).
[6] 30 U.S. 1 (1831).

American nations were not foreign nations within the meaning of Article III of the Constitution, but instead "domestic dependent nations" without standing to invoke the Court's original jurisdiction.

These curtailments of jurisdiction were, however, accompanied by three modes of expansion. First, in *The Genessee Chief v. Fitzhugh*,[7] the Court overruled the precedent of the *Steamboat Thomas Jefferson*,[8] which had held that the federal admiralty jurisdiction extended only to the ebb and flow of the tide. Henceforth, that jurisdiction would extend to all navigable inland waterways as well. Second, in *Louisville Railroad Co. v. Letson*[9] and *Marshall v. B&O Railroad Co.*,[10] the Court departed from earlier precedents and, through the use of a legal fiction, effectively held that corporations were citizens for purposes of suing and being sued in federal court under Article III's grant of jurisdiction over cases involving citizens of different states ("diversity" jurisdiction). And third, decisions such as *Swift v. Tyson*[11] held that federal courts sitting in diversity were not obliged by Section 34 of the Judiciary Act to apply the decisional law of the states in which they sat, but could instead apply what they determined to be the "general" common law governing the controversies before them. Over time, the domain of the general common law expounded by federal courts came to include the law of contracts, commercial transactions, torts, insurance, common carriers, and eventually even of real property.

Though there were few questions concerning the scope of Congress's enumerated powers that generated significant litigation before the Civil War, those that did produced some of the period's most celebrated and vilified decisions. Secretary of the Treasury Alexander Hamilton's

[7] 53 U.S. 443 (1851).
[8] 23 U.S. 428 (1825).
[9] 43 U.S. 497 (1844).
[10] 57 U.S. 314 (1853).
[11] 41 U.S. 1 (1842).

financial system was among the most divisive issues of the early Republic, and his proposal for a congressionally chartered Bank of the United States elicited considerable constitutional controversy. James Madison, arguing for a narrow construction of Congress's enumerated powers, observed that the Constitution conferred no such power to charter a bank. Indeed, Madison's own motion that the federal government be empowered to grant corporate charters had been rejected at the Philadelphia Convention. As for Article I's Necessary and Proper Clause, Madison maintained, it should be read so as to authorize only such powers as arose by "unavoidable implication" from those specifically enumerated. Secretary of State Thomas Jefferson, asked by President Washington for his views on the constitutionality of the Bank Bill, replied that it was beyond congressional power. Construing the text strictly, Jefferson observed that the Constitution conferred no express power to charter a bank, and maintained that the term "necessary" should be read not to mean merely "convenient," but instead should be rendered as "indispensable." Hamilton, by contrast, insisted that the Constitution conferred both express and implied powers on Congress, and he gave the Necessary and Proper Clause its classic broad construction: "If the end be clearly contemplated within any of the specified powers, and it the measure have an obvious relation to that end, and is not forbidden by any particular provision of the Constitution, it may be safely be deemed to come within the compass of the national authority."

Washington signed the bill, but the charter lapsed of its own terms in 1811. When then-President Madison was faced with a bill to charter a Second Bank in 1816, his opinion on the constitutional issue had not changed. But because he believed that the actions of the political branches and the American people had settled the question in favor of the Bank's constitutionality, he declined to veto the bill. When a unanimous Supreme Court placed its

constitutional imprimatur on the Bank in *McCulloch v. Maryland*,[12] Chief Justice John Marshall's exposition of the Necessary and Proper Clause simply paraphrased the construction rendered by Hamilton nearly three decades earlier: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional."[13] In 1832, however, Congress preemptively sent a bill renewing the Bank's charter to a hostile President Andrew Jackson. Invoking departmental principles of constitutional interpretation, Jackson vetoed the bill on the ground that Congress lacked the constitutional power to enact it. Continued domination of the presidency by Democratic successors ensured that Jackson's views of the Bank's constitutionality would prevail throughout the antebellum period.

In *Gibbons v. Ogden*,[14] the Court offered its principal antebellum exposition of the congressional power to regulate interstate commerce. The case involved the validity of New York's grant of a monopoly in steamboat navigation on the Hudson River between New York and New Jersey. Here Chief Justice Marshall established that "commerce among the several states" included not merely "traffic," i.e., the buying and selling of goods, but all commercial "intercourse," including interstate navigation. Associate Justice William Johnson maintained that congressional power to regulate interstate commerce was exclusive, and that the grant of this power to Congress implicitly deprived the states of legislative jurisdiction over the subject. Marshall found it unnecessary to reach this question, finding that the New York legislation conflicted with a 1793 federal coastal licensing statute, and was therefore void under the

[12] 17 U.S. 316 (1819).
[13] Id. at 421.
[14] 22 U.S. 1 (1824).

provision of Article VI declaring statutes enacted pursuant to Congress's constitutional authority "the Supreme Law of the Land."

Despite the Court's seemingly broad formulation of the Commerce Clause in *Gibbons*, the antebellum Congress hesitated to call upon that power as a source of regulatory authority. Perhaps most notable in this regard was the failure of Congress seriously to consider regulation or prohibition of the interstate trade in slaves.[15] Instead, the three decades following *Gibbons* witnessed the justices engaging in a divisive debate over whether and to what extent the "negative implications" of the Constitution's grant of power over interstate commerce to Congress imposed restraints on the taxing and regulatory powers of the states. Though they disagreed over whether the commerce power was exclusive or concurrent, and the extent to which it qualified the states' police powers to regulate for the health, safety, and welfare of their inhabitants, the members of the Court on the whole upheld state measures challenged under what came to be known as the "dormant" Commerce Clause. Ultimately, in *Cooley v. Pennsylvania Board of Wardens*,[16] six of the nine justices joined an opinion that split their differences. They agreed that some aspects of interstate commerce were national in character and therefore could be regulated only by Congress. With respect to the regulation of such activities, congressional power was exclusive. Other aspects, by contrast, were local in character. The states were permitted to regulate these aspects of interstate commerce unless and until Congress had legislated with respect to them. With respect to these activities, state power was concurrent, though federal power was paramount. The majority justices agreed that Pennsylvania's challenged regulation of pilotage fell into the latter category, but the determination of which activities fell into which category was for the most part left open to the case-by-case

[15] See Arthur Bestor, "The American Civil War as a Constitutional Crisis," 69 Am. Hist. Rev. 327 (1964).
[16] 53 U.S. 299 (1851).

determination of future Courts. As one scholar has put it, the *Cooley* decision's most "significant feature" was "not the formulation of a definitive doctrine but the court's tacit agreement to stop looking for one."[17]

Federalism also played a central role in the law of freedom and slavery. In 1776, slavery was legal in all of the North American colonies. But the Constitution left the decision over whether to countenance slavery to the several states, and over the next three decades eight northern states took steps to emancipate their slave populations, either gradually or at a stroke. For the remainder of the antebellum period, new free and new slave states were admitted to the Union in nearly equal proportions, so that in 1858 Abraham Lincoln could with reason describe the nation as "half slave and half free." The heterogeneity of state policy positions on the issue gave rise to a series of controversies over states' rights and federal power.

Article IV, Section 2 of the Constitution provided that "The citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states." This provision was understood to require that, with regard to the enjoyment of certain privileges and immunities, a citizen of one state traveling in a second state must be treated by that state as if he were one of its own citizens. The question of whether free blacks from northern states were citizens entitled to the equal enjoyment of such privileges and immunities when traveling to unfree states arose in two contexts.

The first concerned the so-called Negro Seamen's Laws, enacted by the legislatures of South Carolina and six other coastal slave states. Those statutes prescribed that black sailors be incarcerated in local jails for the periods during which their ships were in port. In 1823 Justice Johnson, sitting in his capacity as a federal circuit judge, heard a constitutional challenge to

[17] R. Kent Newmyer, The Supreme Court Under Marshall and Taney 107 (2d ed., 2006).

South Carolina's statute. Anticipating his concurring opinion in *Gibbons*, Johnson held that the statute offended the dormant Commerce Clause.[18] South Carolina and its sister states nevertheless persisted in enforcing their laws, and in 1832, President Andrew Jackson's Attorney General, Roger Taney, wrote an opinion concluding that the southern statutes did not violate Article IV's Privileges and Immunities Clause. Anticipating his own decision a quarter century later in *Dred Scott v. Sandford*,[19] Taney wrote that "[t]he African race in the United States, even when free, are everywhere a degraded class, and exercise no political influence. The privileges they are allowed to enjoy, are accorded to them as a matter of kindness and benevolence rather than of right….They were not looked upon as citizens by the contracting parties who formed the Constitution….and were not intended to be embraced in any of the provisions of that Constitution but those which point to them in terms not to be mistaken."[20]

The second context in which the Privileges and Immunities issue arose concerned the so-called exclusion laws. Most southern states enacted legislation prohibiting free blacks from entering their states, and by 1857, four northern states had joined their ranks. No successful constitutional challenge to these measures ever was mounted, and an 1856 decision of the Indiana Supreme Court enforcing that state's statute appeared to assume its constitutionality.[21]

Article IV, Section 2 also provided that "No Person held to Service or Labor in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labor, but shall be delivered up on Claim of the

[18] Elkison v. Deliesseline, 8 Fed. Cas. 493 (C.C.D. S.C., 1823).
[19] 60 U.S. 393 (1857).
[20] Opinion and supplement accompanying letters of Taney to Secretary of State Edward Livingston, dated May 28 and June 9, 1832, Miscellaneous Letters, Department of State Papers, National Archives, quoted in Don E. Fehrenbacher, The Dred Scott Case: Its Significance in American Law and Politics 70 (1978). In Bank of Augusta v. Earle, 38 U.S. 519 (1839), then-Chief Justice Taney would similarly hold that corporations were not citizens for purposes of the Privileges and Immunities Clause.
[21] Barkshire v. State, 7 Ind. 389 (1856).

Party to whom such Service or Labor may be due." This Fugitive Slave Clause did not specify the means by which its directives were to be enforced, but in 1793 Congress assumed powers of enforcement by enacting the first Fugitive Slave Act. The Act permitted the owner of a fugitive slave or the owner's agent to seize the alleged slave and to bring him before either a federal or state judge in the free state in which the alleged slave was located. If the owner or agent could prove title to the fugitive by affidavit or oral testimony, the judge was to issue the captor a certificate of removal permitting the captor to leave the jurisdiction with the fugitive. In addition, the Act imposed criminal penalties for obstructing the capture and for rescuing, harboring, aiding, or hiding an alleged fugitive slave.

