

AN AMERICAN CONSTITUTIONAL HISTORY COURSE

for **Non-American** Students

LUIS GRAU



An American Constitutional History Course
for Non-American Students

The Figuerola Institute
Programme: Legal History

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for Non-American Students

Luis Grau

UNIVERSIDAD CARLOS III DE MADRID

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To Federico and Almudena

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CHAPTER 1

THE COLONIAL ORIGINS OF AMERICAN CONSTITUTIONALISM

The Thirteen British Colonies – The First Permanent Settlement – The Pilgrims – The First Republican Settlers

THE THIRTEEN BRITISH COLONIES

In 1697, British colonists settled permanently in the American continent, on the shores of the present Commonwealth of Virginia. Several failed attempts had been made previously, such as the legendary Lost Colony, in Roanoke, North Carolina, an expedition that had been organized and financed by Sir Walter Raleigh in 1587.

After the Virginia settlement became established, other British colonists moved to America and, in 1620, permanent settlements on the shores of what today is the Commonwealth of Massachusetts were begun. From that time on, several other colonies were formed, some as the result of the proliferation of other already established colonies such as Connecticut, Rhode Island or New Hampshire, which were originally part of the Massachusetts Bay Colony. Maryland, the two Carolinas, Pennsylvania, Georgia, and the original Virginia all spawned new settlements and to this were added the spoils of war or captured lands already settled by other nations, such as New York and New Jersey taken from the Dutch or Delaware from the Swedish. In 1776, these thirteen colonies rose in rebellion and declared their independence from the British Crown.

All these British colonists spoke the same language, had very similar customs, declared fealty to the same monarch, received laws from the same Parliament, and had the same common law; but they had forms of government sufficiently diverse to be manifest and mark a difference

among them. Some of those differences came from the way each colony was started. Basically, a colony had one of three possible origins. A first group, such as Virginia or Massachusetts Bay, for example, started from a Royal Charter granted by the king to a group of citizens or a corporation and establishing the terms of the grant of land and the form of gov-



ernment the colonists would have; in a second group, like Maryland or Pennsylvania, the king made them the proprietary possession of one or more noblemen; and in a final group were colonies originated just as the provincial dominions of the king himself. (Curtis, vol. 1, pp. 4 ff; Putney, vol. 1, pp. 194 ff.)

The colonies (with the exception, at most, of the colony of New York, which was a grant of the king to his “dearest” brother James, Duke of York) received at the time of its establishment some kind of Royal Charter. By 1776, only three of the colonies –Massachusetts, Connecticut, and Rhode Island– were ruled according to their original Charters (in the case of Massachusetts, its second one), and enjoyed a remarkable degree of independence, away from the direct control of the monarch. In the particular case of Connecticut and Rhode Island, these two colonies elected all their officers, and their relation to the crown was limited basically to their oaths of loyalty and fealty to the British king. Such was the level of

Sir Walter Raleigh (ca. 1554-1618), known as Guantarral in the Spanish literature of the time, was an English aristocrat, model of a Renaissance man: soldier, courtier, poet, explorer, and, finally, buccaneer. In 1580, he took part in the suppression of the Irish rebellion, seizing a large part of the lands of the rebels. Queen Elizabeth I knighted him, and Raleigh became one the Queen’s favorite. In 1584, Raleigh got a Royal Patent to establish a settlement in the North American continent, but by 1590 that settlement had failed and the settlers had disappeared without trace. In 1596, Raleigh took part in the sacking of the City of Cadiz, in Spain. He was repeatedly imprisoned in the Tower of London, first for disobeying the Queen, and later for conspiring against King James I. At the request of the Spanish Ambassador, in 1618 Raleigh was imprisoned and later beheaded, on charges of having sacked the City of Santo Tomás de la Guayana, in present Venezuela.

self-government of these two colonies that, after their independence, they held their original Charters as their respective State Constitutions –Connecticut did it until 1818, and Rhode Island until 1842– by just removing in those the references to the British Parliament and monarchy.

While the Portuguese and Castilian kings, for example, had personally financed their respective settlement efforts in the New Continent, England’s solution, on the other hand, was initially to establish mercantile corporations or companies for the specific purpose of financing the expeditions and with the intention of benefiting investors from future financial returns. In 1555, the Muscovy Company was chartered for the

purpose of opening a new route to China through Northern Russia. In 1600, Queen Elizabeth I granted a Royal Charter to the East India Com-

James I of England and VI of Scotland (1566-1625) became King of Scotland in 1566, when he was few months old, and of England and Ireland in 1603, at the death of Elizabeth I. In spite of attempts made by James I to unite as one the kingdoms of England and Scotland, these remained legally separated, with separate parliaments and statutes. In 1606, the King “vouchsafed unto the London and Plymouth Companies his License to deduce colonies in America,” what later became the First Charter of Virginia, and in 1609 and 16011-12, the Second and Third Charters of Virginia, respectively. In the midst of the religious conflicts of the time, James I was the target in 1605 of a failed plot, planned by a group of Catholics, to assassinate him – the Gunpowder Plot– by blowing up the Houses for Parliament while the king was present. As a result of the plot, persecution of Catholics and Puritans increased. One of the results of those religious persecutions was, in 1620, the migration to the shores of what is now Massachusetts of a group of Puritans that later became known as The Pilgrims.

Charles I (1600-1649), second son of James I, became King of England, Scotland and Ireland in 1625, at the death of his father. (His older brother Henry, Prince of Wales, had died without progeny leaving the succession to Charles.) Of an absolutist character, Charles I clashed with the English Parliament when the latter attempted to limit his Royal prerogatives. The end result of that dispute was the English Civil Wars of 1642-1646 and 1648-1649. The Royalists lost both wars and, in 1649, Charles I was executed. The Parliament approved then the abolition of the monarchy, establishing the Commonwealth. After the restoration of the monarchy in 1660, Charles II, son of Charles I, ascended the throne, and had him canonized by the Church of England as King Charles the Martyr for allegedly having given his life in defense of his faith.

pany. The London Company and the Plymouth Company were created in 1606 for the initial colonization of North America; each of these two

Charles II (1630-1685) became King of Scotland in 1649, at the death of his father, Charles I, but he had to wait for the restoration, in 1658, of the English monarchy to become King of England. In 1660, Charles II returned to England from The Netherlands, where he had been exiled since 1651, during the English Interregnum. His reign was beset by conflicts with the Parliament and religious intrigues. In 1682, Charles II dissolved the Parliament, governing from that date as an absolute monarch. On his deathbed he converted to Roman Catholicism, the religion professed by his brother James, Duke of York, who succeeded him in the throne because Charles II had fathered no legitimate heir.

corporations received from King James I a Charter or Letter Patent that described precisely the tracts of land where each Company could settle, its privileges, and the form of government it could take. (See *infra* the details in The First Charter of Virginia.) The Virginia Colony was the result of the investments by the London Company –later on named The Virginia Company– and the first settlements in the New England region by the

James II of England and Ireland and VII of Scotland (1633-1701) succeeded his brother, Charles II, in 1685. The last Roman Catholic king to reign in those kingdoms, James II ruled as an absolutist monarch, what spurred the opposition of both Anglicans and Protestants. When in 1688, the Queen consort gave birth to a Catholic heir, a group of noblemen started what would become known as the Glorious Revolution, and offered the throne to William III of Orange through the royal line of his Protestant wife Mary II (daughter of the same James II). Facing the opposition of a large number of Peers, James II fled to France. In 1689, he tried to recover the throne, but he was defeated in battle and had to return to the court of his cousin Louis XVI of France, where he remained until his death.

Plymouth Company. Due to the many difficulties encountered during the initial colonization, both of these companies became insolvent, the Virginia Company in 1624 and the Plymouth Company in 1635. As a result, both lost their Charters, and Virginia became a provincial colony. New England was divided into several colonies, one of them New Hampshire that, later on, became another of the provincial colonies. In 1629, Charles I signed a Charter for a group of Puritans to establish the colony of Massachusetts Bay. Charles II annulled this Charter in 1684, and subsequently the Massachusetts colony was ruled by a king's governor. In 1691, William and Mary approved a new Charter for the citizens of Massachusetts, although it was not on the same terms as the original of 1629, as the people of Massachusetts had requested.

By the end of the colonial period, several of the British colonies had become provincial colonies, in which it was the king who, through gover-

Sir Edmund Andros (1637-1714) was appointed by James II as Royal Governor for the dominion of New England, which extended from the limits of Canada all the way to Pennsylvania. Hated by most of the American colonists who thought of him as a tyrant, today Andros is considered a good and efficient administrator who faithfully followed the orders of the King. In 1689, when news of the Glorious Revolution reached the British colonies, Andros was arrested and sent back to England in irons.

nors directly appointed by him, made practically all political and administrative decisions in the colonies, thereby becoming also known by the name of royal colonies. As a matter of fact, during the colonial period every colony became, at some time in its history, a provincial or royal colony because, for one or other reason, the king would temporarily revoke the original Charters of the colonies and take them under his direct control. Thus, in 1686, King James II joined as the "dominion of New England in America known by the names of our Colony of the Massachusetts Bay, our Colony of New Plymouth, our Provinces of New Hampshire and Maine and the Narraganset Country or King's Province." James then appointed Sir Edmund Andros as his common governor in 1688 (Grau vol. II, pp. 483 ff). When the American Revolution started in 1775, New Hampshire, New

York, New Jersey, Virginia, North Carolina, South Carolina, and Georgia were provincial colonies.

Cecilius (or Cecil) Calvert, 2nd Baron Baltimore (1605-1675) was the first Proprietary and Governor of the Colony of Maryland. His father, George Calvert, 1st Baron Baltimore, like him a Roman Catholic, asked from Charles I the grant of a colony in America to serve as refuge for Catholics and other religious minorities, such as the one the monarch had previously granted to the Puritans in Massachusetts. But George Calvert died before the King issued the Charter, thus it was granted to his son. Cecil Calvert established the colony on the principles of religious tolerance and –a certain degree of– separation between Church and State. In 1649, the General Assembly –the legislative branch– of Maryland passed An Act concerning Religion (Grau, vol. 1, pp. 589-597), the first statute on religious tolerance. The heirs of Cecil Calvert still ruled the colony at the time of the Revolution of Independence, in 1776.

James Edward Oglethorpe (1696-1785) was a British general, politician, philanthropist, and social reformer who was looking for a solution to the terrible situation of the many poor that inhabited the United Kingdom at the time, as well as of the people incarcerated for insolvency. Oglethorpe and a group of noblemen proposed to George II the establishment of the Colony of Georgia, in America, where all those deprived people could have a new start in life. Oglethorpe's plan was that the colonists would own the land they worked, but could not sell it nor bequeath it. Very few debtors, however, migrated to the new Colony. Oglethorpe and his partners then opened the Colony to refugees of all faiths and beliefs, except Roman Catholics. Oglethorpe, as a trustee and de facto governor of the colony, imposed many restrictive policies, like banning slavery or the sale of rum. Due to these policies and his strict character, many of the early colonists branded him a dictator.

In the proprietary colonies, the king granted certain tracts of land to a single or small number of proprietors –always noblemen– who, in return for a symbolic rent, ruled those territories as feudal lords. The first

of these colonies was Maryland, for which, in 1632, King Charles I granted proprietorship to Lord Baltimore, who had the purpose of setting in America a safe haven for Catholics, then persecuted in Great Britain and Ireland for their faith. Years later, in 1663, Charles II granted the Carolinas to several of his courtiers in appreciation for their efforts to facilitate his

William Penn (1644-1718) was the son of an Admiral who participated in the restoration of Charles II. At the age of 22, Penn converted to the Religious Society of Friends, becoming a Quaker. His religious opposition to the established Anglican religion inflamed the wrath of his father, who expelled him from home, and of the Royal Justice, who repeatedly arrested and incarcerated him. At the time, Quakers were persecuted in England by the Anglican Church and in America by the Puritans. At the death of his father, William Penn inherited the rights on a large debt that the King Charles II owed to the Admiral. Penn then exchanged the debt for the rights to a large tract of land in America to establish a colony there – named by the King Pennsylvania or “the forest of Penn” – where the Quakers could practice their religion free of prosecutions, and Penn could establish a government in which to materialize his democratic and egalitarian ideals. In 1682 William Penn wrote “The frame of the government of the province of Pensilvania, in America” (Grau 2009, vol. II, pp. 377-407), and then sailed for his colony with a large group of his followers. He signed a peace treaty with the Indians of that area and founded the city of Philadelphia. Besides his good intentions and beliefs, William Penn was not a good administrator of his personal fortune, nor a good manager, eventually losing control of his colony and of his fortune, dying a bankrupt.

restoration. In 1664, when the colony of Nieuw-Nederland was still in the hands of the Dutch, Charles II granted it to his brother, the Duke of York and future King James II, renaming it the colony of New York. In 1682, to clear a debt incurred with Admiral Penn, Charles II granted William Penn, son of the Admiral, the colony of Pennsylvania. Lastly, in 1732, George II granted a charter for James Oglethorpe and some other Peers “to erect and settle a corporation” for the purpose of establishing the Colony of

Georgia, to be used as a refuge where the poor and the insolvent debtors imprisoned in British jails could make a new start.

In 1664, the Duke of York sold a large tract of the land he had received from the King, his brother, a tract that then became part of the Colony of New Jersey. When in 1685 the Duke ascended to the throne as James II, the rest of the land became the Royal Colony of New York. In 1729 the proprietary colony of Carolina split into the separate colonies

George II (1683-1760) was King of Great Britain and Ireland, ascending to the throne in 1727. He had been born in Hanover, Germany. His father, George I, had inherited the British throne at the death of Queen Anne. George II was the last British king to personally command his troops in battle, which he did at Dettingen, Bavaria, in 1743. As Prince of Wales he quarreled frequently with his father, as he did later on with his own son, heir apparent Frederick Louis. More interested in the European intrigues than in managing the British government, George II allowed the British Parliament and his prime ministers to increase their power and influence. In 1756, France and Great Britain became entangled in the Seven Years' War, which eventually became one of the causes leading to the American Revolution and subsequent independence of the thirteen British colonies, already in the reign of his successor.

of North and South Carolina, and became two royal colonies. Contrary to the perpetuity of the grants of other proprietary colonies, the grant for the Colony of Georgia was for only 21 years. Due to disagreements between its trustees, these returned the colony to the monarch in 1752, and Georgia thus became the last provincial colony. Consequently, in 1776 the only proprietary colonies were Maryland, Pennsylvania and Delaware, although William Penn had conveyed to the settlers of these last two colonies a very large degree of self-government. (The Charters of these colonies can be found in Grau 2009, vol. I, pp. 339-381, for Maryland; vol. I, pp. 625-653, for Carolina; and vol. II, pp. 297-321, for Pennsylvania.)

In spite of the differences in the way the colonies were originally created, all of them (perhaps with the partial exception of Pennsylvania) ended up having quite similar government structures. These structures closely resembled an ideal British model. All the colonies had, at the top, a governor as their principal executive figure. Whereas in the charter colo-

nies he was elected accordingly to the procedure indicated in the Charter itself, in the case of Connecticut and Rhode Island, the election of the governor was conducted by the colonists' own representatives, without requiring any royal participation or approval of him. In the provincial or royal colonies, the governor was appointed and named by the King himself or the officer to whom he had delegated this power. In the proprietary colonies, the proprietor or proprietors of the colony (who frequently resided in the metropolis) appointed an officer to act as their local representative and executive head. All the colonies had a Council to assist the governor in his decisions. These Councils performed, effectively, the functions of an Upper House. All colonies had a Lower House (similar to the House of Commons in the British Parliament) where most of the estates or ranks of the colony were represented. The very first official gathering of representatives of "freemen" settlers took place in Virginia, in 1619, at an assembly that was named the House of Burgesses. This body acted as the lower house of the General Assembly of Virginia, which, together with the Council, was presided over by the governor (Putney, p. 196). The General Assembly had the power to enact any statute that was considered essential or necessary to the good order of the colony. In addition to its strictly legislative functions, the House of Burgesses had power over other tasks through three Committees: the Committee on Private Claims, the Committee on Election Returns, and the Committee on Propositions and Grievances" (Bruce, p. 478 ff).

Assemblies were an institution intrinsic to the Puritan and Presbyterian congregations, since that was the way those groups ruled themselves ecclesiastically. Thus, in the Charter for the Massachusetts Bay colony, King James I decreed, at the request of the settlers, that "in any of their general Courts aforesaid, or in any other Courts to be specially summoned and assembled for that Purpose [...] to make, ordain, and establish all Manner of wholesome and reasonable Orders, Laws, Statutes, and Ordinances, Directions, and Instructions, not contraire to the Laws of this our Realm of England, as well for settling of the Forms and Ceremonies of Government and Magistracy fit and necessary for the said Plantation, and the Inhabitants there, and for naming and setting of all sorts of Officers, both superior and inferior, which they shall find needful for that Government and Plantation" (Grau 2009, vol. 1, p. 268).

The New Hampshire Colony resulted from a break away from the Massachusetts Bay Colony. In The Commission constituting a President & Councill for ye Province of New-Hampshire in New-England (also known as the John Cutt's Commission), the King ordered that the General As-

sembly of that Colony was to be implemented immediately in a manner he prescribed as follows: “by these presents authorize, require, & command the said President and Council that they within 3 months after they have been sworn (as aforesaid) do and shall issue forth Summons under the seal by Us appointed to be used in the nature of writs for the calling of a General Assembly of the said Province” (Ibid., vol. II, p. 290).

A strict construction of the statement “of and with the advise assent and approbation of the Freemen of the said Province, or the greater part of them, or of their delegates or deputies, whom for the enacting of the said Laws, when, and as often as need shall require, We will that the said now Lord Baltimore, and his heirs, shall assemble in such fort and form, as to him or them shall seem best,” in the Maryland Charter (Ibid., p. 354), forced the proprietor to admit and allow an assembly of the representatives of the settlers, and their participation in the legislative functions of the Colony of Maryland.

Before the first group of Pennsylvania settlers departed for America, the Quaker William Penn, proprietor of the colonies of Pennsylvania and Delaware, agreed with them that they would participate directly in the government through assemblies of their representatives. The Colony of New Jersey, also settled mainly by Quakers, had a similar form of representation. Many of the settlers that originally migrated to Carolina came from Virginia, where they used to be represented in the House of Burgesses. Thus, they forced the proprietors of their new Colony of Carolina to establish a House of popular representation. The Assemblies of the colonies of New York and Georgia were established by Royal grants, for the first in 1683, and for the second in 1775, once Georgia had become a provincial colony.

We can see, then, that some of the colonies were originally established as commercial investments; others were religious refuges; and others simply the feudal land of certain noblemen. Their economic models were also different. Certain colonies depended solely on agriculture for their economic growth; in others, manufacturing industries were the main economic contributors; while others still were primarily dependent on the direct exploitation of their natural resources, mainly timber at that time. In some colonies, the Anglican Church was the official one, while diverse sects of puritans populated others. To all these variances, one should also consider that the distances separating the several colonies were so huge, and the communications between them so difficult, that, in many ways, they could be considered as several isolated foreign nations. However, it can be observed that, in spite of the differences in their original formation

or way of establishment, by 1776 every one of the thirteen colonies had a legislative assembly with a House of popular representation, in which delegates were elected by a sector of society, and each had also a governor as its main magistrate, assisted by a Council that –except in Pennsylvania and Delaware–acted at the same time as the Upper House of the legislative Assembly. Those differences and similarities marked their separate and sovereign character at the time of their independence, and they were reflected in the peculiarities of their individual constitutions.

THE FIRST PERMANENT SETTLEMENT

On 26th of April of 1607, around a hundred British subjects landed on the shores of the Chesapeake Bay, at a point near the present town of Williamsburg, in Virginia. After a great deal of difficulties and enormous suffering, those colonists managed to establish the first permanent British settlement on the American Continent. The settlers had sailed from Blackwall, London, in December 1606, and, when they landed, claimed a right to settle in the American territory. This claim was made on the basis of a Royal Charter that one year earlier, on the 10th of April of 1606, the British monarch James I had issued with his signature and the private Seal of England. (This document was termed a “patent letter” because it was open to everybody’s inspection and had to be recognized and obeyed by everybody.) The Charter, and other orders and instructions issued by the King at the same time, established a corporation named initially The Virginia Company, and later The London Company, to finance and manage the expedition and the consequent “first Plantation and Habitation” (Ibid., vol. I, p. 54).

In the Charter, the monarch granted the partners of the Virginia Company the possession of “all the Lands, Woods, Soil, Grounds, Havens, Ports, Rivers, Mines, Minerals, Marshes, Waters, Fishings, Commodities, and Hereditaments, whatsoever,” within a circle of “fifty Miles of English Statute Measure” radius from the “first Seat of their Plantation” (Ibid., p. 54). (The actual ownership or domain of those goods belonged to the King exclusively.) In exchange, the Company had just to yield and give to the monarch and his “heirs and Successors, the fifth Part only of all the same Gold and Silver, and the fifteenth Part of all the same Copper, so to be gotten or had, as is aforesaid, without any other Manner of Profit or Account” (Ibid., p. 58).

The Charter also granted “that each of the said Colonies shall have a Council, which shall govern and order all Matters and Causes, which

shall arise, grow, or happen, to or within the same several Colonies, according to such Laws, Ordinances, and Instructions, as shall be, in that behalf, given and signed with Our Hand or Sign Manual, and pass under the Privy Seal of our Realm of England” (Ibid., p. 56). Without an explicit mention of the English Parliament, the monarch had released, at least in part, the government of the colony to its Council, although it had to rule in accordance with the laws “given and signed” by the King himself.

However, the clause of this first Charter of Virginia that later became the most significant and exercised by the rebellious colonists was in its section xv, where the monarch manifested “that all and every of the Persons, being our Subjects, which shall dwell and inhabit within every or any of the said several Colonies and Plantations, and every of their Children, which shall happen to be born within any of the Limits and Precincts of the said several Colonies and Plantations, shall HAVE and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of England, or any other of our said Dominions” (Ibid., pp. 62-64). Then, one hundred and seventy years later, when the colonists needed to justify their decision to break off their political ties with Great Britain, the words included in the first Charter of James I were employed to their advantage. Thus, in the 2nd section of the Resolves of the Convention of the English Colonies at New York, October 19, 1765, the colonists reminded King George III that “His Majesty’s liege subjects, in these colonies, are entitled to all the inherent rights and liberties of his natural born subjects within the kingdom of Great Britain” (Ibid., vol. III, p. 14). And nine years later, the 14th of October, 1774, the Continental Congress made a political declaration of rights in which they “Resolved, N.C.D. [Nemine Contradicente Dissentiente] 2. That our ancestors, who first settled these colonies, were at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England” (Ibid., p. 22). By this means, then the principle was established that the first Charter of the colonies gave their inhabitants inherent rights that belonged to them by the simple fact of having been born in the colonies as freemen.

The Virginia Colony suffered all kind of disasters –such as plagues, famines, and Indian attacks– and it was close to vanishing, just as the Lost Colony had on the shores of present time North Carolina. In an attempt to save it, James I granted several additional charters (of which two are known) to increase and modify the grants previously made to the London Company. In addition, as we saw above, the King granted the colony

the right to establish its own “legislative-judicial” institution: the House of Burgesses. This lower House was formed by representatives elected directly by the freemen in Colony, and it was presided by its governor, meeting for the first time the 30th of July, 1619, in the city of Jamestown and presided by Sir George Yeardley, then Governor of Virginia. Thus, just twelve years after its foundation, the English Colony of Virginia had a popular presence in its main instrument of government.

THE PILGRIMS

The religious conflicts in England that had built up at the end of the 16th century finally persuaded a congregation of Puritan English Dissidents, followers of the doctrines of John Calvin, to flee to The Netherlands in 1608. In spite of having a flourishing congregation in the Dutch city of Leiden, the group concluded that they could better follow their own religious faith and practices in an environment where they could be free

The Pilgrims are frequently used in American historiography as the best example to justify the British colonization in the American continent. Their conduct, from today's viewpoint, was positive from all sides. Their main reason for migrating was to escape from religious prosecution and to assert their right to freedom of religion; their relationship with the native inhabitants seems to have been always respectful and fair; and they established an ethical society from the very moment they landed in their new land, as the Mayflower Compact shows. Although there are references to the Pilgrims in several of the earlier narratives of the British colonization of America, the use of the term to refer to the settlers that in 1620 landed on the shores of Massachusetts did not become commonplace until 1825.

of any pressure imposed by local authorities with different beliefs. So, in 1618, they decided to migrate to America, and to that end sent agents to England to negotiate a Charter or letter patent from the officers of the London Company that would allow them to settle in the territory of the Colony of Virginia.

However, due to some problems arising during the negotiations with the London Company, a merchant, by the name of Thomas Weston,

told the migrant puritans that he could get the necessary Charter of settlement from the Plymouth Company, and he persuaded them to settle further north from the Colony of Virginia, within the territory granted to the Plymouth Company.

The Leiden congregation returned to England and, even before getting the necessary Charter and permits, approximately a hundred of its members boarded a ship by the name of Mayflower, departing Plymouth

John Locke (1632-1704) was an English philosopher and physician whom many consider to be the father of modern liberalism. His ideas had a great influence on many other philosophers of the Age of Enlightenment –such as Voltaire, Rousseau, Hume, or Kant– as well as on the American revolutionaries. His influence can be seen in The unanimous Declaration [of Independence] of the thirteen united States of America itself. Son of Puritan parents, Locke studied medicine and philosophy in Oxford. In 1666, John Locke met the 1st Earl of Shaftesbury, becoming a member of his entourage as his personal physician. When, in 1675, Shaftesbury fell into disgrace with King Charles II, Locke moved to France, where he stayed until 1679, before returning to England. Shortly after, Shaftesbury was part of a plot to prevent the accession of the Duke of York –the brother of Charles II– to the throne. When the conspiracy failed, Shaftesbury had to flee to Holland, where Locke followed him. After the Glorious Revolution of 1688, Locke returned to England with the entourage of Queen Mary II, wife of William III of Orange. John Locke wrote his most influential works while in Holland, publishing them in England after his return. His principal works are the Essay Concerning Toleration (1667); the three Letters Concerning Toleration (1689, 1690 and 1692); the two Treatises of Government (1689); and An Essay Concerning Human Understanding (1690). The Fundamental Constitutions of Carolina, completed in 1669, is also attributed to Locke.

on September 6, 1620, and arriving two months later in America, at the shores of Cape Cod, in the bay of Massachusetts. These settlers are commonly known as The Pilgrims.

Since the settlers arrived to the New Continent without any legal document to establish their settlement and that would allow them to legally inhabit the territory or to organize themselves on the basis of some form of recognized authority, they drafted a common agreement or contract regulating in very general terms their rules of behavior and organization before landing. This contract is known as the Mayflower Compact. It is a clear example of a social contract, but written as early as 1620 –that is, much earlier than Hobbes, Pufendorf, or Locke– and, though concise, it exhibits all the requirements identified by Prof. Fioravanti in a contract of the kind. That is, that before the *pactum subiectionis* [contract of subjection] was agreed to, the Pilgrims understood that they had to “combeene our selves together into a civill body politick” (Ibid., vol. 1, p. 194). That means that the settlers acknowledged “the *pactum societatis* from which the civil society of individuals sprouts” (Fioravanti 2007, p. 42).

Despite its brevity, the constitutional significance of the Mayflower Compact is definitive, and American historiography considers it the democratic seed of the present constitutional system of the United States of America. This simple agreement has the fundamental elements qualifying it as a constitutional text, since it starts from a covenant or pact among the constituents; it sets up a rudimentary form of government (as the settlers defined it “a civill body politick”); it establishes the supremacy of the law –”unto which we promise all due submission and obedience”– by “just & equall lawes, ordinances, acts, [and] constitutions” (Grau 2009, vol. 1, p. 194), thereby enshrining those implicit fundamental rights of justice and equality that could not be violated.

The Mayflower Covenant is also a precedent of the theories that, seventy years later, John Locke developed in his Second Treatise of Government, of 1690. The Pilgrims understood that “to plant ye first colonie in ye Northerne parts of Virginia” was to move into terra incognita, and that without taking the proper measures, they would end up in a state of nature, including all the “inconveniences” associated with it. To avoid all those “inconveniences of the state of nature,” the only “proper remedy,” according to John Locke, was to establish a civil government. The way to reach that civil government was through a compact, but Locke specified that: “it is not every compact that puts an end to the state of nature between men, but only this one of agreeing together mutually to enter into one community, and make one body politic” (Locke, p. 13).

And that is what the Pilgrims did when all forty one, “whose names are underwritten [...] solemnly & mutually, in ye presence of God, and one of another, covenant & combeene our selves together into a civill body

politick, for our better ordering & preservation.” For Locke, “[t]hose who are united into one body, and have a common established law and judicature [...] are in civil society one with another” (Ibid., p. 47). In a surprising parallel, to establish their own civil society, the Pilgrims manifest sets out “to enacte, constitute, and frame such just & equall lawes, ordinances, acts, constitutions, & offices, from time to time, as shall be thought most meete & convenient for ye generall good of ye Colonie.” And Locke, also in the very same terms, states that “when any one joins himself to, and incorporates with any government already made: for hereby he authorizes the society, or which is all one, the legislative thereof, to make laws for him, as the public good of the society shall require” (Ibid., p. 48). Laws “unto which [the Pilgrims] promise all due submission and obedience” because, as Locke also required, “[n]o man in civil society can be exempted from the laws of it” (Ibid., p. 51).

In this way, the Pilgrims, while still on board of the ship that had brought them from Europe, and before physically landing on the American shore and dispersing themselves into a situation perhaps the closest to the “state of nature” mentioned by Hobbes and Locke many years later, drafted a very brief constitution in which they pledged and joined in a very simple form of government under which, consensually, they would enact just and equal laws, the most convenient for the general good of the Colony, and they would choose the officials that such a government required.

The rights and liberties of the Pilgrims were equally protected since, just by affirming their loyalty to their “dread soveraigne Lord, King James,” they could practice their religion “for ye glorie of God, and advancement of ye Christian faith,” without fear of being persecuted, as they had been back in England.

THE FIRST REPUBLICAN SETTLERS

The Fundamental Orders of Connecticut were approved January 14, 1638, by representatives of the freemen of the towns of Windsor, Hartford and Wethersfield, convened in General Assembly in the town of Hartford. All these towns had been established after 1633, as a result of migrations from the colonies of Plymouth (where the Pilgrims had originally settled) and Massachusetts. Those migrations were the consequence of disagreements between the Puritan leaders of the colonies and certain dissident groups.

It seems that during the first year after the new settlements, there was no formal civil, military or religious authority in the region (Trumbull, p. 100). Since the dissidents settled outside the tract of land granted

to Massachusetts in its Charter, and since the new settlements had no Charter of their own that would bring them within the Royal jurisdiction, the settlers found themselves in a situation without laws to apply and without formal authorities that would apply them.

On the other hand, such a situation was ideal in a highly Puritan society, whose goal was to establish a new social and religious order, democratic to a certain degree since the “choice” of magistrates “shall be made by all that are admitted freemen [...], and doe cohabite within this Jurisdiction, [...] or the mayor part of such as shall be then present” (Grau 2009, vol. 1, p. 420). But, at the same time, the jurisdiction would be highly theocratic since, in the absence of the necessary civil laws, the settlements would be ruled “according to the rule of the word of God.”

Less than twenty years after the Mayflower’s arrival in America, and still before Locke had published his Treatises, the Connecticut settlers were much more explicit than the Pilgrims when declaring their “*pactum societatis*.” They continued to recognize the need for the Compact and its consequences, since “to maintain the peace and union of such a people there should be an orderly and decent Government” to which, once established, the settlers, their successors and everyone that would join them in the future, will “associate and conjoin ourselves to be as one Public State or Commonwealth [... to be] governed according to such Laws, Rules, Orders and decrees as shall be made, ordered and decreed” (Ibid., p. 420). Additionally, the Fundamental Orders clearly identify “those politically active individuals –the People [...]– as such autonomously capable of executing the constituting power and the willingness to establish a certain kind [...] of a political association” (Fioravanti 2007, p.42). Those are the “freemen and have taken the Oath of Fidelity, and doe cohabite within this Jurisdiction, (having been admitted Inhabitants by the major part of the Town wherein they live)” (Grau 2009, vol. 1, p. 420).

But the “contractual dimension of reciprocity” (Fioravanti 2007, p. 27), proper of the feudalism of the Middle Ages, fails in America, even at this very early stage of the constitutional process. Therefore, contrary to wording in the Mayflower Compact, in the Fundamental Orders of Connecticut the settlers do not swear loyalty to the king, but they do it to themselves and to the laws approved by themselves; and, at the same time, do not expect any protection from the monarch since, given their distant and isolated situation, the most basic pragmatism made it obvious that royal protection would never be sent, and that if sent, it would never arrive in time. Consequently, the settlers expected protection from –and thus pledged loyalty to– themselves through the keeping of their laws.

Although by means of what nowadays could be considered primitive institutions, the Fundamental Orders include certain features required by present western constitutions. The Orders set up a form of government with assemblies, courts and public officials, including a governor. All those institutions had a clearly republican character, since all their offices were filled by suffrage and were temporary; and it was not possible to acquire permanent privileges, as was the case with all European monarchies of the time. On the contrary, in Connecticut the provisions were that “no person be chosen Governor above once in two years” and in addition “no other Magistrate to be chosen for more then one year.” It should be noted, however, that its theocratic character is also widely present across the document, and thus “the Governor be always a member of some approved congregation,” and he, as well as all the other magistrates, should always “further the execution of Justice according to the rule of God’s word.” (Grau 2009, vol. I, p. 420, 422 and 428.)

CHAPTER 1 QUESTIONS

1. Which were the British colonies that claimed their independence in 1776? Identify them on the map.
2. How are those colonies classified and how is that classification justified?
3. What is the time line of the settlement of those colonies? Is there any difference in the establishment of the colonies with respect to time?
4. Identify in the Documents section statements that qualify the colonies accordingly to their classification.
5. What does the First Charter of Virginia add to modern constitutionalism?
6. What was the main, formally stated goal of the new colonies? And what were the underlying reasons?
7. Why did the Pilgrims draft the Mayflower Compact?
8. Why is this Compact so special to the Americans?
9. Why did the settlers of Connecticut draft the Fundamental Orders?
10. What are the differences between the Compact and the Orders?
11. What facets of the Fundamental Orders show democratic and republican characteristics?
12. What is a *pactum subiectionis*? Identify in the Documents statements related to this kind of *pactum*.
13. What is a *pactum societatis*? Identify in the Documents statements related to this kind of *pactum*.
14. What are the differences between the Commission of Sir Edmund Andros and other Charters?

CHAPTER 1 DOCUMENTS

THE FIRST CHARTER OF VIRGINIA, 1606 (EXCERPTS)

I. JAMES, by the Grace of God, King of England, Scotland, France, and Ireland, Defender of the Faith, &c. Whereas our loving and well-disposed Subjects, Sir Thomas Gates, and Sir George Somers, Knights, Richard Hackluit, Clerk, Prebendary of Westminster, and Edward-Maria Wingfield, Thomas Hanham and Raleigh Gilbert, Esqrs. William Parker, and George Popham, Gentlemen, and divers others of our loving Subjects, have been humble Suitors unto us, that We would vouchsafe unto them our Licence, to make Habitation, Plantation, and to deduce a colony of sundry of our People into that part of America, commonly called Virginia, and other Parts and Territories in America, either appertaining unto us, or which are not now actually possessed by any Christian Prince or People, situate, lying, and being all along the Sea Coasts, between four and thirty Degrees of Northerly Latitude from the Equinoctial Line, and five and forty Degrees of the same Latitude, and in the main Land between the same four and thirty and five and forty Degrees, and the Islands thereunto adjacent, or within one hundred Miles of the Coast thereof;

II. And to that End, and for the more speedy Accomplishment of their said intended Plantation and Habitation there, are desirous to divide themselves into two several Colonies and Companies; The one consisting of certain Knights, Gentlemen, Merchants, and other Adventurers, of our City of London and elsewhere, which are, and from time to time shall be, joined unto them, which do desire to begin their Plantation and Habitation in some fit and convenient Place, between four and thirty and one and forty Degrees of the said Latitude, amongst the Coasts of Virginia, and the Coasts of America aforesaid; And the other consisting of sundry Knights, Gentlemen, Merchants, and other Adventurers, of our Cities of Bristol and Exeter, and of our Town of Plimouth, and of other Places, which do join themselves unto that Colony, which do desire to begin their Plantation

and Habitation in some fit and convenient Place, between eight and thirty Degrees and five and forty Degrees of the said Latitude, all alongst the said Coasts of Virginia and America, as that Coast lyeth:

III. We, greatly commending, and graciously accepting of, their Desires for the Furtherance of so noble a Work, which may, by the Providence of Almighty God, hereafter tend to the Glory of his Divine Majesty, in propagating of Christian Religion to such People, as yet live in Darkness and miserable Ignorance of the true Knowledge and Worship of God, and may in time bring the Infidels and Savages, living in those Parts, to human Civility, and to a settled and quiet Government; DO, by these our Letters Patents, graciously accept of, and agree to, their humble and well intended Desires;

IV. And do therefore, for Us, our Heirs, and Successors, GRANT and agree, that the said Sir Thomas Gates, Sir George Somers, Richard Hackluit, and Edward-Maria Wingfield, Adventurers of and for our City of London, and all such others, as are, or shall be, joined unto them of that Colony, shall be called the first Colony; And they shall and may begin their said first Plantation and Habitation, at any Place upon the said Coast of Virginia or America, where they shall think fit and convenient, between the said four and thirty and one and forty Degrees of the said Latitude; And that they shall have all the Lands, Woods, Soil, Grounds, Havens, Ports, Rivers, Mines, Minerals, Marshes, Waters, Fishings, Commodities, and Hereditaments, whatsoever, from the said first Seat of their Plantation and Habitation by the Space of fifty Miles of English Statute Measure, all along the said Coast of Virginia and America, towards the West and Southwest, as the Coast lyeth, with all the Islands within one hundred Miles directly over against the same Sea Coast;

[...]