Northern antislavery lawyers and legislators, construing the Constitution strictly, maintained that, because the Constitution was silent on the mechanism for rendition of fugitives, the matter had been left to the several states. Anxious to protect their free black citizens from wrongful abduction, they persuaded legislators in most northern states to enact anti-kidnapping statutes providing procedural protections for alleged fugitive slaves in proceedings before state judges. In the 1842 case of *Prigg v. Pennsylvania*,[22] the Supreme Court struck down Pennsylvania's anti-kidnapping statute on the ground that it conflicted with the 1793 Fugitive Slave Act and was therefore invalid under the Supremacy Clause. At the same time, however, the Court maintained that the federal government could not compel state governments to enforce the federal Act. Such a requirement would be an infringement on states' rights. Justice Story's majority opinion further acknowledged that the states could refuse to allow their officers and officials to enforce the federal law. In response, northern states withdrew the assistance of their law enforcement officials in helping slave owners recapture fugitive slaves. Several state

[22] 41 U.S. 539 (1842).

legislatures enacted personal liberty laws, prohibiting state officials from enforcing the federal Act, or repealed statutes that had directed state officials to enforce it. And numerous state court judges cited *Prigg* in holding that they were without power to issue a certificate of removal or otherwise entertain proceedings concerning fugitive slaves. Slave owners could proceed to the federal courts, but they were few and far between, and might be more than a hundred miles away and not even in session. The protections that the personal liberty laws provided for free blacks and fugitive slaves prompted John C. Calhoun to denounce them as "one of the most fatal blows ever received by the South and the Union." They had, he lamented, rendered the constitutional obligation to return runaways "of non-effect, and with so much success that it may be regarded now as practically expunged from the Constitution."[23]

In 1850, in response to southern demands for a more stringent federal law prompted by the passage of the new northern personal liberty laws, Congress enacted a statute beefing up the enforcement provisions of the 1793 Act with the creation of federal fugitive slave commissioners, who were granted authority to issue certificates authorizing the removal of a captured fugitive from a free state. Several northern states responded by enacting new personal liberty laws designed to frustrate the federal rendition process by denying slave catchers the assistance of state officials or the use of state jails, appointing commissioners to defend anyone claimed as a fugitive, strictly punishing anyone guilty of seizing a free man, and supplying alleged fugitives with substantial procedural guarantees. In some states, such as Massachusetts, slave catchers were so intimidated by the obstacles to rendition that they simply stopped pursuing those who managed to reach free soil. Southern politicians complained that these personal liberty laws had rendered the federal statute a dead letter, and South Carolina's

[23] 6 Richard Cralle, ed., The Works of John C. Calhoun 292 (1870), quoted in Thomas D. Morris, Free Men All: The Personal Liberty Laws of the North, 1780-1861 130 (1974).

Declaration of the Causes of Secession of 1860 listed the personal liberty laws as the first of its grievances against the northern states. The Declaration charged that "fourteen of the States have deliberately refused, for years past, to fulfill their constitutional obligations" by enacting "laws which either nullify" the Fugitive Slave Laws of Congress "or render useless any attempt to execute" those laws.[24]

Occasionally a slave owner traveling to or through a free state would voluntarily bring with him one or more of his slaves. Before the mid-1830s, free states generally extended comity to the law of southern states by allowing masters to sojourn in the North accompanied by their slaves. If, however, the master established a domicile in the northern state, then the slaves accompanying him became free. The question of domicile usually turned on the intentions of the master, but states such as Pennsylvania and New York enacted statutes providing that the master became a domiciliary of their states if he remained there for longer than six or nine months, respectively. Similarly, if the master returned to his southern home after having established a domicile in a free state, southern state courts extended comity to northern state laws by holding that slaves that had accompanied the master were as a result now free.[25]

Beginning in the 1836, however, under the spur of rising abolitionist sentiment and Joseph Story's 1834 treatise on the Conflict of Laws, northern state courts began to grant freedom to slaves that had been brought into their jurisdictions for much shorter periods of time. The Supreme Judicial Court of Massachusetts led the way with its 1836 decision in *Commonwealth v. Aves*,[26] but over the next two decades every northern state other than Indiana and New Jersey followed suit. Pennsylvania and New York repealed their comity statutes, with

[24] Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union (1860).
[25] Paul Finkelman, An Imperfect Union: Slavery, Federalism, and Comity (1981).
[26] 35 Mass. 193 (1836).

the effect that slaves traveling through those states could now be freed as soon as they crossed the border.[27] In 1860, the New York Court of Appeals would hold that Virginia slaves who had spent a mere three days in a New York hotel awaiting passage on a ship were free.[28] Slaves who escaped to free states remained enslaved under federal law, but slaves who were brought to a free state by their masters became free by virtue of state law.

Southern state courts responded by ceasing to extend comity to the northern law of freedom. Even if a northern court would have ruled that a slave had become free under the terms of the law of the jurisdiction into which his master had taken him, if the slave did not secure his freedom in the North but instead returned with his master to the South, southern courts began to rule that his status as a slave had "reattached" upon his return.[29] The most famous such instance involved the slave Dred Scott, whose master, an army physician, had taken Scott with him for two-year postings in both the free state of Illinois and the free Minnesota Territory. Scott sued for his freedom when he returned, and the Missouri Supreme Court, refusing to extend comity to the laws of Illinois and the federal territory, held that Scott remained a slave.[30] After Dr. Emerson died, Scott sought his freedom in federal court by suing the estate's executor, Sanford. The defendant was a citizen of New York, and thus might have been amenable to suit under the federal court's jurisdiction involving citizens of different states.[31] But Chief Justice Taney reprised his interpretation of Article IV while Attorney General, holding that the federal courts lacked jurisdiction to hear the case because, as an African-American, Scott could not be a citizen for purposes of Article III even if he were free. Taney and his colleagues went on to hold that

[27] Finkelman, An Imperfect Union.
[28] Lemmon v. People, 20 N.Y. 562 (1860).
[29] Finkelman, An Imperfect Union.
[30] Scott v. Emerson, 15 Mo. 576 (1852).
[31] Fehrenbacher, The Dred Scott Case.

Scott was not free in any event, because the provision of the Missouri Compromise (1820) making the federal territory free was beyond congressional power to enact, and the slave state of Missouri was not required to extend comity to the law of the free state of Illinois.[32]

The period's central unresolved question in constitutional federalism, which became ever more pressing as time wore on, concerned the character of the Union. Was it a single, compound republic, partly national and partly federal, or was it instead merely a compact among sovereign States? Was the Union perpetual, or were States at liberty to withdraw from it? Though in connection with these inquiries intelligent contemporaries and subsequent commentators have lavished a great deal of attention on the question of whether the Nation preceded the States in time or vice versa, it does not appear that anything of consequence turns on the resolution of this issue. If in fact the States preceded the Nation in time, it does not follow that the States were at liberty to secede from the Union formed by the Constitution. Similarly, if the Nation preceded the States, it does not follow that the States were precluded by the Constitution from departing the Union. The relevant question was, what sort of union did the ratification of the Constitution call into being? The Constitution's silence on that question assured that it would remain a disputed one.

The issue was first prominently joined when the Federalist Congress enacted the Alien & Sedition Acts in 1798. In anonymous pamphlets authored respectively by James Madison and Thomas Jefferson, the Virginia and Kentucky Resolutions maintained that Congress was without power to enact the legislation in question. Madison's Virginia Resolutions maintained that the sovereign states were empowered to judge independently the constitutionality of congressional legislation, and had the right and duty to "interpose" in order to preserve their rightful authority

[32] 60 U.S. 393 (1857).

and to protect the rights and liberties of their people "in case of a deliberate, palpable, and dangerous exercise" of powers not granted by the federal "compact." Jefferson's Kentucky Resolutions went further, claiming in addition that the proper remedy for federal overreaching was state "nullification" of such unconstitutional federal enactments. Though each of the documents called upon other states to cooperate in efforts to resist usurpation by the federal government, no sister states rallied to the cause. The issue soon was mooted by the expiration of the objectionable legislation, which lapsed before Jefferson's inauguration as president in March of 1801.

The issue again came to a head in 1832, however, when a South Carolina convention disgruntled by the allegedly unconstitutional 1828 federal "Tariff of Abominations" drew upon the compact theory of the Union articulated in Vice-President John C. Calhoun's anonymously-authored 1828 *South Carolina Exposition* and his 1831 *Fort Hill Address* in adopting an ordinance purporting to "nullify" the tariff within South Carolina. The ordinance declared unlawful any efforts by state or federal authorities to enforce the tariff, and directed the legislature to enact measures to prevent such enforcement. Moreover, the authors of the ordinance took a position that Madison and Jefferson had not advocated, and that Madison later disavowed, by threatening secession from the Union should the federal government attempt to coerce South Carolina in the matter. Like the authors of the South Carolina ordinance, most of the statesmen who had spoken on the issue to this point in the Nation's history appeared not to regard the Union as necessarily perpetual. President Andrew Jackson, however, responded with a message denouncing both nullification and secession as unconstitutional, and Congress supported his position with the Force Act of 1833. The conflict ultimately was settled peacefully through negotiated compromise, but even in its measure repealing the ordinance, the South

Carolina convention pointedly preserved its constitutional claims by expressly purporting to nullify the Force Act. As John Quincy Adams wrote of the issue of whether the Union was perpetual, "It is the odious nature of the question that it can be settled only at the cannon's mouth."[33]

Civil War and Reconstruction

And so it was. When South Carolina and ten other States enacted ordinances seceding from the Union in 1860 and 1861, President Abraham Lincoln denounced the actions as unconstitutional and mobilized the remaining States for a war to preserve the Union. Secessionists maintained that the federal government was the creature and agent of the people of the states, who remained the ultimate locus of sovereignty and had retained the power to withdraw from the Union. Lincoln and others insisted that sovereign authority rested with the people of the United States rather than those of the states severally, and that the perpetuity of the Union they had together created was implicit in its fundamental law. After the Union Army emerged victorious at Appomattox, Chief Justice Salmon P. Chase of the Supreme Court of the United States articulated in memorable prose what many believed had been won on the battlefield. In pronouncing the Texas ordinance of secession a legal nullity, Chase declared in *Texas v. White*[34] that, "[t]he Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States." Notwithstanding some contrary theories seeking to explain and justify the fact that the delegations of several southern states had yet to be seated in Congress, and that large swaths of the South remained under extensive federal supervision,

[33] William Freehling, Prelude to Civil War: The Nullification Crisis in South Carolina, 1816-1836 (1965); Kenneth Stampp, "The Concept of a Perpetual Union," 65 J.A.H. 5 (1978).
[34] 74 U.S. 700 (1869).

Chase insisted that the Confederate States never had been outside the Union. "When, therefore, Texas became one of the United States, she entered into an indissoluble relation… The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States." At the same, time, Chase cautioned, "the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self-government, by the States." Under the Constitution, "all powers not delegated to the United States nor prohibited to the States, are reserved to the States respectively, or to the people."[35] With the question of the Union's essential character definitively resolved, the Court would now devote its efforts to defining and policing the boundaries between state and federal legislative jurisdiction in a federal system transformed by three constitutional amendments and a series of landmark statutes.

A particularly pressing question concerned the extent to which the constitutional amendments ratified in the wake of the Civil War had transformed the federal equilibrium. The Reconstruction Amendments were the first to withdraw power from the states and to grant additional power to Congress. The Thirteenth Amendment (1865) abolished slavery and involuntary servitude throughout the nation. The Fourteenth Amendment (1868), overruling *Dred Scott*, declared that all persons born or naturalized in the United States, and subject to their jurisdiction, were citizens of the United States and of the States wherein they resided. That Amendment also prohibited the states from abridging the privileges or immunities of citizens, from depriving any person of life, liberty, or property without due process of law, and from

[35] Id. at 725-26. Of course, not everyone was persuaded. See Cynthia Nicoletti, The Fragility of Union: Secession in the Aftermath of the American Civil War, 1865-1969 (forthcoming).

denying to any the person equal protection of the laws. The Fifteenth Amendment (1870) further prohibited both the state and federal governments from denying the right to vote based on race, color, or previous condition of servitude. Moreover, each of the three Reconstruction Amendments granted Congress authority to enforce their provisions by appropriate legislation. In the ensuing two decades, the Court would repeatedly confront the question of whether legislation enacted pursuant to these new grants of authority lay within the power of Congress.

In a number of cases the justices held that Reconstruction legislation exceeded congressional authority. In *United States v. Reese*,[36] for example, the Court held that two provisions of the Enforcement Act of 1870 that sought to protect voting rights exceeded the power conferred by the Fifteenth Amendment because they did not confine their protections to racially discriminatory conduct. Similarly, in *United States v. Cruikshank*,[37] the Court invalidated indictments of defendants charged with the massacre of dozens of African-American voters on the ground that those indictments did not allege that the conduct was motivated by racial animus. In *United States v. Harris*,[38] the Court unanimously invalidated a section of the Ku Klux Klan Act of 1871 that made conspiracies to deprive any person of the equal protection of the laws a federal crime. Twenty members of a lynch mob had been convicted under that section for abducting four prisoners from the custody of a Tennessee deputy sheriff and savagely beating them, one to death. The statute could not be sustained as an enforcement of the guarantees of the Thirteenth or Fifteenth Amendments, the Court held, because those Amendments secured protection only against actions taken because of the victim's race, color, or previous condition of servitude. (In fact, though in all likelihood unbeknownst to the justices, each of the victims in the

[36] 92 U.S. 214 (1876).
[37] 92 U.S. 542 (1876).
[38] 106 U.S. 629 (1883).

case was white). Nor could the Fourteenth Amendment supply a foundation for the challenged provision, as Section One of that Amendment secured a guarantee of equal protection against state action, and no such action had been alleged in this case. That same year, in the *Civil Rights Cases*,[39] the justices likewise invalidated the public accommodations provisions of the Civil Rights Act of 1875 on the ground the Fourteenth Amendment empowered Congress to reach only racial discrimination perpetrated by state officials, and not by private individuals.

Many scholars have viewed these decisions as comprising a judicially-led "retreat" from Reconstruction. On this account, the justices construed the power conferred upon Congress by the Reconstruction Amendments with an unduly narrow vision, thereby aiding the war-fatigued political branches in their program of forging sectional reconciliation on the backs and with the blood of the freedmen. Others have argued that this perspective credits the members of the Reconstruction Congresses with greater racial egalitarianism and a more robust desire to transform the federal system than they deserve. On this account, the Court's decisions were instead coherent and principled applications of the more moderate aspirations of those who framed and ratified the Reconstruction Amendments. Indeed, some scholars maintain that several of the Court's decisions clearly left open constitutional pathways for Congress and federal prosecutors to reach racial discrimination, intimidation, and violence, in many cases even where perpetrated by private individuals. On this view, the federal officials to blame for the outrages of the Jim Crow South were not the justices of the Supreme Court, but instead those in the political branches who lost the will to deliver on the promise of the Reconstruction Amendments.[40]

[39] 109 U.S. 3 (1883).

[40] Pamela Brandwein, Rethinking the Judicial Settlement of Reconstruction (2011); Michael Collins, "Justice Bradley's Civil Rights Odyssey Revisited," 70 Tul. L. Rev. 1979 (1996); Michael Collins, "'Economic Rights,' Implied Constitutional Actions, and the Scope of Section 1983," 77 Geo. L. J. 1493 (1989); Michael Les Benedict, "Preserving Federalism: Reconstruction and the Waite Court," 1978 Sup. Ct. Rev. 39 (1979); Michael Les Benedict, "Preserving the Constitution: The Conservative Basis of Radical Reconstruction," 61 J.A.H. 65 (1974).

This latter interpretation finds some support when these Reconstruction decisions are read against the broader backdrop of the Court's congruent contemporary federalism jurisprudence. First, the justices recognized that the possession by the states of "all of the powers essential to separate and independent existence" placed inherent limitations of the powers of the federal government. In *Lane County v. Oregon*,[41] for example, the Court held the state of Oregon was not required to take federal greenbacks from its counties in payment of their state tax obligations. Notwithstanding federal legislation making the paper currency legal tender for all debts public and private, Congress could not prescribe to the state the currency in which its power to tax might be satisfied. Similarly, in *Collector v. Day*,[42] which along with *McCulloch v. Maryland* launched what would become a vast and complex body of case law identifying limits on the power of the state and federal governments to tax one another's officials and instrumentalities, the Court held that the salary of a state judge could not be subjected to federal income tax. As Chief Justice Marshall had put it in *McCulloch v. Maryland* when striking down the state's taxation of the Bank of the United States, the power to tax involved "the power to destroy."[43] Were one government permitted to tax the officials or instrumentalities of the other, it might make the tax so burdensome as to be insupportable, and thus destructive of the powers necessary to its separate and independent existence. From this it followed, as *McCulloch* had made clear, that the existence of the federal government placed inherent limitations on state power as well. So, for example, in *Tarble's Case*,[44] the justices ruled as they had in *Abelman v.*

[41] 74 U.S. 71 (1869).
[42] 78 U.S. 113 (1871).
[43] 17 U.S. at 431.
[44] 80 U.S. 391 (1871).

Booth[45] that federal officials having custody of federal prisoners were not amenable to writs of habeas corpus issued by state courts.[46]

Such manifestations of what came to be called "dual federalism" were thus apparent both in cases that involved racial issues and in those that did not. The Court's post-bellum preoccupation with policing the respective boundaries of state and federal authority was animated by the conviction that the federal and state governments occupied separate spheres of authority within which they were entitled to exercise all of the powers that they had been granted or retained, and that neither was permitted to trespass upon nor impede the exercise of the sovereign prerogatives of the other. Thus, the very existence of the state and federal governments implicitly limited the powers of each.[47]

At the same, time, however, the Court also recognized that very existence of the federal government entailed the possession by Congress of certain inherent powers beyond those specifically enumerated in the Constitution. In *Kohl v. United States*,[48] for instance, notwithstanding language in the constitutional text suggesting that Congress could acquire land within a state only by purchasing it with the consent of the state's legislature, the Court held that the federal government had an inherent eminent domain power that could not be obstructed by intransigent persons or states. It was upon such notions of inherent federal power that the Court relied in upholding a conviction under the Enforcement Act in *Ex parte Yarbrough*.[49] The case concerned the same section of the Act that had been unsuccessfully deployed in *Cruikshank* eight years earlier. But whereas *Cruikshank* had involved horrific violence in connection with a state

[45] 62 U.S. 506 (1859).
[46] Charles W. McCurdy, "Federalism and the Judicial Mind in a Conservative Age: Stephen Field," in Harry N. Scheiber & Malcom Feeley, eds., Power Divided: Essays on the Theory and Practice of Federalism (1989).
[47] Edward S. Corwin, "The Passing of Dual Federalism," 36 Va. L. Rev. 1 (1950).
[48] 91 U.S. 367 (1876).
[49] 110 U.S. 651 (1884).

election, the black voter beaten by Yarbrough had been intercepted on his way to vote in a federal election.[50]

Critics of the judicial "retreat from Reconstruction" hypothesis point to *Yarbrough* and other lesser-known decisions as evidence indicating that, even if the justices could be justifiably faulted for a callous focus on structural concerns in the face of pressing needs to safeguard Southern blacks' rights to personal security, liberty, and equal protection, they were by no means implacably opposed to federal intervention to secure these rights. First, *Reese*, *Cruikshank*, and *Harris* indicated that statutes and indictments that were more narrowly tailored to target only racial discrimination with respect to rights secured by the Thirteenth and Fifteenth Amendments would pass constitutional muster. Moreover, such critics contend, both *Cruikshank* and *Harris* appeared rather casually to read the state action requirement out of the Fifteenth Amendment, leaving open the possibility of federal enforcement legislation criminalizing private efforts to deny the right to vote on the basis of race. In addition, some opinions have been read to suggest that the failure of state officials to protect their African-American citizens from private violence – a sort of state *inaction* – might constitute state *action* denying those citizens the equal protection of the laws, and that this in turn could authorize Congress to enact legislation punishing perpetrators pursuant to the enforcement power of the Fourteenth Amendment. On this account, those potentialities lay unrealized because a Congress in which representatives of all of the former states of the Confederacy had now been seated refused to take up the Court's invitations.[51]

[50] McCurdy, "Federalism and the Judicial Mind."
[51] Brandwein, Rethinking the Judicial Settlement; Collins, "Justice Bradley's Civil Rights Odyssey"; Benedict, "Preserving Federalism."

Prior to its withdrawal from the field, however, Congress did enact a series of statutes enlarging the jurisdiction of the federal courts, thereby offering mistreated people who previously could seek redress only from state courts new opportunities to vindicate their rights before a more sympathetic federal tribunal. First, the Civil Rights Act of 1866, enacted in response to the infamously discriminatory Southern "black codes," guaranteed to the freedmen equal legal treatment with respect to rights of contract, property, and access to courts, as well as "the full and equal benefit of all laws and proceedings for the security of persons and property." The Act further provided that anyone sued or arrested under a discriminatory law impinging upon the rights enumerated in that statute could remove his case to federal court. Second, before the Civil War, persons seeking habeas corpus from state custody could resort only to state courts. The Habeas Corpus Act of 1867, by contrast, authorized federal courts to issue writs of habeas corpus "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or any treaty or law of the United States." Third, the Judiciary Act of 1875 granted the lower federal courts jurisdiction over all cases involving questions of federal law, and made all such cases initiated in state courts removable to a federal forum. Though the Supreme Court had enjoyed appellate jurisdiction over such cases since 1789, state courts had held monopolies over the trial and initial levels of appeal in all such "federal question" cases excepting those arising in specific areas, such as intellectual property, over which Congress had expressly conferred jurisdiction on the lower federal courts.

Throughout the period between the "end" of Reconstruction in 1877 and the late New Deal, the Court generally upheld efforts to employ the Reconstruction Amendments to protect what were at the time considered the "civil" rights – those of contract, property, and vocational

liberty -- of the freedmen. In the 1867 federal circuit court case of *In re Turner*,[52] for example, Chief Justice Chase struck down a racially discriminatory Maryland apprenticeship law. In *Yick Wo v. Hopkins*,[53] the Court unanimously invalidated a conviction for violating a building code regulation that was discriminatorily administered against Chinese laundry owners with "an evil eye and an unequal hand" by local authorities. In *Bailey v. Alabama*[54] and *United States v. Reynolds*,[55] the Court invalidated southern labor regulations that ensnared impecunious African-Americans in webs of debt peonage and forced servitude. And in *Buchanan v. Warley*,[56] the Court unanimously struck down a residential housing ordinance that prohibited whites and blacks from buying homes from one another.

These interventions did little to change realities on the ground, however. Southern authorities either openly defied or found ways to circumvent the Court's rulings, and African-Americans faced the prospect of economic coercion or private violence were they to pursue legal redress. Moreover, unlike the California Chinese, whose financial backing from Cantonese merchants enabled them to mount successful challenges to numerous discriminatory business and employment regulations in the federal courts, Southern blacks generally lacked access to the legal services necessary to enforce their rights. Notwithstanding these important judicial vindications of federal authority, the domain of "civil" rights remained governed almost exclusively by state law and local custom.[57]

[52] 24 F. Cas. 337 (C.C.C. Md. 1867).
[53] 118 U.S. 356 (1886).
[54] 219 U.S. 219 (1911).
[55] 235 U.S. 133 (1914).
[56] 245 U.S. 60 (1917).
[57] Charles J. McClain, In Search of Equality: The Chinese Struggle Against Discrimination in Nineteenth-Century America (1994); Alexander M. Bickel & Benno C. Schmidt, The Judiciary and Responsible Government, 1910-1921 (1984); Daniel A. Novak, The Wheel of Servitude: Black Forced Labor After Slavery (1978); Pete Daniel, The Shadow of Slavery: Peonage in the South, 1901-1969 (1972).