And shall and may inhabit and remain there; and shall and may also build and fortify within any the same, for their better Safeguard and Defence, according to their best Discretion, and the Discretion of the Council of that Colony;

[...]

VII. And we do also ordain, establish, and agree, for Us, our Heirs, and Successors, that each of the said Colonies shall have a Council, which shall govern and order all Matters and Causes, which shall arise, grow, or happen, to or within the same several Colonies, according to such Laws, Ordinances, and Instructions, as shall be, in that behalf, given and signed with

Our Hand or Sign Manual, and pass under the Privy Seal of our Realm of England; Each of which Councils shall consist of thirteen Persons, to be ordained, made, and removed, from time to time, according as shall be directed and comprised in the same Instructions; And shall have a several Seal, for all Matters that shall pass or concern the same several Councils; Each of which Seals, shall have the King's Arms engraven on the one Side thereof, and his Portraiture on the other; And that the Seal for the Council of the said first Colony shall have engraven round about, on the one Side, these Words; *Sigillum Regis Magnæ Britanniae, Franciæ, & Hiberniæ*; on the other Side this Inscription round about; *Pro Concilio primæ Coloniae Virginiae*. And the Seal for the Council of the said second Colony shall also have engraven, round about the one Side thereof, the aforesaid Words; *Sigillum Regis Magnæ Britanniae, Franciæ, & Hiberniæ*; and on the other Side; *Pro Concilio Secundæ Coloniae Virginiae*:

VIII. And that also there shall be a Council established here in England, which shall, in like Manner, consist of thirteen Persons, to be, for that Purpose, appointed by Us, our Heirs and Successors, which shall be called our Council of Virginia; And shall, from time to time, have the superior Managing and Direction, only of and for all Matters, that shall or may concern the Government, as well of the said several Colonies, as of and for any other Part or Place, within the aforesaid Precincts of four and thirty and five and forty Degrees, abovementioned; Which Council shall, in like manner, have a Seal, for Matters concerning the Council or Colonies, with the like Arms and Portraiture, as aforesaid, with this Inscription, engraven round about on the one Side; *Sigillum Regis Magnæ Britanniae, Franciæ, & Hiberniæ*; and round about the other Side, *Pro Concilio Suo Virginiae*.

IX. And moreover, we do Grant and agree, for Us, our Heirs and Successors; that that the said several Councils of and for the said several Colonies, shall and lawfully may, by Virtue hereof, from time to time, without any Interruption of Us, our Heirs or Successors, give and take Order, to dig, mine, and search for all Manner of Mines of Gold, Silver, and Copper, as well within any Part of their said several Colonies, as of the said main Lands on the Backside of the same Colonies; And to Have and enjoy the Gold, Silver, and Copper, to be gotten thereof, to the Use and Behoof of the same Colonies, and the Plantations thereof; Yielding therefore, to Us, our Heirs and Successors, the fifth Part only of all the same Gold and Silver, and the fifteenth Part of all the same Copper, so to be gotten or had, as is aforesaid, without any other Manner of Profit or Account, to be given or yielded to Us, our Heirs, or Successors, for or in Respect of the same:

X. And that they shall, or lawfully may, establish and cause to be made a Coin, to pass current there between the people of those several Colonies, for the more Ease of Traffick and Bargaining between and amongst them and the Natives there, of such Metal, and in such Manner and Form, as the said several Councils there shall limit and appoint.

[...]

XV. Also we do, for Us, our Heirs, and Successors, Declare, by these Presents, that all and every the Persons, being our Subjects, which shall dwell and inhabit within every or any of the said several Colonies and Plantations, and every of their Children, which shall happen to be born within any of the Limits and Precincts of the said several Colonies and Plantations, shall have and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of England, or any other of our said Dominions.

[...]

XVIII. And finally, we do, for Us, our Heirs, and Successors, Grant and agree, to and with the said Sir Thomas Gates, Sir George Somers, Richard Hackluit, Edward-Maria Wingfield, and all others of the said first Colony, that We, our Heirs, and Successors, upon Petition in that Behalf to be made, shall, by Letters-patent under the Great Seal of England, Give and Grant, unto such Persons, their Heirs, and Assigns, as the Council of that Colony, or the most Part of them, shall, for that Purpose nominate and assign, all the Lands, Tenements, and Hereditaments, which shall be within the Precincts limited for that Colony, as is aforesaid, To be holden of Us, our Heirs, and Successors, as of our Manor at East-Greenwich in the County of Kent, in free and common Soccage only, and not in Capite:

[...]

[...] In Witness whereof, we have caused these our Letters to be made Patents; Witness Ourselves at Westminster, the tenth Day of April, in the fourth Year of our Reign of England, France, and Ireland, and of Scotland the nine and thirtieth.

LUKIN

Per breve de privato Sigillo.

(The complete document can be found in Grau 2009, vol. 1, pp. 49-69.)

THE CHARTER OF MARYLAND, 1632 (EXCERPTS)

Charles By the Grace of God, King of England, Scotland, France, and Ireland, Defender of the Faith, &c. To all to whom these Presents shall come greeting.

WHEREAS Our right Trusty and Wellbeloved Subject Cecilius Caluert Baron of Baltemore in our Kingdom of Ireland, Sonne and heire of Sir George Caluert Knight, late Baron of Baltemore, in the same Kingdome of Ireland, pursuing his Fathers intentions, being excited with a laudable and pious zeale for the propagation of the Christian Faith, and the enlargement of our Empire and Dominion, hath humbly besought leave of Vs, by his industry and charge, to transport an ample Colony of the English Nation, unto a certaine Countrey hereafter described, in the Parts of America, not yet cultivated and planted, though in some parts thereof inhabited by certaine barbarous people, having no knowledge of Almighty God, and hath humbly besought our Royall Majestie to give, grant, and confirme all the said Countrey, with certaine Priviledges, and Iurisdiccions, requisite for the good government, and state of his Colony and Countrey foresaid, to him and his heirs for ever.

KNOW YE therefore, that Wee favouring the Pious, and Noble purpose of the said Barons of Baltemore, of our speciall grace, certaine knowledge, and meere motion, have given, granted, and confirmed, and by this our present Charter, for Vs, Our Heires, and Successors, doe give, grant and confirme unto the said Cecilius, now Baron of Baltemore, his heires and Assignes, all that part of a Penjnsula, lying in the parts of America, betweene the Ocean on the East, and the Bay of Chesopeack on the West, and divided from the other part thereof, by a right line drawne from the Promontory or Cape of Land called Watkins Point, (situate in the foresaid Bay, neere the river Wighco) on the West, unto the maine Ocean on the East; and betweene that bound on the South, unto that part of Delaware Bay on the North, which lieth under the fortieth degree of Northerly Latitude from the Equinoctiall, where New-England ends; And all that tract of land betweene the bounds aforesaid; that is to say, passing from the said Bay, called Delaware Bay, in a right line by the degree aforesaid, unto the true Meridian of the first fountaine of the River of Pattowmeck, and from thence trending toward the South unto the farther banke of the foresaid River, and following the West and South side thereof unto a certaine place called Cinquack, situate neere the mouth of the said River, where it falls into the Bay of Chesopeack, and from thence by a stright line unto

the foresaid Promontory, and place called Watkins Point, (So that all that tract of land divided by the line aforesaid, drawne betweene the maine Ocean, and Watkins Point unto the Promontory called Cape Charles, and all its apurtenances, doe remaine intirely excepted to us, our heires, and Successors for ever.)

WEE DOE also grant and confirme unto the said now Lord Baltemore, his heires and Assignes, [...] all and singular the like, and as ample rights, Jurisdictions, Priviledges, Prerogatives, Royalties, Liberties, Immunities, Royal rights, and franchises of what kind soever temporall, as well by Sea, as by land, within the Countrey, Iles, Iletts, and limits aforesaid; To have, exercise, use and enjoy the same, as amply as any Bishop of Durham, within the Bishoprick, or County Palatine of Durham, in our Kingdome of England, hath at any time heretofore, held, used, or enjoyed, or of right ought, or might had, held, used, or enjoyed.

AND HIM the said now Lord Baltemore, his Heires and Assignes, Wee doe by these Presents for Vs, Our Heires and Successors, make, create, and constitute the true and absolute Lords, and Proprietaries of the Countrey aforesaid, and of all other Premises (except before excepted) saving always, the faith and allegiance, and Sovereaigne dominion due to Vs, Our Heires and Successors.

[...]

TO BEE holden of Vs, Our Heires, and Successors, Kings of England, as of Our Castle of Windsor, in our County of Berkshire, in free and common soccage, by fealty onely, for all seruices, and not in Capite, or by Knights service: YEELDING and paying therefore to Vs, our Heires and Successors, two Indian Arrowes of those parts, to be delivered at Our said Castle of Windsor, every yeere on the Tuesday in Easter weeke; and also the fifth part of all Gold and Siluer Oare within the limits aforesaid, which shall from time to time happen to be found.

NOW THAT the said Countrey thus by Vs granted, and described, may be eminent above all other parts of the said territory, and dignified with larger titles: Know yee that wee of our further grace, certaine knowledge, and meere motion, have thought fit to erected the same Countrey and Ilands into a Province, as out of the fullnesse of Our royall Power, and Prerogative, Wee doe, for Vs, Our Heires, and Successors, erect, and incorporate them into a Province, and doe call it Maryland, and so from henceforth will have it called.

AND FORASMVCH as Wee have hereby made, and ordained the foresaid now Lord Baltimore, the true Lord, and Proprietary of all the Province aforesaid: Know yee therefore moreover, that Wee, reposing especiall trust and confidence in the fidelitie, wisdom, Iustice, and Provident circumspection of the said now Lord Baltimore, for Vs, Our Heires and Successors, doe grant free, full, and absolute power, by vertue of these Presents, to him and his heires, for the good and happy government of the said Province, to ordaine, make, enact, and under his and their seales to publish anye Laws whatsoever appertaining either unto the publike State of the said Province, or unto the private utility of particular Persons, according unto their best discretions, of and with the advise assent and approbation of the Free-men of the said Province, or the greater part of them, or of their delegates or deputies, whom for the enacting of the said Lawes, when, and as often as neede shall require, We will that the said now Lord Baltimore, and his heires, shall assemble in such fort and forme, as to him or them shall seem best: And the same lawes duly to execute upon all people, within the said Province, and limits thereof, for the time being, or that shall be constituted under the government, and power of him or them, either sayling towards Mary-land, or returning from thence toward England or any other of Ours, or forraine Dominions, by imposition of Penalties, Imprisonment, or any other punishment; yea, if it shall be needfull, and that the quality of the offence require it, by taking away member or life, either by him the said now Lord Baltimore, and his heires, or by his or their Deputies, Lieutenants, Iudges, Iustices, Magistrates, Officers, and Ministers to be ordained or appointed, according to the Tenor and true Intention of these Presents:

[...]

(The complete document can be found in Grau 2009, vol. 1, pp. 339-381.)

CHARTER OF CAROLINA, MARCH 24, 1663 (EXCERPTS)

CHARLES the Second, by the grace of God, king of England, Scotland, France, and Ireland, Defender of the Faith, &c., To all to whom these present shall come: Greeting:

1st. Whereas our right trusty, and right well beloved cousins and counsellors, Edward Earl of Clarendon, our high chancellor of England, and George Duke of Albemarle, master of our horse and captain general of all our forces, our right trusty and well beloved William Lord Craven, John,

Lord Berkley, our right trusty and well beloved counsellor, Anthony Lord Ashley, chancellor of our exchequer, Sir George Carteret, knight and baronet, vice chamberlain of our household, and our trusty and well beloved Sir William Berkley, knight, and Sir John Colleton, knight and baronet, being excited with a laudable and pious zeal for the propagation of the Christian faith, and the enlargement of our empire and dominions, have humbly besought leave of us, by their industry and charge, to transport and make an ample colony of our subjects, natives of our kingdom of England, and elsewhere within our dominions, unto a certain country hereafter described, in the parts of America not yet cultivated or planted, and only inhabited by some barbarous people, who have no knowledge of Almighty God.

2^d. [...] of our special grace, certain knowledge and meer motion, have given, granted and confirmed, and by this our present charter, for us, our heirs and successors, do give, grant and confirm unto the said Edward Earl of Clarendon, [etc.], all that territory or tract of ground, scituate, lying and being within our dominions of America, extending from the north end of the island called Lucke island, which lieth in the southern Virginia seas, and within six and thirty degrees of the northern latitude, and to the west as far as the south seas, and so southerly as far as the river St. Matthias, which bordereth upon the coast of Florida, and within one and thirty degrees of northern latitude, and so west in a direct line as far as the south seas aforesaid; together with all and singular ports, harbours, bays, rivers, isles and islets belonging to the country aforesaid; and also all the soil, lands, fields, woods, mountains, fields, lakes, rivers, bays and islets, scituate or being within the bounds or limits aforesaid, with the fishing of all sorts of fish, whales, sturgeons and all other royal fishes in the sea, bays, islets and rivers within the premises, and the fish therein taken; and moreover all veins, mines, quarries, as well discovered as not discovered, of gold, silver, gems, precious stones, and all other whatsoever, be it of stones, metals, or any other thing whatsoever, found or to be found within the countries, isles and limits aforesaid.

[...]

4th. To have, use, exercise and enjoy, and in as ample manner as any bishop of Durham in our kingdom of England, ever heretofore have held, used or enjoyed, or of right ought or could have, use, or enjoy. [...]

5^d. [...] and forasmuch as we have hereby made and ordained the aforesaid Edward Earl of Clarendon, [etc.], the true lords and proprietors of all the province aforesaid; Know ye, therefore moreover that we, reposing especial trust and confidence in their fidelity, wisdom, justice and provident circumspection, for us, our heirs and successors, do grant full and absolute power, by virtue of these presents, to them the said Edward Earl of Clarendon, [etc.], for the good and happy government of the said province, to ordain, make, enact, and under their seals to publish any laws whatsoever, either appertaining to the publick state of the said province, or to the private utility of particular persons, according to their best discretion, of and with the advice, assent and approbation of the freemen of the said province, or of the greater part of them, or of their delegates or deputies, whom for enacting of the said laws, when and as often as need shall require, we will that the said Edward Earl of Clarendon, [etc.], shall from time to time assemble in such manner and form as to them shall seem best, and the same laws duly to execute upon all people within the said province and limits thereof, for the time being, or which shall be constituted under the power and government of them or any of them, either sailing towards the said province of Carolina, or returning from thence towards England, or any other of our, or foreign dominions, by imposition of penalties, imprisonment or any other punishment; [...] Provided nevertheless, that the said laws be consonant to reason, and as near as may be conveniently, agreeable to the laws and customs of this our kingdom of England.

[...]

(The complete document can be found in Grau 2009, vol. I, pp. 625-653.)

CHARTER OF THE PROVINCE OF PENNSYLVANIA, 1680 (EXCERPTS)

CHARLES THE SECOND, BY THE GRACE of god, King of England, Scotland, France, and Ireland, defender of the faith, &c. To all whome these presents shall come, greeting. Whereas our Trustie and well beloved Subject William Penn, Esquire, sonn and heire of Sir William Penn, deceased, out of a commendable desire to enlarge our English Empire, and promote such vsefull comodities as may bee of benefitt to vs and our Dominions, as alsoe to reduce the Savage Natives by gentle and iust manners to the love of civill Societie and Christian Religion hath humbly besought leave of vs to transport an ample Colonie vnto a certaine Countrey hereinafter

described, in the partes of America not yet cultivated and planted; And hath likewise humbly besought our Royall Maiestie to give, grant, and confirme all the said Countrey, with certaine priviledges and Jurisdiccions requisite for the good Government and safetie of the said Countrey and Colonie, to him and his heires forever: [...] In consideration thereof of Our special grace, certaine knowledge and meere motion, Have Given and granted, and by this Our present Charter, for vs, Our heires and Successors, Doe give and grant vnto the said William Penn, his heires and assignes All that Tract or parte of land in America, with all the Islands therein conteyned, as the same is bounded on the East by Delaware River, from twelve miles distance, Northwarde of New Castle Towne vnto the three and fortieth degree of Northerne Latitude if the said River doeth extend soe farre Northwarde; [...]and him the said William Penn, his heires and Assignes, Wee doe, by this our Royall Charter, for vs, our heires and Successors, make, Create and Constitute the true and absolute Proprietaries of the Countrey aforesaid, and of all other, the premisses, saving alwayes to vs, Our heires and Successors, the faith and allegiance of the said William Penn, his heires and assignes, and of all other, the⁵ proprietaries, Tenants and Inhabitants that are, or shall be within the Territories and Precincts aforesaid; and Saving also vnto vs, our heires and Successors, the Sovreignty of the aforesaid Countrey; TO HAVE, hold, possesse and enjoy the said Tract of land, Countrey, Isles, Inletts and other the premisses, vnto the said William Penn, his heires and assignes, To the only proper vse and behoofe of the said William Penn, his heires and assignes forever. To bee holden of vs, our heires and Successors, Kings of England, as of our Castle of Windsor, in our County of Berks, in free and comon Socage by fealty only for all services, and not in Capite or by Knights service, Yeelding and paying therefore to vs, our heires and Successors, two beaver Skins to bee delivered att our said Castle of Windsor, on the first day of Januarie, in every yeare; and also the fifth parte of all Gold and Silver Oare, which shall from time to time happen to be found within the Limitts aforesaid, cleare of all Charges. [...]

(The complete document can be found in Grau 2009, vol. II, pp. 297-321.)

COMMISSION OF SIR EDMUND ANDROS FOR THE DOMINION OF NEW ENGLAND, 1688 (EXCERPTS)

James the Second by the Grace of God King of England, Scotland France and Ireland Defender of the Faith &c. To our trusty and welbeloved Sr Ed-

mund Andros Knt Greeting: Whereas by our Commission under our Great Seal of England bearing date the third day of June in the second year of our reign wee have constituted and appointed you to be our Captain Generall and Governor in Chief in and over all that part of our territory and dominion of New England in America known by the names of our Colony of the Massachusetts Bay, our Colony of New Plymouth, our Provinces of New Hampshire and Main and the Narraganset Country or King's Province. And whereas since that time Wee have thought it necessary for our service and for the better protection and security of our subjects in those parts to join and annex to our said Government the neighboring Colonies of Road Island and Connecticut, our Province of New York and East and West Jersey, with the territories thereunto belonging, as wee do hereby join annex and unite the same to our said government and dominion of New England [...] (our province of Pensilvania and country of Delaware only excepted) [...]

And for your better guidance and direction Wee doe hereby require and command you to do & execute all things in due manner that shall belong unto the said office and the trust wee have reposed in you, according to the severall powers instructions and authoritys mentioned in these presents, or such further powers instructions and authoritys as you shall herewith receive or which shall at any time hereafter be granted or appointed you under our signet and sign manual or by our order in our Privy Councill and according to such reasonable lawes and statutes as are now in force or such others as shall hereafter be made and established within our territory & dominion aforesaid.

[...]

And Wee do hereby give and grant unto you full power and authority to suspend any member of our Councill from sitting voting and assisting therein, as you shall find just cause for so doing.

[...]

And Wee do hereby give and grant unto you full power and authority, by and with the advise and consent of our said Councill or the major part of them, to make constitute and ordain lawes statutes and ordinances for the public peace welfare and good governmt of our said territory & dominion and of the people and inhabitants thereof, and such others as shall resort thereto, and for the benefit of us, our heires and successors. Which said lawes statutes and ordinances are to be, as near as conveniently may be, agreeable to the lawes & statutes of this our kingdom of England: Provid-

ed that all such lawes statutes and ordinances of what nature or duration soever, be within three months, or sooner, after the making of the same, transmitted unto Us, under our Seal of New England, for our allowance or disapprobation of them, as also duplicates thereof by the next conveyance.

And Wee do by these presents give and grant unto you full power and authority by and with the advise and consent of our said Councill, or the major part of them, to impose assess and raise and levy rates and taxes as you shall find necessary for the support of the government within our territory and dominion of New England, to be collected and leyed and to be employed to the uses aforesaid in such manner as to you & our said Councill or the major part of them shall seem most equall and reasonable.
[...]

And wee do by these presents ordain constitute and appoint you or the Commander in Cheif for the time being, and the Councill of our said territory & dominion for the time being, to be a constant and settled Court of Record for ye administration of justice to all our subjects inhabiting within our said Territory and Dominion, in all causes as well civill as criminall with full power and authority to hold pleas in all cases, from time to time, as well in Pleas of the Crown and in all matters relateing to the conservation of the peace and punishment of offenders, as in Civill causes and actions between party and party, or between us and any of our subjects there, whether the same do concerne the realty and relate to any right of freehold & inheritance or whether the same do concerne the personality and relate to matter of debt contract damage or other personal injury; and also in all mixt actions which may concern both realty and personalty; [...]

And Wee do hereby give and graunt unto you full power where you shall see cause and shall judge any offender or offenders in capitall and criminall matters, or for any fines or forfeitures due unto us, fit objects of our mercy, to pardon such offenders and to remitt such fines & forfeitures, treason and willfull murder only excepted, in which case you shall likewise have power upon extraordinary occasions to grant reprieves to the offenders therein untill and to the intent our pleasure may be further known.
[...]

(The complete document can be found in Grau 2009, vol. II, pp. 483-501.)

THE MAYFLOWER COMPACT, 1620

In ye name of God, Amen. We whose names are underwritten, the loyall subjects of our dread soveraigne Lord, King James, by ye grace of God, of Great Britaine, Franc, & Ireland, King, defender of ye faith, &c. haveing undertaken, for ye glorie of God, and advancement of ye Christian faith, and honour of our King & countrie, a voyage to plant ye first colonie in ye Northerne parts of Virginia, doe by these presents, solemnly & mutuallly, in ye presence of God, and one of another, covenant & combeene our selves together into a civill body politick, for our better ordering & preservation & furtherance of ye ends aforesaid; and by vertue hearof to enacte, constitute, and frame such just & equall lawes, ordinances, acts, constitutions, & offices, from time to time, as shall be thought most meete & convenient for ye generall good of ye Colonie; unto which we promise all due submission and obedience. In witnes wherof we have hereunder subscribed our names at Cap-Codd ye 11. of November, in ye year of ye raigne of our soveraigne lord, King James, of England, France, & Ireland ye eighteenth, and of Scotland the fiftie fourth, Ano: Dom. 1620.

[It includes the names of 27 men.]

FUNDAMENTAL ORDERS OF CONNECTICUT, 1638 (EXCERPTS)

FORASMUCH as it hath pleased the Almighty God by the wise disposition of his diuine prudence so to Order and dispose of things that we the Inhabitants and Residents of Windsor, Hartford and Wethersfield are now cohabiting and dwelling in and vpon the River of Conectecotte and the Lands thereunto adioyneing; And well knowing where a people are gathered together the word of God requires that to mayntayne the peace and vnion of such a people there should be an orderly and decent Government established according to God, to order and dispose of the affayres of the people at all seasons as occasion shall require; doe therefore associate and conioyne our selues to be as one Publike State or Commonwelth; and doe, for our selues and our Successors and such as shall be adioyned to vs att any tyme hereafter, enter into Combeenation and Confederation together, to mayntayne and prsearue the liberty and purity of the gospell of our Lord Jesus wch we now prfesse, as also the disciplyne of the Churches, wch according to the truth of the said gospell is now practised amongst vs; As also in or Ciuell Affaires to be guided and gouerned according to such Lawes, Rules, Orders and decrees as shall be made, ordered & decreed, as followeth:-

1. It is Ordered, sentenced and decreed, that there shall be yerely two generall Assemblies or Courts, the one on the second thursday in Aprill, the other the second thursday in September, following; the first shall be called the Courte of Election, wherein shall be yerely Chosen frō tyme to tyme soe many Magestrats and other publike Officers as shall be found requisite: Whereof one to be chosen Gouvernour for the yeare ensueing and vntill another be chosen, and noe other Magistrate to be chosen for more then one yeare; prouided allwayes there be sixe chosen besides the Gouvernour; wch being chosen and sworne according to an Oath recorded for that purpose shall haue power to administer iustice according to the Lawes here established, and for want thereof according to the rule of the word of God; wch choice shall be made by all that are admitted freemen and haue taken the Oath of Fidellity, and doe cohabitte wthin this Jurisdiction, (hauing beene admitted Inhabitants by the maior prt of the Towne wherein they liue,) or the mayor prte of such as shall be then present.

2. It is Ordered, sentensed and decreed, that the Election of the aforesaid Magestrats shall be on this manner: euery prson present and qualified for-choyse shall bring in (to the prsons deputed to receaue thē) one single papr wth the name of him written in yt whom he desires to haue Gouvernour, and he that hath the greatest nūber of papers shall be Gouvernour for that yeare. And the rest of the Magestrats or publike Officers to be chosen in this manner: The Secretary for the tyme being shall first read the names of all that are to be put to choise and then shall seuerally nominate them distinctly, and euery one that would haue the prson nominated to be chosen shall bring in one single paper written vpon, and he that would not haue him chosen shall bring in a blanke: and euery one that hath more written papers then blanks shall be a Magistrat for that yeare; wch papers shall be receaued and told by one or more that shall be then chosen by the court and sworne to be faythfull therein; but in case there should not be sixe chosen as aforesaid, besides the Gouvernour, out of those wch are nominated, then he or they wch haue the most written paprs shall be a Magistrate or Magestrats for the ensueing yeare, to make vp the foresaid nūber.

3. It is Ordered, sentenced and decreed, that the Secretary shall not nominate any prson, nor shall any prson be chosen newly into the Magestracy wch was not prpounded in some Generall Courte before, to be nominated the next Election; and to that end yt shall be lawfull for ech of the Townes aforesaid by their deputyes to nominate any two whō they conceaue fitte to be put to election; and the Courte may ad so many more as they iudge requisitt.

4. It is Ordered, sentenced and decreed that noe prson be chosen Gouvernor aboue once in two yeares, and that the Gouvernor be always a mēber of some approved congregation, and formerly of the Magestracy wthin this Jurisdiction; and all the Magestrats Freemen of this Commonwelth: and that no Magestrate or other publike officer shall execute any prte of his or their Office before they are seuerally sworne, wch shall be done in the face of the Courte if they be prsent, and in case of absence by some deputed for that purpose.

5. It is Ordered, sentenced and decreed, that to the aforesaid Courte of Election the seurall Townes shall send their deputyes, and when the Elections are ended they may pceed in any publike searvice as at other Courts. Also the other Generall Courte in September shall be for makeing of lawes, and any other publike occation, wch conserns the good of the Commonwelth.

[...]

9. It is ordered and decreed, that the deputyes thus chosen shall haue power and liberty to appoynt a tyme and a place of meeting together before any Generall Courte to aduise and consult of all such things as may concerne the good of the publike, as also to examine their owne Elections, whether according to the order, and if they or the gretest prte of them find any election to be illegall they may seclud such for prsent frō their meeting, and returne the same and their resons to the Courte; and if yt proue true, the Courte may fyne the prty or prtyes so intruding and the Towne, if they see cause, and give out a warrant to goe to a newe election in a legall way, either in prte or in whole. Also the said deputyes shall haue power to fyne any that shall be disorderly at their meetings, or for not comming in due tyme or place according to appoyntment; and they may returne the said fynes into the Courte if yt be refused to be paid, and the tresurer to take notice of yt, and to estreete or levy the same as he doth other fynes.

10. It is Ordered, sentenced and decreed, that euery Generall Courte, except such as through neglecte of the Gournor and the greatest prte of Magestrats the Freedmen themselves doe call, shall consist of the Gouvernor, or some one chosen to moderate the Court, and 4 other Magestrats at lest, wth the mayor prte of the deputyes of the seurall Townes legally chosen; and in case the Freemen or mayor prte of thē, through neglect or refusall of the Gouvernor and mayor prte of the magestrats, shall call a Courte, yt shall consist of the mayor prte of Freemen that are prsent or their deputyes, wth a Moderator chosen by thē: In wch said Generall

Courts shall consist the supreme power of the Commonwelth, and they only shall haue power to make laws or repeale thē, to graunt leuyes, to admitt of Freeman, dispose of lands vndisposed of,, [sic] to seuerall Townes or prsons, and also shall haue power to call ether Courte or Magestrate or any other prson whatsoeuer into question for any misdemeanour, and may for just causes displace or deale otherwise according to the nature of the offence; and also may deale in any other matter that concerns the good of this common welth, excepte election of Magistrats, wch shall be done by the whole boddy of Freeman.

In wch Courte the Gouvernour or Moderator shall haue power to order the Courte to giue liberty of spech, and silence vnreasonable and disorderly speakeings, to put all things to voate, and in case the vote be equall to haue the casting voice. But non of these Courts shall be adiorned or dissolued wthout the consent of the maior prte of the Court.

11. It is ordered, sentenced and decreed, that when any Generall Courte vppon the occations of the Commonwelth haue agreed vppon any summe or sommes of mony to be leuyed vppon the seuerall Townes wthin this Jurisdiction, that a Committee be chosen to sett out and appoynt wt shall be the prportion of euery Towne to pay of the said leuy, prvided the Committees be made vp of an equall nūber out of each Towne.

14th January, 1638, the 11 Orders abouesaid are voted.

The Oath of the Gournor, for the [present.]

I N. W. being now chosen to be Gournor wthin this Jurisdiction, for the yeare eusueing, and vntil a new be chosen, doe sweare by the greate and dreadfull name of the everliueing God, to prmote the publicke good and peace of the same, according to the best of my skill; as also will mayntayne all lawfull priuiledges of this Commonwealth; as also that all wholsome lawes that are or shall be made by lawfull authority here established, be duly executed; and will further the execution of Justice according to the rule of Gods word; so helpe me God, in the name of the Lo: Jesus Christ.

The Oath of a Magestrate, for the present

I, N. W. being chosen a Magestrate wthin this Jurisdiction for the yeare ensueing, doe sweare by the great and dreadfull name of the euerliueing God, to prmote the publike good and peace of the same, according to the best of my skill, and that I will mayntayne all the lawfull priuiledges thereof according to my vnderstanding, as also assist in the execution of all such wholsome lawes as are made or shall be made by lawfull authority

heare established, and will further the execution of Justice for the tyme aforesaid according to the righteous rule of Gods word; so helpe me God, etc.

(The complete document can be found in Grau 2009, vol. II, pp. 419-431.)

CHAPTER 2

THE CONSTITUTIONS OF THE REVOLUTION – 1776-1780

The First Constitution of the Revolution – The First Declaration of Rights – The First Radical Constitution – The First Constitution Ratified by the People

The American colonial period ended abruptly when, during the reign of George III, delegates from thirteen British colonies on the continent assembled in the city of Philadelphia for a convention known as The Second Continental Congress and, on the 4th of July of 1776, proclaimed their Unanimous Declaration of independence from the British Crown.

Until the middle of the 18th century, the relationship between the American colonies and Great Britain had been that of faithful subjects toward their respected monarch. Between 1764 and 1775, however, tensions built up between the colonies and the mother country as a consequence of the British Parliament enacting several laws –among them, those commonly known as the Sugar Act and the Stamp Act– which levied additional taxes on the Colonies. The intent of those taxes was to defray the enormous costs incurred by the Crown during the French and Indian War, which was the American appendage to the European conflict known as the Seven Years' War. Shouting the slogan “No taxation without representation!” settlers from many towns and cities demonstrated violently against the fiscal policies imposed upon them.

During the next ten years, tensions gradually built up between Great Britain and the colonies, and with the tensions grew the discontent of many settlers, turning into street violence, to the point that, in 1773, a protest against a further tax on the importation of tea, led a group of

colonists to disguise themselves as Native Americans and board several British ships in the Boston harbor. There they threw the cargoes of tea overboard, into the harbor. Later on this incident became humorously known as the “Boston Tea Party.”

The response of the British Parliament to such insurrection was to enact in 1774 the Coercive Acts for the purpose of punishing the mutinous colonies, particularly Massachusetts, the most vociferous. The Coercive

George III (1738-1820) accessed the thrones of Great Britain and Ireland in 1760. When all the British kingdoms united in 1801, he became King of the United Kingdom. After defeating France in the Seven Years' War, in 1782 George III lost the war of the American independence, which the revolutionaries had been fighting since 1775. In 1815 British troops defeated Napoleon in Waterloo. George's health had already deteriorated and, from 1811 until his death, it was his son, the Prince of Wales, who acted as Regent. George III had a deep interest in development of agriculture and industry, and Great Britain started the industrial revolution during his reign.

Acts limited the civil rights of the colonists and imposed heavy restrictions on commerce and access of shipping to Boston harbor, so the Americans labeled them as Intolerable Acts.

The reaction of the American colonists to the British laws was to assemble delegates from all the colonies and convene what was called the First Continental Congress. The delegates drafted a Petition known as the Olive Branch Petition, addressed to the British monarch, asking him to revoke the Parliament's Coercive Acts; but the delegates concurrently organized a plan for all the colonies to join together in a boycott of imports coming from Great Britain, expecting to force the King into accepting the Petition, which he never did. Delegates to the Congress adjourned to their individual Colonies while waiting for the King to reply, agreeing to meet again the following year to consider the result of their appeal to the Crown. Meanwhile civil mutiny and unrest continued and the British troops repressed them with various degrees of energy. But when in May of 1775 the Second Continental Congress convened in Philadelphia as had been agreed, the armed conflict between the colonists and the British troops had begun in earnest. On the 19th of April 1775, the battles of Lex-

ington and Concord, in the Colony of Massachusetts, were fought between British troops and American minutemen. Consequently, the first decision of the Second Continental Congress was to form a “Continental Army” to fight on an equal footing against the British Army, and it named George Washington as its commander in chief.

Between May of 1775 and July of 1776, neither camp had any decisive military advantage over the other. On the one hand, the British troops

George Washington (1732-1799), American soldier and politician, was the first President of the United States (under the Constitution of 1787), and he is considered as the Father of the country. Born in Virginia, in the tobacco plantation of a reasonably wealthy family, he worked as a surveyor and, during the French and Indian War of 1754-63, rose to rank of Colonel in the Virginia Regiment. His patriotic spirit and military knowledge acquired during that war meant that, when the Continental Army was organized in 1775, the delegates assembled in Congress decided to elect him as its commander-in-chief. His strategy on the battlefield and his ability to negotiate effectively with his own revolutionary colleagues, allowed him to bring about the eventual defeat of the British army in 1781. After the peace treaty with Great Britain was signed in 1783, George Washington resigned his military post and returned to his plantation in Virginia. When the Constitutional Convention was organized in 1787, Washington was first elected one of the Virginia delegates, and then was unanimously chosen President of the Convention. After the ratification of the new Constitution in 1789, George Washington was elected, again unanimously, the first President of the United States of America and then reelected for the following term. Washington did not run for a third term alleging that, as he explained in his farewell address, “every day the increasing weight of years admonishes me more and more that the shade of retirement is as necessary to me as it will be welcome.” His example was one of the reasons adduced in the 20th century to limit to two the Presidential terms.

had to leave Boston; but they were able to restore Royal control over parts of the colonies of New York, New Jersey and the Carolinas. In most of the colonies, however, governors and main officials resigned their posts,

leaving the citizens without institutions for their administration and government. Popularly formed colonial assemblies requested from the Continental Congress advice on how to resolve the lack of such governing institutions. Since it had been assembled exclusively for the purpose of negotiating a common solution to the conflict with King and Parliament, the Continental Congress lacked jurisdiction to ordain the colonies any specific way to proceed. Congress, therefore, suggested that each colony should draft its own constitution, fixing in it the form of government most convenient to their particular circumstances.