The justices also often vindicated the "political" rights of the freedmen. In a pair of cases decided in 1880, the Court held that the Fourteenth Amendment protected the rights of African-Americans to sit on juries and the rights of black defendants to juries from which African-Americans were not categorically excluded, and conferred upon Congress the power to protect those rights through positive legislation.[58] In *Guinn v. United States*,[59] the Court unanimously struck down an Oklahoma statute that the required passage of a literacy test for all prospective voters whose ancestors had not been eligible to vote before 1866. And in *Nixon v. Herndon*[60] and *Nixon v. Condon*,[61] the justices invalidated Texas statutes commanding or authorizing exclusion of African-American voters from Democratic primary elections.

Here again, however, state resistance and black subordination were obstacles to realizing the promise of such decisions. The practice of striking African-Americans from jury venires through peremptory and for-cause challenges continued unimpeded. Oklahoma authorities cynically circumvented the *Guinn* decision in a manner that persisted for nearly a quarter-century until a case successfully challenging the scheme finally reached the Court in 1939.[62] The Texas legislature maintained its white primary by withdrawing from its regulation and simply leaving the "private" Democratic Party to do as it liked. With state action no longer involved, the Court unanimously rejected a constitutional challenge to the Party's rules excluding black primary voters in *Grovey v. Townsend*.[63] Meanwhile, poll taxes, private intimidation, and discriminatorily administered literacy tests functioned to exclude vast numbers of Southern blacks from the franchise and, as a consequence, from eligibility to serve as jurors. The general spirit of judicial

[58] Strauder v. West Virginia, 100 U.S. 303 (1880); Ex parte Virginia, 100 U.S. 339 (1880).
[59] 238 U.S. 347 (1915).
[60] 273 U.S. 536 (1927).
[61] 286 U.S. 73 (1932).
[62] Lane v. Wilson, 307 U.S. 268 (1939).
[63] 295 U.S. 45 (1935).

resignation was captured by Justice Oliver Wendell Holmes's opinion in *Giles v. Harris*,[64] where he confessed that, without the aid of the political branches, the Court had little power to correct systemic voting discrimination in the South. Here again, the Reconstruction Amendments and enforcing legislation notwithstanding, the applicable "law in action" was state and local.

In the domain of "social equality," by contrast, southern authorities and Supreme Court justices were in agreement on the law. Just as the Court had held in the *Civil Rights Case*s that Congress was without power to prohibit private discrimination in hotels, restaurants, theaters, and the like, so the justices of this period upheld state and local regulations prescribing racial segregation in public schools (*Cumming v. Richmond Board of Education*,[65] *Gong Lum v. Rice*[66]) and public transportation (*Plessy v. Ferguson*[67]), as well statutes prohibiting interracial marriage or cohabitation (*Pace v. Alabama*[68]). Regulation of such matters was left both legally and functionally to state and local authorities.

From the Gilded Age Through the New Deal

Along with such questions of minority rights, a central concern of the Court's post-bellum federalism jurisprudence was the scope of state and federal power to regulate business. If scholars sometimes have described the resulting body of case law as incoherent, it may be because they have not fully appreciated two key features of "dual federalism." The first feature concerns the interconnected nature of the Court's "dormant" and "affirmative" Commerce Clause decisions. Although the Court's dormant Commerce Clause cases were facially

[64] 189 U.S. 475 (1903).
[65] 175 U.S. 528 (1899).
[66] 275 U.S. 78 (1927).
[67] 163 U.S. 537 (1896).
[68] 106 U.S. 583 (1883).

concerned with defining the scope of *state* regulatory authority over commercial subjects left unregulated by Congress, we shall see that the categories developed in these decisions also would play an important role in defining the extent of Congress's affirmative commerce power. Similarly, New Deal transformations in affirmative Commerce Clause doctrine would entail a reorientation of dormant Commerce Clause jurisprudence. The second neglected feature of post-bellum federalism jurisprudence concerns the relationship between the Commerce Clause and due process. As we shall see, the law of vested rights and due process played a critical role in defining the boundary between state and federal regulatory authority. The New Deal-era collapse of dual federalism can thus be seen as resulting, at least in part, from the Court's prior abandonment of traditional due process limitations. After a review of the New Deal Court's transformative Commerce Clause decisions and of coordinate developments concerning the congressional powers to tax and spend, this section concludes with a brief examination of some significant constitutional amendments and a discussion of contemporaneous developments concerning the treaty power, state sovereign immunity, rules governing diversity jurisdiction, and in the law of intergovernmental tax immunities.

The Court's dormant Commerce Clause docket expanded considerably in the period following the Civil War, as an increasing number of enterprises carrying on an interstate business sought to dismantle time-honored schemes of state and local economic protectionism. In case after case, the justices found that longstanding programs of licensure, taxation, and inspection of out-of-state goods and salesmen failed to pass muster.[69] Though the field of concurrent power recognized by *Cooley* persisted, it came to represent an increasingly small slice of dormant Commerce Clause doctrine. Instead, justices and commentators characteristically

[69] Charles W. McCurdy, "American Law and the Marketing Structure of the Large Corporation, 1875-1890," 38 J. Econ. Hist. 331 (1978).

referred to Congress's power to regulate interstate commerce as "exclusive," thereby placing the subject matter beyond the legislative jurisdiction of the states. The doctrine was animated by a frankly instrumental impulse to break down state and local barriers to interstate commercial traffic in an increasingly vibrant and integrated economy, and it functioned to open up a zone of free trade among the states.[70]

At the same time, however, it was recognized that the theory of exclusive congressional jurisdiction, unless properly qualified, might be destructive of necessary state and local powers to tax and regulate. If every activity, tax, or regulation that had an effect on interstate commerce lay beyond the powers of state and local government, then the states and localities would be deprived of significant portions of their tax bases, and Congress alone would have the power to regulate such matters. Were Congress not to act, such activities would necessarily remain entirely free of regulation. The justices rightly doubted that Congress was prepared to take on such a herculean task, and in light of the great variation in local conditions and circumstances, they doubted as well that Congress could perform the task effectively even were it to try.[71]

The Court therefore formulated the doctrine so as to leave room for a broad range of state and local taxation and regulation. To be sure, where a state or local regulation touched on a "national" matter or burdened interstate commerce "directly," it would be held invalid. But as to "local" matters, any otherwise valid exercise of the police or taxing powers that affected interstate commerce only "incidentally," "indirectly," or "remotely" would be sustained. With such analytic distinctions at the ready, the justices upheld a broad range of nondiscriminatory programs of licensure, taxation, and regulation at the state and local level. Moreover, goods that had not yet begun their interstate transit, or had concluded their interstate journey and had come

[70] Barry Cushman, "Formalism and Realism in Commerce Clause Jurisprudence," 67 U. Chi. L. Rev. 1089 (2000).
[71] Id.

to rest in the destination state, remained subject to state and local legislative jurisdiction. The overall effect of the doctrine was to remove impediments to free trade without simultaneously opening an enormous regulatory vacuum.[72]

The paradigmatically "local" activities the regulation of which the doctrine left to state and local authorities were those of "production" – agriculture, mining, and manufacturing. Thus, for example, state taxation or regulation of coal mining, iron mining, petroleum production, and the production of electricity each survived dormant Commerce Clause challenges. Regulations restricting the conditions under which cotton-seed oil companies could own or operate cotton gins, and prohibiting the manufacture of such controversial products as liquor and oleomargarine colored to resemble butter were likewise upheld. Production, even if intended for interstate sale, preceded interstate commerce, the Court held, and its regulation affected such commerce only "indirectly." Were it otherwise, Congress would be saddled with the impossible task of enacting a vast array of "only locally applicable and utterly inconsistent" statutes regulating every act of human industry that contemplated an interstate market, while at the same time leaving to local regulators those acts that did not. This would "paralyze" state governments and create interminable tensions and confusions between federal and local authorities.[73]

These dormant Commerce Clause decisions created the categories and set the terms within which the Court developed its jurisprudence concerning the scope of congressional power to regulate commerce among the several states. The justices regularly relied upon dormant Commerce Clause precedents in holding that the Sherman Antitrust Act could not reach acts of corporate consolidation in the manufacturing sector (e.g., *U.S. v. E.C. Knight*[74]) or labor strikes

[72] Id.
[73] Id.
[74] 156 U.S. 1 (1895).

or boycotts of manufacturing enterprises (e.g., *United Leather Workers v. Herkert & Meisel Trunk Co.*[75]). The effect of such actions on interstate commerce was only "indirect." During the New Deal the Court similarly reasoned to the conclusions that Congress could not regulate employment terms and relations between coal companies and their employees (*Carter v. Carter Coal Co.*[76]), nor those of a Brooklyn Kosher butchery that sold all of its meat locally (*Schechter Poultry Corp. v. U.S.*[77]). The Justice Department enjoyed considerable success in prosecuting anticompetitive behavior both in the interstate railroad industry and among independent enterprises that entered into agreements not to compete with one another in interstate markets. The Court also recognized federal jurisdiction over mergers, acquisitions, and labor disturbances that were demonstrably undertaken with the intent to restrain interstate trade. There the effects on interstate commerce were "direct." But in the absence of such evidence, the justices insisted that the regulation of activities of production was a matter reserved to the states.[78]

During this period, then, much of affirmative Commerce Clause jurisprudence was the mirror image of its dormant counterpart. Matters subject to the legislative jurisdiction of one sovereign lay beyond that of the other. But just as the *Cooley* doctrine permitted states and localities to regulate provisionally some matters that were subject to the jurisdiction of Congress, two affirmative Commerce Clause doctrines recognized the power of Congress to regulate activities that would otherwise have been considered "local." They were the "stream of commerce" doctrine, first announced in *Swift v. U.S.*,[79] and the "*Shreveport* doctrine,"

[75] 265 U.S. 457 (1924).
[76] 298 U.S. 238 (1936).
[77] 295 U.S. 495 (1935).
[78] Cushman, "Formalism and Realism."
[79] 196 U.S. 375 (1905).

inaugurated in the so-called *Shreveport Rate Case*.[80] Where these doctrines applied, the local activity regulated by Congress was deemed to have a "direct" effect on interstate commerce.[81]

The stream of commerce doctrine recognized the power of Congress to regulate local activities, even those falling into the category of production, where those activities were both preceded and followed by interstate shipment of the item in question. Thus, for example, the Court held in *Stafford v. Wallace*[82] that Congress could regulate the charges imposed by owners of stockyards for housing, feeding, watering, and caring for livestock that had arrived from out of state and would continue its interstate journey after sale or slaughter. The *Shreveport* doctrine recognized congressional power to regulate rates for intrastate rail travel where necessary to prevent destructive competition with federally-regulated interstate carriers. Under each doctrine the activity in question was subject to state regulation, but Congress was free to step in and preempt local authority with a scheme of its own.