The years of 1776 and 1777 saw a constitutional activity without precedent in the history of the Western world. In less than fifteen months, ten constitutions were drafted *ex novo*. For modern constitutionalism, this was “a rather integral historical process, with its gradual developments and technical refinements, but also with its breakdowns” (Matteucci, p. 163). Partially forced by the collapse of the previous regime, and partially pushed by the will to create a new society, American patriots engaged passionately in the legislative task. In addition to the constitutions “an outpouring of political writings –pamphlets, letters, articles, sermons– that has never been equaled in the nation’s history” (Wood, p. 6) were published.

The first colony responding to the directions from the Continental Congress was New Hampshire, and on 5th January, 1776, its Assembly ratified a constitution. This was followed by the constitutions of South Carolina (March 26), Virginia (June 29), and New Jersey (July 2). In April of 1776, Georgia had ordained its concise Rules and Regulations that, to a point, could be considered a text of constitutional character. On the 4th of July, the Continental Congress published “The unanimous Declaration of the thirteen united States of America,” formal title of the Declaration of Independence.

In the following months of 1776, the constitutions of Delaware, Pennsylvania, Maryland and North Carolina were drafted and ratified, and in 1777 Georgia, New York and Vermont (which was not yet a state of the Union) completed their work. In 1780, after a long and cumbersome process of popular endorsement, Massachusetts finally ratified its constitution (which text is still in force today).

When Prof. Fioravanti describes the differences between the French and the American Revolution, he points out that, in the American Revolution, “the right to resistance of the people, in those cases of tyranny and breakup of government, is understood as an instrument for restoring a breached legality and not as an instrument to launch a new and bet-

ter political order” (Fioravanti 2007, p. 34). A good example of this can be found in the approach taken by the States of Connecticut and Rhode Island when, in 1776, they addressed their newly acquired independency. Both states decided not to draw new constitutions, but rather chose to keep their original Charters of the 17th century. These had not been drafted by the British King nor by the British Parliament, but by representatives of the colonist themselves, and had been simply sanctioned by the King. The colonists considered that, by removing any reference to the British monarch, these Charters were appropriate to their new condition as independent states.

During that revolutionary period of 1776 to 1783, all constitutions were drafted according to one of four possible models. Some constitutions were enacted directly by the existing legislative assemblies, via the colonial assemblies or their derivative institutions, without being authorized or ratified by the people. Such was the case for the 1776 constitutions of South Carolina, Virginia and New Jersey, which were drafted before the Declaration of Independence. In a second group, the constitutions of New Hampshire, Delaware, New York and Georgia, were drafted and approved by legislative assemblies specially authorized by the people, but the texts were not presented subsequently for popular ratification. In a third case, popularly authorized assemblies wrote constitutions that were later presented to the people for some kind of informal acceptance, such was the case of the constitutions of Maryland, Pennsylvania and North Carolina. This group was joined in 1778 by the constitutions of South Carolina and Massachusetts. In this last case, a subsequent constitutional convention, specifically elected and assembled, was given the mandate to write a constitutional text that was afterward presented to the people of Massachusetts for its ratification. In 1780, the Constitution of the Commonwealth of Massachusetts was finally completed. Although it was the first example of such democratic procedure in this period, it was then replicated by New Hampshire in 1783, and later this has been the model adopted by most of the states for their subsequent constitutions.

Aside from those differences related to the body drafting the constitution, and of the processes used for its ratification, most of those early state-constitutions show similar characteristics. This is unsurprising because of the prevailing common philosophy among the American revolutionaries at the time, and because most of the people framing the different constitutions communicated frequently among themselves at the sessions of the Continental Congress. Their first common characteristic that can be observed is an expression of republicanism in which all offices were elec-

tive and –with the exception of some judicial positions– were temporary. Following Montesquieu’s model (who, incidentally, was following himself a radical form of the British constitutional model), all constitutions proclaim a government formed by three separate powers. (The two most simple and earliest constitutions –New Hampshire and South Carolina– ignored the separation of powers altogether.) Like their colonial predecessors, the early texts of the New Jersey and Delaware constitutions assign to the Council the executive and legislative functions. With the exception of those of Pennsylvania and Georgia, all constitutions established a mixed legislative power, with two Houses. The aim of these mixed governments was to avoid what at the time was considered to be the tyranny of democracy and the subjugation of minorities by the majority. All constitutions defined a popularly elected legislative branch and an executive headed by a governor or president, who was assisted by an executive Council, giving in most cases little information of the characteristics of the judicial power, being sometimes relegated to one administrative office more of the government.

Most of those constitutions recognized, either as a separate declaration or as an integral part of the constitution itself, a catalog of individual rights limiting the power of the established government. Finally, almost all of these constitutions included as a prerogative of the legislature the power to bring charges of impeachment against individuals who exceeded the authority of their office.

As Prof. Fioravanti points out, “the American Revolution [...] had no ancien regime to overthrow” and, thus, “definitively had no need to position itself against past times.” In America there were not “any estates to destroy; there was no need to sanction the supremacy of the law of the land over the ancient sources of the law [...]; there was not, definitely, any previous corporative form of representation to be obliterated” (Ibid., pp. 78-79). It is logical, therefore, to find various influences of the British government structure in the new American constitutions, such as the three powers of government –with the touch of Enlightenment given by Montesquieu– or a moderate government in which checks and balances control, mutually, each of its three branches to avoid, as in a wagon, the chance of overturning. The colonists clearly understood too that “without a written constitution –solidly founded on the constituent power of the sovereign people– to clearly prescribe the limits and the extension of each power, the constitutionalism was bound to become simply a quest for balances within a Parliament that the British themselves had already declared as sovereign” (Fioravanti 2001, p. 109).

The main difference, however, between the English model of government described by Montesquieu and the new American constitutionalism was the recognition of a constituent power belonging to the People. In the British Parliament there is certainly a “balanced arrangement [...] of the three political estates in the kingdom [...] ensuring that none of them could become dominant and thus allot itself all the elements of the political model” (Fioravanti 2007, p. 34). But in 1776 there was in America “an element of the constitution understood as the absolute power of the People or the nation to devise a constitutional order subjected to the will of the citizens” (Ibid., p. 35). This characteristic can be materially seen in several of the constitutions written in that period (and especially in the federal Constitution of 1787 to be studied in the following chapter). Thus, “the members of the Congress of New-Hampshire Chosen and Appointed by the Free Suffrages of the People of said Colony, and Authorised and Empowered by them to meet together [...] to establish Some Form of Government” (Grau 2009, vol. III, p. 40); or “the representatives of the colony of New Jersey, having been elected by all the counties, in the freest manner and in congress assembled, have, after mature deliberations, agreed upon a set of charter rights and the form of a Constitution” (Ibid., p. 92); or “The Constitution, or System of Government, Agreed to and Resolved upon by the Representatives in Full Convention of the Delaware State, [...] the Said Representatives Being Chosen by the Freemen of the Said State for that Express Purpose” (Ibid., p. 128); etc. All the new states had established a “constituent power,” understood as an original and fundamental power for individuals to decide the form and the course of their political relationship, to be their government. “This power will be the father of all political liberties –the ‘positive’– since it has the highest freedom of decision, which is the liberty to decide a certain and specific political order” (Fioravanti 2007, pp. 41-42).

THE FIRST REVOLUTIONARY CONSTITUTION

From a historical point of view, the main relevance of the first constitution of New Hampshire does not derive from being the first constitution drafted during the revolutionary period, but from the fact it encapsulates the circumstances in the gestation of the American Revolution. An independent spirit had not yet been engraved in the heart of the colonists and the disagreement with the metropolis was considered to be a passing problem, which with effort could be resolved. From a constitutionalist point of view, when compared with those that followed, the New Hampshire con-

stitution allows us to see the quick progress that, in very few months, took place in the techniques for drafting this novel form of legal framework.

The text begins by proclaiming the legitimacy of the New Hampshire congress that had written it. Its members had been “Chosen and Appointed by the Free Suffrages of the People of said Colony, and Authorised and Impowered by them to meet together [...] And in Particular to establish Some Form of Government,” and in addition they were following “a Recommendation to that Purpose having been Transmitted to [them] From the Said [Continental] Congress.” It then went on to regret “the Unhappy Circumstances, into which this Colony is Involved by means of many Grievous and Oppressive Acts of the British Parliament, Depriving us of our Natural & Constitutional rights & Privileges.” The text claimed that things had been made worse by the British Parliament, “To Enforce Obedience to which Acts, A Powerful Fleet and Army have been Sent into this Country by the ministry of Great Britain, who have Exercised a Wanton & Cruel Abuse of their Power, in Destroying the Lives and Properties of the Colonists in many Places with Fire & Sword: Taking the Ships & Lading from many of the Honest and Industrious Inhabitants of this Colony Employed in Commerce, agreeable to the Laws & Customs a long time used here.” The text then explained the immediate reasons forcing them to take such a drastic action, that being “The Sudden & Abrupt Departure of his Excellency John Wentworth, Esqr., our Late Governor, and Several of the Council, Leaving us Destitute of Legislation, and no Executive Courts being open to Punish Criminal Offenders, whereby the Lives and Propertys of the Honest People of this Colony are Liable to the Machinations & Evil Designs of wicked men.” The argument concluded that, “for the Preservation of Peace and good order, and for the Security of the Lives and Properties of the Inhabitants of this Colony. We Conceive ourselves Reduced to the Necessity of establishing A Form Of Government.”

But the document is not purporting a definitive and radically final solution. It is rather setting forth a formula for self-government “to Continue During the Present Unhappy and Unnatural Contest with Great Britain.” And the colonists reiterate their innocence regarding the “Unhappy Circumstances,” as well as their willingness and hope of reaching a “reconciliation between us and our Parent State can be Effected.” But at the same time, the colonists of New Hampshire recognized that this was not simply a problem between New Hampshire and the Kingdom of Great Britain, but between the motherland and all thirteen colonies, so any decision taken will be “as shall be Approved by the Continental Congress in

whose Prudence and Wisdom we confide Accordingly” (Grau 2009, vol. III, pp. 40-42).

Then, the constitution describes a quite simple form of government, built exclusively around a bicameral (dual chamber) legislative that will elect government officers for the temporary conduct of the colony’s business; but leaving open a chance to have new elections and to make that government larger “if the Present unhappy Dispute with Great Britain Should Continue longer than this present year” (Ibid., p. 42). One should note the coincidences and similarities between this first Constitution of New Hampshire and the Fundamental Orders of Connecticut, which are easily recognizable.

As we know, the “unhappy Dispute with Great Britain” lasted more than “this present year,” so the simple form of government adopted at the beginning of 1776 became inadequate to the needs of a newly independent state. In 1778, a brand-new constitutional text was presented for the people’s ratification (the text of 1776 had not been so), but it was rejected. In 1781, New Hampshire prepared a constitution following the lines marked by the Massachusetts’ Constitution, which had been ratified by its people the year before, and in 1783 it was approved and ratified by the People of New Hampshire. The Constitution came into force the following year and it has been in use since then, with the addition of just a few amendments, making it the second oldest constitution currently in force.

THE FIRST DECLARATION OF RIGHTS

Both the Declaration of Rights of Virginia and its constitution were unanimously approved in a General Convention of delegates and representatives of all counties and towns of what was then still a colony; but neither text was presented to the people for its ratification.

Although the Virginian Constitution was approved one week before the Continental Congress made its declaration of independence, its independent character is well reflected throughout the text. Whereas New Hampshire and South Carolina made references to “the Unhappy Circumstances” forcing them to organize new forms of government –but only “During the Present Unhappy and Unnatural Contest with Great Britain,” or “until an accommodation of the differences between Great Britain and America shall take place”– (Ibid., p. 64), Virginia radically stated that “the government of this country, as formerly exercised under the crown of Great Britain, is totally dissolved” (Ibid., p. 78).

The significance of the Declaration of Rights and the constitution of Virginia resides not in their anticipation to the independence of the colonies, but in the fact that they were the first two documents which recorded, for the first time, concepts and values that would eventually be included in the constitutions of the other states as well as in the subsequent federal Constitution and its Amendments. Those concepts and values have also been adopted in many of the modern constitutions of the Western world. As Prof. Matteucci says, “Virginia’s is the constitution most influential in all others of its kind” (Matteucci, p. 163). The first paragraph of its Declaration of Rights has become prototypical: “THAT all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety” (Grau 2009, vol. III, p. 70).

In that Declaration and constitution of 1776, Virginia included several concepts that, for the first time, were written down and structurally considered in a fundamental norm. Virginia’s constitution was the first to proclaim the sovereignty of the People: “all power is vested in, and consequently derived from, the people.” And this declaration is not a simple statement of intent, empty of any specific meaning and power, but rather a definition of the place occupied by the government in the new constitutional order: “Magistrates are their trustees and servants, and at all times amenable to [the people]” (Ibid., p. 70). Virginia’s are the first texts to establish a clearly marked separation of powers, so “the Legislative and Executive powers of the state should be separate and distinct from the Judiciary” (Ibid., p. 70), and “The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the other; nor shall any person exercise the powers of more than one of them at the same time” (Ibid., p. 78).

The Constitution of the Commonwealth of Virginia created a form of government that was subsequently used by the other new states and even transmitted to the federal Constitution. It had a mixed –bicameral– legislative, renewed periodically through popular elections, and in which the origination of any “money bill” was limited to the branch of the most representative house. A governor or president headed the executive power. Election to the judicial branch was for life – “during good behaviour” – and provided the independent judges with “fixed and adequate salaries” to protect them from undue influences from the other branches of the government. The constitution established a republican order of government

in which legislative and executive offices were elective and temporary, and in no way transmissible or hereditary, so those who occupy those offices “should at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain and regular elections” (Ibid., p. 70). The constitution also specifically defined the process of impeachment as a mechanism for the political control of public officials.

Together with its form of government, Virginia was the first state to establish a written list of “inherent rights” of the individual that should act “as the basis and foundation of Government.” Those rights included “the free exercise of religion” and “the freedom of the press;” the “right of suffrage” and of free elections; and that individuals could not be “deprived of their property for public uses” without adequate compensation. Its citizens were entitled “to a speedy trial by an impartial jury” with all due process, and they were protected from “cruel and unusual punishments.” Moreover, the constitution declared that the “military should be under strict subordination to, and governed by, the civil power,” and that an individual could not to be searched or seized, in his person or property, without a proper warrant (Ibid., pp. 70, 72).

All these concepts, then original but which today are taken almost for granted, appeared for the first time in the history of constitutionalism in the Constitution of Virginia of 1776 and its Declaration of Rights. Thereafter they were included, modified or adapted to the circumstances of the time, in other famous documents, such as the French *Déclaration des droits de l'homme et du citoyen*, or the Constitution of the United States itself and its Amendments. But we have to acknowledge that “the Representatives of the Good people of Virginia” were the first to show us how to establish a government founded on the sovereignty of the People and “instituted for the common benefit, protection, and security, of the people.”

THE FIRST RADICAL CONSTITUTION

The Pennsylvania Constitution of 1776 is considered “the most radical and most democratic of the Revolutionary constitutions” (Wood, p. 438; similarly in Fioravanti 2007, pp. 87-88). Promulgated at the end of September, 1776, this constitution followed the lines set up by the Virginia Constitution, but added certain new concepts that make it different from the rest of the constitutions and justify the claim that it was “most radical and most democratic” in character.

Some of these new “radical and democratic” concepts had, in fact, actually been included in the preceding constitutions of New Jersey and Delaware. It should be reminded that both these states had, like Pennsylvania, an important Quaker influence. The ideas were primarily those of William Penn, by way of his *Concessions and Charter of Liberties* (Grau 2009, vol. II, pp. 323-331, 361-375). The similarities in the texts can be observed, for example, in Section 2 of the Declaration of Rights of Delaware and the second paragraph of Chapter I in Pennsylvania’s Constitution (Ibid., vol. III, pp. 120 and 148).

During the colonial period, only men of a minimum age and the owners of a sizable land property were allowed to vote. That prescriptive entitlement continued in most of the states after their independence. However, in accordance with its democratic spirit, Pennsylvania considered that the right of suffrage had to be extended to a much larger part of the citizenry. Thus, its Constitution reduced the minimum age required to vote from the 25 to the 21 years, and extended the right to all those male residents who had paid taxes in the state. As a result, many artisans and merchants, who previously could not vote because they did not own any land, now were entitled to vote. The right of suffrage was extended even to the sons, older than 21 years of age, of those landowners and other people who already paid taxes. This was due to the fact that Chapter I of the Constitution stated that, “all elections ought to be free, and that all free men, having a sufficient evident common interest with and attachment to the community, have a right to elect officers or to be elected into office” (Ibid., p. 150). Such “interest with” and “attachment to” the community were evidenced by the paying of taxes in the municipality where the voting right was exercised.

Other rights that appear for the first time in the Pennsylvania Constitution are “[t]hat the people have a right to bear arms for the defence of themselves, and the state,” which years later was to be included almost literally in the federal Bill of Rights as the second Amendment; “[t]hat all men have a natural inherent right to emigrate from one state to another that will receive them, or to form a new state in vacant countries, or in such countries as they can purchase, whenever they think that thereby they may promote their own happiness,” rights which, in this case, were to be expressly forbidden in the federal Constitution; or that “[a] school or schools shall be established in each county by the legislature for the convenient instruction of youth, with such salaries to the masters paid by the public as may enable them to instruct youth at low prices, [a]nd all useful learning shall be duly encouraged and promoted in one or more universi-

ties,” concepts that will pass, again almost literally, into the constitutions of North Carolina and Georgia. (The interest for education was extensively developed in the Massachusetts Constitution of 1780, but there is no connection with Pennsylvania’s.) Other significant rights that appear for

Thomas Paine (1737-1809) was a writer, pamphleteer and American revolutionary. Born in England, he is famous especially for his pamphlet *Common Sense*, published in January 1776, in which he vehemently urged the colonies to separate from Great Britain. For his contribution toward the independence of the United States, Paine is considered one of its Founding Fathers. Paine migrated to America in 1774, and immediately joined the American revolutionaries. In 1777, he was appointed Secretary of the Committee on Foreign Affairs of the Continental Congress, but because of his indiscretions he was expelled from the Committee two years later. Nevertheless, in 1781 Paine participated in a mission to France to get finance for the newly formed Union in their war of independence, and returned to the United States with a grant of several million pounds sterling. Congress rewarded Paine with \$3,000 for his services. In 1787, Paine returned to England, and two years later he moved to France to participate in the French Revolution. In spite of not speaking the language, in 1792 he was elected as deputy to the French National Convention. The next year, right in the middle of the Reign of Terror, Paine was arrested and narrowly escaped the guillotine. In 1802 he returned to the United States, remaining there until his death.

the first time in the Pennsylvania constitution are “[t]hat the people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances by address, petition or remonstrance” (Ibid., pp. 150, 152, 170).

There are other rights in the Constitution of Pennsylvania which are now considered obsolete, but that clearly illustrate the subjects of interest in the society of the time. Thus, “[t]he inhabitants of this state shall have liberty to fowl and hunt in seasonable times on the lands they hold, and on all other lands therein not inclosed, and in like manner to fish in all boatable waters and others not private property,” examples again of democratic-radicalism in the constitution extending to all its citizens, a

privilege that till now had been reserved to those few people in a privileged class.

The recognition of many of these rights was a prerequisite for the proper operation of other novel institutions that appear in the Pennsylvania Constitution for the first time, such as a unicameral (single house) legislature. Contrary to most of the states, which followed the British model and had set up bicameral Assemblies, thus avoiding “the tyranny of the majorities” and contributing balance to the legislative process, Pennsylvania did not create a senior branch of the legislature. (Initially Georgia and Vermont follow Pennsylvania’s trend, and established unicameral legislative Assemblies. All three states now have bicameral legislatures.) The decision for a single House was another attempt to protect the Revolution’s democratic character in a society in which all citizens were equal. If the Revolution was to claim equal rights for all the Americans, that equality had to be reached “without Respect to the Dignity of the Persons concerned” (Wood, p. 83, citing Patrick Henry). If the old British governors and officers had been “a minority of rich men,” the Revolution could not turn to an “aristocratical junto” (Ibid., p. 86), such as an upper house would become, with even a fraction of the power from which they were dying to free themselves.

For the same reason of supporting truly democratic principles above all, the Pennsylvania Constitution did not grant veto power to the executive branch. No single person, not even the president or governor of the state, was given sufficient power to reject or obstruct the decisions made by the representatives of the People as a whole. In particular those representatives “shall consist of persons most noted for wisdom and virtue” (Grau 2009, vol. III, p. 152). Only the People would be enabled to hold their representatives to account. To this end, Pennsylvania set up a complex process of legislative enactment, and before bills were ratified they had to be published so the people could read and analyze them; and then, using their right of assembly, they went on to “instruct their representatives” on how to vote on those bills.

As an ultimate exercise of control over the government, Pennsylvania created a Council of Censors, an institution that was no part of the Legislature, nor of the Executive, nor of the Judicial Power, but that had unlimited powers over those three. Its members “chosen, by ballot, by the freemen, [... their] duty [was] to enquire whether the constitution [had] been preserved inviolate in every part; and whether the legislative and executive branches of government [had] performed their duty, as guardians of the people, or assumed to themselves or exercised other or greater

powers than they are entitled to by the constitution; they [were] also to enquire whether the public taxes have been justly laid and collected in all parts of this commonwealth, in what manner the public monies have been disposed of, and whether the laws have been duly executed.” [...] The said council of censors [had] power to call a convention [for] amending any

John Adams (1735-1826) was an attorney and American politician, second President of the United States and one of the Founding Fathers. He was born in Massachusetts and graduated from Harvard College. After studying law in the office of a prominent local lawyer, he was admitted to the Bar in 1758. In 1765 he played an active role in the protests against the Stamp Act. Elected to the legislative assembly of the Massachusetts Colony in 1774, he later became one of its delegates to the Continental Congresses. John Adams was part of the committee that drafted the Declaration of Independence. In 1779, Adams and James Bowdoin drafted the text of the Massachusetts Constitution. Adams was one of the American delegates who, in 1782, negotiated the Peace Treaty with Great Britain. Subsequently, he was named Ambassador, first to The Netherlands and then to Great Britain. These assignments prevented him from participating in the drafting of the federal Constitution. John Adams was elected Vice-President in the two presidential terms of George Washington. After Washington's decision not to run for a third term, John Adams was elected President in 1796 as the candidate for the Federalist Party. In the forth-presidential elections, of 1800, John Adams was defeated by the candidate of the Democratic-Republican Party, Thomas Jefferson, whereupon Adams retired from politics and moved to Massachusetts, dying the 4th of July of 1826, the same day as Thomas Jefferson did.

article of the constitution, which may be defective, explaining such as may be thought not clearly expressed, and of adding such as are necessary for the preservation of the rights and happiness of the people” (Ibid., pp. 170, 172).

The radical elements in the Pennsylvania Constitution were, therefore, unique, and it had some other differences with the texts of the several states. Undoubtedly, the reasons for the differences can be found in

the Quaker origin of the colony. As mentioned in the previous chapter, its initial proprietor, William Penn, and the majority of his fellow settlers belonged to the Religious Society of Friends. The principles of equality and democracy of this group became deeply engraved in the Pennsylvanians.

Many of the conventions discussing the future of the British colonies, as well as the Continental Congresses, took place in Philadelphia due to the fact that, by mid 18th century, it was the largest, most populous and prosperous city in America. Its geographic location, central to all the colonies also favored it as a place of meeting. As a result, the revolutionary delegates of the colonies gathered there, as did many radical pamphleteers, such as Thomas Paine, who published most of his works on egalitarianism there. Another reason for those radical attitudes was that, when the Continental Army was created, many of the rich, influential, and thus conservative, citizens of Pennsylvania took posts in it, thus leaving the General Assembly to other representatives less wealthy and more extreme in their opinions. These ingredients combined to give the Pennsylvania Constitution its radical character. Only in 1790, when the War of Independence had ended and the whole political process settled down under the federal Constitution, would Pennsylvania enact a much more conservative new constitution.

THE FIRST CONSTITUTION RATIFIED BY THE PEOPLE

The Massachusetts Constitution ratified in 1780 is the oldest constitution in force and precedes the federal Constitution by nine years. Today, the original –obviously amended– text remains the law of the state. (By November 2000, the constitution had received 120 amendments.) It is the only constitution of that period that was formally ratified by the people at large. (All previous state constitutions had been approved only by their constituent or regular assemblies.)

Due to its Puritan origins, the influence of town meetings played an important part in the democratic process of Massachusetts. Contrary to the Roman Catholic and the Church of England Churches, which were strictly hierarchical, many of the Puritan congregations were governed through the direct participation of their members at church meetings. The Puritan churches had prospered in many of the towns in Massachusetts, so it was natural that the towns came to be governed through the same meetings as their churches. These town meetings were clear examples of a form of direct democracy, in which all the neighbors in the town par-

ticipated personally and directly in the resolution of any community business.

When in 1776 Massachusetts had the need to draw a constitution to govern itself as an independent state, its General Assembly decided that the new constitutional text had to be ratified by the people. (One of the negative consequences of that decision was the delay until 1780 in the ratification.) Massachusetts finished the first draft of its constitution at the beginning of 1778, already two years behind the other states. It was then presented to the people for its ratification, but the text was rejected. The reason for that rejection was that it did not include a bill of rights, and, consequently, did not explicitly guarantee the natural and inalienable rights of the People. Neither did it include a clearly marked separation of powers, because the executive powers were not vested exclusively in the governor; he was at the same time President of the Senate and shared powers with it. Moreover, the draft proposed for ratification had not been

James Bowdoin (1726-1790) was an American politician and revolutionary. Born in Boston, Massachusetts, to a wealthy family, he graduated from Harvard University and, in 1753, was elected to the House of Representatives of Massachusetts. Later, in 1756, he was elected to the colonial Council becoming deputy to the first Continental Congress, but he declined to participate in its work, owing to poor health. In 1779, Bowdoin was elected President of the Convention assembled to draft the Massachusetts Constitution. In 1785, he was elected Governor of Massachusetts for a two-year term.

written by a constituent convention, elected specifically to that end, but rather by a committee of the General Assembly, thus the legitimacy of the drafting convention was limited, and the independence of the draft was therefore compromised (Bradford, p. 278). As a result of the rejection, a convention of representatives was specially elected to write the new constitution.

The constitutional convention met for the first time on September 1st, 1779. John Adams and James Bowdoin are credited with writing the new draft. After innumerable changes forced by the town assemblies, on March 2nd, 1789, the Convention considered the text done and complete, and sent it to the towns for ratification. After two thirds of the people ac-

cepted it in June of that year, the democratic process was completed and the new constitution took effect by the end of the following October.

Compared to preceding bills of rights, Massachusetts' Declaration of Rights does not add any concept that could be considered genuinely novel or original. But although it does not confer any new right beyond the previous constitution, it presents those rights in a more structured and detailed way, sometimes even verbosely. Taking, as an example, the right to religious liberty, Virginia's Declaration of Rights describes it in a direct and succinct way – "all men are equally entitled to the free exercise of religion, according to the dictates of conscience" – while Massachusetts adds special emphasis on the details of the practice of religion and turns it from a right into an obligation: "II. – It is the right as well as the duty, of all men in society, publickly, and at stated seasons, to worship the SUPREME BEING, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship." And to it Massachusetts adds another long section imposing the public teaching of religion: "III. – As the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and morality; and as these cannot be generally diffused through a community, but by the institution of the public worship of GOD, and of public instructions in piety, religion, and morality. Therefore, to promote their happiness, and to secure the good order and preservation of their government, the people of this Commonwealth have a right to invest their Legislature with power to authorize and require, and the Legislature shall, from time to time, authorize and require, the several towns, parishes, precincts, and other bodies politic, or religious societies, to make suitable provision, at their own expense, for the institution of the public worship of GOD, and for the support and maintenance of public Protestant teachers of piety, religion, and morality, in all cases where such provision shall not be made voluntarily" (Grau 2009, vol. III, pp. 72, 392). (It should be noted that these two articles were later on amended. The text of article III was replaced in 1833 by Amendment XI that eliminated all references "to enjoin upon all the subjects, an attendance upon" religious teachings, although retaining their importance: "As the public worship of God and instructions in piety, religion and morality, promote the happiness and prosperity of a people and the security of a republican government; – therefore, the several religious societies of this commonwealth,

whether corporate or unincorporate, at any meeting legally warned and holden for that purpose, shall ever have the right to elect their pastors or religious teachers, to contract with them for their support, to raise money for erecting and repairing houses for public worship, for the maintenance of religious instruction, and for the payment of necessary expenses: and all persons belonging to any religious society shall be taken and held to be members, until they shall file with the clerk of such society, a written notice, declaring the dissolution of their membership, and thenceforth shall not be liable for any grant or contract which may be thereafter made, or entered into by such society: – and all religious sects and denominations, demeaning themselves peaceably, and as good citizens of the commonwealth, shall be equally under the protection of the law; and no subordination of any one sect or denomination to another shall ever be established by law.” Equally, in 1917, article II was softened by several Amendments, especially Amendment XLVI, which Section 1 simply states: “No law shall be passed prohibiting the free exercise of religion.”)

What distinguishes the Massachusetts Constitution (in its 1780 version, before the Amendments that moderate it) is its defense of the property rights and recognition of the distinctions between classes. In Pennsylvania, as we saw above, the distinctive feature of its constitution of 1776 was its radical and democratic nature. The requirements regarding voters or electors in Massachusetts were that they had to be a “freemen of the full age of twenty-one years, having resided in this state for the space of one whole year next before the day of election for representatives, and paid public taxes during that time” (or be the son of who had paid them). To be elected representatives, it was required that “persons [be] most noted for wisdom and virtue” and have resided two years in the district represented. In Pennsylvania, to be an elected representative it was not required to own a minimum of property. In fact, taking literally the constitutional text, elected representatives of the freemen did not need to be freemen themselves, nor to have a minimum age, not even to have paid taxes in the district where they were elected. All those requirements were replaced for “wisdom and virtue.”

In Pennsylvania, the number of representatives (of the single legislative House) assigned to a district was determined by the number of freemen paying taxes in that district. In Massachusetts, anyone standing for election required a minimum of property, the value of the property increasing proportionally accordingly to the rank of office sought. The Massachusetts Constitution also required that people eligible to vote be not only freemen, but also freeholders or holders of a significant estate.

In Massachusetts too, the number of senators for a district was not determined by the number of its inhabitants, but by the amount of taxes paid in that district; thus, wealthier districts had more senators, so the wealthier citizens had a larger representation in the Senate. To be eligible to vote, it was required to be a “male inhabitant of twenty-one years of age and upwards, having a freehold estate within the Commonwealth, of the annual income of three pounds, or any estate of the value of sixty pounds.” To be elected a Senator, it was required to be “seized in his own right of a freehold within this Commonwealth, of the value of three hundred pounds at least, or possessed of personal estate to the value of six hundred pounds at least, or of both to the amount of the same sum, and who has [...] been an inhabitant of this Commonwealth for the space of five years immediately preceding his election, and, at the time of his election, he shall be an inhabitant in the district for which he shall be chosen.” In the second House, the number of Representatives in every district was not determined by the number of its inhabitants but of its “rateable polls,” that is, number of properties paying taxes. To be elected, every Representative, “for one year at least next preceding his election, shall have been an inhabitant of, and have been seized in his own right of a freehold of the value of one hundred pounds within the town he shall be chosen to represent, or any rateable estate to the value of two hundred pounds.” Not only had the Representative to have that property when elected, but also he needed to keep it to be able to hold the seat, since “he shall cease to represent the said town immediately on his ceasing to be qualified as aforesaid.” (Ibid., pp. 406, 410, 412-414.) Although they had to be at least three times wealthier than representatives, once elected, senators did not need to keep their wealth to hold their seats.

A similar favorable attitude toward the upper classes can be seen in the pomp and circumstance section of the Massachusetts Constitution. The egalitarian spirit of the American Revolution required that “nor shall the united states in congress assembled, or any of them, grant any title of nobility” (in *Articles of Confederation*, Ibid., p. 372). Massachusetts, however, is the first state to address its governors as “His Excellency” and its lieutenant-governors as “His Honour” (Ibid., pp. 416, 424). To be elected for either office, the candidate “shall have been an inhabitant of this Commonwealth for seven years next preceding; and unless he shall, at the same time, be seized in his own right of a freehold within the Commonwealth, of the value of one thousand pounds; and unless he shall declare himself to be of the Christian religion” (Ibid., p. 416).

Finally, Massachusetts made extensive provisions for education, the social value of which had already been recognized in previous constitutions in other states (Sec. 44 of Pennsylvania's, Sec. 41 of North Carolina's, Sec. LIV of Georgia's, Sec. XL of Vermont's of 1777). But the Massachusetts Constitution reserves its whole Chapter v to praise the importance of education and, specifically, to the Harvard University (Ibid., p. 430). Although maintaining the values sustained in the original text, Massachusetts has eliminated, by way of amendments, the direct influence of the government over private institutions, including the University itself. Support for the excellence in learning in its original constitution made it possible for Massachusetts to house today some of the most prestigious academic institutions in the world.

CHAPTER 2 QUESTIONS

1. Point to any relation between the Tea Party of the 18th century and the institution by the same name of the 21st century.
2. Why did the American colonists declare their independence from Great Britain?
3. What are the differences that can be noticed among the several Declarations of Rights? What could be the reasons behind those differences?
4. Describe some of the rights that nowadays are considered fundamental to the Constitution that may be missing from the original Declarations.
5. What place does education have in some of the Revolutionary constitutions?
6. Why was one particular state constitution considered so radical for its time?
7. Why are there frequent references to freemen in the Revolutionary constitutions?
8. Define constituent power.
9. Identify in the Revolutionary constitutions (Grau 2009, vol. III) examples in which the constituent power is recognized.
10. What does impeachment mean? Describe its use in modern times.
11. Why is there emphasis on oaths in several of the constitutions? Could you give some recent examples of their relevance?
12. Why is there emphasis too on the precision of the constitutional texts?
13. How was judicial power defined in many of the states?
14. What was the influence of judicial power during this period (1776 to 1786)?

CHAPTER 2 DOCUMENTS

CONSTITUTION OF NEW HAMPSHIRE, 1776

In Congress at Exeter Janry 5th 1776

Voted That this Congress Take up Civil Government for this Colony in manner and Form Following, viz.

We the members of the Congress of New-Hampshire Chosen and Appointed by the Free Suffrages of the People of said Colony, and Authorised and Impowered by them to meet together, and use such means and Pursue Such Measures as we Should Judge best for the Public Good; And in Particular to establish Some Form of Government, Provided that Measures should be recommended by the Continental Congress; And a Recommendation to that Purpose having been Transmitted to us From the Said Congress; Have taken into our Serious Consideration the Unhappy Circumstances, into [P. 2] which this Colony is Involved by means of many Grievous and Oppressive Acts of the British Parliament, Depriving us of our Natural & Constitutional rights & Privileges: To Enforce Obedience to which Acts. A Powerful Fleet and Army have been Sent into this Country. by the ministry of Great Britain, who have Exercised a Wanton & Cruel Abuse of their Power, in Destroying the Lives and Properties of the Colonists in many Places with Fire & Sword: Taking the Ships & Lading from many of the Honest and Industrious Inhabitants of this Colony Employed in Commerce. agreeable to the Laws & Customs a long time used here. The Sudden & Abrupt Departure of his Excellency John Wentworth, Esqr our Late Governor, and Several of the Council, Leaving us Destitute of Legislation. and no Executive Courts being open to Punish Criminal Offenders: whereby the Lives and Propertys of the Honest People of this Colony. are Liable to the Machinations & Evil Designs of wicked men; Therefore for the Preservation of Peace and good order. and for the Security of the Lives and Properties of the Inhabitants of this Colony. We

Conceive ourselves Reduced to the Necessity of establishing A Form Of Government to Continue During the Present Unhappy and Unnatural Contest with Great Britain; Protesting & Declaring that we Never Sought to throw off our Dependence upon Great Britain. but felt ourselves happy under her Protection, while we Could Enjoy our Constitutional Rights and Priviledges, – And that we Shall Rejoice if Such a reconciliation between us and our Parent State can be Effected as shall be Approved by the Continental Congress in whose Prudence and Wisdom we confide Accordingly Pursuant to the Trust reposed in us. We Do Resolve That this Congress. Assume the Name, Power & Authority of a house of Representatives or Assembly for the Colony of New-Hampshire. And that Said House then Proceed to Choose Twelve Persons being Reputable Freeholders and Inhabitants within this Colony. in the Following manner viz. Five in the County of Rockingham. Two in the County of Strafford, Two in the County of Hillsborough. Two in the County of Cheshire. and one in the County of Grafton. To be a Distinct and Separate Branch of the Legislature. by the Name of A Council for this Colony, to continue as Such untill the Third Wednesday in December next; any Seven of whom to be a Quorum to do Business. That Such Council appoint their President; and in his absence that the Senior Councillor Preside.

That a Secretary be appointed by both Branches, who may be a Councillor, or otherwise as they shall Choose:

[P. 3] That no act or resolve Shall be Valid & put into Execution unless agreed to, and passed by both Branches of the Legislature.

That all Public Offices for the Said Colony, and Each County, for the Current Year. be appointed by the Council & Assembly, Except the Several Clerks of the Executive Courts, who shall be appointed by the Justices of the respective Courts.

That all Bills, Resolves, or votes for Raising Levying & Collecting money Originate in the House of Representatives.

That at any Session of the Council and Assembly. Neither Branch Shall Adjourn for any Longer time than from Saturday till the Next Monday without Consent of the other.

And it is further Resolved, That if the Present unhappy Dispute with Great Britain Should Continue longer than this present year, & the Continental Congress Give no Instruction or Direction to the Contrary – The Council be chosen by the People of Each respective County in such manner as the Council & house of Representatives shall order.

That General & field officers of the Militia, on any Vacancy, be appointed by the Two houses and all Inferior officers be chosen by the respective Companys.

That all officers of the Army be appointed by the Two houses, Except they should Direct otherwise in case of any Emergency.

That all Civil officers for the Colony & for Each County be appointed, & the time of their Continuance in office, be Determined by the Two houses. Except Clerks of Courts,¹² & County Treasurers, & recorders of Deeds.

That a Treasurer and a recorder of Deeds for Each County be Annually Chosen by the People of Each County Respectively; The votes for Such officers to be returned to the respective Courts of General Sessions of the Peace in the County, there to be ascertained as the Council & Assembly Shall hereafter Direct.

That Precepts in the name of the Council & Assembly Signed by the President of the Council & Speaker of the House of Representatives, shall Issue Annually at or before the first day of November, for the Choice of a Council and house of Representatives to be returned by the third Wednesday in December then next Ensuing, in such manner as the Council & Assembly Shall hereafter Prescribe.

VIRGINIA BILL OF RIGHTS, 1776

A Declaration of Rights, made by the Representatives of the Good people of Virginia, assembled in full and free Convention; which rights do pertain to them, and their posterity as the basis and foundation of Government.

I. THAT all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

II. That all power is vested in, and consequently derived from, the people; that Magistrates are their trustees and servants, and at all times amenable to them.

III. That government is, or ought to be, instituted for the common benefit, protection, and security, of the people, nation or community. Of all the various modes and forms of government, that is best, which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and that when

any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable, and indefeasible right, to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.

IV. That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which not being descendible, neither ought the offices of Magistrate, Legislator, or Judge, to be hereditary.

V. That the Legislative and Executive powers of the state should be separate and distinct from the Judiciary; and that the members of the two first may be restrained from oppression, by feeling and participating the burthens of the people, they should at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain and regular elections, in which all, or any part of the former members, to be again eligible or ineligible, as the laws shall direct.

VI. That elections of members to serve as representatives of the people, in Assembly, ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed or deprived of their property for public uses, without their own consent, or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assented, for the public good.

VII. That all power of suspending laws, or the execution of laws, by any authority without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.

VIII. That in all capital or criminal prosecutions, a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land, or the judgment of his peers.

IX. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

X. That general warrants whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive and ought not to be granted.

XI. That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred.

XII. That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments.

XIII. That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that in all cases, the military should be under strict subordination to, and governed by, the civil power.

XIV. That the people have a right to uniform government; and therefore that no government separate from, or independent of, the government of Virginia, ought to be erected or established within the limits thereof.

XV. That no free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles.

XVI. That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence, and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity, towards each other.

THE CONSTITUTION OF VIRGINIA, 1776 (EXCERPTS)

The Constitution or Form of Government, agreed to and resolved upon by the Delegates and Representatives of the several Counties and Corporations of Virginia

I. WHEREAS George the third, King of Great Britain and Ireland, and Elector of Hanover, heretofore entrusted with the exercise of the kingly office in this government, hath endeavoured to pervert the same into a detestable

and insupportable tyranny, by putting his negative on laws the most wholesome and necessary for the public good: by denying his Governors permission to pass laws of immediate and pressing importance, unless suspended in their operation for his assent, and, when so suspended, neglecting to attend to them for many years: By refusing to pass certain other laws, unless the persons to be benefited by them would relinquish the inestimable right of representation in the Legislature: By dissolving Legislative Assemblies repeatedly and continually, for opposing with manly firmness his invasions of the rights of the people: When dissolved, by refusing to call others for a long space of time, thereby leaving the political system without any Legislative head: By endeavoring to prevent the population of our country, and, for that purpose, obstructing the laws for the naturalization of foreigners: By keeping among us in time of peace, standing armies and ships of war: By affecting to render the military independent of, and superior to, the civil power: By combining with others to subject us to a foreign jurisdiction, giving his assent to their pretended acts of Legislation: For quartering large bodies of armed troops among us: For cutting off our trade with all parts of the world: For imposing taxes on us without our consent: For depriving us of the benefits of trial by jury: For transporting us beyond seas, to be tried for pretended offences: For suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever: By plundering our seas, ravaging our coasts, burning our towns, and destroying the lives of our people: By inciting insurrections of our fellow subjects, with the allurements of forfeiture and confiscation: By prompting our negroes to rise in arms among us, those very negroes, whom, by an inhuman use of his negative, he hath refused us permission to exclude by law: By endeavoring to bring on the inhabitants of our frontiers the merciless Indian savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes, and conditions of existence: By transporting at this time, a large army of foreign mercenaries, to complete the works of death, desolation, and tyranny, already begun with circumstances of cruelty and perfidy unworthy the head of a civilized nation: By answering our repeated petitions for redress with a repetition of injuries; And finally, by abandoning the helm of government, and declaring us out of his allegiance and protection. By which several acts of misrule, the government of this country, as formerly exercised under the crown of Great Britain, is totally dissolved.

II. We therefore, the Delegates and Representatives of the good people of Virginia, having maturely considered the premises, and viewing with great concern the deplorable conditions to which this once happy country

must be reduced, unless some regular, adequate mode of civil polity is speedily adopted, and in compliance with a recommendation of the General Congress, do ordain and declare the future form of government of Virginia to be as followeth:

III. The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the other; nor shall any person exercise the powers of more than one of them at the same time, except that the Justices of the county courts shall be eligible to either House of Assembly.

[...]

(The complete document can be found in Grau 2009, vol. III, pp. 75-89.)

THE CONSTITUTION OF PENNSYLVANIA, 1776 (EXCERPTS)

THE CONSTITUTION

Of the commonwealth of Pennsylvania, as established by the general convention elected for that purpose, and held at Philadelphia, July 15, 1776, and continued by adjournment, to September 28, 1776

WHEREAS all government ought to be instituted and supported for the security and protection of the community as such, and to enable the individuals who compose it, to enjoy their natural rights, and the other blessings which the author of existence has bestowed upon man; and whenever these great ends of government are not obtained, the people have a right, by common consent to change it, and take such measures as to them may appear necessary, to promote their safety and happiness. And whereas the inhabitants of this commonwealth have, in consideration of protection only, heretofore acknowledged allegiance to the king of Great Britain, and the said king has not only withdrawn that protection, but commenced and still continues to carry on, with unabated vengeance, a most cruel and unjust war against them, employing therein not only the troops of Great Britain, but foreign mercenaries, savages and slaves, for the avowed purpose of reducing them to a total and abject submission to the despotic domination of the British parliament (with many other acts of tyranny more fully set forth in the declaration of congress) whereby all allegiance and fealty to the said king and his successors, are dissolved and at an end, and all power and authority derived from him ceased in these colonies. And whereas it is absolutely necessary for the welfare and safety of the inhabitants of said colonies, that they be henceforth free and independent

states, and that just, permanent and proper forms of government exist in every part of them, derived from, and founded on the authority of the people only, agreeable to the directions of the honorable American congress. WE, the representatives of the freemen of Pennsylvania, in general convention met, for the express purpose of framing such a government, confessing the goodness of the great governor of the universe (who alone knows to what degree of earthly happiness mankind may attain by perfecting the arts of government) in permitting the people of this state, by common consent and without violence, deliberately to form for themselves, such just rules as they shall think best for governing their future society; and being fully convinced, that it is our indispensable duty to establish such original principles of government, as will best promote the general happiness of the people of this state and their posterity, and provide for future improvements, without partiality for, or prejudice against, any particular class, sect or denomination of men whatsoever, do, by virtue of the authority vested in us by our constituents, ordain, declare and establish the following declaration of rights and frame of government, to be the constitution of this commonwealth, and to remain in force therein for ever unaltered, except in such articles as shall hereafter, on experience, be found to require improvement, and which shall by the same authority of the people, fairly delegated, as this frame of government directs, be amended or improved for the more effectual obtaining and securing the great end and design of all government, herein before mentioned.

CHAPTER I.

A declaration of the rights of the inhabitants of the commonwealth or state of Pennsylvania

I. That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.

II. That all men have a natural and unalienable right to worship Almighty God, according to the dictates of their own consciences and understanding, and that no man ought, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against his own free will and consent; nor can any man who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments, or peculiar mode of religious worship; and that no authority can,

or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner controul the right of conscience in the free exercise of religious worship.

III. That the people of this State have the sole, exclusive and inherent right of governing and regulating the internal police of the same.

IV. That all power being originally inherent in, and consequently derived from the people; therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them.

V. That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation or community; and not for the particular emolument or advantage of any single man, family, or set of men, who are a part only of that community; and that the community hath an indubitable, unalienable and indefeasible right to reform, alter or abolish government, in such manner as shall be by that community judged most conducive to the public weal.

VI. That those who are employed in the legislative and executive business of the state, may be restrained from oppression, the people have a right, at such periods as they may think proper, to reduce their public officers to a private station, and supply the vacancies by certain and regular elections.

VII. That all elections ought to be free, and that all free men, having a sufficient evident common interest with and attachment to the community, have a right to elect officers, or to be elected into office.

VIII. That every member of society hath a right to be protected in the enjoyment of life, liberty and property; and therefore is bound to contribute his proportion towards the expense of that protection, and yield his personal service when necessary, or an equivalent thereto; but no part of a man's property can be justly taken from him, or applied to public uses, without his own consent or that of his legal representatives; nor can any man who is conscientiously scrupulous of bearing arms be justly compelled thereto if he will pay such equivalent; nor are the people bound by any laws but such as they have in like manner assented to, for their common good.

IX. That in all prosecutions for criminal offences, a man hath a right to be heard by himself and his council; to demand the cause and nature of his accusation; to be confronted with the witnesses, to call for evidence in his favor, and a speedy public trial by an impartial jury of the country, with-

out the unanimous consent of which jury he cannot be found guilty; nor can he be compelled to give evidence against himself; nor can any man be justly deprived of his liberty, except by the laws of the land or the judgment of his peers.

X. That the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure; and therefore warrants, without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property not particularly described, are contrary to that right, and ought not to be granted.

XI. That in controversies respecting property, and in suits between man and man, the parties have a right to trial by jury, which ought to be held sacred.

XII. That the people have a right to freedom of speech, and of writing and publishing their sentiments; therefore the freedom of the press ought not to be restrained.

XIII. That the people have a right to bear arms for the defence of themselves, and the state; and as standing armies in the time of peace, are dangerous to liberty, they ought not to be kept up: and that the military should be kept under strict subordination to, and governed by, the civil power.

XIV. That a frequent recurrence to fundamental principles and a firm adherence to justice, moderation, temperance, industry and frugality, are absolutely necessary to preserve the blessings of liberty, and keep a government free. The people ought therefore to pay particular attention to these points in the choice of officers and representatives, and have a right to exact a due and constant regard to them from their legislatures and magistrates, in the making and executing such laws as are necessary for the good government of the state.

XV. That all men have a natural inherent right to emigrate from one state to another that will receive them, or to form a new state in vacant countries, or in such countries as they can purchase, whenever they think that thereby they may promote their own happiness.

XVI. That the people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances by address, petition or remonstrance.

CHAPTER II.

Plan or frame of government for the commonwealth or state of Pennsylvania.

SECTION 1. The commonwealth or state of Pennsylvania shall be governed hereafter by an assembly of the representatives of the freemen of the same, and a president and council, in manner and form following:—

SECT. 2. The supreme legislative power shall be vested in a house of representatives of the freemen of the commonwealth or state of Pennsylvania.

SECT. 3. The supreme executive power shall be vested in a president and council.

SECT. 4. Courts of justice shall be established in the city of Philadelphia, and in every county of this state.

(The complete document can be found in Grau 2009, vol. III, pp. 145-173.)

THE CONSTITUTION OF MASSACHUSETTS, 1780 (EXCERPTS)

the CONSTITUTION, or FORM of GOVERNMENT, for the
COMMONWEALTH of MASSACHUSETTS

PREAMBLE

The end of the institution, maintenance and administration of government, is to secure the existence of the body politic; to protect it; and to furnish the individuals who compose it, with the power of enjoying, in safety and tranquillity, their natural rights, and the blessings of life: and whenever these great objects are not obtained, the people have a right to alter the government, and to take measures necessary for their safety, prosperity and happiness.

The body politic is formed by a voluntary association of individuals: It is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good. It is the duty of the people, therefore, in framing a Constitution of Government, to provide for an equitable mode of making laws, as well as for an impartial interpretation, and a faithful execution of them; that every man may, at all times, find his security in them.

WE, therefore, the People of Massachusetts, acknowledging, with grateful hearts, the goodness of the Great Legislator of the universe, in

affording us, in the course of his providence, an opportunity, deliberately and peaceably, without fraud, violence, or surprise, of entering into an original, explicit, and solemn compact with each other; and of forming a new Constitution of Civil Government, for ourselves and posterity; and devoutly imploring his direction in so interesting a design, DO agree upon, ordain, and establish, the following Declaration of Rights, and Frame of Government, as the CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS.

PART THE FIRST

A DECLARATION of the RIGHTS of the INHABITANTS of the COMMONWEALTH of MASSACHUSETTS.

Art. I. All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.

II. It is the right as well as the duty, of all men in society, publickly, and at stated seasons, to worship the SUPREME BEING, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.

III. As the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and morality; and as these cannot be generally diffused through a community, but by the institution of the public worship of GOD, and of public instructions in piety, religion, and morality: Therefore, to promote their happiness, and to secure the good order and preservation of their government, the people of this Commonwealth have a right to invest their Legislature with power to authorize and require, and the Legislature shall, from time to time, authorize and require, the several towns, parishes, precincts, and other bodies politic, or religious societies, to make suitable provision, at their own expense, for the institution of the public worship of GOD, and for the support and maintenance of public Protestant teachers of piety, religion, and morality, in all cases where such provision shall not be made voluntarily.

And the people of this Commonwealth have also a right to, and do, invest their Legislature with authority to enjoin upon all the subjects, an attendance upon the instructions of the public teachers aforesaid, at stated times and seasons, if there be any on whose instructions they can conscientiously and conveniently attend.

Provided notwithstanding, That the several towns, parishes, precincts, and other bodies politic, or religious societies, shall, at all times, have the exclusive right of electing their public teachers, and of contracting with them for their support and maintenance.

And all monies paid by the subject to the support of public worship, and of the public teachers aforesaid, shall, if he require it, be uniformly applied to the support of the public teacher, or teachers, of his own religious sect or denomination, provided there be any on whose instructions he attends; otherwise it may be paid towards the support of the teacher, or teachers, of the parish or precinct in which the said monies are raised.

And every denomination of Christians, demeaning themselves peaceably, and as good subjects of the Commonwealth, shall be equally under the protection of the law: and no subordination of any one sect or denomination to another shall ever be established by law.

IV. The people of this Commonwealth have the sole and exclusive right of governing themselves, as a free, sovereign, and independent State; and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction, and right, which is not, or may not hereafter be, by them expressly delegated to the United States of America in Congress assembled.

V. All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are, at all times, accountable to them.

VI. No man, nor corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges distinct from those of the community, than what arises from the consideration of services rendered to the public; and this title being in nature neither hereditary nor transmissible to children, or descendants, or relations by blood, the idea of a man born a magistrate, law-giver, or judge, is absurd and unnatural.

VII. Government is instituted for the common good; for the protection, safety, prosperity, and happiness of the people; and not for the profit, honour, or private interest of any one man, family, or class of men: There-

fore the people alone have an incontestable, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity and happiness require it.

VIII. In order to prevent those who are vested with authority, from becoming oppressors, the people have a right, at such periods, and in such manner, as they shall establish by their frame of government, to cause their public officers to return to private life; and to fill up vacant places, by certain and regular elections and appointments.

IX. All elections ought to be free; and all the inhabitants of this Commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments.

X. Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary: but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this Commonwealth are not controllable by any other laws, than those to which their constitutional representative body have given their consent. And whenever the public exigencies require, that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

XI. Every subject of the Commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

XII. No subject shall be held to answer for any crime or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs that may be favourable to him; to meet the witnesses against him, face to face, and to be fully heard in his defence, by himself, or his council, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of

the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land. And the Legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

XIII. In criminal prosecutions, the verification of facts in the vicinity where they happen, is one of the greatest securities of the life, liberty and property of the citizen.

XIV. Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation, and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: And no warrant ought to be issued but in cases, and with the formalities, prescribed by the laws.

XV. In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherwise used and practised, the parties have a right to a trial by a jury; and this method of procedure shall be held sacred, unless, in causes arising on the high seas, and such as relate to mariners' wages, the legislature shall hereafter find it necessary to alter it.

XVI. The liberty of the press is essential to the security of freedom in a State; it ought not, therefore, to be restrained in this Commonwealth.

XVII. The people have a right to keep and to bear arms for the common defence. And as in time of peace armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it.

XVIII. A frequent recurrence to the fundamental principles of the Constitution, and a constant adherence to those of piety, justice, moderation, temperance, industry, and frugality, are absolutely necessary to preserve the advantages of liberty, and to maintain a free government. The people ought, consequently, to have a particular attention to all those principles, in the choice of their officers and representatives: And they have a right to require of their law-givers and magistrates, an exact and constant obser-

vance of them, in the formation and execution of the laws necessary for the good administration of the Commonwealth.

XIX. The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives; and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer.

XX. The power of suspending the laws, or the execution of the laws, ought never to be exercised but by the legislature, or by authority derived from it, to be exercised in such particular cases only as the legislature shall expressly provide for.

XXI. The freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action, or complaint, in any other court or place whatsoever.

XXII. The legislature ought frequently to assemble for the redress of grievances, for correcting, strengthening, and confirming the laws, and for making new laws, as the common good may require.

XXIII. No subsidy, charge, tax, impost, or duties, ought to be established, fixed, laid, or levied, under any pretext whatsoever, without the consent of the people, or their representatives in the legislature.

XXIV. Laws made to punish for actions done before the existence of such laws, and which have not been declared crimes by preceding laws, are unjust, oppressive, and inconsistent with the fundamental principles of a free government.

XXV. No subject ought, in any case, or in any time, to be declared guilty of treason or felony by the legislature.

XXVI. No magistrate or court of law shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.

XXVII. In time of peace no soldier ought to be quartered in any house without the consent of the owner; and in time of war such quarters ought not to be made but by the civil magistrate, in a manner ordained by the legislature.

XXVIII. No person can in any case be subjected to law-martial, or to any penalties or pains, by virtue of that law, except those employed in the army and navy, and except the militia in actual service, but by authority of the legislature.

XXIX. It is essential to the preservation of the rights of every individual, his life, liberty, property and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. It is therefore not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the supreme judicial court should hold their offices as long as they behave themselves well; and that they should have honourable salaries ascertained and established by standing laws.

XXX. In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

PART THE SECOND

The FRAME of GOVERNMENT

The People inhabiting the territory formerly called the Province of Massachusetts-Bay, do hereby solemnly and mutually agree with each other, to form themselves into a free, sovereign, and independent body politic, by the name of THE COMMONWEALTH OF MASSACHUSETTS.

CHAPTER I.

The LEGISLATIVE POWER.

SECTION I.

The GENERAL COURT.

Art. I. THE department of legislation shall be formed by two branches, a Senate and House of Representatives: each of which shall have a negative on the other. The legislative body shall assemble every year on the last Wednesday in May, and at such other times as they shall judge necessary; and shall dissolve and be dissolved on the day next preceding the said last

Wednesday in May; and shall be styled, The General Court of Massachusetts. [...]

CHAPTER II.

EXECUTIVE POWER.

SECTION I.

GOVERNOR.

Art. I. There shall be a supreme executive Magistrate, who shall be styled, THE GOVERNOR OF THE COMMONWEALTH OF MASSACHUSETTS; and whose title shall be, HIS EXCELLENCY.

II. The Governor shall be chosen annually: And no person shall be eligible to this office, unless at the time of his election, he shall have been an inhabitant of this Commonwealth for seven years next preceding; and unless he shall, at the same time, be seized in his own right of a freehold within the Commonwealth, of the value of one thousand pounds; and unless he shall declare himself to be of the Christian religion. [...]

CHAPTER III.

JUDICIARY POWER.

Art. I. THE tenure, that all commission officers shall by law have in their offices, shall be expressed in their respective commissions. All judicial officers, duly appointed, commissioned and sworn, shall hold their offices during good behaviour, excepting such concerning whom there is different provision made in this Constitution: Provided nevertheless, the Governor, with consent of the Council, may remove them upon the address of both Houses of the Legislature.

II. Each branch of the Legislature, as well as the Governor and Council, shall have authority to require the opinions of the Justices of the Supreme Judicial Court, upon important questions of law, and upon solemn occasions. [...]

CHAPTER V.

The UNIVERSITY at CAMBRIDGE, and ENCOURAGEMENT of LITERATURE, &c.

SECTION I.

The UNIVERSITY.

Art. I. Whereas our wise and pious ancestors, so early as the year one thousand six hundred and thirty-six, laid the foundation of Harvard College, in which University many persons of great eminence have, by the blessing of GOD, been initiated in those arts and sciences, which qualified them for public employments both in Church and State: And whereas the encouragement of arts and sciences, and all good literature, tends to the honour of GOD, the advantage of the Christian religion, and the great benefit of this and the other United States of America – It is declared, That the PRESIDENT and FELLOWS of HARVARD COLLEGE, in their corporate capacity, and their successors in that capacity, their officers and servants, shall have, hold, use, exercise and enjoy, all the powers, authorities, rights, liberties, privileges, immunities and franchises, which they now have, or are entitled to have, hold, use, exercise and enjoy: And the same are hereby ratified and confirmed unto them, the said President and Fellows of Harvard College, and to their successors, and to their officers and servants, respectively, forever.

[...]

(The complete document can be found in Grau 2009, vol. III, pp. 389-443.)

CHAPTER 3

THE PROCESS OF FEDERATION – 1776-1789

The Thirteen United States: the Declaration of Independence, 1776 – The United States of America, in Congress Assembled, 1777-1781 – The Federal State: The Constitution of the United States of America – The Constitution's ratification: *The Federalist*

THE THIRTEEN UNITED STATES: THE DECLARATION OF INDEPENDENCE, 1776

The American declaration of independence could be interpreted simply as gesture politics, breaking the ties of loyalty and fealty between colonists and monarch, or as the first step toward a novel form of federalist government. The federation of the new sovereign states also shifted perceptions of the role of the people in choosing who governed them. Although the actual federation did not take place formally until 1789 –when the Constitution of 1787 reached a prescribed level of ratification–, in those early days of July of 1776 the states were for the first time making joint decisions and declaring themselves to the rest of the world to be a single and unique political body, namely The United States of America. Individual British colonies could have proclaimed their own independence and –as many other colonies in that continent did later on– remain fully sovereign and legally separated from each other. But had they done so, they would not have given future generations the legacy of a structured and unique constitutional process. Breaking entirely new democratic ground, the thirteen British colonies went further and, once independent, started the process of defining a federal United States, process that reached a level of critical mass in June of 1788, at the already described ratification process of “this Constitution for the United States of America.” It could not be said that

the federalist process had been completed on that date, but rather that a continuous process for development had been established that continues until our time. Day by day, as the need for changes was identified, new Amendments to the Constitution were ratified, or the Supreme Court

Benjamin Franklin (1706-1790) was an American politician, diplomat, publisher, inventor, musician and writer. Born in Massachusetts, within a humble family, he was self-taught, since he had to leave school at the age of 10 years because his father could not pay the teacher. Franklin worked first as a printer apprentice. At the age of 17, he ran away to Philadelphia and then migrated to London, where he worked as a typesetter. After returning to Philadelphia, at age 21 he started *The Pennsylvania Gazette*, and at 25 he created the Library Company of Philadelphia. Although he never patented any of them, several inventions are attributed to Franklin, such as the lightning rod and the bifocal lenses. In 1751, Franklin was elected as Representative to the Pennsylvania Assembly and, three years later, he was part of the delegation sent to Albany, where he presented his Plan of union of the colonies. In 1765, Pennsylvania colonists sent him to London, to sue William Penn's heirs for the proprietorship of the colony, returning to America ten years later, when the Lexington and Concord battles had already been fought. As a delegate to the Second Continental Congress, Franklin was part of the committee that drafted the Declaration of Independence. In 1776, he was sent as the Ambassador to France of the newly independent states, remaining there until 1785. After coming back from that post, he was elected President (governor) of Pennsylvania, an office he held until 1788. In 1787, Franklin was one of the delegates for Pennsylvania to the Constitutional Convention in Philadelphia, but owing to his age and medical condition, his participation was mainly testimonial. Some 20,000 persons attended his funeral in 1790.

opinions clarified its meaning. This process has been successful in satisfying every political and social challenge that the United States has faced in the last two hundred and thirty years.

In June of 1776, the delegates to the Second Continental Congress could have recommended to the colonies, as they had done for their state

constitutions, that each proceed independently to make its own declaration of independence. Instead, the Continental Congress itself –most probably exceeding its prerogatives (Fioravanti 2001, p. 103)– exercised constituent powers by which it “solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States.” Thus the British colonial period was ended and the American process of federalism took its place.

Federal concepts and attempts were not new to the American continent. William Penn, the proprietor of the Pennsylvania and Delaware colonies, was the first man, at the end of the 17th century, to have publicly recognized the many inconveniences of governing multiple colonies, so he proposed to the British authorities “A Brief and Plain Scheme how the

Richard Henry Lee (1732-1794) was an American politician. Born in an aristocratic and influential Virginian family, in 1757 he was elected justice of the peace and Representative to the House of Burgesses. When in 1769 the Royal governor dissolved the House, Lee met in a tavern with other radical representatives to plan how to boycott British imports. In 1774, Robert Henry Lee was elected delegate to the Continental Congress, and in 1776 he and John Adams proposed to declare formally the independence of the colonies. Lee considered that the federal Constitution was taking away the sovereignty of the new states and he was against ratifying it, but in 1789 he was elected U.S. Senator for Virginia.

English Colonies in the North parts of America, viz.: Boston, Connecticut, Road Island, New York, New Jerseys, Pennsylvania, Maryland, Virginia, and Carolina may be made more useful to the Crown, and one another’s peace and safety with an universal concurrence” (see the original in Grau 2009, vol. II, p. 568). The “scheme” of William Penn was, simply, to set up a congress headed by a commissioner appointed by the King and where representatives of the several colonies would jointly find better solutions to common problems. (See *Penn’s Plan* in *Ibid.*, pp. 567-569.)

Half a century later, motivated by the requirements imposed on the colonies by the French and Indian War, Benjamin Franklin proposed in 1754 a “Plan of Union Adopted by the Convention at Albany,” commonly known as “The Albany Plan.” (The text of the *Plan* is to be found in *Ibid.*, pp. 663-671.) This Plan proposed to create, by an Act of the Brit-

ish Parliament, a general government for all the colonies, to be administered by a President-General, appointed and paid for by the Crown, and a Grand Council, chosen by the representatives of the people of the several colonies. The number of counselors would have been proportional to the population of each colony.

This British President-General would be advised by the Grand Council and his powers would have related mainly to the dealings with

Thomas Jefferson (1743-1826) was an American erudite, politician, diplomat, and statesman, and 3rd President of the United States. Born in one of the most influential families of Virginia, in 1762 he graduated in Laws from the College of William & Mary, establishing a prosperous law practice. In 1769, Jefferson was elected as a Representative to the House of Burgesses, and in 1774 drafted several resolutions against the Coercive Acts passed by the British Parliament. Elected in 1775 as one of the delegates to the Second Continental Congress, in 1776 he was the main drafter of the Declaration of Independence. From 1779 to 1781, Jefferson was the governor of Virginia, and in 1784 he was sent as Ambassador to France, where he remained until 1789, not being able to participate in the Constitutional Convention. George Washington, in his first term as President, appointed Jefferson Secretary of State. From 1797 to 1801, during the presidential term of John Adams, Jefferson was elected Vice-President. The main candidate of the Democratic-Republican Party, Jefferson won the Presidential election of 1800, serving two terms, until 1809. During his Presidency, the United States carried out the "Louisiana Purchase" from France. Jefferson organized the Lewis and Clark transcontinental expedition. Almost bankrupt as a result of the poor administration of his estate, in 1815 Jefferson sold his library of more than 6,000 volumes to the Library of Congress, to replace the books that had been burned by the British during the War of 1812. Jefferson died the 4th of July of 1826, a few hours before John Adams did.

the Indian tribes: to sign treaties, make peace, declare war, regulate trade, and undertake the purchase of lands for new settlements.

Roger Sherman (1721-1793) was an American politician, attorney and judge. He was born in Massachusetts but after the death of his father moved to Connecticut, where he opened a store. Self-taught, in 1754 Sherman was admitted to the Connecticut Bar. The following year he was elected to the House of Representatives of Connecticut and, after 1766, he became a member of the Governor's Council, holding that office until 1785. At the same time, Sherman was elected justice of the peace and subsequently became judge of the court of common pleas, before finally becoming justice of the Superior Court of Connecticut. Sent as a delegate to the Continental Congress, he was one of the five members of the committee who drafted the Declaration of Independence. After having a very active part in the Constitutional Convention of Philadelphia, in 1789 Sherman was elected Senator for Connecticut, holding the seat until his death.

As with William Penn's Plan, the British Parliament considered that Franklin's Plan was not conducive to the best interests of the Kingdom.

The next factor persuading the colonies that they should make an urgent effort to work together was the publishing by the British Parliament of the Coercive Acts (already identified in the previous chapter). The blockade of Boston Harbor and other punitive measures included in the Acts convinced the colonists that joint action had become necessary to defend themselves from what they considered to be an attack by the British Parliament on their legitimate rights. To that end, in 1774 all the colonies

Robert R. Livingston (1746-1813) was an American attorney, politician, and diplomat. Born in an important New York family, Livingston studied in King's College (presently Columbia University), graduating in 1765. Appointed Recorder of New York City, he was removed from that office when he made public his revolutionary tendencies. Elected as a delegate to the Second Continental Congress, Livingston was one of the five members of the committee that drafted the Declaration of Independence, although his signature does not appear in the parchment because he had to return to New York before the 4th of July of 1776. From 1777 to 1801 Livingston was Chancellor of New York, and from 1801 to 1804 he was sent as Ambassador to France and was part of the Louisiana Purchase negotiations.

except Georgia sent delegates to Philadelphia to meet in a convention that they called the (first) Continental Congress. Colonists in Georgia were dependent on British troops to protect them from attacks by both native Indians and Spaniards, so they did not want to do anything to upset the British government.

The Continental Congress decided that all the colonies should boycott imports from Great Britain (a boycott that was actually never fully implemented). In addition, Congress sent a Petition to the king, asking him to revoke the Coercive Acts and to proclaim a Declaration of Rights in favor of the colonists. The delegates agreed to meet the next year if

John Hancock (1737-1793) was an American businessman and politician. Born in Massachusetts, in 1754 he graduated from Harvard University, and in 1760 he traveled to London to take care of the commercial interests of his uncle. In 1766 Hancock was elected a member of the House of Representatives of Massachusetts and in 1774 delegate to the Second Continental Congress. When he reached Philadelphia, after escaping the British attack on the town of Lexington, Hancock was unanimously elected President of the Continental Congress, holding that seat until 1777. As President of the Congress, Hancock's signature appears conspicuously in the parchment of the Declaration of Independence. After the Constitution of Massachusetts was ratified in 1780, John Hancock was elected governor, resigning in 1785. In 1787, in the middle of uprisings by the farmers of Massachusetts, Hancock was again elected governor, holding the office until his death.

the differences reported in their petition had not been resolved to their satisfaction. But by then, as it has been mentioned, those differences had already become the cause of an armed confrontation between the British troops and the American minutemen. The Continental Congress sent then new Petitions to the King, asking him again to repeal the British Acts that had caused the conflict and to stop the attacks of the British troops on the citizenry. Instead the King responded to those Petitions with A Proclamation for Suppressing Rebellion and Sedition, thereby adding further heat to the dispute between king and colonists. In the following year, on the 4th

of July, the Continental Congress proclaimed The unanimous Declaration of the thirteen united States of America.

The reader will remember from the previous chapter that in 1775, at the beginning of conflict between Great Britain and the colonies, most of the British officials responsible for governing the colonies, including their governors, abandoned their duties and fled the country, leaving the colonists without government institutions. In consequence, several of the colonial Assemblies requested that the Continental Congress issue its recommendation to resolve the problem of the British dereliction and the consequent anarchy they faced as a result. In May of 1776, Congress “Resolved, That it be recommended to the respective assemblies, and conventions, of the united colonies, where no government sufficient to the exigencies of their affairs has been heretofore established, to adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general.” (Proceedings of the Conventions of the Province of Maryland, p. 139.) On the 7th of June, several delegates presented motions, not for the establishment of acting governments, but for a joint declaration of independence.

During the first months of 1776, the declaration of independence was a frequent subject of debate on the floor of the Continental Congress. On the 10th of June, Richard Henry Lee of Virginia and John Adams of Massachusetts proposed to elect a committee to prepare a declaration of independence in the following terms: “That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved” (Grau 2009, vol. III, p. 112). The committee was formed by Thomas Jefferson, John Adams, Benjamin Franklin, Roger Sherman and Robert Livingston, and tasked Jefferson, who was a quiet man but known for his rhetoric ability, with writing the draft of the declaration. The following day Congress organized two more committees, one to draft the form of federation to be adopted by the colonies, and the other to prepare the treaties the new independent states should sign with the foreign powers. On the 12th of June, the Continental Congress organized a fourth committee, named “A Board of War and Ordnance.” In less than a month the movement toward independence had become unstoppable.

On June 25th, the delegates from Pennsylvania requested a vote to declare the United Colonies an independent state. Three days later, on June 28th, the committee drafting the Declaration of Independence sub-

mitted its proposal. On July 1st, the delegates from Maryland declared themselves for independence, and that same day the whole Continental Congress organized itself into a full committee to decide the wording of a motion for independence. Next day, a resolution was adopted declaring the colonies to be free and independent states. On the 4th of July, af-

John Hanson (1721-1783) was an American merchant and politician, Born in Maryland, into a humble family, he was a self-taught person. Hanson reached several government offices during the colonial period as well as after the independence. In 1779 he was elected as a delegate to the Second Continental Congress, and in 1781, once the Articles of Confederation had been fully ratified and its Congress assembled, he was elected President. In very loose terms, John Hanson could be considered the first President of the United States, although his office lacked the executive powers given to the Constitution's President. After serving the one-year term of his presidential mandate, he retired and died shortly after.

ter striking out the most radical paragraphs of Jefferson's original draft, the delegates voted the final terms of The unanimous Declaration of the thirteen united States of America. A copy on paper was made, and John Hancock signed it as President of the Continental Congress, and printed copies were sent to the several assemblies, conventions, and committees charged with responsibility for the safety of the new states, as well as to the Continental Army generals. The Declaration was read publicly in towns and cities, and printed in many of the newspapers of the time. (It is said that George III learned of the Declaration through the newspapers, before the official documents arrived in England.) Although the parchment copy is dated as "In Congress, July 4, 1776," it was actually completed later and signed on August 2, when signatures of some delegates who had not been present on the 4th of July were added.

The unanimous Declaration of the thirteen united States of America is, as the text itself explains, a justification of the drastic measure taken and the vehicle to present a just cause to the rest of the nations since "a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation" (Ibid., p. 108). To that end, the rebels made an exhaustive account of all those deeds of the British monarch that, according to them, made of him a tyrant and,

thus, justified the withdrawal of fealty to the Crown due by the colonies in their Charters. Reflecting the feelings of the time, the new constitutions of South Carolina, Virginia and New Jersey, which were written prior to the actual Declaration of Independence, include as Preambles an account of the tyrannical British deeds. After the Declaration, all the other states, except Massachusetts and Delaware, included in their constitutions similar accounts in more or less detail. In the particular case of New York, the drafters literally copied the Declaration into the Preamble of its constitution.