In order to appreciate how narrowly circumscribed the domains of these two doctrines were, it is necessary to understand the important role that concepts of vested rights and substantive due process played in configuring the federal equilibrium. During this period, the Due Process Clause of the Fourteenth Amendment performed a role analogous to that played in the antebellum period by Article I, Section 10's prohibition on state laws impairing the obligation of contract. In each case, the constitutional provision placed constraints on the policy options available to states and localities in the realm of political economy. Though substantive due process is conventionally most closely associated with decisions invalidating certain

[80] 234 U.S. 342 (1914).
[81] Barry Cushman, Rethinking the New Deal Court: The Structure of a Constitutional Revolution (1998).
[82] 258 U.S. 495 (1922).

regulations of the employment relationship, its broadest application came in cases involving the regulation of prices and rates charged by businesses and utilities.[83]

Following its 1877 decision upholding the regulation of rates charged by grain elevators in *Munn v. Illinois,*[84] the Court repeatedly held that the prices of goods and services provided by ordinary private enterprises were not amenable to government regulation. An enterprise was subject to price and certain other forms of regulation only if it were a "business affected with a public interest." Though there was some disagreement among the justices concerning where the outer boundaries of this category lay, at its core were those businesses that provided a necessary or indispensable good or service for which the market provided no substitute. Because the public was forced to deal with such "virtual monopolies," they could extract from their customers "exorbitant charges." No one had a vested right to a monopoly rent, however, so regulation of their prices that still allowed them a "reasonable return" on their investment did not deprive them of property without due process of law. The rather brief list of enterprises that fell into this narrow category included railroads, power and water utilities, public stockyards, public grain exchanges, and grain elevators,[85] which, as Chief Justice Morrison Waite put it in *Munn*, stood "in the very gateway of commerce," taking "toll from all who pass."[86]

It was just such enterprises that occupied a monopolistic position in streams of interstate commerce, and it was only such activities that were held to be subject to federal regulation under the stream of commerce doctrine. Of the four stream of commerce cases the Court decided during this period, three involved public stockyards[87] and the other involved a major public grain

[83] Barry Cushman, "Some Varieties and Vicissitudes of Lochnerism," 85 B.U. L. Rev. 881 (2005).
[84] 94 U.S. 113 (1877).
[85] Cushman, "Some Varieties and Vicissitudes."
[86] 94 U.S. at 132.
[87] Tagg Bros. & Moorhead v. U.S., 280 U.S. 420 (1930); Stafford v. Wallace, 258 U.S. 495 (1922); Swift & Co. v. U.S., 196 U.S. 375 (1905).

exchange.[88] In order to be a local business subject to federal regulation under the stream of commerce doctrine, it was necessary that such a business be affected with a public interest. The stream of commerce doctrine thus cut a very narrow channel, leaving the overwhelming majority of local enterprises free from federal regulation.

The *Shreveport* doctrine was similarly constrained by due process limitations. There, congressional power to regulate intrastate rates for rail carriage was derived from its power to regulate interstate rates. Of course, Congress had power to regulate such interstate rates – and therefore intrastate rates – only because railroads were businesses affected with a public interest. Indeed, between the time that the doctrine was announced in 1914 and 1937, all of the cases in which the Court applied the *Shreveport* case involved railroads. No other area of local economic activity fell within the doctrine's purview.[89]

The Court abandoned of this category of due process jurisprudence in the 1934 case of *Nebbia v. New York*,[90] declaring that there was "no closed class or category of businesses affected with a public interest." Henceforth, that term would mean only that "an industry, for adequate reason, [was] subject to control for the public good." Due process required "only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."[91] The remarkable relaxation of this due process limitation opened vast new frontiers for regulation underwritten by the Commerce Clause doctrines that it had previously constrained. The stream of commerce, now free to overflow its former banks, could justify a flood of federal regulation. Attorneys defending the constitutionality of the National Labor Relations Act deliberately selected as test cases

[88] Chicago Board of Trade v. Olsen, 262 U.S. 1 (1923).
[89] Cushman, "Formalism and Realism."
[90] 291 U.S. 502 (1934).
[91] Id. at 510-11, 515-16.

disputes at manufacturing plants that acquired most of their raw materials from other states and then shipped their finished products across state lines. Such formerly "private" enterprises, they now claimed, stood astride a stream of interstate commerce and were accordingly subject to federal regulation.[92] Their efforts were rewarded with success in the *Labor Board Cases*,[93] and such broadened stream of commerce arguments continued to play a prominent role in legal arguments, scholarly commentary, and judicial decisions throughout the late 1930s.[94]

This revolution in due process jurisprudence likewise dramatically expanded the range of application of the *Shreveport* doctrine. Now that the due process clause no longer limited price regulation to a narrow class of businesses affected with a public interest, Congress was free to prescribe reasonable prices at which items such as coal, milk, and a variety of agricultural commodities could be sold in interstate commerce. And because the successful regulation of interstate prices required that Congress also regulate prices and marketing in intrastate transactions, the Court repeatedly held that the *Shreveport* doctrine authorized such regulation. Thus, by reorienting its regulatory efforts toward marketing rather than production, Congress could wield substantial control over national and local markets.[95]

These transformations alone, however, did not extend congressional jurisdiction to most of the "local" activities previously regulated only by states and localities. The stream of commerce did not extended to local production, such as mining or agriculture, which preceded interstate commerce. Nor did it reach local activities conducted after the stream of interstate commerce had come to its terminus in a destination state. Similarly, the *Shreveport* doctrine did

[92] Cushman, Rethinking the New Deal Court; Peter Irons, The New Deal Lawyers (1982); Richard C. Cortner, The Jones & Laughlin Case (1970).
[93] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); NLRB v. Fruehauf Trailer Co., 301 U.S. 49 (1937); NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58 (1937).
[94] Cushman, Rethinking the New Deal Court.
[95] Id.

not authorize federal regulation of intrastate activity unless it were necessary and proper to maintain the efficacy of a program that the commerce power authorized Congress to enact. Indeed, the Court cautioned that the liberalized Commerce Clause doctrines must be applied "in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."[96] The justices continued throughout the late 1930s to employ the same categories and vocabulary that had governed both affirmative and dormant Commerce Clause jurisprudence for decades.[97]

That longstanding, coordinated jurisprudential enterprise came to an end with *Wickard v. Filburn*.[98] There the Court upheld federal regulations limiting the acreage that a farmer could plant during any given season. The farmer who had planted more wheat than was authorized claimed that his excess wheat would be marketed neither in interstate nor in intrastate commerce, but would instead be consumed on his own farm. The Court nevertheless reasoned that such a means of satisfying one's own demand for wheat, if pursued by many others similarly situated, could have a significant effect on the aggregate demand for wheat. This in turn could have a significant effect on the price at which wheat traded in interstate commerce. And because Congress had the power to regulate the price at which wheat was marketed in interstate commerce, it therefore had the power to regulate local activities where it was necessary and proper to make effective its program of interstate marketing regulation. In arriving at this conclusion, Justice Robert Jackson's unanimous opinion for the Court rejected the analytic

[96] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. at 37.
[97] Cushman, Rethinking the New Deal Court.
[98] 317 U.S. 111 (1942).

categories that had bound affirmative and dormant Commerce Clause jurisprudence together for half a century. Now it was of no significance that the activity Congress purported to regulate was one of production; nor would questions of congressional power any longer turn on whether the effect of an activity on interstate commerce was "direct" or "indirect." The only question was whether the aggregate effect of such activities on interstate commerce was "substantial."

This recognition of virtual plenary congressional power under the Commerce Clause had immediate and dramatic implications for dormant Commerce Clause jurisprudence. If congressional power to regulate interstate commerce was both plenary and exclusive, then longstanding state powers to regulate and tax what previously had been regarded as "local" activities would be implicitly preempted, and the regulatory vacuum feared by late-nineteenth jurists and commentators would have become a reality. The Court avoided this consequence by quickly abandoning the premise of congressional exclusivity, replacing it with the premise that, in the absence of statutory preemption, state and federal governments enjoyed concurrent power to regulate matters over which the Commerce and Necessary and Proper Clauses together conferred power on Congress. Dormant Commerce Clause jurisprudence was thereby reoriented from a focus on the scope of legislative jurisdiction to inquiries into whether state or local regulations discriminated against or unduly burdened interstate commerce.[99]

This doctrinal decoupling of affirmative and dormant Commerce Clause jurisprudence, however, obscured a common underlying theoretical foundation. Jackson had come to regard questions of congressional power under the Commerce Clause as political questions not only because economic integration had made judicial line-drawing impracticable, but also because he believed that state and local interests were adequately protected in the national political process

[99] Cushman, "Formalism and Realism."

through their representation in Congress.[100] By contrast, as Justice Harlan Fiske Stone observed in the dormant Commerce Clause case of *South Carolina Highway Department v. Barnwell Brothers*,[101] the interests of sister states were not adequately represented in state and local legislative bodies, and for this reason it was appropriate for those interests to be safeguarded by judicial review. This "representation-reinforcement" conception of federalism, famously articulated by Marshall in *McCulloch*, thus became a central organizing principle of Commerce Clause jurisprudence.

The line of affirmative Commerce Clause doctrine just described concerned the power of Congress to regulate local activities because of their relationship to interstate commerce. Another line of affirmative Commerce Clause doctrine concerned the power of Congress to prohibit the interstate shipment or transport of disfavored items. This line of doctrine similarly followed a course of development influenced by both dormant Commerce Clause and substantive due process jurisprudence. Beginning in the late nineteenth century, the Court began to infer from the grant of the commerce power to Congress a disability on the part of states to exclude from their borders such controversial items as liquor, oleomargarine, and cigarettes. Even though the Due Process Clause would permit extensive regulation of such items under state and local police powers once they had become intermingled with the general property of the state, so long as they remained in their "original packages" they fell within the exclusive regulatory jurisdiction of Congress.[102]

Congress responded to the opening of such regulatory lacunae in three ways. The first was with legislation "divesting" the article of its interstate character upon its arrival in the

[100] Cushman, Rethinking the New Deal Court.
[101] 303 U.S. 177 (1938).
[102] Barry Cushman, "*Carolene Products* and Constitutional Structure," 2012 Sup. Ct. Rev. 321 (2013).

destination state, even while it remained in its original package, thereby permitting state regulation of the article's disposition under the police power. Congress enacted such measures with respect to alcoholic beverages, oleomargarine colored to resemble butter, and eventually convict-made goods, and the Court upheld these statutes when they were challenged. The second generation of such "cooperative" statutes prohibited interstate transport of an article, such as liquor or convict-made goods, into a state where it was to be used, sold, or possessed in violation of the destination state's law. The Court likewise sustained these measures. The third legislative response was to prohibit interstate transportation of an article altogether, irrespective of whether its use, possession, or disposition would violate the law of a destination state. The Court upheld such statutes prohibiting interstate transport of lottery tickets and of impure or mislabeled food and drugs. But in *Hammer v. Dagenhart*,[103] a narrowly divided Court struck down a statute prohibiting the interstate shipment of goods produced by firms employing children under specified ages and for certain hours.[104]

The apparent inconsistency in this line of cases presents a puzzle. The majority maintained that the Child Labor Act was a regulation of production, but this claim suffered from two deficiencies pointed out by the dissent. First, the Act regulated only the interstate transportation of the firm's products, not the conditions of their production. Second, to the extent that the prohibition on shipment indirectly affected conditions of production in the firm, it was not distinguishable from the Lottery Act, which by eliminating the interstate market in lottery tickets reduced the volume of their production, nor from the Pure Food and Drugs Act, which by prohibiting interstate shipment of articles not meeting the standards prescribed by the Act naturally affected the conditions of their production. The majority sought to distinguish those