In fact, the Declaration of Independence includes very few legal clauses. Its very famous paragraph “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness,” is undoubtedly an excellent example of rhetorical literature, but above all it is just an expression of general principles of natural law. The only legal relevance of the document comes in its last paragraph, where the authors “solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved” (Ibid., p. 112), which is the actual declaration of independence. The other legally important wording in the Declaration is the formal use for the first time of the title United States of America, instead of the one used by the Continental Congress up to that time of United Colonies.

This detail is the really relevant point of interest here. Contrary to subsequent wording in the *Articles of Confederation*, in the Declaration of Independence the Continental Congress makes no reference to thirteen independent states that subscribe a common treaty, but it rather makes a unanimous Declaration of thirteen United States, and all of them mutually pledge the support of this Declaration. Thus, it seems that the intention of the delegates was to speak as a single, federated voice, and not as a chorus of thirteen independent little nations.

“THE UNITED STATES OF AMERICA, IN CONGRESS ASSEMBLED,”
1777-1781

As we saw earlier, the Second Continental Congress set up several committees. The first was to draft the Declaration of Independence, and the second to decide the kind of federation that the newly independent states

should take. However, the original mandates brought by delegates from the several states to the Continental Congress in Philadelphia, authorized them exclusively to agree with the delegates of other colonies over such measures exclusively necessary to reconcile the colonies with the King and the British Parliament. Consequently, the delegates were exceeding their mandate when they solemnly publish and declare the unanimous Declaration of independence. Any other act of government taken up by the delegates would have been a further violation of the prerogatives granted to them.

Nevertheless, all the delegates clearly understood the need to formalize the very tenuous link so far established among the new states and that, as separate states, all of them were highly vulnerable to the attacks by the powerful British Army. United, as it happened with their adopted symbol of the Roman fasces, they would prove to be unbeatable.

On June 11th, 1776, the Continental Congress set up a committee formed by a delegate from each colony whose task was to write the draft of “certain articles of Confederation,” which would be used upon completion to administer those common concerns of the several states. The initial draft of the *Articles of Confederation* was ready by November of 1777, and copies were sent to each of the state legislatures to be revised and modified as they considered fit. Following countless changes, the final version of the document was completed, and finally the *Articles of Confederation* came into force the 1st of March of 1781, after every one of the thirteen estates had ratified them. The next day, the new “Congress of the United States” was inaugurated, and John Hanson was elected its President. The *Articles* and the Continental Congress were in force until the 4th of March of 1789, when the latter was adjourned permanently. The same day, the new federal Congress, established under the Constitution of 1787, immediately replaced it.

Properly, the *Articles of Confederation* does not describe any particular frame or “form” of a structured government. Essentially, they describe only a common instrument of representation for the new states, named Congress or the United States in Congress assembled. In that forum, an undefined number of delegates could meet for an undefined period of time. The only specific requirement established is that the delegates should meet at least once “on the first Monday in November, in every year.”

Within that Congress was another institution, named “A Committee of the States,” to sit in the recess of Congress and with only a limited number of its powers delegated. One of the powers withheld was the right

“to appoint one of their number to preside.” It is not clear from the text whether this President was exclusively to preside over Congress or if his authority extended further. In any case, the *Articles* only specified that his mandate was to be “no more than one year in any term of three years,” without determining any functions specifically assigned to his office.

The remaining of the document lists a number of “exclusive rights and powers,” either attributed to Congress, or barred to the individual states for having been transferred to Congress. This transfer or limita-

James Madison (1751-1836) was an American politician and 4th President of the United States (1809-1817). Born in Virginia, he graduated in 1771 from the College of New Jersey (nowadays Princeton University). Elected in 1776 to the Virginia House of Burgesses, Madison contributed to the drafting of the Virginia Constitution. In 1777 he was elected a member of the governor’s Council, where he met Thomas Jefferson, developing a profound friendship with him. In 1780 he was elected delegate to the Continental Congress, taking side with those proposing a strong central government. In 1787 he was part of the Constitutional Convention of Philadelphia. Madison is considered the father of the Constitution because of his major advocacy of its principles. Madison also drafted the Bill of Rights and wrote several of *The Federalist* papers in support of the Constitution. In 1790 he organized, with Thomas Jefferson, the Democratic-Republican Party. During his appointment from 1801 to 1809 as Secretary of State, he was the defendant in the *Marbury v. Madison* case, in which Chief Justice John Marshall stated the constitutional doctrine of the judicial review. In 1808 he was elected President of the United States, and during his mandate declared the War –of 1812– against Great Britain, in which British troops captured the federal capital, Washington, DC, and burned down the Capitol and the White House. After his second term, James Madison retired from politics and became a farmer.

tion of powers required “the consent of nine states” (which was, if not contradictory, at least confusing, since the exercise of the powers required unanimity).

Rather than a constitution or the framework of a government, The *Articles of Confederation and Perpetual Union* was, in reality, just an in-

ternal treaty signed by thirteen independent states, in which none of them relinquished any part of their sovereignty. The document simply conferred on a representative body –namely the United States in Congress assembled– a number of tasks considered better managed from a common, joint, and coordinated office. In reality, the *Articles* did not even achieve that goal of coordination, but simply, as its Article III declared, the “States hereby severally enter into a firm league of friendship with each other.”

Although there are significant conceptual and fundamental differences between the *Articles* and the present American Constitution, a good number of political elements were drafted almost in identical terms. Thus, for example, the style “The United States of America,” which appears in the first article and it was anticipated in the Unanimous Declaration, is used repeatedly in the Constitution. Article V of the *Articles* establishes that “the members of congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from, and attendance on congress, except for treason, felony, or breach of the peace.” The parallel is to be found in section 6 of the first article of the Constitution, which states the protection for the members who “shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same.”

Some of the limitations imposed on the states by the *Articles* were also included in the Constitution. In article VI of the *Articles*, for example, “No state, without the Consent of the united states in congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any King prince or state.” The Constitution, in Section 10 of Article I, is more concise but equally categorical: “No State shall enter into any Treaty, Alliance, or Confederation.” Another important prohibition in the *Articles* is that which forbids the “grant [of] any title of nobility,” and this is restated in the Constitution as “No Title of Nobility shall be granted by the United States.”

The *Articles* and the Constitution are unanimous in forbidding “any person holding any office of profit or trust under the united states, or individual state from, accepting any present, emolument, office or title of any kind whatever from any king, prince or foreign state,” although the Constitution allows for the specific “Consent of the Congress” allowing the united states some freedoms. Among the exclusive powers granted to Congress in both documents are the powers to coin money and regulate its value, to fix the standards of weights and measures, or to establish post offices and post roads.

A few years after the ratification of the *Articles of Confederation*, a number of deficiencies were identified that were making it very difficult to govern the confederation and that put its survival at significant risk. Among those deficiencies, the most critical were the lack, firstly, of an executive power to enforce the few laws passed by Congress, and, secondly, of a judicial power to resolve the controversies arisen among the different states. Moreover, Congress could not impose taxes and had no mechanism to exact moneys for the common treasury. Consequently, the only source of funds available to the confederation to repay its common debts was the voluntary contributions from the states. Once the War of Independence ended in 1782, the states were extremely reluctant to make any such contributions.

Additionally, in many cases the tasks of Congress became inoperable because it was not compulsory for its members to attend the sessions, and yet to approve laws required unanimity. That situation meant that international treaties, negotiated by the foreign ministers or ambassadors, were never ratified by Congress. The fact was that any state could block any decision of Congress. These deficiencies resulted in a lack of legal certainty, and a number of states began to complain frequently about the system in place.

However, not everything was a negative experience during the eight years of rule under the *Articles of Confederation*. Congress was able to pass in 1784 the Resolutions for the Government of the Western Territory (Ibid., pp. 491 ff). The following year it approved a Land Ordinance that set the basis for the method of surveying public lands to today; and finally, in 1787, “the United States of America, in Congress assembled” passed An Ordinance for the Government of the Territory of the United States, North-West of the River Ohio (Ibid., pp. 593 ff), thereby solving several territorial disputes pending among the states and making possible the first westward expansion of the United States.

THE FEDERAL STATE: THE CONSTITUTION OF THE UNITED STATES OF AMERICA

The deficiencies of the confederation under the *Articles* caused many Americans, particularly the more affluent and influential, to seriously consider the need for severe modifications to the *Articles of Confederation* or even a radical change of the then form of government.

A serious weakness of the confederation was its inability to properly regulate interstate commerce in spite of the direct mandate in the

Articles that “the people of each state [...] shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively.” With the goal of addressing the difficulties of such commerce in general, and to resolve its particular disagreement with Maryland over the commercial use of the Potomac River, Virginia proposed a convention to take place in 1785 at Annapolis, the capital of Maryland. On the scheduled date for the meeting the delegates of eight of the thirteen states failed to make an appearance,

Alexander Hamilton (1755?-1804) was an American lawyer, soldier, banker and politician. Born in the British colony of Nevis Island, in the Caribbean, he was sent to study at King’s College (now Columbia University), where he graduated in a single year. When the American Revolution started, Hamilton joined the American troops and shortly after became George Washington’s aide. In 1782 he was elected delegate for New York to the Continental Congress. The following year, after three arduous months of self-tuition, Hamilton was admitted to the New York Bar, where he practiced law very successfully. In 1784 he founded the Bank of New York (the oldest American bank in operation today). In 1786 Hamilton went to the Annapolis Convention where he met James Madison, contributing to the report sent to Congress by the latter. Hamilton was one of the delegates to the Constitutional Convention, contributing to it significantly. During the ratification process, Hamilton wrote most of the essays of *The Federalist*. George Washington appointed him Secretary of the Treasury, though he felt obliged to leave that office in 1795, as a result of an adulterous affair. As one of the leaders of the Federalist Party, in 1804 Hamilton campaigned bitterly against Aaron Burr, with whom he had a personal vendetta. Burr challenged him to a duel in which Hamilton was mortally wounded.

including those of Maryland, residents in the very same city where the convention was taking place. The delegate for Virginia, James Madison, wrote a report entitled *Proceedings of Commissioners to Remedy Defects of the Federal Government*. He sent it to Congress, which was sitting at the time in the city of New York, and copies went to the executives of several states. In the report, Madison recommended that Congress should call another convention to identify the specific changes to the *Articles*

John Marshall (1755-1835) was an American politician and Jurist, 4th Chief Justice of the Supreme Court of the United States. Born in Virginia, in what today would be considered a middle-class home, Marshall received his earlier education from his father. During the first years of the War of Independence he served in the Continental Army, reaching the rank of captain. In 1780, Marshall was admitted to the Virginia Bar after studying law at the College of William and Mary. Between 1782 and 1796 he was elected to the Virginia House of Delegates (the old House of Burgesses) as a candidate for the Federalist Party. In 1795, Marshall declined George Washington's offer to become Attorney General of the United States and Ambassador to France, although in 1797, during John Adams' presidency, he accepted a mission to travel to France to negotiate with the *Directoire*. The next year, Marshall declined the office of Associate Justice of the Supreme Court of the United States. In 1799 he was elected Representative for Virginia, but the President John Adams instead appointed him Secretary of State. When Adams lost the presidential election of 1800 to Thomas Jefferson, he tried to fill in, before Jefferson was inaugurated, as many federal offices as possible with members of his Federalist Party. That included the offices of Chief Justice of the Supreme Court of the United States, vacated by the resignation of Oliver Ellsworth. Adams nominated Marshall, who was confirmed immediately by the Senate. Marshall was Chief Justice from 1801 until his death in 1835, the longest serving Chief Justice in the history of the Court. The mandate of Marshall resulted in the most significant change to the Supreme Court. Marshall declared the doctrine of *judicial review*, which gave the judiciary "the energy, weight, and dignity" that previous Chief Justice John Jay had recognized the institution was lacking. Marshall made of the judiciary a power on equal terms with the legislative and executive arms of government. During his term, the Court issued more than 1,200 decisions, of which Marshall himself wrote 519. Marshall advocated a strong, central federal government, and he repeatedly asserted the supremacy of the federal Constitution and laws. In many of his decisions he extended the reach of the "enumerated powers" far beyond the limits established in the original text of the Constitution, expanding the powers of the federal government at the expense of the states.

needed to improve the governing of the confederation. He even proposed the time and place for the meeting: “at Philadelphia on the second Monday in May next.”

Any “alterations” to the *Articles* would be extremely difficult to enact, since its article XIII required any change to “be afterwards confirmed by the legislatures of every state.” The *Articles* did not include provisions for popular referenda or to allow Congress to endorse any bill or proposal that had been formulated by extraneous conventions. In this case, however, claiming that regular government businesses would not allow sufficient time for such a task, the delegates accepted Madison’s proposal and authorized the Constitutional Convention with the single and specific goal of revising –not eliminating!– the *Articles of Confederation*.

“On the second Monday in May next,” that is of 1787, the required quorum of delegates could not be mustered in Philadelphia to initiate the Convention; but on the 25th of that month, quorum was reached, and the Convention was inaugurated. After unanimously electing George Washington as president of the Convention on the 29th of May 1787, the actual debates began. Sessions were held behind closed doors and under oath of secrecy. The details of what happened at that Convention have reached us mainly through the notes taken by James Madison, the only delegate to attend the meetings each and every day.

As soon as the debates began, the Virginia delegation tabled a plan that offered not an amendment to the *Articles*, but rather described a new form of government. This would introduce a bicameral legislature of proportional representation (instead of the existing mono-cameral structure and without the proportionality of delegates included in the *Articles*). It was to have a national executive power with one or more supreme courts as well as the appropriate and necessary number of inferior courts (institutions all missing in the *Articles*).

A few days later, after giving the Virginian proposals some thought, the delegation of New Jersey made a different proposal, featuring what was a proper revision of the *Articles*. The core of the following debate focused on the type of government to be chosen. Virginia’s proposal seemed to favor the large states, such as Virginia itself or the Carolinas, while New Jersey’s proposal seemed to favor the smaller states, such as New Jersey or New Hampshire. Rhode Island, the smallest state of all, had not sent delegates to Philadelphia believing that, no matter what the outcome was, the new arrangement would be more disadvantageous for them than the current *Articles*.

The solution to the dilemma came from the delegation of Connecticut, proposing that the representation in one of the Houses was to be proportional to each state's population, while in the other House each state would have an equal representation, regardless of any other consideration. Connecticut's proposal, however, did not solve all the issues, since the abolitionist states did not want slaves to be counted in those proportions, while the slave-holding states want them to be calculated as part of their population. Eventually the Convention reached a compromise that was to count each slave as just three-fifths of a person.

On 17th September 1787, less than four months after the inauguration of the Convention, the text of the new Constitution was finished. Of the total number of 55 delegates attending the proceedings in Philadelphia, 42 were also present at the signing of the Convention. Three delegates, namely Elbridge Gerry from Massachusetts, Edmund Randolph and George Mason from Virginia, refused to sign the final document at the last moment. The engrossed copy has the signatures of the other 39 delegates. Reasons given by the thirteen delegates who had departed the Convention earlier varied. Some delegates had left for personal reasons, but others thereby registered their opposition to the decisions of the majority. As example, early in June the delegates Robert Yates and John Lansing from New York left Philadelphia alleging that nothing useful would come from the Convention.

Article VII of the new Constitution regulated the procedure for its adoption, requiring that at least nine states had to ratify it. That condition was met on June 21st 1788, nine months after the Convention in Philadelphia had closed, when New Hampshire approved it. The old Continental Congress was suspended in October of 1788 and formally disbanded on the 4th of March of 1789, when the new Congress of the United States of America was inaugurated. Only Representatives of eleven of the thirteen states were present that day because North Carolina and Rhode Island had not yet ratified the Constitution. On the 6th of April, George Washington was elected President and John Adams Vice-President.

Under the guidance of these two men, on the 24th of September, Congress passed, as mandated by Article III of the Constitution, An act to establish the judicial courts of the United States. This document gave form to the Supreme Court of the United States and established 16 inferior courts. The three supreme powers of the federal government were, thus, fully established.

The Constitution of the United States fixes the basic principles on which the federal government rests, as well as imposing limits to the pow-

er of that government. The constitutional text is structured very simply, having only seven articles. The first three describe the form of government, and the fourth the terms of the federal relationships, both among the states and between these and the central government. The remaining three articles are dedicated to general procedures, among which, almost hidden in the text, is the Supremacy Clause. This establishes the fundamental principle under-pinning the Constitution, the U.S. treaties, and the federal laws as “the supreme law of the land.” Federal law, thus, overrides the state laws, removing de jure state sovereignty. The Supremacy Clause established the fundamental framework for the federal future of the country.

The first Article describes the structure of the legislative branch or “Congress of the United States,” which consists of two Houses: the House of Representatives, proportional to the population of each state; and the Senate, of equal representation for all the states regardless of size or population. This is, by far, the longest article, and illustrates in sufficient detail the composition of the Houses, the requirements to be elected as a Congressperson, the powers and limits of Congress, and the distribution of spheres of authority between the national central government, and the governments of the states.

The second Article is dedicated to the executive branch and describes, although in much less detail than the previous article, its organization, including not just the roles of President and Vice President but of “all other Officers of the United States” and some of their functions. Following Montesquieu’s model closely, most of the functions described in this Article are dedicated to foreign relations with other nations. Through the doctrine of implied powers, deduced from the Necessary and Proper Clause in Section 8 of Article 1, Congress was able to expand upon the “limited powers” granted in the Constitution. Alexander Hamilton was the first individual who developed this doctrine, saying “[t]hat every power vested in a government is in its nature sovereign, and includes, by force of the term, a right to employ all the means requisite and fairly applicable to the attainment of the ends of such power, and which are not precluded by restrictions and exceptions specified in the Constitution, or not immoral, or not contrary to the essential ends of political society” (Hamilton, “Opinion as to the Constitutionality of the Bank of the United States, February 23, 1791,” p. 446). The doctrine was reiterated again in *The Federalist*, this time by James Madison, in the following terms: “there can be no doubt that all the particular powers requisite as means of executing the general powers would have resulted to the government, by unavoidable

implication” (Hamilton-Jay-Madison, p. 249). By that implication, the executive power –i.e., vested in the President of the United States–exercises today many more powers and functions than those explicitly listed in the constitutional text.

The third Article succinctly describes the general nature of the judicial power and the extent of its jurisdiction, leaving most of the details of its institutions to the discretionary powers of Congress. Nevertheless, the Constitution pre-established “one supreme Court” and certain limits to its jurisdiction. In 1789, Congress passed, as already mentioned, An act to establish the judicial courts of the United States, and with it and the many Federal Judiciary Acts that followed, Congress complied with the mandate to “ordain and establish” and completed those details originally missing in the constitutional text.

Hamilton had qualified the Judicial Power as “the least dangerous” branch of government because it was lacking the sword of the executive and the purse of the legislative (Ibid., p. 428). In 1803, Chief Justice John Marshall formally recognized in the *Marbury v. Madison* resolution the doctrine of judicial review and, in the opinion of some Anti-federalists, the judiciary came to “be exalted above all other power in the government, and subject to no controul” (Storing, p. 182. *Brutus Essay xv*, 20 March 1788). Actually the change was not as radical as *Brutus* had predicted, but it is unquestionable that, after *Marbury*, the judiciary definitively acquired a much larger influence in the governing of the nation than could strictly have been read in the constitutional text.

The fourth Article orders the states to recognize each other’s records and judicial proceedings; extends to all citizens the “Privileges and Immunities” given in the several states; commands to deliver the fugitives of justice to the state having jurisdiction over the crime; recognizes the admission of new states to the Union, but forbids the secession within any existing state; guarantees to every state “a Republican Form of Government” and protects them against invasion and any “internal violence.” This Article acknowledges implicitly the legality of slavery, by ordering that run-away slaves be returned to their owners. (The Thirteen Amendment later eliminated this last clause.)

The fifth Article fixes in detail the process to be followed in modifying the Constitution. As already noted, its extreme rigidity and inability to be changed was one of the major problems of the *Articles of Confederation*. Any “alteration [had to] be agreed in a congress of the united states, followed by its confirmation in the legislatures of every state.” Clearly only non-controversial changes would achieve the unanimity necessary for

them to be adopted. The new Constitution, on the other hand, spelled out precisely the method of adding to it any change or modification. Originally the Constitution contained no provision for a deadline in the ratification processes; but in 1919, through the Eighteenth Amendment, Congress included the possibility to limit in some cases the ratification period (normally to seven years).

The sixth Article recognizes the validity of all previous debts and contracts incurred by the previous Congress (under the *Articles of Confederation*), and orders an “Oath or Affirmation, to support this Constitution” to be taken by all Congresspersons as well as “all executive and judicial Officers.” The Article explicitly prohibits any religious test for any of the federal positions (though not necessarily for the state offices!). In between these two almost-innocuous clauses (the recognition of previous debts was the minimum of legal certainty for the United States to be recognized by the foreign powers, and the Oath of Loyalty was an ancient and common requirement in a time when personal honor still counted) is the fundamental Supremacy Clause, already mentioned.

In the *Articles of Confederation*, the first proclamation made, just after announcing the style of the new confederation, was that “Each state retains its sovereignty, freedom, and independence.” The issue of the sovereignty of the individual states had been highly controversial, dividing the nation into federalists and anti-federalists, and it was to remain latent until the Civil War, in 1861. On the other hand, state sovereignty and a powerful central federal government were incompatible. To express as an opening line of the new Constitution the supremacy of the federal Constitution, U.S. treaties, and federal laws over the state laws or constitutions, would have been to call for its premature defeat. On the other hand, without that clause the rest of the Constitution was hardly worth the paper it was written on. In 1787 the Philadelphia Convention dedicated very little time to the clause. Already in the New Jersey plan a clause had been included that made federal laws related to a particular state the supreme law in that state. One month later, a new phrasing of the same clause was approved *nemine contradicente*. At the beginning of August the draft of the new Constitution included the supremacy clause as a separate article. By the end of that month, John Rutledge (future Chief Justice) proposed a new phrasing that was accepted without further arguments, also *nemine contradicente*. The differences between that and the final version were that the “supreme law” was then “of the several States and of their citizens and inhabitants,” and now it is simply “of the Land” and the separate article had become a simple paragraph embedded in between two

other clauses in the Article. So with minimum debate, the sovereignty of the states had become subordinated to the federal Constitution “and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

Finally, in only 24 words, the seventh Article included the ratification process needed for the Constitution to be adopted and go into effect.

The Constitution of the United States therefore represents a number of principles and characteristics that have since become a requirement in every constitution claiming to have universal acceptance. First of all—and above all—the Constitution is a written document. This means that the literal meaning of the text becomes an essential factor to guarantee legal certainty. No longer is there a need to go back to ancient customs and traditions retained in the memory of elderly people to determine the prerogatives and duties of the governor. Then, the Constitution has to be drafted by a constituent convention (in this case the Philadelphia Convention) and has to be ratified by the people (in state conventions and referenda). It specifies powers and determines limits to authority; hence even the punctuation of the text is as relevant to convey the intention of the law as the words themselves. That must be a rigid text, difficult to change through amendments and requiring qualified majorities to approve them; but, unlike the *Articles of Confederation*, which were unable to adapt to a changing reality and therefore doomed to disappear, it should not be inflexible.

Although the main objection to its ratification was the lack of a declaration of rights, the original text of the Constitution holds a number of individual rights, declared to limit the powers of government, such as active and passive suffrage (Secs. 2 y 3, Art. I, and Sec. 1, Art. II), the right of Habeas corpus (Sec. 9, Art. I), intellectual property rights (Sec. 8, Art. I), the right to a trial by jury and in the vicinity of the community in which the crime was committed (Sec. 2, Art. III), and the equal protection of the states (Sec. 2, Art. IV). The structure of its government is based on the separation of three powers. The executive is monocratic, the legislative bicameral, and the judiciary internally independent. It is a republican system, in which government officials are elected democratically in frequent elections, and with the exception of judges, who “shall hold their Offices during good Behaviour,” must be replaced periodically. It is a balanced democracy, in which the majority rules, but not over the rights of the minority. That balance is reached through the bicameralism of the legislative and the “negative” —the veto power— of the executive, over which stands a

constitutional review by the judiciary. Thus is provided a system of checks and balances among all the branches of government.

The Constitution is the supreme law of the land, but above it and above all is the ultimate will of “We, the People,” in whom is vested all sovereignty. According to Prof. Fioravanti, it is an unequivocally democratic constitution, resting firmly over the constituent power of the American people, who in themselves cannot be considered a posthumous product of the traditional mixed constitution. To the Americans, there are no longer “forces” and “realities” to mend, but only States to join through the federal bond, and federal powers to legitimize through the agreement of citizens. (Fioravanti 2001, p. 106).

THE CONSTITUTION’S RATIFICATION: *THE FEDERALIST*

Once submitted to the states, the earliest ratifications of the Constitution were reached quickly and positively. Two months after submission, Delaware, Pennsylvania, and New Jersey had ratified the Constitution either unanimously or by a very large majority. Shortly after, however, several states objected to its text, mainly because it lacked a Bill of Rights. One of the states presenting the strongest opposition was New York. Although all that was needed for the adoption of the Constitution was the ratification by nine states, the survival of the new federation depended largely on the inclusion of New York because of its size, its large population, and its economic strength.

Immediately after the distribution of the constitutional text, a large number of opposing pamphlets were published, often under pseudonyms such as *Cato* or *Brutus*. Those pamphlets emphasized defects such as the centralism and absolutist nature of the Constitution. In response to these pamphlets, Alexander Hamilton published in the New York newspapers, under the pseudonym of *Publius*, an article entitled “The Federalist,” promising to respond to all questions and objections posed against the Constitution or any of its clauses. Hamilton then requested the help of two of his colleagues in the Philadelphia Convention, James Madison and John Jay, to construct answers that were easy for people to understand.

Between October 1787, and the following August, the authors published in two of the New York newspapers, seventy-seven articles under the same pseudonym and with the same title. Publishing under pseudonyms was a common practice at the time, but it was notorious for the authors behind them to be identified, although it has never been possible to be absolutely certain of the specific authorship of each and every article.

At the end of 1788, all those seventy-seven, and a further eight additional articles, were published in two volumes under the title *The Federalist*, a Collection of Essays written in favor of the New Constitution, as Agreed upon by the Federal Convention, September 17, 1787.

The structure of the whole work, as stated by Alexander Hamilton himself in his first article, *A general Introduction*, is the following:

The utility of the union to your political prosperity (No. 2 to No. 14).

The insufficiency of the present confederation to preserve that union (No. 15 to No. 22).

The necessity of a government at least equally energetic with the one proposed, to the attainment of this object (No. 23 to No. 36).

The conformity of the proposed constitution to the true principles of republican government (No. 37 to No. 84).

Its analogy to your own state [New York] constitution (No. 85).

The additional security that its adoption will afford to the preservation of that species of government, to liberty, and to property (No. 85).

Of all of them, the most famous essays are: No. 10, where Madison develops the argument for avoiding the tyranny of the majority and the advantage of one large state over several small states; No. 14, where the same author explains the need to expand the power of the state; No. 39, where Madison, again, describes federalism and, in No. 51, the doctrine of checks and balances. In No. 70, Alexander Hamilton argues the convenience of a monocratic executive, and in No. 78 the fundamentals of judicial review; in No. 84 Hamilton disputes the need of a Bill of Rights, contending that the constitutional text had already enough personal guarantees.

As time went by, the main value of *The Federalist*, beyond its original intention of getting the votes necessary for the ratification of the Constitution in the State of New York, has been as an aid for the construction of the Constitution. Its two main authors –Hamilton and Madison– had been two of the most active participants in the Philadelphia Convention, and, thus, they knew firsthand what had been intended in each clause. Although it has always been understood that the Papers do not hold actual legal value, the Supreme Court of the United States has often cited them in its opinions.

CHAPTER 3 QUESTIONS

1. – Why did American Revolutionaries proclaim a Declaration of Independence?
2. – What is the legal value of the Declaration of Independence?
3. – What is the connection between federalism and the Declaration of Independence?
4. – What are the *Articles of Confederation* and why were they drafted?
5. – What form of government is established by the *Articles of Confederation*?
6. – What form of government is established by the Constitution of the United States?
7. – How is power organized in the Constitution of the United States?
8. – What individual rights are explicitly embraced in the Constitution of the United States?
9. – Identify in the constitutional text itself the characteristics described by Prof. Fioravanti.
10. – Why was *The Federalist* published?
11. – What was the goal intended by the authors of *The Federalist*?
12. – Identify briefly the events leading up to the drafting, ratification and adoption of the present Constitution of the United States.
13. – Draw a diagram of the government of the United States.

CHAPTER 3 DOCUMENTS

DECLARATION OF INDEPENDENCE, 1776 (EXCERPTS)

In Congress, July 4, 1776

The unanimous Declaration of the thirteen united States of America

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

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. - That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, --That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security. —Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain [George III] is a

history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

He has refused his Assent to Laws, the most wholesome and necessary for the public good.

He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.

[...]

We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by the Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. And for the support of this Declaration, with a firm reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

(The complete document can be found in Grau 2009, vol. III, pp. 105-135.)

ARTICLES OF CONFEDERATION AND PERPETUAL UNION, 1777 (EXCERPTS)

[Articles of Confederation and perpetual Union between the states of Newhampshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia]
To all to whom these Presents shall come, we the under signed Delegates of the States affixed to our Names, send greeting.

Whereas the Delegates of the United States of America, in Congress assembled, did, on the 15th day of November, in the Year of our Lord One thousand Seven Hundred and Seventy seven, and in the Second Year of the Independence of America, agree to certain articles of Confederation and perpetual Union between the States of Newhampshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia in the Words following, viz. “Articles of Confederation and perpetual Union between the states of Newhampshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia.

Article I. The Stile of this confederacy shall be “The United States of America.”

Article II. Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.

Article III. The said States hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their Liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatsoever.

Article IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any state, to any other state, of which the Owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any state, on the property of the united states, or either of them.

[...]

(The complete document can be found in Grau 2009, vol. III, pp. 367-387.)

CONSTITUTION OF THE UNITED STATES OF AMERICA

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article. I.

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section. 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

{Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.} [Changed by Amendments XIII, XIV, and XV.] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section. 3. The Senate of the United States shall be composed of two Senators from each State, {chosen by the Legislature thereof,} [repealed by clause 1 of Amendment xvii] for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; {and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.} [Changed by clause 2 of Amendment xvii.]

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section. 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be {on the first Monday in December,} [changed by Section 2 of Amendment xx] unless they shall by Law appoint a different Day.

Section. 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section. 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section. 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he

shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;— And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section. 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

{No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.}
[Affected by Amendment xvi.]

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section. 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article. II.

Section. 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows.

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress:

but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

{The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.} [Affected by Amendment XVI.]

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:— “I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.”

Section. 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section. 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article III.

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;— to all Cases affecting Ambassadors, other public Ministers and Consuls;— to all Cases of admiralty and maritime Jurisdiction;— to Controversies to which the United States shall be a Party;— to Controversies between two or more States;— {between a State and Citizens of another State,} [changed by Amendment xi] — between Citizens of different States,— between Citizens of the same State claiming Lands under Grants of different States, {and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects}. [Changed by Amendment xi.]

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section. 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Article. IV.

Section. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section. 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

{No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.} [Affected by Amendment XIII.]

Section. 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Article. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Applica-

tion of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of it's equal Suffrage in the Senate.

Article. VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

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

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Article. VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independance of the United States of America the Twelfth In witness whereof We have hereunto subscribed our Names,

G^o. Washington Presidt. and Deputy from Virginia

(Follow the names of the other thirty-eight signing Delegates.)

THE FEDERALIST (EXCERPTS)

FEDERALIST No. 4

The Same Subject Continued

(Concerning Dangers From Foreign Force and Influence)

For the *Independent Journal*

JAY

To the People of the State of New York:

My last paper assigned several reasons why the safety of the people would be best secured by union against the danger it may be exposed to by just causes of war given to other nations; and those reasons show that such causes would not only be more rarely given, but would also be more easily accommodated, by a national government than either by the State governments or the proposed little confederacies.

[...] Leave America divided into thirteen or, if you please, into three or four independent governments—what armies could they raise and pay—what fleets could they ever hope to have? If one was attacked, would the others fly to its succor, and spend their blood and money in its defense? Would there be no danger of their being flattered into neutrality by its specious promises, or seduced by a too great fondness for peace to decline hazarding their tranquillity and present safety for the sake of neighbors, of whom perhaps they have been jealous, and whose importance they are content to see diminished? Although such conduct would not be wise, it would, nevertheless, be natural. The history of the states of Greece, and of other countries, abounds with such instances, and it is not improbable that what has so often happened would, under similar circumstances, happen again.

[...]

But whatever may be our situation, whether firmly united under one national government, or split into a number of confederacies, certain it is, that foreign nations will know and view it exactly as it is; and they will act toward us accordingly. If they see that our national government is efficient and well administered, our trade prudently regulated, our militia properly organized and disciplined, our resources and finances discreetly managed, our credit re-established, our people free, contented, and united,

they will be much more disposed to cultivate our friendship than provoke our resentment. If, on the other hand, they find us either destitute of an effectual government (each State doing right or wrong, as to its rulers may seem convenient), or split into three or four independent and probably discordant republics or confederacies, one inclining to Britain, another to France, and a third to Spain, and perhaps played off against each other by the three, what a poor, pitiful figure will America make in their eyes! How liable would she become not only to their contempt but to their outrage, and how soon would dear-bought experience proclaim that when a people or family so divide, it never fails to be against themselves.

Publius.

FEDERALIST No. 10

The Same Subject Continued

(The Union as a Safeguard Against Domestic Faction and Insurrection)

For the *New York Packet*

Friday, November 23, 1787.

MADISON

To the People of the State of New York: Among the numerous advantages promised by a wellconstructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. [...] The valuable improvements made by the American constitutions on the popular models, both ancient and modern, cannot certainly be too much admired; [...]

By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.

[...]

No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of

large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine? Is a law proposed concerning private debts? It is a question to which the creditors are parties on one side and the debtors on the other. Justice ought to hold the balance between them. Yet the parties are, and must be, themselves the judges; and the most numerous party, or, in other words, the most powerful faction must be expected to prevail. [...]

From this view of the subject it may be concluded that a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. [...] Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths. Theoretic politicians, who have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions. A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking. Let us examine the points in which it varies from pure democracy, and we shall comprehend both the nature of the cure and the efficacy which it must derive from the Union.

The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.

The effect of the first difference is, on the one hand, to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose. On the other hand, the effect may be inverted. Men of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests, of the people. The

question resulting is, whether small or extensive republics are more favorable to the election of proper guardians of the public weal; and it is clearly decided in favor of the latter by two obvious considerations:

In the first place, it is to be remarked that, however small the republic may be, the representatives must be raised to a certain number, in order to guard against the cabals of a few; and that, however large it may be, they must be limited to a certain number, in order to guard against the confusion of a multitude. Hence, the number of representatives in the two cases not being in proportion to that of the two constituents, and being proportionally greater in the small republic, it follows that, if the proportion of fit characters be not less in the large than in the small republic, the former will present a greater option, and consequently a greater probability of a fit choice. [...]

Hence, it clearly appears, that the same advantage which a republic has over a democracy, in controlling the effects of faction, is enjoyed by a large over a small republic,—is enjoyed by the Union over the States composing it. Does the advantage consist in the substitution of representatives whose enlightened views and virtuous sentiments render them superior to local prejudices and schemes of injustice? It will not be denied that the representation of the Union will be most likely to possess these requisite endowments. Does it consist in the greater security afforded by a greater variety of parties, against the event of any one party being able to outnumber and oppress the rest? In an equal degree does the increased variety of parties comprised within the Union, increase this security. Does it, in fine, consist in the greater obstacles opposed to the concert and accomplishment of the secret wishes of an unjust and interested majority? Here, again, the extent of the Union gives it the most palpable advantage.

[...]

In the extent and proper structure of the Union, therefore, we behold a republican remedy for the diseases most incident to republican government. And according to the degree of pleasure and pride we feel in being republicans, ought to be our zeal in cherishing the spirit and supporting the character of Federalists.

Publius.

CHAPTER 4

THE FIRST CHANGES TO THE CONSTITUTION

The Bill of Rights or the first ten Amendments – Suits against the states: The Eleventh Amendment – The process of the President's election: The Twelfth Amendment – The Supreme Court of the United States and its constitutional function – Judicial Review: *Marbury v. Madison* – The Necessary and Proper Clause and the Federal supremacy: *McCulloch v. Maryland* – The Commerce Clause: *Gibbons v. Ogden*

In the previous Chapter we saw that several states objected to some aspects of the new Constitution and imposed conditions for its ratification. Massachusetts ratified the Constitution at the beginning of February 1788, but on the condition that the first duty of the new Congress would be to consider its modification. The ratification by New Hampshire on June 21st of the same year reached the requirement majority imposed in Article VII, and the new Constitution became effective. Another eight states had already ratified although New Hampshire had also requested modifications as the first priority for the new delegates. On June 24th, by which time the Constitution had already been adopted, Virginia, unaware of the acceptance status, submitted its ratification document together with a proposal for a Bill of Rights comprising twenty articles. One month later, New York followed suit, proposing in its case 25 articles in a Bill of Rights and 31 additional amendments.

As already mentioned, one of the main problems that the preceding *Articles of Confederation* had exhibited was its inflexible character, since any significant change required the unanimity of the states, an objective that had proved unachievable with just thirteen states in the Union. The framers of the new constitution clearly understood the need to redress this critical weakness. But they also understood, from their experience of working with their own state constitutions, that an overly accommodating

method of amendment was equally undesirable. So, the framers came out with an innovative procedure that proved to be exceptionally effective. The procedure has given the American Constitution the form of a fairly rigid norm, but coincidentally has ensured its survival for more than 220 years by allowing essential changes when circumstances dictate them.

The process to amend the Constitution is spelled out in Article v. There are two phases in the amendment process, and each of the phases

Patrick Henry (1736-1799) was an American attorney, farmer, orator and radical politician. Born in Virginia into a wealthy family, after failing twice in business, Henry studied law and was admitted to the Bar. In 1765 he was elected to the House of Burgesses. There he proposed the radical Virginia Resolves against the Stamp Act enacted by the British Parliament. In 1773 Henry, with other Patriot leaders such as Thomas Jefferson and Richard H. Lee, created the Committee of Correspondence of Virginia to inform similar committees in other colonies of the events that were taking place, and from which the first Continental Congress evolved. After the approval of the Constitution of 1776, Henry was elected the first governor of Virginia. He was re-elected in 1784 and 1786. In 1787, Henry declined to attend the Constitutional Convention in Philadelphia because, as he said, he “smelt a rat” and feared the Convention would create a monarchy in the new United States. Once the Federal Constitution was drafted, Henry opposed its ratification because in his opinion it limited the powers of the states and the liberties of the citizens. Patrick Henry is popularly remembered mainly for his shout (probably apocryphal) “Give me Liberty, or give me Death!”

can take two possible paths. The first phase is the proposal to the states of the new amendment text for its ratification. The second phase is the actual ratification by the states. The first phase requires a highly qualified two-thirds majority. The majority required in the second phase is even higher, requiring three-fourths of all the states in the Union to approve the proposals within the time defined for the ratification to be concluded. (This means that if during the period ratification is in progress additional states should join the Union, the total number of states that have to ratify

increases to reach the three-fourths requirement.) However, there is no case requiring the total unanimity of the states.

One of the two possible paths in the first phase is that two-thirds of the House of Representatives and two-thirds of the Senate approve the same text for an amendment. The other path is that two-thirds of the state legislatures request of Congress that a constitutional convention be called. So far, only the first path has been followed; the path of the constitutional convention has been considered highly dangerous because, once summoned, a constitutional convention has the power to change everything, even to draft an altogether new constitution, were the delegates so minded. Only once, in 1912, regarding what is now the Seventeenth Amendment, was a constitutional convention close to being called, but at the last minute the Senate, which for years had been blocking every effort to introduce that amendment, reconsidered its position. The Senate was the subject of that amendment, and it was only recognition of the disadvantages of forcing state legislatures to demand a convention that finally persuaded it to approve a joint text to be proposed to the states.

Once the proposing phase is successfully completed, the amendment text is sent to the states for their ratification and, once again, there are two possible paths to be followed. One path is that the proposed amendment is ratified by the ordinary legislatures of each of the states. The other path is for the ratification to be decided by conventions specially called in by the executive of every state. Whichever path is chosen, three-fourths of the states have to ratify it for the proposed text to become an Amendment and part of the Constitution.

Because of the significantly high majorities required in the federal legislative, only 33 amendments, out of thousands and thousands proposed, have been sent to the states in the 223 years of the Constitution. Of those 33 amendments, only 27 have been ratified by the states. Of the remaining six, four are still pending ratification and two have already been discarded. (Some of the four pending have very little chances of ever being ratified.)

It is important to note that although some of the ratified Amendments were signed by the then President of the United States, he has no active legal part in the process of amendment. Contrary to ordinary laws, which must be presented to the President for his approval or the exercise of his “negative” or veto power, Amendments do not need to be presented to him for his approval nor can he veto them.

THE BILL OF RIGHTS OR THE FIRST TEN AMENDMENTS

Thus, the First Congress of the United States was inaugurated with an express mandate to modify the very Constitution that had created it and, particularly, to add a Bill of Rights to its text. One of the toughest discussions during the Philadelphia Convention had been about the need to include a catalogue of fundamental rights within the Constitution. In 1787, eight of the thirteen states in the Union had such a declaration of rights in their constitutional texts or as documents approved separately, but with equally supremacy over ordinary laws. The Constitution had been drafted in 1787 without such declaration, but not because of a *lapsus calami* (slip of the pen). Those drafters who favored its omission alleged that the constitutions of several states did not include such declarations, but that the constitutions were nevertheless considered valid. For example, during the ratification convention in Pennsylvania, Thomas McKean, who had been one of the signers of the Declaration of Independence, argued that, “[a] bill of rights, though it can do no harm, is an unnecessary instrument.” He went on to say “[t]he constitutions of but five out of the thirteen United States have bills of rights” (Bancroft, v. 2, p. 247). Moreover, as already mentioned, the Constitution actually included several individual rights already. Furthermore, the declarations of rights were originally agreements between the monarch and his subjects, limiting his prerogatives and reserving certain rights that the people had denied to the king as a result of the historic struggles in England against the supreme power of the monarch. Consequently, such a declaration was not directly applicable to the American constitutions established on the sovereignty of the People. The People were not handing anything over to their government, but were retaining everything, so that eliminated the need to reserve anything.

Another allegation was that the Preamble to the Constitution – “We, the People, [...] do ordain and establish this Constitution for the United States of America” – was a much better acknowledgement of civil rights than all the books of aphorisms because these belong to a treatise of ethics rather than to the constitution of a government, the purpose of which was to regulate the political interests of the nation. Alexander Hamilton went as far as to consider the declarations of rights not only unnecessary but also even dangerous. He argued that establishing exceptions to powers that had not been granted in the first place was to give cause to the government to demand more powers than those it held legitimately. Finally, in Hamilton’s opinion, the Constitution was in itself a bill of rights, since the first of its purposes was to declare and state specifically the political rights

of the citizens within the structure and rule of the government. A second purpose was to describe the immunities and the due processes to be followed in all private and particular matters, and Hamilton reasoned that the Constitution of the United States was doing both. James Wilson was of a like mind and considered a declaration of rights unnecessary because the United States was a limited government with powers clearly defined and delimited, and which it was not allowed to exceed. Consequently, it could never invade individual liberties on issues beyond its specific jurisdiction.

But many citizens continued to demand a declaration of rights as an integral part of the Constitution itself, before they would consider it complete. On the 12th of September of 1787, at the Philadelphia Convention, just three days before the final draft of the new constitution was completed, the delegates Elbridge Gerry of Massachusetts and George Mason of Virginia, proposed to add a bill of rights. Mason, who in 1776 had been the author of Virginia's Declaration of Rights, argued that "[i]t would give great quiet to the people; and with the aid of the State declarations, a bill might be prepared in a few hours" (Killian, p. 955). But the motion was rejected by a very large majority. Mason then left the Convention and did not sign the Constitution. Richard Henry Lee, one of the representatives from Virginia in the Continental Congress, who had declined to attend the Philadelphia Convention having disagreed with its intended ends, demanded: "Where is the contract between the nation and the government? The constitution makes no mention but of those who govern, and never speaks of the rights of the people who are governed" (Bancroft, v. 2, p. 227). All these protests were widely reflected in the newspapers of the time.

Among many other publications against the new Constitution, several letters were published in newspapers under the pseudonym *The Federal Farmer*. These essays were collected under the title *Observations Leading to a Fair Examination of the System of Government Proposed by the Late Convention; and to Several Essential and Necessary Alterations in It. The Federal Farmer* (probably Richard H. Lee) declared in his second letter that "[t]here are certain unalienable and fundamental rights, which in forming the social compact, ought to be explicitly ascertain and fixed—a free and enlightened people, in forming this compact, will not resign all their rights to those who govern, and they will fix limits to their legislators and rulers;" and that "[t]hese rights should be made the basis of every constitution." In a fourth letter, *The Federal Farmer* restated that "[t]here are certain rights which we have always held sacred in the United

States, and recognized in all our constitutions, and which, by the adoption of the new constitution in its present form, will be left unsecured” (Storing, pp. 40-41, 55). Several other Anti-Federalist authors were also publishing, some under pseudonyms such as *Brutus*, “The Minority [delegates] of the Convention of Pennsylvania”, or the Impartial Examiner. Some under their own names, such as Patrick Henry, defended in their pamphlets the need for a bill of rights and specified which were those sacred rights.

The Federal Farmer gave a long list of matters that he believed should be included as the rights of the people. For example: the free exercise of religion; freedom from hasty and unreasonable search warrants for searching and seizing men’s papers, property, and persons; trial by jury in criminal and civil causes; right to cross examine witnesses; freedom of the press; the right to hold and enjoy property; that property cannot be taken away without the consent of the owner or of his representatives and receiving a reasonable compensation for it; to have free recourse to the laws; not to be subjected to laws or taxes not assented to by the peoples’ representatives, constitutionally assembled; the writ of habeas corpus; the right to a speedy trial in the local vicinage (legal term for the vicinity from which jurors can be drawn); to be heard in court while representing themselves or with the aid of legal counsel; not to be compelled to furnish evidence against themselves; to have witnesses give their evidence face to face the accused; for anyone to confront his adversaries in front of a duly elected judge; to assemble in an orderly manner; to petition the government for a redress of wrongs (Storing, pp. 58-59, 71). The Impartial Examiner added to those rights, that excessive bail should not be required; that excessive fines should not be imposed; and that cruel and unusual punishments should not be inflicted (Storing, p. 288).

As indicated, the inauguration of the first session of the Congress of the United States took place on March 4, 1789. One of the first actions of Congress was to approve the text of twelve amendments to be proposed to the states. On the 25th of September copies of these proposals were sent to the several states for their ratification by the state legislatures. On the 20th of November, New Jersey was the first state to ratify eleven of the twelve amendments. During the next two years, the states ratified several of the proposed amendments and, on the 15th of December of 1791, the ratification by Virginia gave the authorization for ten of the amendments to become part of the Constitution. These are popularly known as the Bill of Rights.

The most recent amendments each address a specific and particular right, such as feminine suffrage, the prohibition of slavery, or the right to vote at 18 years of age or older. But in the first ten amendments a catalogue of rights are bundled and grouped in the amendments by their common nature. At least 21 rights and two general clauses can be recognized in those ten amendments.

The First Amendment recognizes the free exercise of religion, the freedom of speech, the freedom of the press, the right to assemble peacefully, and the right to petition to the government. The Second Amendment (and probably the one that nowadays is most controversial) guarantees to the people the right to bear arms, but it also recognizes the militia. The Third Amendment protects people from being forced to house and feed troops. The Fourth Amendment protects the people from unreasonable searches and seizures of “persons, houses, papers, and effects.”

The Fifth Amendment is dedicated to the rights of citizens accused of an infamous crime, requiring the indictment by a Grand Jury before being held to answer; not to be tried twice for the same capital offence (the Double Jeopardy Clause); not to be compelled in any criminal case to be a witness against oneself; not to be deprived of life, liberty, or property, without due process of law; the right to a just compensation when private property is compulsorily taken for public use. The Sixth Amendment includes the right to a speedy and public trial, by an impartial jury of the vicinity; to be informed of the accusation; the right of the accused to confront the witnesses against him; to obtain witnesses in his favor; and to be assisted by counsel.

The Seventh Amendment preserves the right to a trial by jury in civil cases and to the rules of common law. The Eighth Amendment protects against imposing excessive bail or fines, and inflicting cruel and unusual punishments before or after coming to trial.

The Ninth and Tenth Amendments are two general clauses that protect against the Federal government’s invasion of other unnamed rights “retained by the people”, or of taking powers not delegated to the United States by the Constitution (*Reserve Clause*).

These ten Amendments recognize explicitly the character of the United States as a “limited government” (as opposed to the absolute governments of the time).

Initially, the Bill of Rights imposed limits on the Federal government, but the rights included were neither applicable nor enforceable on the states. James Madison had proposed in Congress a different version of the First Amendment in which the states were compelled to apply the

mandates of the Bill of Rights, but that proposal was rejected, and after ratification, the Supreme Court has systematically shown itself to be of the opinion that the states were free to ignore any of the mandates included in the Bill. Unless those rights were written into their own constitutions, the states were not obliged to protect any of the individual rights declared in Amendments One to Seven. The ratification of the Fourteenth Amendment, in 1868, made that, as part of the Due Process Clause of that Amendment, certain individual rights recognized in the Federal Constitution were equally applicable to the states, and that their legislation and executive measures had to honor those rights. But it was not until 1887 that, in the opinion *Spies v. Illinois*, the Supreme Court declared that the individual rights defined in the Bill of Rights applied even if a state had not specifically recognized them in its own constitution.

Actually, to this date there are only three rights in the Bill of Rights that the Supreme Court has signaled are not strictly applicable to the states: the Second Amendment “right of the people to keep and bear Arms;” the Fifth Amendment requirement for an “indictment of a Grand Jury;” and the Seventh Amendment “right of trial by jury In Suits at common law,” that is, in civil suits. (In 2008, the Supreme Court’s opinion *District of Columbia v. Heller* recognized the right of the people to bear arms in Federal lands, such as the capital Washington, DC. But it made no reference to the rest of the country, thus allowing the states the freedom to regulate the sale and possession of arms, or even to prohibit them altogether without infringing the Second Amendment.) The rest of the rights and liberties of the Bill of Rights are considered nowadays to be part of the state laws, whether included or not in the state constitutions.

Just as examples, the following Supreme Court opinions have recognized the relevance to the states of particular rights in the Bill of Rights: in *Chicago, Burlington and Quincy Railroad v. City of Chicago*, 166 U.S. 226 (1897), the right for a fair compensation for expropriations; in *Near v. Minnesota*, 283 U.S. 697 (1931), the freedom of the press; in *De Jonge v. Oregon*, 299 U.S. 353 (1937), the right to assembly peaceably; in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the free exercise of religion; in *Everson v. Board of Education*, 330 U.S. 1 (1947), the free establishment of religions; in *In re Oliver*, 333 U.S. 257 (1948), “the right to a speedy and public trial, and to be informed of the nature and cause of the accusation;” in *Mapp v. Ohio*, 367 U.S. 643 (1961), against arbitrary searches and seizures; in *Robinson v. California*, 370 U.S. 660 (1962), against “cruel and unusual punishments;” in *Gideon v. Wainwright*, 372 U.S. 335 (1963), the right of the accused “to have the Assistance of Coun-

sel for his defense;" in *Malloy v. Hogan*, 378 U.S. 1 (1964), the right not to be "compelled in any criminal case to be a witness against himself;" in *Aguilar v. Texas*, 378 U.S. 108 (1964), to the need of a court's writ for any search; in *Pointer v. Texas*, 380 U.S. 400 (1965), "to be confronted with the witnesses against him;" in *Klopfer v. North Carolina*, 386 U.S. 213 (1967), to a speedy trial; in *Washington v. Texas*, 388 U.S. 14 (1967), "to have compulsory process for obtaining witnesses in his favor;" in *Duncan v. Louisiana*, 391 U.S. 145 (1968), to a "public trial, by an impartial jury of the State and district wherein the crime shall have been committed;" and in *Benton v. Maryland*, 395 U.S. 784 (1969), not to "be subject for the same offence to be twice put in jeopardy of life or limb."

SUITS AGAINST THE STATES: THE ELEVENTH AMENDMENT

The next ratified Amendment was the result of the Supreme Court's opinion *Chisholm v. Georgia*, U.S. 419 (1793). The Eleventh Amendment modified Section 2 of Article III of the Constitution, removing the extent of the jurisdiction of the Federal courts "to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

In 1792, Alexander Chisholm, a citizen of South Carolina, acting as executor of Robert Farquhar, sued the State of Georgia in the Supreme Court of the United States over a certain amount of money due and unpaid for supplies that Farquhar had made to the State of Georgia during the War of Independence. Georgia had not denied the debt, but refused to appear in court to defend itself on the allegations that, as a "sovereign" state, it could not be sued without giving its own prior consent to the suit. In a 4 to 1 decision, the Supreme Court of the United States ruled for the plaintiff, arguing that the text of Section 2 of Article III of the Constitution was unmistakable and definite, and limited the sovereign immunity of the states since it explicitly granted to the Federal courts the jurisdiction over "Controversies between a State and Citizens of another State." This, they said, was the case before the Court.

Fearing a rush of suits against the states based on this opinion of the Supreme Court, Congress was quick to respond. In its first Session after the Court's ruling, Congress proposed the Eleventh Amendment to protect the immunity of the states against suits by individuals from other states of the Union or from foreign states. The Eleventh Amendment was ratified in less than a year.

Although this Amendment protects the states against suits from individuals in federal courts for debts or compensations, subsequent decisions by the Supreme Court have ruled that the states are not protected when the suits are for violations by the states of any of the enumerated powers of the Federal government. In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the Supreme Court ruled that citizens of another state, or foreign individuals, can sue in federal courts if Congress, pursuant to a valid exercise of the Fourteenth Amendment, abrogates the states' immunity from suit.

The Eleventh Amendment equally protects the state officials from suits by citizens of another state or of foreign nations, but not if the officers exceeded their authority or pretended to enforce any law declared unconstitutional. State officers are not protected, either, in suits for torts, when such officers are safeguarded by a state act or law. In these cases, the defendant is not treated as a member of government, but rather as a private individual, who must respond to the action as such.

Finally, the states have the freedom to renounce their immunity and consent to be sued in federal courts. But the state's consent must be clear and unambiguous, which implies that it is insufficient for the state simply to appear in court.

THE PROCESS OF THE PRESIDENT'S ELECTION: THE TWELFTH AMENDMENT

The delegates to the Philadelphia Convention recognized that the process for electing the President should be included in the Constitution, and a unique and innovative procedure was therefore devised. The process, however, has caused constitutional disputes ever since, and the year 2000 Presidential election provides a good example of that controversy.

The original Presidential election process has been directly or indirectly modified by seven amendments. The many and frequent proposals for revision continuing in Congress indicate that the process may be modified again in the future. In 2009, for example, three joint resolutions for the elimination of the Electoral College were on the Congress floor.

The earliest failures of the original Presidential electoral process became apparent shortly after the Republic was founded, as a result of radical bipartisan attitudes following George Washington's departure from politics. Washington, who was enormously popular as the commander-in-chief who had defeated the British in the War of Independence, was unanimously elected in 1789 as the first President of the United States.

He was re-elected in the 1792 elections. Such “unanimity” made it impossible to test the adequacy of the election procedure in situations where the popularity of the candidates was more equally balanced. By 1796, when Washington decided not to become a candidate for a third term as President, the country divided into two irreconcilable factions behind the Federalists of John Adams on one hand and the Democrat-Republicans of Thomas Jefferson on the other.

Without Washington’s stabilizing influence, candidates and electors gave their allegiance to one or other of the two parties. Indeed, each candidate expected, correctly as it turned out, that electors of his own party or persuasion would vote for him without question. In the elections of 1796, there were 138 electors and, according to Section 1 of Article II of the Constitution, a candidate needed no less than 70 votes to become elected President. John Adams got 71 (Federalist) votes, and Thomas Jefferson 68 (Democratic-Republican), becoming President and Vice-President respectively. The party differences between the top two men in the country led to all kinds of intrigues and partisan infighting within the executive power, making it extremely difficult to manage the country’s affairs effectively.

The elections of 1800 illustrated further deficiencies in the electoral process. This time, the Electoral College resulted in a tie between Thomas Jefferson and Aaron Burr, both Democrat-Republicans. That tie had to be resolved by the House of Representatives, so the problem moved from the Electoral College to Congress. But like the College, the House was also very evenly divided, so it took eight days and 36 suffrages to finally give the Presidency to Jefferson and the Vice-Presidency to Burr.

To avoid the same problems in future elections, Congress approved and sent the text of the Twelfth Amendment to the states for its ratification, separating the elections of President and Vice-President and limiting the time that the House had to choose a President in the eventuality of a tie in the Electoral College. (Note, however, that the Senate made no such stipulation on the time limitation for choosing the Vice-President.) By this revision to the Constitution, problems seen in the previous two Presidential elections could not repeat themselves. The Amendment also spelled out the same eligibility requirements for Vice-Presidential candidates as originally stated for the President, making it impossible for a non-native American to become President of the United States should circumstances require the Vice-President to step up to the responsibility.

In spite of the changes introduced in 1804 by the Twelfth Amendment the Presidential Electoral process frequently continued to be trou-

blesome, requiring new amendments in 1933 (Twentieth Amendment), 1951 (Twenty second Amendment), and 1967 (Twenty fifth Amendment).

THE SUPREME COURT OF THE UNITED STATES AND ITS CONSTITUTIONAL FUNCTION

The United States applies what is called a diffuse model for controlling the constitutionality of laws and acts. The doctrine of judicial review implies that, in the application of any law, treaty, or government act, any court, at state or federal level, may and must determine its conformance to the Constitution of the United States. This obligation to determine the adequacy and conformance of the laws to the Constitution logically implies that all courts have the capacity to construct the laws and, thus, to vary the Constitution itself. When that construction is applied by the Supreme Court of the United States, and given that its decisions are the ultimate authority because there is no court above it, the construction effectively becomes an integral part of the Constitution. The validity of the court's decision remains until it is either formally modified by a constitutional Amendment, or the Court itself changes its own previous ruling. As a consequence, the study of the text of the American Constitution and its Amendments is not complete without the study of the constitutional opinions of the Supreme Court of the United States.

But nowhere in the original text of the Constitution is there any explicit reference to the judicial review mechanism. The constitutional text states in its Article III that there is a judicial power in the United States and that it is "vested in one supreme Court" and in other inferior courts. All these courts have jurisdiction over "all Cases, in Law and Equity, arising under this Constitution". In Article VI, "all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution." Finally, and in the same Article, the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof [...], shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Thus, no law at the local, state or federal level, nor any act of government can be contrary to the Constitution, which is supreme in its nature, and all other laws or acts must yield to it. This concept of the Constitution as the supreme law of the country is the main contribution of American constitutionalism to the universal history of Law (Enterría, pp. 95 ff).

Nevertheless, nowhere in the Constitution is it stated that the Supreme Court of the United States has the exclusive right or privilege to define what the Constitution is and what it is not. Actually, in the earliest days of the Republic many people, for instance Thomas Jefferson, sustained the idea of *departmentalism*. According to this doctrine, every department (power or branch) of government had both authority and responsibility to interpret the Constitution (Whittington, p. xi), provided this was in the course of performing their own departmental duties. Jefferson was also of the opinion that neither the legislative nor the judiciary could over-ride the President's constitutional interpretation of the executive powers and duties.

It was by an opinion of the Supreme Court of the United States –the already mentioned *Marbury v. Madison*, written by Chief Justice John Marshall in 1803– that the doctrine of judicial review became established and fixed, and then accepted by the other two powers of government and by the states. This early acceptance by the legislative made it possible to avoid an amendment that, as was the case with the Eleventh Amendment in the case *Chisholm v. Georgia*, could have overruled the Court's decision.

To fully understand the constitutionalism of the United States, it is required that a number of constitutionally related opinions of the Supreme Court be studied. Among these, and in the early years of the Republic, the following two are fundamental: *McCulloch v. Maryland*, which in 1819 established the doctrines of the necessary and proper and of the federal supremacy, and *Gibbons v. Ogden*, which declared in 1829 the extension of the (interstate) Commerce Clause. As in the case of *Marbury v. Madison*, Chief Justice John Marshall wrote both these opinions.

Prof. Fioravanti holds that “judicial review is fundamental and essential, not only as an instrument to protect the rights of the individuals and of minorities –as Hamilton himself sustained– against the arbitrary acts of legislators or of the political majority, but also, and above everything else, to avoid that one of the government branches, the most powerful one such as the legislative, try to occupy all the constitutional space, becoming not only the foundations of the Constitution but rather the people themselves. [...] The actors and instruments of judicial review are the judges, who continually remind the legislators that, no matter how relevant their power is, it is always derived from the people through the Constitution” (Fioravanti 2001, p. 109).

JUDICIAL REVIEW: *MARBURY V. MADISON*

In *Marbury v. Madison* Chief Justice John Marshall elaborated two essential principles of modern constitutionalism: the supremacy of the Constitution and *judicial review*. The supremacy principle means that, in a case of conflict between the Constitution and either state or federal law, the controlling norm will always be the Constitution. Further, if the conflict is between a state law and a constitutionally valid federal law, the latter has precedence. The *judicial review* doctrine states that it is the province of the courts, especially of the Supreme Court, to interpret the Constitution and to determine if the laws or the executive acts conform to it. Prior to the adoption of the Constitution, Alexander Hamilton had asserted in *The Federalist* No. 78 the power of the judges to declare void any legislative act opposing the Constitution, so the Chief Justice was simply endorsing the original concepts in this area.

After the 1800 elections, in which the Federalist Party was widely defeated, in the last day of his office term the outgoing President John Adams nominated 42 new Justices of the Peace. Adams was attempting to fill in as many federal offices as possible with his supporters before handing the government to the new President and leader of the Democratic-Republican Party, Thomas Jefferson. However, the officer in charge of sending the commissions to new appointees was the outgoing Secretary of State John Marshall. He did not have enough time to deliver all the commissions before handing over his office at the White House to the new administration, leaving the remaining commissions in his desk. The new Secretary of State, James Madison, found the commissions and reported them to Thomas Jefferson, who ordered him not to deliver them to the appointees.

One of the intended Justices of the Peace for the District of Columbia was William Marbury, an enthusiastic federalist and follower of John Adams. His commission was essential to the exercise of office, and Marbury therefore requested the Supreme Court of the United States to issue a writ of mandamus to force Madison to hand over the commission. As part of its original jurisdiction, the Supreme Court had authorization from Congress, in the *Judiciary Act of 1789*, to issue writs of mandamus to any officer of the United States.

The Supreme Court ruled unanimously, in a 4 to zero decision (two of the Justices were absent for illness), that while Marbury was entitled to his commission, the Court had no way to force Madison to hand it over. Notwithstanding the *Judiciary Act of 1789*, the Supreme Court took the

view that it had no power to issue writs of mandamus because this law –the *Judiciary Act*– was contrary to Article III of the Constitution and, consequently, unconstitutional, null and void.

Chief Justice John Marshall wrote the opinion of the Court stating that it had only the judicial power to determine what was and what was not constitutional. “It is emphatically the province and duty of the Judicial Department,” Marshall said, “to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each.”

“So,” Marshall continued, “if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.”

“If, then,” Marshall went on, “the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.”

“Those, then,” Marshall concluded, “who controvert the principle that the Constitution is to be considered in court as a paramount-law are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law.”

“This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government is entirely void, is yet, in practice, completely obligatory. It would declare that, if the Legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the Legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.”

Marshall concluded “[t]hat it thus reduces to nothing what we have deemed the greatest improvement on political institutions – a written Constitution, would of itself be sufficient, in America where written Constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the Constitution of the United States furnish additional arguments in favour of its rejection.”

Thus, “[t]he judicial power of the United States is extended to all cases arising under the Constitution.” (*Marbury v. Madison*, 5 U.S. 137, 177-178.)

Prof. Nicola Matteucci believes that the constitutional edifice was not finished with the original text of 1787, or even with the inclusion of the Bill of Rights, because there still lacked a body that allowed government to exist within constraints, and that prevented the dangerous tensions of a federal state. The edifice was lacking a judge on earth. The Constitution had set limits to government, but it had not assigned the task of determining if those limits had been exceeded or not. As far back as 1761, James Otis had pronounced that a law opposed to the constitution was null and void. But it was not apparent which branch of government was authorized to declare that nullity and at the same time to guarantee the efficacy of associated constitutional mandates. An assumption that such responsibilities came under the responsibility of the judicial power was not because it was ordained in the Constitution –it was not!–, or because the Constitution defined the doctrine of judicial review –it did not!–, but because it was established by the Supreme Court itself in the case of *Marbury v. Madison*. As a result of this court opinion “the American constitutionalism is completed and, as the Great Seal of the United States proclaims, a *novus ordo seclorum* begins. By replacing the king we find the democratic political process of a pluralistic society; the old customary laws are replaced by one written constitution, with rights guaranteed to the citizens by a judge who says what the law is” (Matteucci, pp. 168 ff).

THE IMPLIED POWERS OF THE NECESSARY AND PROPER CLAUSE: *MCCULLOCH V. MARYLAND*

The last clause of Section 8, Article I, of the Constitution was the cause of great controversies even since the Philadelphia Convention itself. The clause reads: “The Congress shall have Power [...] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” Anti-Federalists were against such an open statement that, theoretically at least, gave free rein to the Federal government; the Federalists protested that the clause was indispensable for the Federal Government to carry out the duties assigned by the Constitution. In *The Federalist* No. 44, James Madison stated: “without the substance of this power, the whole Constitution would be a dead letter.”

This debate continued in the background until Chief Justice John Marshall, fifteen years after the case of *Marbury v. Madison*, ruled in *McCulloch v. Maryland*, that the Federal government could exercise more powers than those explicitly enumerated in Section 8, Article I, of the Constitution. Nevertheless, he applied the constraint that, whatever actions were taken by the government, they must be related to the enumerated powers and must not be forbidden by the Constitution. The fact that the Necessary and Proper Clause was included within Section 8, listing the enumerated powers, quite separately from the prohibitions listed in Section 9, meant that the intention of the Framers was to expand the powers of the Federal government and not to reduce them. Besides, it was not possible to enumerate in the Constitution each and every one of the powers needed by a government to run its business efficiently, as for example, by the creation of a federal bank. The defendant in *McCulloch v. Maryland* (i.e. the State of Maryland) argued that necessary meant “absolutely essential.” Marshall, however, was more liberal in his interpretation and considered the Necessary and Proper Clause as a power granted to Congress and not as a limitation imposed on it.

In order to prevent the operation in its territory of a federal bank, such as the Second Bank of the United States, the State of Maryland had passed a law to impose a tax on any bank note issued by any bank not constituted in the state. The law had the appearance of a general law, applicable to any bank from any state; but actually it was aimed at the federal bank since this was the only foreign bank operating in Maryland’s territory at the time.

The manager of the Second Bank’s branch in Baltimore, James William McCulloch, refused to pay the Maryland tax. Then, Maryland’s State Attorney sued him and McCulloch was convicted. He appealed to the Maryland Court of Appeals, which ruled that the Second Bank of the United States was unconstitutional because the Constitution did not grant Congress any authority related to federal banks and upheld the lower judgment.

McCulloch then appealed to the Supreme Court of the United States, which decided that the Necessary and Proper Clause, in Section 8 of Article I, provided the authorization for Congress to create the bank in order to carry out the functions ordained by the Constitution to the Federal Government. Chief Justice John Marshall wrote the opinion of the Court, stating that, in the first place, the federal government was supreme since “the Government of the Union, though limited in its powers, is supreme within its sphere of action [...]. It is the Government of all; its pow-

ers are delegated by all; it represents all, and acts for all [...]; the people have, in express terms, decided it by saying, 'this Constitution, and the laws of the United States, which shall be made in pursuance thereof, shall be the supreme law of the land.' Federal supremacy was also evidenced by the requirement for the members of State legislatures and the officers of the executive and judicial departments of the States to take the oath of fidelity to it. The Government of the United States, then, though limited in its powers, is supreme, and its laws, when made in pursuance of the Constitution, form the supreme law of the land, 'anything in the Constitution or laws of any State to the contrary notwithstanding'."

In the second place, Marshall pointed out that the Congress of the United States is always required to act according to the powers explicitly or implicitly granted by the Constitution. "A Constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves." Marshall continued: "Although, among the enumerated powers of Government, we do not find the word 'bank' or 'incorporation,' we find the great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation are entrusted to its Government. It can never be pretended that these vast powers draw after them others of inferior importance merely because they are inferior." The Taxing and Spending Clause implicitly authorized Congress to create a bank to carry out its constitutional mandate. Consequently, the Supreme Court was "unanimously of opinion that the law passed by the Legislature of Maryland, imposing a tax on the Bank of the United States is unconstitutional and void". The Supreme Court went on to rule that "the said Court of Appeals of the State of Maryland erred, in affirming the judgment of the Baltimore County Court, in which judgment was rendered against James W. McCulloch; but that the said Court of Appeals of Maryland ought to have reversed the said judgment of the said Baltimore County Court, and ought to have given judgment for the said appellant, McCulloch. It is, therefore, adjudged and ordered that the said judgment of the said Court

of Appeals of the State of Maryland in this case be, and the same hereby is, reversed and annulled.”

THE COMMERCE CLAUSE: *GIBBONS V. OGDEN*

As the reader saw earlier, John Marshall’s doctrine of judicial review resulted in a power that had not been explicitly included in the Constitution by the constituent delegates. His generous interpretation of the Necessary and Proper Clause opened to Congress and the President the gate to powers that also were not explicitly included in the constitutional text. Five years after *McCulloch*, Chief Justice Marshall would once again deliver an opinion that would expand the influence of the federal government over almost every single aspect of American life. The case of *Gibbons v. Ogden* was about commerce, and commerce is, of course, present in almost everything we humans do. In *Gibbons v. Ogden*, Chief Justice Marshall stated that the federal government had power to regulate interstate commerce far beyond the narrow meaning of a buying and selling transaction. As a collateral casualty of this ruling, the Tenth Amendment was left with little meaning.

The State of New York had granted to Robert Livingston and Robert Fulton the “exclusive privilege” (i.e., a monopoly) to operate steamboats in its territorial waters, authorizing them to seize any boat operating in those waters without prior successful application for their license. Aaron Ogden obtained a license from Livingston and Fulton to operate a steamboat service between New York and New Jersey. When Thomas Gibbons—a previous partner of Ogden—started the same service in competition for commuters, Ogden sued him in the Court of Chancery of New York, asking the Court to issue a restraining order against Gibbons. Gibbons claimed to have a federal license for coastal navigation. Both the Court of Chancery and the Court of Errors of New York ruled in favor of Ogden. Then Gibbons appealed to the Supreme Court of the United States.

The Supreme Court of the United States, in an opinion written by Chief Justice John Marshall, ruled in his favor, stating that the Commerce Clause authorized Congress to issue a license for coastal water navigation. Section 8 of Article 1 assigned to the federal government the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Prior to 1824, this Clause had been construed in a restrictive way, leaving to the legislation of every state any commercial activities carried on within their borders. According to Marshall, coastal

water navigation played an integral part in conducting commerce “among the several states.”

The issue was interpretation of the word “among” in the Commerce Clause, since this was the only argued source of the power of Congress to promulgate the questioned federal law. The Court had to answer whether the law regulated “commerce” that was “among the several states.” With respect to “commerce,” the Court held that commerce is more than mere traffic or trade of commodities. It also included the general intercourse of communities. This broader definition included navigation. Without navigation –at that time– there was no intercourse of the states; and without intercourse of the states, there was no commerce among them. Marshall interpreted “among” as “intermingled with.” “Commerce among the States,” Marshall said, “cannot stop at the external boundary line of each State, but may be introduced into the interior.” The Supremacy Clause implied that the power of Congress to ensure the freedom of commerce overrode any state law to the contrary. “If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several states is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States.” For Marshall, “All America understands, and has uniformly understood, the word ‘commerce’ to comprehend navigation. It was so understood, and must have been so understood, when the Constitution was framed.”

As in other previous cases, Marshall managed once more to resolve over a totally different issue that what was asked in the original claim. In *Marbury* the case was over a writ of mandamus, and the finding of the Supreme Court instituted the judicial review. In *McCulloch*, the case was over a bank, and in his finding Marshall established the extension of the Necessary and Proper Clause. In *Gibbons* the original claim was over navigation, and Marshall used it to provide a ruling over interstate commerce.

Marshall first established that the power to regulate commerce included navigation, since the constitutional power reached any commercial agreement and, without navigation –at the time and in the United States– it would have been impossible to conduct any commercial intercourse or trade. From the constitutional power was excluded –and, thus, reserved to the states– all commerce that was conducted totally within a state. But foreign commerce and the commerce between the states (and with the Indians) were part of the federal regulation without any limit. No limit was

established in Section 9 of Article 1, which set up the powers prohibited to the Federal Congress. Thus, no state could regulate any part of such foreign or interstate commerce since Congress had entire sovereignty on these matters. On this basis Marshall construed that the power to regulate interstate commerce included the boats that carried passengers and the licenses for coastal navigation.