[103] 247 U.S. 251 (1918).
[104] Cushman, "*Carolene Products*."

statutes on the ground that they prohibited interstate shipment of goods that were "harmful," whereas child-made goods were "of themselves harmless" and would, unlike lottery tickets or impure food, inflict no harm in the state of destination. This distinction was undermined seven years later when, to the howls of *Hammer*'s many critics, the Court unanimously upheld a federal prohibition on the interstate transportation of stolen automobiles without explaining how such articles were "of themselves" harmful.[105]

Reconciliation of this line of cases requires a recognition that their differing results are explicable in terms of vested rights and substantive due process. The structure of the doctrine rested on the proposition that once a property right in an item had vested under the applicable state law, the Due Process Clauses prohibited either Congress or sister state legislatures from disadvantageously regulating the disposition of that item unless such a disposition threatened the infliction of a cognizable harm within the legislative jurisdiction of the regulating sovereign. In the absence of a threat that such a cognizable harm might be inflicted within Congress's legislative jurisdiction, therefore, a federal prohibition on the interstate shipment of an item deprived its owner of property without due process of law. Were the threat of such a harm present, however, a prohibition on interstate shipment would not deprive the owner of property without due process, for no one could have a vested right to inflict harm on public health, safety, or morals.[106]

Thus, Congress was competent to prohibit interstate transportation of intoxicating liquors due to the threat that they posed to public health, safety, and morals in states of destination. Just as the states could prohibit their manufacture and sale without violating the Fourteenth Amendment's Due Process Clause, so Congress could exclude them from interstate commerce

[105] Id.
[106] Id.

without violating the corresponding provision of the Fifth Amendment. As it was equally well established that states were empowered to outlaw the sale of lottery tickets due to their tendencies to corrupt morals and contribute to penury, so it followed that Congress impaired no vested right by excluding lottery tickets from interstate channels. And because no one enjoyed a vested right to harm public health and safety through the distribution of impure foods or medicines, nor to defraud the public by deceptively labeling such goods, congressional prohibition of interstate shipment of such products deprived no one of property without due process. Because in each of these instances the original package doctrine made possible the infliction of the threatened harm while the article in question remained within the federal legislative jurisdiction, Congress had power under the Commerce Clause to guard against such an eventuality.[107]

For similar reasons, federal statutes prohibiting interstate transportation of wild game or petroleum acquired in violation of the law of the state of origin weathered judicial review. Because neither the poacher nor the wildcat driller obtained a vested right in the article illegally taken, laws forbidding such interstate transport did not deprive their possessors of property without due process. Nor was a prohibition on the interstate transport of stolen cars constitutionally problematic. For though a stolen car might in itself be no more dangerous than a shoe made by a child, neither the thief nor anyone knowingly taking from him had any vested right in the pilfered motor vehicle. In each of these cases, the legislation was valid not because it prevented infliction of a harm within the federal legislative jurisdiction, but instead because it impaired no vested right.[108]

[107] Id.
[108] Id.

The Child Labor Act was the one such federal initiative that fell within neither of these safe harbors. To be sure, it was established that there was no constitutional right to employ children, and any state was free to prohibit such employment. But if, for example, the state of North Carolina chose to permit the employment of children in its factories, then the employer of that labor acquired a vested right in its product under the law of that state. The power of Congress to exclude that product from interstate commerce thus turned on whether the good threatened to inflict a cognizable harm outside the legislative jurisdiction of the state of its production.[109]

This made a great deal turn on which types of extraterritorial harms the Court regarded as legally privileged, and which it recognized as falling outside the protection of the Due Process Clause. In *Hammer*, the government contended that the extraterritorial harm inflicted was competitive in nature. A firm employing children could pay them less than adults, which reduced its overhead as compared with that of competing firms in states with more restrictive child labor laws. This "unfair competition" would cause economic harm to firms in more child-protective states, which would induce them to pressure their legislatures to relax their own child labor standards and thereby jeopardize the health and safety of that state's children. But the *Hammer* majority refused to recognize the threat of such competitive harms as a justification for federal intervention, pronounced child-made goods of themselves harmless, and invalidated the statute. It was this narrow conception of what constituted a cognizable harm under the Due Process Clause that restrained congressional power to prohibit interstate shipment.[110]

[109] Id.
[110] Id.

In *United States v. Carolene Products Co.*,[111] however, the Court upheld a federal prohibition on interstate transport of filled milk. In his opinion for the Court, Justice Stone expressly disaggregated from the Commerce Clause analysis the due process analysis with which it had been conflated by the *Hammer* majority. Prohibitions on interstate shipment were exercises of the commerce power, Stone declared, constrained only by other provisions of the Constitution such as the Fifth Amendment's Due Process Clause. Moreover, Stone announced that henceforth in cases involving challenges to economic regulation under the Due Process Clauses, the Court would accord a broad measure of deference to legislative judgments concerning harm. This relaxation of the due process constraint on the commerce power paved the way for the recognition in *United States v. Darby Lumber Co.*[112] that the sort of unfair competition generated by firms employing child laborers or underpaid workers was a harm that Congress was empowered to remedy through prohibitions on the interstate shipment of goods produced by such firms. *Darby* thus overruled *Hammer*, rendering congressional power to prohibit interstate shipments as unimpeded by judicial review as *Wickard* would make the power to regulate local activities affecting interstate commerce the following year. The interjurisdictional regulatory competition and policy heterogeneity among the states that had been underwritten by the restrictions that the Court's protection of vested rights had placed on federal regulatory authority thus gave way to national policies implemented through exercises of a commerce power no longer constrained by due process limitations.[113]

Thus, during this period the economic rights protected by the Due Process Clause functioned as structural mechanisms, not only marking the boundaries between individual liberty

[111] 304 U.S. 144 (1938).
[112] 312 U.S. 100 (1941).
[113] Cushman, "*Carolene Products*."

and sovereign authority, but also allocating regulatory power among the state and federal governments.[114] This was true not only with respect to the commerce power, but also with respect to exercises of the congressional fiscal powers. In the late nineteenth century, Congress began to take an interest in regulating substances and activities that lay beyond the reach of its commerce power by imposing prohibitive excise taxes on them. Critics of such measures claimed that they did not impose true taxes, but instead regulated matters reserved to the states. When this claim was presented to the Court in *McCray v. United States*,[115] however, the justices maintained that the question was not justiciable. In upholding a ten cent per pound excise on oleomargarine colored to resemble butter, Chief Justice Edward White insisted that the only the political branches were competent to determine whether a purported tax constituted a true exercise of the taxing power or was instead "the exercise of an authority not conferred" by the Constitution. Under only one condition would the Court intervene: "where it was plain to the judicial mind that the power had been called into play not for revenue but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests." Only if an interest of the sort protected by the Due Process Clause were implicated would the justices address the question of whether Congress had encroached on the domain of the states by seeking the accomplishment of objectives not entrusted to the government. That principle was inapplicable in *McCray*, White observed, because the Court's Fourteenth Amendment due process decisions had established that "the manufacture of artificially colored oleomargarine may be prohibited by a free government without a violation of fundamental rights."[116]

[114] Id.
[115] 195 U.S. 27 (1904).
[116] Id. at 64.

The doctrinal structure that emerged from *McCray* thus entwined Fifth Amendment, Tenth Amendment, and separation of powers concerns in a unique configuration. As a general rule, principles of separation of powers would preclude the Court from inquiring into whether a regulatory tax was intended to invade the regulatory space reserved to the states by the Tenth Amendment, and thus was merely the pretextual exercise of an enumerated power. Only where a fundamental individual right was imperiled would the Court vindicate the Tenth Amendment interest in confining Congress to exercising only those powers conferred by the Constitution. So long as federal regulatory taxation did not transgress the limitations that the Fourteenth Amendment imposed upon the states' police powers, there would be no occasion for the Court to subject such pretextual enactments to searching judicial scrutiny. And by remaining within this safe harbor, over the next several decades Congress managed to secure judicial validation of excises not only on oleomargarine, but also on narcotics, certain firearms, marijuana, gambling, and ticket scalping. Thus, it was the Fifth Amendment, rather than the Tenth, that imposed the constitutional restraint on congressional power to regulate through taxation. Only by asserting a Fifth Amendment interest could one secure judicial vindication of the Tenth Amendment limitation.[117]

It would not be long, however, before two unusually aggressive exercises of the taxing power prompted the Court to qualify this position. In 1922 the justices invalidated a heavy tax on the net profits of firms employing child labor and a prohibitive excise on options contracts in grain futures. No one could seriously contend that regulation of such activities transgressed the limitations of the Due Process Clause, as the Court had sustained earlier state prohibitions of the taxed conduct. But the Court found that, unlike the other taxes that it had upheld and would later

[117] Barry Cushman, "*NFIB v. Sebelius* and the Transformation of the Taxing Power," 89 Notre Dame L. Rev. 133 (2013); Barry Cushman, "The Structure of Classical Public Law," 75 U. Chi. L. Rev. 1917 (2008).

uphold, these taxes imposed heavy exactions for deviations from a prescribed, detailed, and specified course of conduct. Were the Court to sustain such a measure, then Congress could regulate any and all matters simply by prescribing rules of conduct and imposing excises on violators. The result would be a federal government of plenary rather than enumerated powers. The justices therefore declared the exactions "penalties" rather than true taxes, and thus beyond the power of Congress to impose.[118]

With the taxing power now foreclosed as a means of realizing comprehensive programs of federal regulation, Congress turned to the spending power. The scope of this power had been the subject of debate from the earliest years of the Republic. James Madison had construed the power narrowly, maintaining that Congress could appropriate funds only as an incident to the exercise of its other enumerated powers. Alexander Hamilton, by contrast, insisted that the power to spend was a great and independent power limited only by the requirement that it be exercised to provide for the general welfare of the United States. Throughout the nineteenth and early twentieth centuries Congress regularly appropriated funds for a range of purposes, including relief of those suffering from various disasters, and several antebellum presidents vetoed bills underwriting internal improvement projects believed to lie beyond the power of the federal legislature. Yet no case directly presenting the question of the spending power's scope reached the Court until nearly 150 years after the ratification of the Constitution. In *United States v. Butler*,[119] however, the Court relied upon its review of "the writings of public men and commentators" and "the legislative practice" in resolving the dispute in favor of Hamilton. It was on the basis of this resolution that the Court upheld the old-age pension and unemployment

[118] Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922); Hill v. Wallace, 259 U.S. 44 (1922); Cushman, "Transformation of the Taxing Power"; Cushman, "The Structure of Classical Public Law."
[119] 297 U.S. 1 (1936).

compensation provisions of the Social Security Act in *Helvering v. Davis*[120] and *Steward Machine Co. v. Davis*.[121]

The lengthy delay preceding *Butler*'s pronouncement on the scope of the spending power was attributable in no small part to a feature of the Court's justiciability doctrine. In 1921, Congress enacted the Sheppard-Towner Maternity Act, which established a grant-in-aid program for the reduction of maternal and infant mortality. Under the statute, Congress appropriated funds to be disbursed to states that established qualifying programs for the promotion of infant and maternal health. A taxpayer in Massachusetts asserted that Congress was without authority to spend for such a purpose, and that the taxation necessary to fund the program would deprive her of her property without due process of law in violation of the Fifth Amendment. In *Frothingham v. Mellon*,[122] the justices unanimously rejected her challenge, maintaining that she had no standing to bring it. The Court ruled that Frothingham's interest in the moneys of the federal treasury, which was shared with millions of others, was simply too "minute and indeterminable" to support a justiciable claim of injury entitling her to appeal to "the preventive powers of a court of equity" "to enjoin the execution of a federal appropriation act."[123]