On the other hand, the “[i]nspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts of” the state regulations.

The Court held this generous –for the federal government– and broad construction of the Commerce Clause until 1895 when, in the case *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895), it ruled that manufacturing, including oil refining, was a local activity, not subjected to the congressional regulation of interstate commerce. The Supreme Court maintained this strict line until the *New Deal*, when in *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 US 1 (1937), but without overturning *E. C. Knight*, sustained that the federal government could regulate those aspects of internal state commerce that had any influence over interstate commerce.

CHAPTER 4 QUESTIONS

1. – Explain the Amendment Process described in Article v.
2. – What is the Bill of Rights?
3. – What was the reason for adopting the first ten Amendments?
4. – Identify those rights deriving from the Bill of Rights that were included in the Declarations of Rights of the states.
5. – What is the relevance of the Eleventh Amendment?
6. – What is the relevance of the Twelfth Amendment?
7. – What is the constitutional function of the Supreme Court of the United States?
8. – What is the relevance of the Supreme Court opinion in *Marbury v. Madison*?
9. – What is the meaning of *judicial review*?
10. – What is the relevance of the *Necessary and Proper Clause*?
11. – What is the relevance of the *Commerce Clause*?

CHAPTER 4 DOCUMENTS

BILL OF RIGHTS OF THE UNITED STATES

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment v

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in

cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X

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.

AMENDMENTS PREVIOUS TO THE RECONSTRUCTION

AMENDMENT XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT XII

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;— The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;— The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. {And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.} [Superseded by Section 3 of Amendment xx.] The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number

of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

SYLLABI OF SUPREME COURT DECISIONS

MARBURY V. MADISON, 5 U.S. 137 (1803)

Syllabus [from the Legal Information Institute of Cornell University]

Argued: February 11, 1803 – Decided: February 24, 1803

The clerks of the Department of State of the United States may be called upon to give evidence of transactions in the Department which are not of a confidential character.

The Secretary of State cannot be called upon as a witness to state transactions of a confidential nature which may have occurred in his Department. But he may be called upon to give testimony of circumstances which were not of that character.

Clerks in the Department of State were directed to be sworn, subject to objections to questions upon confidential matters.

Some point of time must be taken when the power of the Executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised. And the power has been exercised when the last act required from the person possessing the power has been performed. This last act is the signature of the commission.

If the act of livery be necessary to give validity to the commission of an officer, it has been delivered when executed, and given to the Secretary of State for the purpose of being sealed, recorded, and transmitted to the party.

In cases of commissions to public officers, the law orders the Secretary of State to record them. When, therefore, they are signed and sealed, the order for their being recorded is given, and, whether inserted into the book or not, they are recorded.

When the heads of the departments of the Government are the political or confidential officers of the Executive, merely to execute the will of the President, or rather to act in cases in which the Executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of

that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy.

The President of the United States, by signing the commission, appointed Mr. Marbury a justice of the peace for the County of Washington, in the District of Columbia, and the seal of the United States, affixed thereto by the Secretary of State, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and the appointment conferred on him a legal right to the office for the space of five years. Having this legal right to the office, he has a consequent right to the commission, a refusal to deliver which is a plain violation of that right for which the laws of the country afford him a remedy.

To render a mandamus a proper remedy, the officer to whom it is directed must be one to whom, on legal principles, such writ must be directed, and the person applying for it must be without any other specific remedy.

Where a commission to a public officer has been made out, signed, and sealed, and is withheld from the person entitled to it, an action of detinue for the commission against the Secretary of State who refuses to deliver it is not the proper remedy, as the judgment in detinue is for the thing itself, or its value. The value of a public office, not to be sold, is incapable of being ascertained. It is a plain case for a mandamus, either to deliver the commission or a copy of it from the record.

To enable the Court to issue a mandamus to compel the delivery of the commission of a public office by the Secretary of State, it must be shown that it is an exercise of appellate jurisdiction, or that it be necessary to enable them to exercise appellate jurisdiction.

It is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted, and does not create the cause.

The authority given to the Supreme Court by the act establishing the judicial system of the United States to issue writs of mandamus to public officers appears not to be warranted by the Constitution.

It is emphatically the duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret the rule. If two laws conflict with each other, the Court must decide on the operation of each.

If courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

At the December Term, 1801, William Marbury, Dennis Ramsay, Robert Townsend Hooe, and William Harper, by their counsel, [p138]

severally moved the court for a rule to James Madison, Secretary of State of the United States, to show cause why a mandamus should not issue commanding him to cause to be delivered to them respectively their several commissions as justices of the peace in the District of Columbia. This motion was supported by affidavits of the following facts: that notice of this motion had been given to Mr. Madison; that Mr. Adams, the late President of the United States, nominated the applicants to the Senate for their advice and consent to be appointed justices of the peace of the District of Columbia; that the Senate advised and consented to the appointments; that commissions in due form were signed by the said President appointing them justices, &c., and that the seal of the United States was in due form affixed to the said commissions by the Secretary of State; that the applicants have requested Mr. Madison to deliver them their said commissions, who has not complied with that request; and that their said commissions are withheld from them; that the applicants have made application to Mr. Madison as Secretary of State of the United States at his office, for information whether the commissions were signed and sealed as aforesaid; that explicit and satisfactory information has not been given in answer to that inquiry, either by the Secretary of State or any officer in the Department of State; that application has been made to the secretary of the Senate for a certificate of the nomination of the applicants, and of the advice and consent of the Senate, who has declined giving such a certificate; whereupon a rule was made to show cause on the fourth day of this term. This rule having been duly served, [p139]

Mr. Jacob Wagner and Mr. Daniel Brent, who had been summoned to attend the court, and were required to give evidence, objected to be sworn, alleging that they were clerks in the Department of State, and not bound to disclose any facts relating to the business or transactions of the office.

The court ordered the witnesses to be sworn, and their answers taken in writing, but informed them that, when the questions were asked, they might state their objections to answering each particular question, if they had any.

Mr. Lincoln, who had been the acting Secretary of State, when the circumstances stated in the affidavits occurred, was called upon to give testimony. He objected to answering. The questions were put in writing.

The court said there was nothing confidential required to be disclosed. If there had been, he was not obliged to answer it, and if he thought anything was communicated to him confidentially, he was not bound to disclose, nor was he obliged to state anything which would criminate himself.

The questions argued by the counsel for the relators were, 1. Whether the Supreme Court can award the writ of mandamus in any case. 2. Whether it will lie to a Secretary of State, in any case whatever. 3. Whether, in the present case, the Court may award a mandamus to James Madison, Secretary of State.

(The complete document can be found in <http://www.law.cornell.edu/supct/html/historics/USSC_CR_0005_0137_ZS.html> [verified May 30, 2012].)

McCULLOCH v. MARYLAND, 17 U.S. 316 (1819)

Syllabus [from the Legal Information Institute of Cornell University]

Argued: February 22-27, March 1-3, 1819 – Decided: March 6, 1819

Congress has power to incorporate a bank.

The Act of the 10th of April, 1816, ch. 44, to “incorporate the subscribers to the Bank of the United States” is a law made in pursuance of the Constitution.

The Government of the Union, though limited in its powers, is supreme within its sphere of action, and its laws, when made in pursuance of the Constitution, form the supreme law of the land.

There is nothing in the Constitution of the United States similar to the Articles of Confederation, which exclude incidental or implied powers.

If the end be legitimate, and within the scope of the Constitution, all the means which are appropriate, which are plainly adapted to that end, and which are not prohibited, may constitutionally be employed to carry it into effect.

The power of establishing a corporation is not a distinct sovereign power or end of Government, but only the means of carrying into effect other powers which are sovereign. Whenever it becomes an appropriate means of exercising any of the powers given by the Constitution to the Government of the Union, it may be exercised by that Government.

If a certain means to carry into effect of any of the powers expressly given by the Constitution to the Government of the Union be an appropriate measure, not prohibited by the Constitution, the degree of its necessity is a question of legislative discretion, not of judicial cognizance.

The Bank of the United States has, constitutionally, a right to establish its branches or offices of discount and deposit within any state.

The State within which such branch may be established cannot, without violating the Constitution, tax that branch.

The State governments have no right to tax any of the constitutional means employed by the Government of the Union to execute its constitutional powers.

The States have no power, by taxation or otherwise, to retard, impede, burthen, or in any manner control the operations of the constitutional laws enacted by Congress to carry into effect the powers vested in the national Government.

This principle does not extend to a tax paid by the real property of the Bank of the United States in common with the other real property in a particular state, nor to a tax imposed on the proprietary interest which the citizens of that State may hold in this institution, in common with other property of the same description throughout the State.

This was an action of debt, brought by the defendant in error, John James, who sued as well for himself as for the State of Maryland, in the County Court of Baltimore County, in the said State, against the plaintiff in error, McCulloch, to recover certain penalties, under the act of the Legislature of Maryland hereafter mentioned. Judgment being rendered against the plaintiff in error, upon the following statement of facts agreed and submitted to the court by the parties, was affirmed by the Court of Appeals of the State of Maryland, the highest court of law of said State, and the cause was brought by writ of error to this Court.

It is admitted by the parties in this cause, by their counsel, that there was passed, on the 10th day of April, 1816, by the Congress of the United States, an act entitled, "an act to incorporate the subscribers to the Bank of the United States;" and that there was passed on the 11th day of February, 1818, by the General Assembly of Maryland, an act, entitled, "an act to impose a tax on all banks, or branches thereof, in the State of Maryland, not chartered by the legislature," [p318] which said acts are made part of this Statement, and it is agreed, may be read from the statute books in which they are respectively printed. It is further admitted that the President, directors and company of the Bank of the United States, incorporated by the act of Congress aforesaid, did organize themselves, and go into full operation, in the City of Philadelphia, in the State of Pennsylvania, in pursuance of the said act, and that they did on the ____ day of _____ 1817, establish a branch of the said bank, or an office of discount and deposit, in the City of Baltimore, in the State of Maryland, which has, from that time until the first day of May 1818, ever since transacted and carried on business as a bank, or office of discount and deposit, and as a

branch of the said Bank of the United States, by issuing bank notes and discounting promissory notes, and performing other operations usual and customary for banks to do and perform, under the authority and by the direction of the said President, directors and company of the Bank of the United States, established at Philadelphia as aforesaid. It is further admitted that the said President, directors and company of the said bank had no authority to establish the said branch, or office of discount and deposit, at the City of Baltimore, from the State of Maryland, otherwise than the said State having adopted the Constitution of the United States and composing one of the States of the Union. It is further admitted that James William McCulloch, the defendant below, being the cashier of the said branch, or office of discount and [p319] deposit did, on the several days set forth in the declaration in this cause, issue the said respective bank notes therein described, from the said branch or office, to a certain George Williams, in the City of Baltimore, in part payment of a promissory note of the said Williams, discounted by the said branch or office, which said respective bank notes were not, nor was either of them, so issued on stamped paper in the manner prescribed by the act of assembly aforesaid. It is further admitted that the said President, directors and company of the Bank of the United States, and the said branch, or office of discount and deposit have not, nor has either of them, paid in advance, or otherwise, the sum of \$15,000, to the Treasurer of the Western Shore, for the use of the State of Maryland, before the issuing of the said notes, or any of them, nor since those periods. And it is further admitted that the Treasurer of the Western Shore of Maryland, under the direction of the Governor and Council of the said State, was ready, and offered to deliver to the said President, directors and company of the said bank, and to the said branch, or office of discount and deposit, stamped paper of the kind and denomination required and described in the said act of assembly.

The question submitted to the Court for their decision in this case is as to the validity of the said act of the General Assembly of Maryland on the ground of its being repugnant to the Constitution of the United States and the act of Congress aforesaid, or to one of them. Upon the foregoing statement of facts and the pleadings in this cause (all errors in [p320] which are hereby agreed to be mutually released), if the Court should be of opinion that the plaintiffs are entitled to recover, then judgment, it is agreed, shall be entered for the plaintiffs for \$2,500 and costs of suit. B ut if the Court should be of opinion that the plaintiffs are not entitled to recover upon the statement and pleadings aforesaid, then judgment of non pros shall be entered, with costs to the defendant.

It is agreed that either party may appeal from the decision of the County Court to the Court of Appeals, and from the decision of the Court of Appeals to the Supreme Court of the United States, according to the modes and usages of law, and have the same benefit of this statement of facts in the same manner as could be had if a jury had been sworn and impaneled in this cause and a special verdict had been found, or these facts had appeared and been stated in an exception taken to the opinion of the Court, and the Court's direction to the jury thereon.

Copy of the act of the Legislature of the State of Maryland, referred to in the preceding Statement

An act to impose a tax on all banks or branches thereof, in the State of Maryland not chartered by the legislature

Be it enacted by the General Assembly of Maryland that if any bank has established or shall, without authority from the State first had and obtained establish any branch, office of discount and [p321] deposit, or office of pay and receipt in any part of this State, it shall not be lawful for the said branch, office of discount and deposit, or office of pay and receipt to issue notes, in any manner, of any other denomination than five, ten, twenty, fifty, one hundred, five hundred and one thousand dollars, and no note shall be issued except upon stamped paper of the following denominations; that is to say, every five dollar note shall be upon a stamp of ten cents; every ten dollar note, upon a stamp of twenty cents; every twenty dollar note, upon a stamp of thirty cents; every fifty dollar note, upon a stamp of fifty cents; every one hundred dollar note, upon a stamp of one dollar; every five hundred dollar note, upon a stamp of ten dollars; and every thousand dollar note, upon a stamp of twenty dollars; which paper shall be furnished by the Treasurer of the Western Shore, under the direction of the Governor and Council, to be paid for upon delivery; provided always that any institution of the above description may relieve itself from the operation of the provisions aforesaid by paying annually, in advance, to the Treasurer of the Western Shore, for the use of State, the sum of \$15,000.

And be it enacted that the President, cashier, each of the directors and officers of every institution established or to be established as aforesaid, offending against the provisions aforesaid shall forfeit a sum of \$500 for each and every offence, and every person having any agency in circulating any note aforesaid, not stamped as aforesaid directed, shall forfeit a sum not exceeding \$100, [p322] every penalty aforesaid to be recovered by indictment or action of debt in the county court of the county where the offence shall be committed, one-half to the informer and the other half to the use of the State.

And be it enacted that this act shall be in full force and effect from and after the first day of May next. [p400]

(The complete document can be found in <http://www.law.cornell.edu/supct/html/historics/USSC_CR_0017_0316_ZS.html> [verified May 30, 2012].)

GIBBONS v. OGDEN, 22 U.S. 1 (1824)

Syllabus [from the Legal Information Institute of Cornell University]

Argued: February 4-7, 9, 1824 – Decided: March 2, 1824

The laws of New York granting to Robert R. Livingston and Robert Fulton the exclusive right of navigating the waters of that State with steamboats are in collision with the acts of Congress regulating the coasting trade, which, being made in pursuance of the Constitution, are supreme, and the State laws must yield to that supremacy, even though enacted in pursuance of powers acknowledged to remain in the States.

The power of regulating commerce extends to the regulation of navigation.

The power to regulate commerce extends to every species of commercial intercourse between the United States and foreign nations, and among the several States. It does not stop at the external boundary of a State.

But it does not extend to a commerce which is completely internal.

The power to regulate commerce is general, and has no limitations but such as are prescribed in the Constitution itself.

The power to regulate commerce, so far as it extends, is exclusively bested in Congress, and no part of it can be exercised by a State.

A license under the acts of Congress for regulating the coasting trade gives a permission to carry on that trade.

State inspection laws, health laws, and laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c. are not within the power granted to Congress.

The license is not merely intended to confer the national character.

The power of regulating commerce extends to navigation carried on by vessels exclusively employed in transporting passengers.

The power of regulating commerce extends to vessels propelled by steam or fire as well as to those navigated by the instrumentality of wind and sails.

Aaron Ogden filed his bill in the Court of Chancery of that State, against Thomas Gibbons, setting forth the several acts of the Legislature thereof, enacted for the purpose of securing to Robert R. Livingston and Robert Fulton the [p2] exclusive navigation of all the waters within the jurisdiction of that State, with boats moved by fire or steam, for a term of years which has not yet expired, and authorizing the Chancellor to award an injunction restraining any person whatever from navigating those waters with boats of that description. The bill stated an assignment from Livingston and Fulton to one John R. Livingston, and from him to the complainant, Ogden, of the right to navigate the waters between Elizabethtown, and other places in New Jersey, and the City of New York, and that Gibbons, the defendant below, was in possession of two steamboats, called the Stouinger and the Bellona, which were actually employed in running between New York and Elizabethtown, in violation of the exclusive privilege conferred on the complainant, and praying an injunction to restrain the said Gibbons from using the said boats, or any other propelled by fire or steam, in navigating the waters within the territory of New York. The injunction having been awarded, the answer of Gibbons was filed, in which he stated that the boats employed by him were duly enrolled and licensed to be employed in carrying on the coasting trade under the Act of Congress, passed the 18th of February, 1793, c. 3. entitled, "An act for enrolling and licensing ships and vessels to be employed in the coasting trade and fisheries, and for regulating the same." And the defendant insisted on his right, in virtue of such licenses, to navigate the waters between Elizabethtown and the City of New York, the said acts of the Legislature of the [p3] State of New York to the contrary notwithstanding. At the hearing, the Chancellor perpetuated the injunction, being of the opinion that the said acts were not repugnant to the Constitution and laws of the United States, and were valid. This decree was affirmed in the Court for the Trial of Impeachments and Correction of Errors, which is the highest Court of law and equity in the State, before which the cause could be carried, and it was thereupon brought to this Court by appeal. [p186]

(The complete document can be found in <http://www.law.cornell.edu/supct/html/historics/USSC_CR_0022_0001_ZO.html> [verified May 30, 2012].)

CHAPTER 5

THE CIVIL WAR AND THE RECONSTRUCTION ERA

The Constitutional Acknowledgement of Slavery: *Dred Scott v. Sandford* – The Executive Non-compliance with Judicial Resolutions: *Ex parte Merryman* – The Military Commissions: *Ex parte Milligan* – The Reconstruction Amendments – The First Reconstruction Amendment: The Abolition of Slavery – The Second Reconstruction Amendment: The Citizens Rights – The Third Reconstruction Amendment: The Right to Vote and the Race – The Right to Secede: *Texas v. White* – The “Gutting” of the Fourteenth Amendment: *The Slaughter-House Cases* – Racial Discrimination: *The Civil Rights Cases* – “Separate but Equal”: *Plessy v. Ferguson*

Among American society’s most traumatic experiences in its early history was the Civil War, which was fought in the years 1861 to 1865. The results of that war were firstly that the country lost as many men as were killed in all other wars, including two World Wars. Secondly, it resulted in enduring tensions within American society –between whites and blacks, and even whites and whites– for more than 100 years, and arguably the civil war is at the root of some of the national conflicts today.

There is no real academic agreement on the problems that caused the war. To some scholars, “[t]he seeds of dissension between the North and the South were carried to Virginia in the ships commanded by Newport and to Massachusetts in the ‘Mayflower’” (Lee, p. 11). Certainly, a critical issue between North and South was the controversy over slavery, the North being abolitionist and the South being pro-slavery. The controversy had already surfaced in 1787, at the time of the Constitutional Convention, but it was then seemingly resolved through several compromises. Seventy years after the Convention, those compromises were crumbling, and, by 1860, the congressmen from South Carolina left the U.S. Congress

Roger B. Taney (1777-1864) was an American jurist and 5th Chief Justice of the United States. Born in Maryland, into a Catholic family, at the age of 18 years, when other students were entering university, he graduated with honors from Dickinson College. In 1799 he was admitted to the Bar, and in a short time became one of the most prominent attorneys in Maryland. Taney served in several state offices, first as a Federalist and then as a Jacksonian Democrat. In the presidential elections of 1828, Taney helped to win Maryland for Andrew Jackson, who repaid his assistance by choosing him first as acting Secretary of War, later as Attorney General of the United States, and finally as interim Secretary of the Treasury. As Attorney General, Taney supported several measures against Black people, considering legitimate a law of the State of South Carolina that prohibited free Blacks from entering the state, and declaring that Blacks could not be considered citizens. As the interim Secretary of the Treasury, and against the opinion of the majority in the Senate, Taney carried out the decision of President Jackson to close the Second Bank of the United States, so the Senate decided not to confirm him in the job and then rejected his nomination as Associate Justice of the Supreme Court (to replace Gabriel Duvall). At the death of John Marshall, President Jackson nominated Taney for the seat of Chief Justice and, after long debates, the Senate finally confirmed him in 1836. Taney held the office until his death in 1864, right before the Civil War ended. Roger B. Taney was the first Roman Catholic to reach the Supreme Court of the United States and, contrary to John Marshall's enlightened views, he was a strong defender of the state rights and opposed the expansion of federal government powers. Taney was certainly a brilliant jurist, but several unfortunate opinions earned him enmities on both political sides. As a consequence of the *Dred Scott v. Sandford* opinion, extreme abolitionists accused Taney of causing the Civil War, and Benjamin Curtis, one of the Associate Justices, was so upset with Taney's ruling that resigned his seat. After the *Ex parte Merryman* case, President Lincoln decided to ignore the decisions of the Chief Justice on any war related issue. Taney died in poverty. He lost his properties in the war and, due to his poor relationship with Lincoln's executive, his salary was not raised during the highly inflationary period of the war. It is odd that his own State of Maryland abolished slavery precisely on the same day of his death. Few attended his funeral, and President Lincoln did not make any public eulogy.

and proclaimed their state's secession from the Union. Shortly afterward, ten more states followed suit to establish the Confederate States of America. Then, South Carolina troops bombed the U.S. garrison in Charleston and the Civil War began.

THE CONSTITUTIONAL ACKNOWLEDGEMENT OF SLAVERY: *DRED SCOTT V. SANDFORD*

It was thought that an explicit constitutional acknowledgment of slavery could ease the tensions that along the years had built among the states and, thus, the secession of the Southern states could be avoided. Although it was possible to find in several clauses of the original constitutional text a de facto recognition of slavery, the Constitution was neither clear nor categorical about it, and certainly it was not expressly rejected. The mainly puritan Northern states had pleaded for abolition; but the Southern states, that were heavily dependant economically on cheap labor, demanded a constitutional recognition of "their peculiar institution." To get such recognition by an amendment to the Constitution was impossible because the number of Congressmen from pro-slavery states could not muster the two thirds majority required in Article v to support its proposal, much less the three fourths majority for its ratification. However, it was possible to achieve such recognition through the judicial review process.

Dred Scott was a "Negro" slave born in Virginia. At the age of approximately 35 years, his owners took him to Missouri where, in 1832, Dr. John Emerson, a surgeon in the U.S. Army, bought him. During the next twelve years Scott followed Dr. Emerson to the different forts and barracks in which the surgeon served, initially in Illinois and then in Fort Snelling, the Wisconsin Territory. Both were "free territories," where slavery was not allowed. Dr. Emerson always treated Scott rather as an employee than as a slave, even allowing him to marry, something that slaves were not permitted to do because they could not get into a legal contract such as marriage.

Dr. Emerson died in 1843, and his widow, Eliza Emerson, inherited all his property, including the slave Scott and his family. Scott attempted to buy his and his family's freedom, but Eliza refused to grant it.

With the help of abolitionist groups, Scott sued the widow in the courts of Missouri, claiming that he and his wife had become manumitted (set free) when Dr. Emerson had taken them to the free territories of Illinois and Wisconsin. He also pointed out that his daughters had never been slaves, both having been born in a state that did not recognize slav-

ery. The first lawsuit was dismissed because, surprisingly, Scott was not able to get a single witness to declare that for twelve years he had been Emerson's slave. In a second trial, in 1850, Scott and his family achieved a judgment in their favor and were declared free. But the widow appealed, and in 1852 the Supreme Court of Missouri reversed the decision, declaring Scott and his family to be slaves, property of Eliza.

By that time the estate of Dr. Emerson had been transferred to John F. A. Sanford, who was a citizen of New York State, and who thereby gained the ownership title to Scott and his family. Because the case now fell under "diversity jurisdiction," Sanford being a resident of New York and Scott of Missouri, the case could now be pursued in the federal courts. (Note that a federal court's Clerk misspelled Sanford's name as Sandford, and since the error has never been corrected.) Section 2 of Article III states that "The judicial Power shall extend [...] to Controversies [...] between Citizens of different States," which is commonly called "the Diversity (of Citizenship) Clause." In 1853, Scott's lawsuit was admitted to the United States District Court for the District of Missouri. The judge instructed the jury to apply Missouri's law and, since the state's Supreme Court had already ruled against Scott, the verdict in the Federal District Court was also against Scott.

Scott then appealed to the Supreme Court of the United States. Roger B. Taney, who had succeeded John Marshall as Chief Justice, wrote the main opinion of the court. On the 6th of May of 1857 and by a vote of 7 to 2, the Court ruled against Scott.

Taney decided that, in the first place, the diversity jurisdiction "between Citizens of different States" did not apply to this case because "Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States and not entitled as such to sue in its courts, and consequently that the Circuit Court had no jurisdiction of the case." He was not a citizen of Missouri nor of any other state and, as a "negro", he could never become a citizen. Thus, Scott could not sue in federal courts. In addition, Taney continued, it was "absolutely certain that the African race were not included under the name of citizens of a State, and were not in the contemplation of the framers of the Constitution when these privileges and immunities were provided for the protection of the citizen in other States."

For Taney, all persons of African descent, free or slave, "had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race either in social or po-

litical relations, and so far inferior that they had no rights which the white man was bound to respect.”

If the Court should now grant Scott’s requests, he said, “[i]t would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they

Abraham Lincoln (1809-1865) was an American attorney and politician, and 16th President of the United States. Born in Kentucky in 1809, his family moved to Illinois in 1830. Lincoln was elected to the General Assembly in 1834. Teaching himself law, he was admitted to the Bar in 1836, initiating a successful rural practice. In 1846 he was elected Representative to the Congress of the United States. After a campaign founded on the abolition of slavery, in 1860 he was elected President of the United States. In February of 1861, just one month before his inauguration, seven Southern states seceded from the Union, formed the Confederacy, and elected their own President. In April that year, Confederate troops attacked a federal fort in Southern territory, starting a civil war that lasted until 1865. After indecisive beginnings, the Union Army took control of the war and systematically defeated the Confederate troops. In 1864 most of the Confederate territory was under the control of the Union Army. Lincoln was nominated as the Republican candidate for the Presidential election, and chose a Democrat as Vice-President, forming the national Union Party and winning his re-election by a landslide. On April 9 1865, General Robert E. Lee, commander of the main Confederate Army, surrendered and the war was over. Six days later Lincoln was assassinated while watching a play at a theater in Washington, DC.

pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.” To allow this, Taney followed, would be “inevitably pro-

ducing discontent and insubordination among them, and endangering the peace and safety of the State.”

In a contradiction to his own decision, since the Chief Justice had established that the Court had no jurisdiction to hear the suit, Taney ruled that Scott had not become a free man when he was living in Minnesota and, furthermore, that the Congress of the United States had exceeded its constitutional powers prohibiting slavery in certain states and Territo-

Salmon P. Chase (1808-1873) was an American jurist and politician, 6th Chief Justice of the Supreme Court of the United States. Born in New Hampshire, he graduated from Dartmouth College at the age of 18, and was admitted to the Bar two years later. In 1830 Chase moved to Ohio to practice law there. The death of his wife five years later reinforced his religious and abolitionist beliefs. In 1849, Chase was elected U.S. Senator for Ohio, affirming always his abolitionist position. In 1855 he was elected governor of Ohio and in 1860 U.S. Senator for that state. But he immediately left this seat to become Secretary of the Treasury in Lincoln's Cabinet. As Secretary of the Treasury, Chase established a new national banking system and introduced paper money as legal currency. At the death of Roger B. Taney, President Lincoln nominated Chase as Chief Justice and the Senate confirmed him the same day. Chase held that office until his death. His stance towards blacks was radically opposed to his predecessor, Roger B. Taney, and Chase admitted the first African-American lawyer to appear before the Supreme Court.

ries, as it had done with the Acts known as The Missouri Compromises. In Taney's opinion, these Acts violated the Fifth Amendment, which prohibited “private property be taken for public use, without just compensation.” Accepting the Compromises as constitutional meant that any person moving with his slaves to those Territories would lose them “without just compensation.” Lastly, the Chief Justice concluded that any state legislation prohibiting slavery was likewise to be considered unconstitutional.

Years later, the Chief Justice tried to justify his opinion in Dred Scott as an attempt to satisfy the demands of the pro-slavery states, and thus avoid their secession from the Union. Instead of appeasing the Southern states, the Court's ruling simply exacerbated the abolitionist attitudes in the Northern states. In his Presidential campaign of 1860, Abraham

Lincoln declared that he would do everything possible to have the ruling overturned.

THE EXECUTIVE NON-COMPLIANCE WITH THE JUDICIAL RESOLUTIONS: *EX PARTE MERRYMAN*

As indicated *supra*, alleging the tensions built up between the Northern and Southern states, South Carolina decided to break from the Union. Within one month six other states (Mississippi, Florida, Alabama, Georgia, Louisiana, and Texas) followed suit, and all the seven joined in the Confederate States of America. The Confederacy demanded that the federal government remove all federal troops from Southern lands, considering them to be a foreign invasion force. The Union ignored the demand and, on the 12th of April of 1861, the Confederacy commanded its troops to bomb the federal Fort Sumter in Charleston, South Carolina.

As a result of that attack, President Abraham Lincoln issued a Proclamation asking for volunteers from the Northern States to form an Army of 75,000 men, with the purpose of enabling the Union to repel any other Confederate attacks. In reaction to the Presidential Proclamation four more states (Virginia, Arkansas, Tennessee, and North Carolina) joined the Confederacy, and so began the civil war that lasted four years and resulted in more than 600,000 deaths.

The Northern states responded quickly to President Lincoln's request, and four days later the first detachment of federal troops from Minnesota, plus four hundred volunteers from Pennsylvania, arrived in Washington. To reach the Capital the troops had to march through the city of Baltimore, in Maryland, a "frontier state" between the "North" and "South," where a significant part of the population sided with the secessionists. As the troops marched through the streets, a mob stoned them. The next day, a group of the Massachusetts militia arrived in Baltimore, and again a mob congregated to stone and fire upon them with the aim of preventing their embarkation on the train to Washington. The soldiers responded by firing at the mob and, in the consequent riot, four soldiers and twelve civilians died. That same evening, the Mayor of Baltimore and its Police Chief convinced Maryland's Governor (all of them Confederate sympathizers) to sabotage the railroad bridges by burning them, thus preventing the transportation of any additional Union troops to Washington by that route.

President Lincoln's response to the attacks on the Union troops and the burning of bridges was to issue a written order to the command-

ing General of the Army of the United States, authorizing him to suspend the privilege of the writ of habeas corpus any time that, in his opinion, the maintenance of public safety required it (Rehnquist, pp. 13-25). Lincoln

Andrew Johnson (1808-1875) was an American politician and the 17th President of the United States. Born in North Carolina, into a very poor family, he became an orphan at the age of 3. Without any access to formal education, Johnson taught himself to read and write. Married at the age of 18, his wife taught him the basic elements of arithmetic. A tailor by trade, at the age of 25 he was elected Mayor of his town. Two years later he was elected Representative to the legislature of Tennessee, and in 1841 Senator in that state. From 1843 to 1853, Andrew Johnson was a Representative for Tennessee in the Congress of the United States, and in 1857 U.S. Senator. When in 1861 Tennessee seceded from the Union, Andrew Johnson was the only Senator from all the Southern states who remained in the U.S. Senate. When Republican Lincoln prepared his candidacy for re-election in 1864, he chose Andrew Johnson, a Democrat, as running mate in an attempt to bridge Southern and Northern interests. After the assassination of Abraham Lincoln, Vice-President Johnson assumed the presidency following the procedure established then in the Constitution. In 1868, the House of Representatives impeached Andrew Johnson in a dispute over dismissal of a Cabinet member, but the Senate acquitted him. (Bill Clinton has been the only other President impeached by the House.) In 1874, Andrew Johnson returned to his seat in the U.S. Senate, the only president to do so after the end of his Presidential term.

justified his order on the basis of the Constitution's Suspension Clause in Section 9, Article I, which states that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it".

One of the saboteurs was John Merryman, a resident of Baltimore who was arrested in May of 1861 by soldiers of the Union Army. When Roger B. Taney (who, in addition to Chief Justice of the Supreme Court, was Circuit Judge in the District of Baltimore) learned about the arrest of Merryman, he issued a writ of habeas corpus to the officer that had detained him. The writ ordered the officer to deliver the prisoner to the Cir-

cuit Court the very next day. The officer refused to comply with the writ, declaring that the General of the Army had ordered him to detain Merryman on charges of treason for “levying War against” the United States, and that the President of the United States had suspended the privilege of the writ of habeas corpus for public safety reasons.

In his writ of habeas corpus, Taney, acting on his authority as a Circuit Judge, had ordered the Commander of the Fort where Merryman was detained, to set him free immediately, declaring, firstly, that constitutionally the President had no power to suspend the writ of habeas corpus or to authorize military commanders to suspend it. The Habeas Corpus Clause was not part of Article II of the Constitution, dedicated to the Executive Powers, but of Article I, on the Legislative Powers held by Congress. And secondly, that the U.S. Army was not allowed to detain any person for infringement of the laws of the United States unless the Army was supporting the judiciary, and acted subordinated to it, or the detainee was subject to the military code of justice. Moreover, said Taney, if a civilian was detained by the military, the duty of the officer in charge was to release him immediately to the civilian authorities for judgment according to the law. Otherwise, “the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found” (*Ex parte Merryman*, 17 F. Cas. 144, 152).

In spite of certain opposition in Congress to the Presidential decree suspending the writ of habeas corpus, and of several other judicial opinions reiterative of the decision included in *Ex parte Merryman*, President Lincoln ignored all those opinions and ordered the federal troops to disregard any writ of habeas corpus issued by the judiciary and not to release the detainees to the civilian authorities. In 1863, Congress finally passed an Act authorizing the suspension of the writ of habeas corpus for the duration of the civil war, thus avoiding any possible claims of unconstitutionality over the detentions.

THE MILITARY COMMISSIONS: *EX PARTE MILLIGAN*

Although abolitionism and anti-secessionism feelings were well rooted in the Northern states of the Union, as the previous case *Ex parte Merryman* shows, many civilians, and even government officers in the so-called “border states,” sympathized with the secessionists and sided with the Confederacy. They helped physically by sabotaging Union infrastructures,

and morally by organizing public demonstrations in favor of the Confederacy or against the conscription by the U.S. Army.

In August of 1862, the Union's Secretary of War issued an order authorizing and directing U.S. marshals and local police anywhere in the United States to arrest and imprison "any person or persons who may be engaged, by act, speech, or writing, in discouraging volunteer enlistments, or in any way giving aid and comfort to the enemy, or in any other disloyal practice against the United States" (Rehnquist, p. 60). All persons suspected of aiding the enemy's cause were to be tried summarily by military commissions. (Military commissions are different to Courts-martial and have fewer 'due process' guarantees than those of ordinary courts.) It is not known how many civilians were tried by military commissions in the Northern states during the war, but most probably their number exceeded three thousand.

The *Habeas Corpus Act of 1863* gave constitutional validity to the arrests and detentions of civilians without the indictment process. An allegation of some risk to public safety was sufficient for an individual to be brought before the military courts. In October of 1864, without a court order Union troops arrested an Indiana attorney, Lambdin P. Milligan, and other civilians, who were said to manifest sympathy for the secessionist cause. That same month, all of them were tried by a military commission on charges of "Conspiracy against the Government of the United States; Affording aid and comfort to rebels against the authority of the United States; Inciting insurrection; Disloyal practices; and Violation of the laws of war" (71 U.S. 2, 6). In the trial, many of their constitutional rights were infringed, particularly the presumption of innocence, and all were sentenced to death. Their execution was scheduled for May 1865. But the war ended in April of that year, and then the defendants appealed their sentences, first to the Federal Circuit Court of the District of Indiana and, subsequently, to the Supreme Court of the United States.