This "taxpayer standing doctrine" had profound implications for federal spending policy during the New Deal. So long as Congress appropriated funds for federal spending programs from general revenue rather than from the proceeds of a specially-dedicated tax, no one would have standing to challenge any such expenditures. Numerous public works, relief, and recovery spending programs designed with this counsel in mind managed for that very reason to elude judicial review. Under such a regime of justiciability, it mattered little whether the Court

[120] 301 U.S. 619 (1937).
[121] 301 U.S. 548 (1937).
[122] 262 U.S. 447 (1923).
[123] Id. at 486-87.

espoused a Madisonian or a Hamiltonian reading of the General Welfare Clause. The system was functionally Hamiltonian.[124]

United States v. Butler came to the Court precisely because the Agricultural Adjustment Act of 1933 was not designed to fit within the taxpayer standing doctrine's safe harbor. In an effort to bolster depressed prices brought on by chronic agricultural surpluses, the Act authorized the Secretary of Agriculture to enter into contracts with farmers, paying them to reduce their production of specified commodities. These benefit payments were funded by a special, designated tax on the processors of these commodities. The receiver of an insolvent textile mill thus had standing to challenge the earmarked exaction, and argued that taxing the processor in order to provide a benefit payment to a farmer took the processor's property for a private rather than a public purpose and thereby denied it rights protected by the Fifth Amendment. The Court agreed that an "expropriation of money from one group for the benefit of another" (as distinguished from an "exaction for the support of the Government") was "not a true tax," and struck down the exaction as a step in a scheme to usurp the states' regulatory authority over agricultural production. Here again, the Tenth Amendment interest could be vindicated only because a Fifth Amendment interest was also implicated.[125]

Congress responded by eliminating the Fifth Amendment interest. Under the Soil Conservation and Domestic Allotment Act, which was enacted within two months of the decision in *Butler*, farmers were paid to shift their acreage from soil-depleting, surplus crops to soil-building crops such as grasses and legumes. The payments under the Act were made from general revenue rather than from the proceeds of an earmarked tax, with the result that no taxpayer had any Fifth Amendment interest that would give him standing to challenge the

[124] Barry Cushman, "The Hughes Court and Constitutional Consultation," 23-1 J. Sup. Ct. Hist. 79 (1998).
[125] 297 U.S. at 61.

program. With the Fifth Amendment no longer implicated, restraints on the spending power would be supplied, if at all, only by the political branches.[126]

Before leaving this period, a few other developments should be noted briefly. First, the eight years between 1913 and 1920 witnessed the ratification of the first four amendments to the Constitution since Reconstruction. The Sixteenth Amendment (1913) empowered Congress to enact a federal income tax – a power that a narrowly divided Supreme Court had determined that Congress did not possess in *Pollock v. Farmers' Loan & Trust Co*.[127] It would not be long before the resulting increase in federal revenue would underwrite vast new federal programs both of direct subsidy and of regulation through conditional expenditure. What was long regarded as one of the structural safeguards of federalism fell when the Seventeenth Amendment (1913) prescribed that United States Senators would henceforth be selected not by state legislatures, but instead by popular, state-wide election. The Nineteenth Amendment (1920) prohibited the federal and state governments from denying or abridging the right to vote on the basis of sex. And the Eighteenth Amendment (1919) launched the federal government on a decade-long experiment in federal enforcement throughout the country of prohibitions on the manufacture, sale, and transportation of intoxicating liquors. Those efforts received mixed reviews at best, and regulation of such matters was returned to the states with the ratification of the Twenty-First Amendment in 1933.

In the domain of case law, the Court held in *Missouri v. Holland*[128] that federal legislation implementing treaties with foreign nations need not fall within the scope of Congress's other enumerated powers. Though this decision held the potential to transform the

[126] Cushman, "Constitutional Consultation"; Cushman, "The Structure of Classical Public Law."
[127] 158 U.S. 601 (1895).
[128] 252 U.S. 416 (1920).

federal equilibrium at the time, Congress did not rely upon this principle in order to achieve its desired ends, and the dramatic expansion of the commerce power by 1942 rendered doing so unnecessary. *Hans v. Louisiana*[129] held that principles of sovereign immunity protected states from suits in federal court brought by their own citizens, thus supplying states with an immunity analogous to that which they had long enjoyed under the Eleventh Amendment. The Court soon made it clear in *Ex Parte Young*,[130] however, that these principles did not preclude suits against state *officers* who had acted unconstitutionally.

The Constitutional Revolution of the New Deal Era also witnessed a "Copernican Revolution" concerning the rules of decision applied by federal courts sitting in diversity. In *Erie Railroad. v. Tompkins*,[131] the Court overruled *Swift v. Tyson* and the line of cases it represented. Declaring that there was no federal general common law, the Court announced that henceforth in diversity cases federal judges would be obliged to apply the relevant state decisional law. Finally, in a series of cases decided in the late 1930s, the justices substantially curtailed longstanding principles of intergovernmental tax immunity.

The dramatic expansion of federal power during this period by no means heralded the total displacement of state authority. Indeed, the demise of economic substantive due process during the 1930s "unshackled" state governments, thereby permitting them to engage in forms of regulation that previous decisions had forbidden.[132] State and local government would continue to exert primary control over the content of such expansive realms of positive law as contracts and commercial transactions, property and land use, torts and insurance, marriage and divorce,

[129] 134 U.S. 1 (1890).
[130] 209 U.S. 123 (1908).
[131] 304 U.S. 64 (1938).
[132] Stephen Gardbaum, "New Deal Constitutionalism and the Unshackling of the States," 64 U. Chi. L. Rev. 483 (1997).

wills, trusts, and inheritance, corporate law and criminal law. In the wake of the New Deal constitutional settlement, however, the contours of the federal equilibrium with respect to such matters were largely left to the discretion of federal legislators.

Constitutional Federalism Since the New Deal

In May of 1939, Harold Laski published an article in *The New Republic* entitled "The Obsolescence of Federalism." Laski opined that "the federal form of state is unsuitable to the stage of economic and social development that America has reached," and declared that "the epoch of federalism is over."[133] Rather than a blessing to be celebrated, federalism was a problem to be solved. Later scholars would go so far as to declare federalism "a national neurosis."[134] In the decades following the New Deal Constitutional Revolution, it became the reigning orthodoxy that the political process alone was sufficient to impose whatever limits on federal power might remain desirable, and that judicial review no longer had a meaningful role to play.[135] Congress enacted and the Court approved uses of the commerce power to regulate not only ever-widening swaths of the economy, but a variety of other matters ranging from civil rights to street crime as well. Through the extensive use of conditional grants of federal funds and conditional preemption of fields of regulation, Congress induced state legislatures to enact programs to facilitate the achievement of a broad array of federal goals concerning areas as diverse as health care, education and training, job counseling, child care, housing, conservation,

[133] Harold J. Laski, "The Obsolescence of Federalism," 98 The New Republic 367 (1939).
[134] Edward L. Rubin & Malcolm Feeley, "Federalism: Some Notes on a National Neurosis," 41 UCLA L. Rev. 903 (1994).
[135] John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980); Jesse H. Choper, Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court (1980); Herbert Wechsler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government," 54 Colum. L. Rev. 543 (1954).

transportation, and urban redevelopment.[136] All of this was achieved without meaningful judicial resistance. By mid-century Professor Edward S. Corwin would proclaim "The Passing of Dual Federalism," and joined others in hailing the rise of a new "cooperative federalism."[137] Social scientists valorizing the displacement of dual federalism by "intergovernmental relations" declared that the federal and state governments were now so intermingled and interdependent in matters of public administration that the federal system was no longer a "layer cake," but instead a "marble cake."[138] By 1968, Professor Phillip Kurland would announce that "federalism as a viable constitutional principle" was "moribund if it is not dead."[139]

One can readily understand why observers such as Kurland had come to such a conclusion. The decades following the Great Depression were characterized not only by significant expansion of the federal regulatory apparatus, but also by the judicial imposition of new constitutional constraints in areas of governance traditionally left to state and local authorities. These inhibitions emerged from two related jurisprudential developments: the Court's application to the states of limitations contained in the Bill of Rights, and an ever-broadening construction of the restraints imposed by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. After discussing these developments, this section will turn to the federalism "revival" of the late 20th and early 21st centuries. This period witnessed the resuscitation of modest limits on congressional power under the Commerce Clause and Section Five of the Fourteenth Amendment, as well as the emergence of a more robust doctrine of state sovereign immunity. At the same time, however, broad readings of the taxing power, the

[136] Harry N. Scheiber, "American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives," 9 Toledo L. Rev. 619 (1978).
[137] Edward S. Corwin, "The Passing of Dual Federalism," 36 Va. L. Rev. 1 (1950).
[138] See, e.g., Morton Grodzins, The American System: A New View of Government in the United States (1966).
[139] Philip B. Kurland, "The Impotence of Reticence," 4 Duke L. J. 619, 620 (1968).

Necessary and Proper Clause and, most importantly, the spending power, continued to supply Congress with virtually plenary regulatory authority that was constrained only by the Bill of Rights and the political process.

In *Barron v. Baltimore*,[140] the Marshall Court had established that the Bill of Rights imposed limitations only on Congress, and did not apply to the states. This view was controversial in some contemporary quarters, and after the ratification of the Fourteenth Amendment, the Court was confronted with claims that among the privileges or immunities protected against state abridgment by the Amendment were the rights enumerated in most if not all of the Constitution's first eight amendments. Though recent scholarship has unearthed significant evidence in support of such a claim,[141] for many years it was the conventional wisdom that the contention was mistaken.[142] This was the view taken by a Court majority anxious to limit the scope of Section One's guarantees lest Section Five's enforcement power be understood to authorize congressional regulation of virtually every aspect of local conduct. In 1873 the justices gave the Privileges or Immunities Clause a remarkably narrow reading in *The Slaughterhouse Cases*,[143] and held in a series of subsequent decisions that various provisions of the Bill of Rights did not protect citizens from their own state governments.[144]

Over the next several decades the Court would moderate this position, holding that the Fourteenth Amendment applied against the states only those provisions of the Bill of Rights embodying a "principle of justice so rooted in the traditions and conscience of our people as to

[140] 32 U.S. 243 (1833).
[141] See, e.g., Akhil Amar, The Bill of Rights: Creation and Reconstruction (1998); Richard L. Aynes, "On Misreading John Bingham and the Fourteenth Amendment," 103 Yale L. J. 57 (1993); Michael Kent Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights (1986).
[142] The leading defense of this view was Charles Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding," 2 Stan. L. Rev. 5 (1949).
[143] 83 U.S. 36 (1873).
[144] See *infra* notes 150-53.

be ranked as fundamental."[145] By 1940 the justices had determined that rights of free speech,[146] freedom of the press,[147] peaceable assembly,[148] and free exercise of religion[149] met that standard, whereas the right to indictment by grand jury,[150] the right to trial by jury in civil and criminal cases,[151] the privilege against self-incrimination,[152] and the prohibition on double jeopardy did not.[153]

During the 1940s this "selective incorporation" approach came under attack from Justice Hugo Black, who argued that the Fourteenth Amendment imposed on the states all of the restraints of the Bill of Rights.[154] Though the Court never embraced Black's theory of "total incorporation," the process of selective incorporation proceeded at such a dizzying pace under the Chief Justiceship of Earl Warren that it would not be long before Black's vision would be very nearly realized. At the same time, expansive new readings of the incorporated First Amendment placed new limits on the role that religion could play in public schools,[155] the power of state and local officials to curb speech to which they objected,[156] and the authority of courts to sanction defamatory publications.[157] Similarly momentous were novel and sometimes elaborate constructions of the Fourth, Fifth, Sixth, and Eighth Amendments, which curtailed the power and

[145] Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).
[146] Gitlow v. New York, 268 U.S. 652 (1925).
[147] Near v. Minnesota, 283 U.S. 697 (1931).
[148] DeJonge v. Oregon, 299 U.S. 353 (1937).
[149] Cantwell v. Connecticut, 310 U.S. 296 (1940).
[150] Hurtado v. California, 110 U.S. 516 (1884).
[151] Pearson v. Yewdall, 95 U.S. 294 (1877); Minneapolis & St. Louis. R. Co. v. Bombolis, 241 U.S. 211 (1916); Maxwell v. Dow, 176 U.S. 581 (1900); Snyder v. Massachusetts, 291 U.S. 97 (1934).
[152] Twining v. New Jersey, 211 U.S. 78 (1908).
[153] Palko v. Connecticut, 302 U.S. 319 (1937).
[154] See, e.g., Adamson v. California, 332 U.S. 46, 68 (1947) (Black, J., dissenting).
[155] See, e.g., Abingdon School District v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).
[156] See, e.g., Cohen v. California, 403 U.S. 15 (1971); Brandenberg v. Ohio, 395 U.S. 444 (1969); Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).
[157] New York Times v. Sullivan, 376 U.S. 254 (1964).

discretion of state and local officials with a judicially-crafted, uniform, national code of criminal procedure.[158]

A revolution in the Court's interpretation of the Equal Protection Clause similarly curtailed longstanding state and local powers to formulate and implement social policy. In case after case, the Court announced that racial segregation in public universities, public primary and secondary schools, public transportation, and such public facilities as parks, swimming pools, and golf courses was inconsistent with the guaranties of the Fourteenth Amendment. The Court's landmark decision in *Brown v. Board of Education*[159] did not produce significant racial integration in southern public schools, however. Instead, orders to desegregate were met with "massive resistance" in the South, and tangible integration began to materialize in the mid-1960s only as a result of conditioning eligibility for federal educational grants-in-aid on local compliance with federally-established desegregation standards. Soon lingering prohibitions on interracial marriage were invalidated in the aptly titled case of *Loving v. Virginia*.[160] In addition, *Baker v. Carr*[161] and *Reynolds v. Sims*[162] saw the Court entering the "political thicket" and requiring that state legislative districts be apportioned so as to conform to the standard of "one person, one vote."

Soon this luxuriation of Equal Protection jurisprudence spread to new domains, as the Court invalidated a variety of state and local measures disadvantaging women, aliens, nonmarital children, hippies, those with mental disabilities and, eventually, sexual minorities. In tandem with the near-total incorporation of the Bill of Rights, this expanded domain of equal protection

[158] See, e.g., Furman v. Georgia, 408 U.S. 238 (1972); Miranda v. Arizona, 348 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Henry J. Friendly, "The Bill of Rights as a Code of Criminal Procedure," 53 Cal. L. Rev. 929 (1965).
[159] 347 U.S. 483 (1954).
[160] 388 U.S. 1 (1967).
[161] 369 U.S. 186 (1962).
[162] 377 U.S. 533 (1964).

produced a wave of structural reform litigation that placed a large number of state or local schools, prisons, jails, mental health facilities, housing authorities, and public employers under the ongoing supervision and control of federal courts. Innovative and often controversial interpretations of the Fourteenth Amendment's Due Process Clause similarly expanded the domain of federal rights at the expense of local regulatory power. Decisions from the 1920s had recognized the rights of parents to direct the educations of their children,[163] but in the decades following 1965 the justices further extended rights to be free from traditional state and local regulations in such matters as the distribution of contraceptives, the provision of abortion, sexual conduct, and marriage.[164]

By the mid-1970s, the judicial "consensus" surrounding the claim that the national political process was adequate to safeguard the values of federalism had begun to unravel. In *National League of Cities v. Usery*,[165] a Court transformed by four Nixon appointments held that the Commerce Clause did not empower Congress to prescribe minimum wages and maximum hours for state and local government employees engaged in "traditional governmental functions" such as fire prevention, police protection, sanitation, public health, and parks and recreation. A change of mind on the part of one justice resulted in the overruling of that decision nine years later in *Garcia v. San Antonio Metropolitan Transit Authority*,[166] and it seemed that the political process approach had been restored to its former primacy. But soon the Court began to qualify its position by holding that federal statutes did not reach traditional governmental functions of states and localities unless they contained a "clear statement" of intent to do so.[167] At the same time,

[163] Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).
[164] Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973); Lawrence v. Texas, 539 U.S. 558 (2003); Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
[165] 426 U.S. 833 (1976).
[166] 469 U.S. 529 (1985).
[167] Gregory v. Ashcroft, 501 U.S. 452 (1991).

the justices became less inclined to find that Congress had preempted state or local regulation by "occupying the field," instead requiring a showing that the challenged state or local law was expressly preempted by the language of the federal statute or "conflicted" with provisions of the federal program. And though the Supremacy Clause required state judges to apply and enforce relevant federal law, the Court held in *New York v. United States*[168] and *Printz v. United States*[169] respectively that Congress could not command state legislatures to enact nor state and local executive officials to enforce federal regulatory programs.

Meanwhile, in *Seminole Tribe of Florida v. Florida*[170] the Court overruled the recent decision of *Pennsylvania v. Union Gas Co*.[171] and held that Congress could not exercise the commerce power so as to abrogate state sovereign immunity in suits brought in federal court. Three years later *Alden v. Maine*[172] extended this principle both to all of Congress's Article I powers and to suits brought in state courts. Suits against state officers remained available, however, and Congress continued to be free to abrogate state sovereign immunity when it was exercising its powers to enforce the guaranties of the Fourteenth or Fifteenth Amendments. Yet in a series of decisions beginning with *City of Boerne v. Flores*,[173] the justices began to construe those powers more narrowly than had such earlier decisions as *Katzenbach v. Morgan*.[174] In holding that the Religious Freedom Restoration Act of 1993 could not be enforced against state and local governments, the Court declared that Congress did not possess "the power to decree the substance of the Fourteenth Amendment's restrictions on the states." That was a matter for judicial determination, and congressional exercises of the enforcement powers were required to

[168] 505 U.S. 144 (1992).
[169] 521 U.S. 898 (1997).
[170] 517 U.S. 44 (1996).
[171] 491 U.S. 1 (1989).
[172] 527 U.S. 706 (1999).
[173] 521 U.S. 507 (1997).
[174] 384 U.S. 641 (1966).

bear a "congruence and proportionality" between the constitutional "injury to be prevented or remedied and the means adopted to that end."[175] The interaction of reduced congressional latitude to enforce the Fourteenth Amendment with the Court's sovereign immunity jurisprudence produced a patchwork of cases holding that states were not amenable to suit under the Age Discrimination in Employment Act,[176] that they were so amenable under the Family and Medical Leave Act,[177] and that they could be sued under some provisions of the Americans With Disabilities Act[178] but not under others.[179]

The high water mark in the revival of judicially imposed limits on congressional power came in *United States v. Lopez*[180] and *United States v. Morrison*.[181] *Lopez* struck down a federal statute that proscribed possession of a firearm within 1000 feet of a school, on the ground that the activity regulated was not "economic," but instead pertained to crime and education, two traditional areas of state and local concern. *Morrison* followed *Lopez* in striking down a provision of the Violence Against Women Act of 1994 that created a federal civil remedy for gender-based violence. In each case the Court held that the effect of the regulated activity on interstate commerce was too attenuated to be "substantial," and that because the activities in question were not economic in nature, *Wickard*'s principle of aggregation did not apply. The *Morrison* Court further relied upon the state action doctrine in holding that the provision lay beyond Congress's power to enforce the guaranties of the Equal Protection Clause.

It soon became clear, however, how limited the effects of the Court's new federalism jurisprudence would be. In the immediate wake of *Lopez*, Congress enacted a revised statute

[175] 521 U.S. at 520.
[176] Kimel v. Florida Board of Regents, 528 U.S. 62 (2000).
[177] Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721 (2003).
[178] United States v. Georgia, 546 U.S. 151 (2006); Tennessee v. Lane, 541 U.S. 509 (2004).
[179] Board of Trustees v. Garrett, 531 U.S. 356 (2001).
[180] 514 U.S. 549 (1995).
[181] 529 U.S. 598 (2000).

prohibiting possession within 1000 feet of a school of any firearm "that has moved in or that otherwise affects interstate or foreign commerce." Armed with this new jurisdictional hook, the statute was uniformly upheld in the lower federal courts. The decision in *Morrison,* though certainly more consequential, left standing the legions of other provisions comprising the Act's massive federal initiative to protect women across the country from violent abuse. In *Gonzales v. Raich,*[182] the Court upheld congressional prohibition of the production and use of home-grown marijuana for medicinal purposes even where such conduct had been authorized by the state legislature. And in *National Federation of Independent Businesses v. Sebelius*,[183] the justices held that though the commerce power could not underwrite a federal exaction imposed on persons who failed to acquire health insurance, the taxing power was adequate to the task.

Behind all of these developments lurked the capacious power of Congress to subsidize and regulate local activity through its spending power, even where such regulation lay beyond the reach of its other enumerated powers. Just as the federal government had desegregated southern public schools through the use of the power of the purse, so it continued to induce the states to enact other desired regulations by conditioning receipt of federal funds on compliance with federal directives. The scope of the conditional spending power was resoundingly affirmed in *South Dakota v. Dole*,[184] where the Court upheld a regulation conditioning state eligibility for certain federal highway funds on the states raising their drinking ages to twenty-one. And even where Congress transgressed limitations on the use of the conditional spending power, it remained free to provide direct subsidies. Thus, even though *Sebelius* struck down as unconstitutionally coercive the Affordable Care Act's provision requiring the states to expand

[182] 545 U.S. 1 (2005).
[183] 132 S. Ct. 2566 (2012).
[184] 483 U.S. 203 (1987).

eligibility for Medicaid or forfeit all of their federal Medicaid funding, federal authorities nevertheless provided funding necessary to subsidize the expansion in the many states that elected to do so, and no constitutional obstacle prevented a direct federal appropriation subsidizing health insurance for persons living in states that elected against expansion. Meanwhile, many other vast programs of congressional regulation through conditional spending continued, unimpeded by judicial let or hindrance, even as the justices repeatedly approved uses of the necessary and proper power in conjunction with both the spending power and other enumerated powers. In nearly all cases, it seemed, one or more of Congress's enumerated powers would suffice to achieve the desired objective. Notwithstanding some comparatively modest judicial tinkering at the margins, it remained the case that effective restraints on the exercise of congressional power "must," as Justice Jackson wrote in *Wickard*, "proceed from political rather than from judicial processes."[185]

[185] 317 U.S. at 120.