The Supreme Court, presided now by Salmon P. Chase, who had replaced the deceased Roger B. Taney, ruled that, although the Habeas Corpus Act allowed the military to arrest civilians without having to hand them over to civilian courts, it did not mean that those civilians could be detained and tried without the indictment of a Grand Jury, as ordained in the Fifth Amendment. The suspension of the writ of habeas corpus did not mean that all other constitutional rights were equally suspended and that civilians could be incarcerated and held without evidence and formal charges. The Court's opinion added that the military commissions had no jurisdiction to try, convict, and sentence, civilian citizens in those states

where ordinary civilian courts were open and operating normally. Moreover, the Supreme Court said that Congress was not empowered to grant such authority to the military. The Act passed in 1863 had no validity. For civilians to be tried by military commissions they must be residents in a rebellious state, prisoners of war, or Army or Navy recruits, because the constitutional “right to a speedy and public trial, by an impartial jury” of the Sixth Amendment had been “ordained and established” for peace and for war. Moreover the Sixth Amendment applied in all cases and circumstances to both governors and governed. Consequently, neither Congress nor the President, not even the judiciary, could change any of the safeguards to the civil liberties included in the Constitution, except that of suspending “The Privilege of the Writ of Habeas Corpus” under very specific circumstances. And since the civilian courts in the State of Indiana were open and operating normally when Milligan was arrested, the military commission could not constitutionally try any of its civilian population who were not an Army or Navy recruit, or a prisoner of war. Therefore, the trial of Milligan by a military commission had been unconstitutional and he should be let free.

As a result of this ruling by the Supreme Court, Milligan and the other condemned men were set free. (Incidentally, once he was free Milligan sued for half a million dollars from the Army general who had ordered his arrest, alleging that his constitutional rights had been infringed. But the courts granted him the symbolic amount of five dollars, reasoning that Milligan himself had contributed to his detention by demonstrating, in time of war, against his legitimate government.)

The most relevant issues in this Court’s opinion are that it fixed and separated the constitutional powers of the President and those of Congress in terms of their powers to limit the rights of individuals, such as the right of habeas corpus, and established that, in most situations, civilian courts took precedence over military courts to try civilians, even during times of war.

THE RECONSTRUCTION AMENDMENTS

In an attempt to undermine the social structures of the Confederacy, President Lincoln signed the first day of 1863 an executive order known as the Emancipation Proclamation. The order freed –on paper at least– every slave in the rebellious states. It is not clear that the President had the power to issue such an executive order, particularly considering it was directly opposed to the current precedent established by the Supreme

Court's opinion in *Dred Scott v. Sandford*. Equally, there was no practical possibility of executing the order in the territories controlled by the Confederate government. The main goal of the executive order was to offer foreign powers, particularly Great Britain and France, an image of a just and righteous Union government in favor of human rights and of a wicked Confederacy opposed to them, in an attempt to prevent those foreign powers from siding with the secessionists. As the Union troops advanced into Confederate territory, they executed the President's order and freed the slaves they encountered.

The Civil war ended formally the 9th of April of 1865, when Confederate general Robert E. Lee surrendered his Army to Union general Ulysses S. Grant. In the following months, other Confederate troops surrendered to the Union Army. On the 20th of August of 1866, President Andrew Johnson, who had succeeded Abraham Lincoln after his assassination, signed a Proclamation "Declaring that Peace, Order, Tranquility, and Civil Authority Now Exists in and Throughout the Whole of the United States of America." However, the former Confederate states continued under military control far beyond this date, during a period known as the Reconstruction Era. The name –highly euphemistic– implied the process of reorganization and restoration of the constitutional federal institutions in the Confederate states. While the duration of the era is not clearly defined, we could say that it began in 1863, with the Emancipation Proclamation, and ended with the Compromise of 1877, when President Rutherford B. Hayes removed the federal troops that remained in the occupied Southern states.

Both Presidents Lincoln and Johnson understood that, in order to get the country out of its calamitous situation after the Civil War (particularly the Southern states), a "reconstruction" plan was needed to restore both political order and economic welfare. Such "reconstruction" certainly had its material side, since the cities, industry and agricultural framework, destroyed during the war, had to be rebuilt. But it also had a political and a social side, the aim being to return the secessionist states to the Union and to change their pro-slavery society into an abolitionist one.

The Thirteenth, Fourteenth, and Fifteenth Amendments were approved and ratified during the Reconstruction Era, and are therefore called the "Reconstruction Amendments". The Thirteenth Amendment abolished slavery in 1865; in 1868 the Fourteenth Amendment extended citizenship, and associated rights, to "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof;" and finally, in 1870, the Fifteenth Amendment prohibited the United States and any of

its states to deny or abridge “on account of race, color, or previous condition of servitude” the right of the citizens to vote.

THE FIRST RECONSTRUCTION AMENDMENT: THE ABOLITION OF SLAVERY

The immediate aim of the Thirteenth Amendment was to integrate into the Constitution all President Lincoln’s executive orders and proclamations for the abolition of slavery. As already mentioned, the first attempt to enforce emancipation was a war punishment action against the secessionist states through the Emancipation Proclamation of 1863. At the end of the Civil War and in spite of this Proclamation, slavery was still present in a number of the states. Even in some of the Northern states, such as Delaware or Kentucky, slavery was legal, and eighteen “apprentices for life” – “slaves” by another name– were registered in New Jersey, where theoretically slavery had been abolished since 1846.

But the facts were that, in 1864, Section 2 of Article IV and the *Dred Scott v. Sandford* Supreme Court opinion were a valid part of the Constitution, and both recognized slavery as constitutionally legal. That construction could not be modified by an Act of Congress or by an executive order of the President, but only by a new opinion of the Supreme Court of the United States overturning Taney’s or by an amendment to the Constitution. In January of that year, while the Civil War was still being fought, an amendment was introduced in Congress for the constitutional abolition of slavery. But the proposed text did not get the two-thirds majority in both houses required to achieve approval. Finally, in January of 1865, with the political support of the recently reelected President Lincoln, Congress approved the current text of the Amendment. On the same day, the text was sent to the states for ratification and, by December of that year, the required three-fourths of the states ratified it and the Amendment became part of the Constitution.

In addition to the emancipation of all the slaves, the Thirteenth Amendment modified the distribution of the Representatives in Congress and the direct taxes paid by each of the several states (both procedures included in Section 2 of Article I), as well as a definition, in Section 2 of Article IV, of the rules applying to any “Person held to Service or Labour in one State, under the Laws thereof, escaping into another” state, that is, of fugitive black slaves. It should be noted, however, that it was not until 1873, in the *Slaughter-House Cases* opinion, that the Thirteenth Amendment was construed to be applicable to other conditions of servitude, such

as the treatment of Mexican peons or the Chinese coolies employed on the transcontinental railroad.

The Supreme Court of the United States has rarely cited the Thirteenth Amendment in its opinions; and when it has done so, it has been mainly to void state legislation that placed employees in a condition of servitude to their employers. Initially, the Court strictly limited the application of the Amendment to labor situations, but after 1968, in the *Jones v. Alfred H. Mayer Co.* opinion, the Court construed the Amendment to protect generally against any kind of racial discrimination.

It should be noted, however, that the Supreme Court excludes the applicability of the Thirteenth Amendment to certain special labor relationships, such as employment in the merchant marine, where the seamen on board relinquish some of their personal liberty. The same exclusion applies to the duties that a municipality may impose on its citizens in an emergency situation. Neither did the Amendment relieve citizens from military service or from serving as a juror.

Another peculiarity of this Amendment is that the prohibition of “slavery nor involuntary servitude” applies to the government –state and federal– as well as to private individuals. Thus, an individual subjecting another person to any form of enslavement will be charged with a violation of the Constitution, in addition to the corresponding violations of labor or penal laws.

THE SECOND RECONSTRUCTION AMENDMENT: THE CITIZENS RIGHTS

The emancipation carried out by the Thirteenth Amendment did not eliminate the racial discrimination that African-Americans were subjected to, but rather increased it. As a reaction against the Amendment, many Southern states passed “Black codes” in which, like in their British and Spanish precedents, the rights and liberties of African-Americans were curtailed or eliminated. As examples of those codes, blacks were not allowed to vote in the elections nor serve as jurors; they could not testify against a white person, carry guns, or even defend themselves if attacked by a white; blacks could not own or lease land property, and they could not work in any occupation other than agriculture or domestic service.

Other discriminatory laws were more cunning and, indeed, wicked. For example the vagrancy laws applied to traveling African-Americans who, unable to demonstrate an occupation or domicile, were sentenced to hard labor. Other examples include the apprentice laws, forcing orphans

of former slaves to work for free for their parents' masters; or the anti-miscegenation laws; and so on.

It has been mentioned in Chapter 4 that, originally, the Supreme Court construed the Bill of Rights in a restrictive way, compelling the behavior of federal government only, but not of the states. For instance, in the *Barron v. Baltimore* opinion, of 1833, Chief Justice Marshall sustained that the Fifth Amendment clause "nor shall private property be taken for public use, without just compensation" was not applicable to the Mayor and the City of Baltimore, and, consequently, they were not compelled to compensate John Barron for damages caused to his property by certain public works in the city. In 1866, Congress had passed the Civil Rights Act, which granted American citizenship to any person born in the United States, guaranteeing, thus, the citizenship to former slaves. But, given the precedent of the *Baron v. Baltimore* ruling, Congress feared that the Supreme Court could declare the Civil Rights Act unconstitutional, or that, being an ordinary law, it could be easily modified by a future Congress with different political values. To avoid any of these potential problems, Congress approved the text of the Fourteenth Amendment and submitted it to the states in 1866. The ratification process was highly controversial. Most of the Southern states refused to ratify it. So Congress set up in them military governments that approved it and, thereby, achieved the required majority for ratification. Ohio and New Jersey had already submitted their ratifications, but withdrew them in protest against the imposition of military governments. It was not until July of 1868 that the requirement for "three-fourths of the states" to approve was finally reached. (Eventually, Ohio and New Jersey ratified the Amendment... in 2003!)

The Fourteenth Amendment is the most frequently cited by the Supreme Court when it comes to the resolution of the fundamental rights of individuals. It includes some of the most important clauses applying to American jurisdiction. In its first section, the Amendment incorporates the following five clauses: the Citizens Clause, the Due Process Clause, the Equal Protection Clause, the Privileges or Immunities Clause, and finally the Incorporation Clause. (Some of these clauses are briefly explained in Chapter 7.)

A quick reading of the Amendment text – "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" – could give the understanding that its purpose was "to incorporate" the Bill of Rights to the states. The process followed by the Supreme Court to reach such "incorporation" has been, however,

much slower and much more difficult, only reaching that “incorporation” well into the twentieth century.

Initially, the opinions of the Supreme Court interpreted the Fourteenth Amendment in a way that mainly limited the rights the Amendment sought to protect. As an example, in 1873 the Supreme Court had denied in its finding for the *Slaughter-House Cases* that the Bill of Rights was applicable to the states. The Court reached the paradoxical conclusion that there existed two different citizenships, federal and state; and these were independent of each other. The rights of one were separate from the other. The Court concluded that the “privileges or immunities” in the Amendment were those of the United States, but not those of the states. The opinion held that the main purpose of the Amendment was to grant American citizenship to the former slaves, and nothing else. Three years after the *Slaughter-House Cases* opinion, the Court resolved in *United States v. Cruikshank, et al.*, that “[t]he fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another.” The Court reached a similar conclusion in 1883, in the *Civil Rights Cases*, where it declared unconstitutional the *Civil Rights Act of 1875* because this law of Congress invaded a power reserved to the states. It was up to these, and not to Congress, to prohibit and punish any violation by private individuals of the rights contained in the Amendment.

In spite of the plain intention and meaning of the Amendment, it took the Supreme Court more than ninety years to overturn the precedent established in *Barron v. Baltimore*. In 1925, in the case of *Gitlow v. New York*, part of the Bill of Rights became integrated into the legislation of the states. But it was only after World War II that the Court construed the Fourteenth Amendment in a more liberal and generous way. For example, in 1954, the Supreme Court admitted in *Brown v. Board of Education of Topeka* that the de jure racial segregation in public schools was a violation of the Equal Protection Clause of the Fourteenth Amendment. Then, in 1966, after the assassination of three civil rights activists in Mississippi by Ku Klux Klan members, the Supreme Court ruled, in *United States v. Price, et al.*, that although the Court had consistently held to date that “[t]he Fourteenth Amendment protects the individual against state action, not against wrongs done by individuals,” it now held that private individuals “acting under color of law” were indictable for any violation of the Bill of Rights. This ruling finally overturned the precedent established 90 years earlier in *United States v. Cruikshank, et al.* (Refer to Chapter 4 for a more complete list of incorporated rights).

In addition to its first section, the Fourteenth Amendment includes some other clearly “Reconstructionist” clauses. One of them punished, by a proportional reduction of Representatives in Congress, those states denying or abridging the right to vote to “any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States”. Another clause prohibited any person “engaged in insurrection or rebellion against the [United States], or [who had] given aid or comfort to the enemies thereof” from becoming a relevant officer of the United States or of the states. “But Congress may by a vote of two-thirds of each House, remove such disability.” Finally, the Amendment declared “illegal and void” any “debts, obligations and claims” incurred “in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave.”

THE THIRD RECONSTRUCTION AMENDMENT: THE RIGHT TO VOTE AND THE RACE

Despite the forgoing two amendments, in 1869 African-American citizens in the Southern states were consistently denied, by all kinds of tricks and stratagems, the right to vote. The former Confederate states preferred to incur the penalty imposed by the Fourteenth Amendment, and see their representation in Congress reduced, rather than allow black people the right of suffrage. To resolve this situation, Congress approved the Fifteenth Amendment, explicitly prohibiting to deny or abridge any person “his” right to vote “on account of race, color, or previous condition of servitude.” The Amendment was ratified in less than a year. (But it should be recalled that almost all the Southern states were under military government at that time).

But once more, in spite of the striking clarity of the constitutional text, many states –and it should be noted both “Southern and Northern” states– found ways to “deny or abridge the right of citizens of the United States.” The administrative tricks to disfranchise African-Americans were numerous: to demand literacy tests (that were not exerted on the white population); approving special poll taxes; failing to publish the location of the voting places; setting up “grandfather clauses” that required a voting ancestor at a date prior to the Civil War; or simply applying physical violence against those black people who tried to exercise their right. (See Chapter 7 for more information on this issue.)

THE RIGHT TO SECEDE: *TEXAS V. WHITE*

As in the previous cases of *Marbury v. Madison* or *McCulloch v. Maryland*, in *Texas v. White* the Supreme Court took advantage once more of an apparently insignificant lawsuit to establish a major constitutional doctrine. The original suit was for the recovery of certain U.S. Treasury bonds that the State of Texas allegedly had illegally sold during the Civil War. The Supreme Court grabbed the opportunity and ruled that the states could not secede from the Union through any legislative or executive act of their own governments. Not even Texas, which before joining the Union had been an independent nation –the Republic of Texas–, could do so, because it had freely and voluntarily joined the Union, and once a state had become a member of the federation, it could not change its mind and secede by an act or decree of its own government. Such act or decree, even if all the citizens of that state ratified it, was null and void as were all other laws and acts enacted under a decree of secession.

When in 1861 Texas seceded from the Union and became a part of the Confederacy, it held in its coffers U.S. Treasury bonds worth ten million dollars. These bonds had been received when Texas joined the Union in 1845, as compensation over a border dispute with the United States. At the outbreak of the Civil War, the Confederate government of Texas decided to sell part of the bonds to finance the Confederate Army. On learning of these intentions, the U.S. Federal Government issued a Proclamation declaring illegal any purchase of such bonds. Despite the Proclamation, Texas secretly sold bonds worth one million dollars to George W. White and John Chiles, who in turn sold them to “good faith third party” investors. Once the war ended, the new “Reconstruction government” established in Texas sued White and Chiles for the recovery of the bonds or their value, declaring the sale had been illegal and its aim had been to foment rebellion against the United States. The lawsuit was filed in the Supreme Court of the United State since the Constitution granted in its Section 2 of Article III original jurisdiction to the Supreme Court in all cases “in which a State shall be a party.”

The Court ruled the sale to be void and ordered either the return of bonds or a payment in cash to their value. But the most relevant issue addressed in the Court’s opinion sustained that “[t]he Union of the States never was a purely artificial and arbitrary relation. It began among the Colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form and

character and sanction from the *Articles of Confederation*. By these, the Union was solemnly declared to 'be perpetual.' And when these *Articles* were found to be inadequate to the exigencies of the country, the Constitution was specifically required 'to form a more perfect Union.' It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, with the obligation to make itself more perfect if the circumstances required it, is not?" (74 U.S. 700, 724-725). Thus the Court interpreted that the states, once bound by the ratification of the Constitution, could not secede unilaterally from the Union.

The relationship of Texas to the Union was, as described above, different to the rest of the states. Moreover, Texas was not a former colony in the way of the original thirteen states; neither was it the result of the natural process of development taking place in the Territories owned by the United States, such as Mississippi or Tennessee; and it had not been purchased from a foreign nation, as had been Louisiana or Florida. Before its admission to the Union in 1845, Texas was an independent Republic, the territory of which its inhabitants had won from Mexico through a bloody revolution in 1836. Then, those same inhabitants had decided it was more convenient for them to join the United States than to remain independent and subject to a constant harassment from Mexico. The Supreme Court understood that "[w]hen, 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." Consequently it should be, "[c]onsidered therefore as transactions under the Constitution, the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The obligations of the State, as a member of the Union, and of every citizen of the State, as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the State did not cease to be a State, nor her citizens to be citizens of the Union. If this were otherwise, the State must have become foreign, and her citizens foreigners". The Court concluded that "[t]here was no place for reconsideration or revocation, except through revolution or through consent of the States." (74 U.S. 700, 726 ff.)

THE “GUTTING” OF THE FOURTEENTH AMENDMENT: THE *SLAUGHTER-HOUSE CASES*

A few years after the ratification of the Fourteenth Amendment, the Supreme Court interpreted, in the *Slaughter-House Cases* opinion, that the Amendment was designed to protect the “privileges or immunities” of the citizens of the United States and was not applicable to the “privileges or immunities” of the states.

In the middle of the nineteenth century, the surrounding area to the city of New Orleans had more than a thousand slaughterhouses, butchering over 300,000 head of cattle a year. Owing to the lack of a proper sewer system, animal entrails frequently infected the city and, as a logical consequence, its sanitary conditions were deplorable. Outbreaks of cholera, yellow fever, malaria and similar epidemics were common. To solve that problem, the Louisiana legislature passed a law granting to The Crescent City Live-Stock Landing and Slaughter-House Company a 25-year monopoly of the business, on the understanding that the company would centralize its operations in a specified location well away from the city and its public water and sewer services. The corporation itself was not engaged in the slaughter of the animals, but it just rented space to a number of butchers, who were not allowed to slaughter anywhere else in the region.

Several groups of butchers sued the corporation and the State of Louisiana, alleging that, by granting such a monopoly, their rights protected by the Fourteenth Amendment had been violated. As a consequence of the Louisiana law, they claimed to have been forced to shut down their abattoirs and that they were deprived of their right to earn a living, which was one of the “privileges or immunities” protected by Section 1 of the Fourteenth Amendment.

By a narrow margin of 5 to 4, the Supreme Court ruled that the State of Louisiana had not violated the Fourteenth Amendment because the latter was aimed at protecting federal citizenship rights and not state citizenship rights. The Court ruling construed that there were two citizenships. “It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a state, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual. We think this distinction and its explicit recognition in this Amendment of great weight in this argument, because the next paragraph of this same section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United

States, and does not speak of those of citizens of the several states,” said the opinion (83 U.S. 36, 73-74). Consequently, the privileges protected by the federal government were not necessarily applicable to the states.

The Court recognized that the Fourteenth Amendment had formally “overturn[ed] the Dred Scott decision by making all persons born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt” (83 U.S. 36, 73). So the Amendment was primarily intended to protect former slaves and could not be applied to other situations, such as this one.

In its dissent, Justice Stephen J. Field considered that the majority’s opinion had rendered the Fourteenth Amendment “a vain and idle enactment, which accomplished nothing and most unnecessarily excited Congress and the people on its passage” (83 U.S. 36, 96).

RACIAL DISCRIMINATION: THE *CIVIL RIGHTS CASES*

Under the title *The Civil Rights Cases*, the Supreme Court consolidated five appeals against the U.S. Congress *Civil Rights Act of 1875*, alleging the law was unconstitutional.

To prosecute racial discrimination in trains, hotels, and theaters across the country, which was prevalent at the time, Congress passed An act to protect all citizens in their civil and legal rights. In its first section the Act enacted “[t]hat all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude” (*US Statutes at Large*, vol. xviii, p. 335). The second section established certain fines and penalties to “any person who shall violate the foregoing section.”

Five cases of discrimination reached the Supreme Court as a result of appeals against lower court rulings (*U.S. v. Stanley*; *U.S. v. Ryan*; *U.S. v. Nichols*; *U.S. v. Singleton*; and *Robinson and wife v. Memphis & Charleston Railroad Company*). Two of the cases were for denying hotel accommodations to black people, another two for denying access to theaters, and the fifth and final one for denying an African-American woman access to the ladies car in a train.

By a majority of 8 to 1, the Court ruling sustained the decisions of the lower courts because “[i]t is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment” (109 U.S. 3, 11). Furthermore, the Thirteenth Amendment banned any form of slavery, but it did not prohibit racial discrimination. “Mere discriminations on account of race or color were not regarded as badges of slavery,” said the Court (109 U.S. 3, 25). So Congress could not use the power granted in that Amendment to legislate against any kind of discrimination by private individuals or corporations.

The Fourteenth Amendment granted Congress “the power to enforce, by appropriate legislation, the provisions of this article.” So Congress could apply any corrective measures against any state legislation impairing the rights protected by the Amendment, namely, citizenship, due process, equal protection Clause and the rights described under privileges or immunities. The Court decided, however, that Congress was not allowed to legislate on the matter because the power to enforce such civil rights on its citizens was reserved to the state. Otherwise, the Court said, the legislative power of the states would be empty and meaningless. It ruled that the *Civil Rights Act of 1875* had invaded the reserved power of the state. Thus, the Supreme Court concluded, “the first and second sections of the act of Congress of March 1st, 1875, entitled ‘An Act to protect all citizens in their civil and legal rights,’ are unconstitutional and void” (109 U.S. 3, 26).

“SEPARATE BUT EQUAL”: *PLESSY V. FERGUSON*

As revealed by the previous discussion of racial discrimination cases, by the end of the nineteenth century segregation was still prevalent across United States. The Reconstruction efforts to eliminate that discriminatory situation by the Thirteenth, Fourteenth and Fifteenth Amendments had foundered in the face of state legislation enacted to sustain the status quo existing before and during the Confederacy. In the Southern states, discrimination, indeed, was exacerbated by a spirit of revenge against the emancipation of the slaves. The Supreme Court opinions of the time seemed to connive with the states, being more oriented toward restoring the former discriminatory practices than applying the clear text of the Amendments. One of these opinions of the Supreme Court, worthy of further attention, was *Plessy v. Ferguson*, of 1896.

Homer Plessy, a citizen of the State of Louisiana, challenged, on the grounds that it was unconstitutional, a law requiring railroad compa-

nies within its borders to apply racial segregation in their trains. He had been forcibly detained and accused of civil disobedience. In 1892, Plessy purchased a first class train ticket and sat in the “whites only” car. Although seven of his great-grand parents were white, Plessy was considered by the state to be colored, so the conductor ordered him to move to a car for blacks. When Plessy refused to comply, he was ejected from the train by force, detained and sentenced to prison for violating Louisiana’s *Separate Car Act*, which required “equal but separate” railroad cars for blacks and whites in its trains.

By a majority decision of 7 to 1 (the Report indicates that one of the nine Justices did not participate in the decision of this case), the Supreme Court ruled that the state laws forcing racial segregation were not unconstitutional as alleged by the plaintiff. According to the Court, the Louisiana law that required the railroad companies operating in the state to implement the necessary measures to guarantee the racial separation in their trains, did not violate the Commerce Clause nor the Thirteenth Amendment, since the Court had already “intimated” in 1873, in the *Slaughter-House Cases*, that the Thirteenth “amendment was regarded by the statesmen of that day as insufficient to protect the colored race from certain laws which had been enacted in the Southern states, imposing upon the colored race onerous disabilities and burdens, and curtailing their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value; and that the fourteenth amendment was devised to meet this exigency” (163 U.S. 537, 542), but that this last Amendment was also insufficient. “The object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power” (163 U.S. 537, 544).

For the Court, the doctrine of “Separate but Equal” was the best way to save all social prejudices of the time, since “[a] statute which implies merely a legal distinction between the white and colored races – a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race

by color— has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude” (163 U.S. 537, 543).

In his solitary dissent, Justice John Harlan denounced, nevertheless, that “[t]he white race deems itself to be the dominant race in this country. [...] But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race. In my opinion,” Justice Harlan concluded, “the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott Case*” (163 U.S. 537, 559).

Shortly after *Plessy*, in 1899 the Supreme Court extended the same doctrine of “Separate but Equal” to the American public schools in the opinion *Cumming v. Richmond County Board of Education*. The doctrine the Supreme Court had sanctioned was the constitutional norm in the United States until 1954, when the Court overturned it in the opinion expressed in the case of *Brown v. Board of Education*.

CHAPTER 5 QUESTIONS

1. – What were the supporting arguments used by the Supreme Court in the *Dred Scott* opinion?
2. – What is the current value of the *Dred Scott* opinion? Elaborate.
3. – What power has the Supreme Court to enforce its resolutions?
4. – Is there any situation presently related to the *Ex parte Milligan* case?
5. – Why were the “Reconstruction Amendments” so called?
6. – Why is the Fourteenth Amendment relevant?
7. – Is it possible for a state to withdraw from the Union?
8. – What was the Supreme Court ruling in the *Slaughter-House* opinion?
9. – What were the rights demanded in the *Civil Rights Cases* suits?
10. – Enumerate the Civil Rights that you know.
11. – What was the Supreme Court reasoning for its *Plessy* ruling?
12. – Why was Homer Plessey judged to have resorted to civil disobedience?
13. – Describe the status in the United States, during the period under study in this Chapter, of what we nowadays call “fundamental rights.”

CHAPTER 5 DOCUMENTS

THE RECONSTRUCTIONS AMENDMENTS

AMENDMENT XIII

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly Convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male

citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT XV

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have the power to enforce this article by appropriate legislation.

SYLLABI OF SUPREME COURT DECISIONS

DRED SCOTT V. SANDFORD, 60 U.S. 393 (1857)

Syllabus [from the Legal Information Institute of Cornell University]

Argued: February 11-14, December 15-18, 1856 – Decided: March 6, 1857

I

1. Upon a writ of error to a Circuit Court of the United States, the transcript of the record of all the proceedings in the case is brought before the court, and is open to inspection and revision.
2. When a plea to the jurisdiction, in abatement, is overruled by the court upon demurrer, and the defendant pleads in bar, and upon these pleas the final judgment of the court is in his favor -- if the plaintiff brings a writ of error, the judgment of the court upon the plea in abatement is before this court, although it was in favor of the plaintiff -- and if the court erred in overruling it, the judgment must be reversed, and a mandate issued to the Circuit Court to dismiss the case for want of jurisdiction.
3. In the Circuit Courts of the United States, the record must show that the case is one in which, by the Constitution and laws of the United States, the court had jurisdiction -- and if this does not appear, and the judgment must be reversed by this court -- and the parties cannot be consent waive the objection to the jurisdiction of the Circuit Court.
4. A free negro of the African race, whose ancestors were brought to this country and sold as slaves, is not a "citizen" within the meaning of the Constitution of the United States.
5. When the Constitution was adopted, they were not regarded in any of the States as members of the community which constituted the State, and were not numbered among its "people or citizens." Consequently, the special rights and immunities guarantied to citizens do not apply to them. And not being "citizens" within the meaning of the Constitution, they are not entitled to sue in that character in a court of the United States, and the Circuit Court has not jurisdiction in such a suit.
6. The only two clauses in the Constitution which point to this race treat them as persons whom it was morally lawfully to deal in as articles of property and to hold as slaves.
7. Since the adoption of the Constitution of the United States, no State can by any subsequent law make a foreigner or any other description of persons citizens of [p394] the United States, nor entitle them to the rights and privileges secured to citizens by that instrument.
8. A State, by its laws passed since the adoption of the Constitution, may put a foreigner or any other description of persons upon a footing with its own citizens as to all the rights and privileges enjoyed by them within its dominion and by its laws. But that will not make him a citizen of the

United States, nor entitle him to sue in its courts, nor to any of the privileges and immunities of a citizen in another State.

9. The change in public opinion and feeling in relation to the African race which has taken place since the adoption of the Constitution cannot change its construction and meaning, and it must be construed and administered now according to its true meaning and intention when it was formed and adopted.

10. The plaintiff having admitted, by his demurrer to the plea in abatement, that his ancestors were imported from Africa and sold as slaves, he is not a citizen of the State of Missouri according to the Constitution of the United States, and was not entitled to sue in that character in the Circuit Court.

11. This being the case, the judgment of the court below in favor of the plaintiff on the plea in abatement was erroneous.

II

1. But if the plea in abatement is not brought up by this writ of error, the objection to the citizenship of the plaintiff is still apparent on the record, as he himself, in making out his case, states that he is of African descent, was born a slave, and claims that he and his family became entitled to freedom by being taken by their owner to reside in a Territory where slavery is prohibited by act of Congress, and that, in addition to this claim, he himself became entitled to freedom by being taken to Rock Island, in the State of Illinois, and being free when he was brought back to Missouri, he was, by the laws of that State, a citizen.

2. If, therefore, the facts he states do not give him or his family a right to freedom, the plaintiff is still a slave, and not entitled to sue as a "citizen," and the judgment of the Circuit Court was erroneous on that ground also, without any reference to the plea in abatement.

3. The Circuit Court can give no judgment for plaintiff or defendant in a case where it has not jurisdiction, no matter whether there be a plea in abatement or not. And unless it appears upon the face of the record, when brought here by writ of error, that the Circuit Court had jurisdiction, the judgment must be reversed.

The case of *Capron v. Van Noorden*, 2 Cranch 126, examined, and the principles thereby decided reaffirmed.

4. When the record, as brought here by writ of error, does not show that the Circuit Court had jurisdiction, this court has jurisdiction to review and correct the error like any other error in the court below. It does not and cannot dismiss the case for want of jurisdiction here, for that would leave the erroneous judgment of the court below in full force, and the party injured without remedy. But it must reverse the judgment and, as in any other case of reversal, send a mandate to the Circuit Court to conform its judgment to the opinion of this court.

5. The difference of the jurisdiction in this court in the cases of writs of error to State courts and to Circuit Courts of the United States pointed out, and the mistakes made as to the jurisdiction of this court in the latter case by confounding it with its limited jurisdiction in the former.

6. If the court reverses a judgment upon the ground that it appears by a particular part of the record that the Circuit Court had not jurisdiction, it does not take away the jurisdiction of this court to examine into and correct, by a reversal of the judgment, any other errors, either as to the jurisdiction or any other matter, where it appears from other parts of the record that the Circuit Court had fallen into error. On the contrary, it is the daily and familiar practice of this court to reverse on several grounds where more than one error appears to have been committed. And the error of a Circuit Court in its jurisdiction [p395] stands on the same ground, and is to be treated in the same manner as any other error upon which its judgment is founded.

7. The decision, therefore, that the judgment of the Circuit Court upon the plea in abatement is erroneous is no reason why the alleged error apparent in the exception should not also be examined, and the judgment reversed on that ground also, if it discloses a want of jurisdiction in the Circuit Court.

8. It is often the duty of this court, after having decided that a particular decision of the Circuit Court was erroneous, to examine into other alleged errors and to correct them if they are found to exist. And this has been uniformly done by this court when the questions are in any degree connected with the controversy and the silence of the court might create doubts which would lead to further useless litigation.

III

1. The facts upon which the plaintiff relies did not give him his freedom and make him a citizen of Missouri.

2. The clause in the Constitution authorizing Congress to make all needful rules and regulations for the government of the territory and other property of the United States applies only to territory within the chartered limits of some one of the States when they were colonies of Great Britain, and which was surrendered by the British Government to the former Confederation of the States in the treaty of peace. It does not apply to territory acquired by the present Federal Government by treaty or conquest from a foreign nation.

3. The United States, under the present Constitution, cannot acquire territory to be held as a colony, to be governed at its will and pleasure. But it may acquire territory which, at the time, has not a population that fits it to become a State, and may govern it as a Territory until it has a population which, in the judgment of Congress, entitled it to be admitted as a State of the Union.

4. During the time it remains a Territory, Congress may legislate over it within the scope of its constitutional powers in relation to citizens of the United States, and may establish a Territorial Government, and the form of the local Government must be regulated by the discretion of Congress, but with powers not exceeding those which Congress itself, by the Constitution, is authorized to exercise over citizens of the United States in respect to the rights of persons or rights of property.

IV

1. The territory thus acquired is acquired by the people of the United States for their common and equal benefit through their agent and trustee, the Federal Government. Congress can exercise no power over the rights of persons or property of a citizen in the Territory which is prohibited by the Constitution. The Government and the citizen, whenever the Territory is open to settlement, both enter it with their respective rights defined and limited by the Constitution.

2. Congress have no right to prohibit the citizens of any particular State or States from taking up their home there while it permits citizens of other States to do so. Nor has it a right to give privileges to one class of citizens which it refuses to another. The territory is acquired for their equal and common benefit, and if open to any, it must be open to all upon equal and the same terms.

3. Every citizen has a right to take with him into the Territory any article of property which the Constitution of the United States recognises as property.

4. The Constitution of the United States recognises slaves as property, and pledges the Federal Government to protect it. And Congress cannot exercise any more authority over property of that description than it may constitutionally exercise over property of any other kind.

5. The act of Congress, therefore, prohibiting a citizen of the United States from [p396] taking with him his slaves when he removes to the Territory in question to reside is an exercise of authority over private property which is not warranted by the Constitution, and the removal of the plaintiff by his owner to that Territory gave him no title to freedom.

V

1. The plaintiff himself acquired no title to freedom by being taken by his owner to Rock Island, in Illinois, and brought back to Missouri. This court has heretofore decided that the status or condition of a person of African descent depended on the laws of the State in which he resided.

2. It has been settled by the decisions of the highest court in Missouri that, by the laws of that State, a slave does not become entitled to his freedom where the owner takes him to reside in a State where slavery is not permitted and afterwards brings him back to Missouri.

Conclusion. It follows that it is apparent upon the record that the court below erred in its judgment on the plea in abatement, and also erred in giving judgment for the defendant, when the exception shows that the plaintiff was not a citizen of the United States. And the Circuit Court had no jurisdiction, either in the cases stated in the plea in abatement or in the one stated in the exception, its judgment in favor of the defendant is erroneous, and must be reversed.

This case was brought up, by writ of error, from the Circuit Court of the United States for the district of Missouri.

It was an action of trespass *vi et armis* instituted in the Circuit Court by Scott against Sandford.

Prior to the institution of the present suit, an action was brought by Scott for his freedom in the Circuit Court of St. Louis county (State court), where there was a verdict and judgment in his favor. On a writ of error to the Supreme Court of the State, the judgment below was reversed and the

case remanded to the Circuit Court, where it was continued to await the decision of the case now in question.

The declaration of Scott contained three counts: one, that Sandford had assaulted the plaintiff; one, that he had assaulted Harriet Scott, his wife; and one, that he had assaulted Eliza Scott and Lizzie Scott, his children.

Sandford appeared, and filed the following plea:

DRED SCOTT)

v.) Plea to the Jurisdiction of the Court.

JOHN F. A. SANDFORD)

APRIL TERM, 1854.

And the said John F. A. Sandford, in his own proper person, comes and says that this court ought not to have or take further cognizance of the action aforesaid, because he says that said cause of action and each and every of them (if any such have accrued to the said Dred Scott) accrued to the said Dred Scott out of the jurisdiction of this court, and exclusively within the jurisdiction of the courts of the State of Missouri, for that, to-wit: the said plaintiff, Dred Scott, is not a citizen of the State of Missouri, as alleged in his declaration, because [p397] he is a negro of African descent; his ancestors were of pure African blood, and were brought into this country and sold as negro slaves, and this the said Sandford is ready to verify. Wherefore, he prays judgment whether this court can or will take further cognizance of the action aforesaid.

JOHN F. A. SANDFORD

To this plea there was a demurrer in the usual form, which was argued in April, 1854, when the court gave judgment that the demurrer should be sustained.

In May, 1854, the defendant, in pursuance of an agreement between counsel, and with the leave of the court, pleaded in bar of the action:

1. Not guilty.
2. That the plaintiff was a negro slave, the lawful property of the defendant, and, as such, the defendant gently laid his hands upon him, and thereby had only restrained him, as the defendant had a right to do.

3. That with respect to the wife and daughters of the plaintiff, in the second and third counts of the declaration mentioned, the defendant had, as to them, only acted in the same manner and in virtue of the same legal right.

In the first of these pleas, the plaintiff joined issue, and to the second and third filed replications alleging that the defendant, of his own wrong and without the cause in his second and third pleas alleged, committed the trespasses, &c.

The counsel then filed the following agreed statement of facts, viz:

In the year 1834, the plaintiff was a negro slave belonging to Dr. Emerson, who was a surgeon in the army of the United States. In that year, 1834, said Dr. Emerson took the plaintiff from the State of Missouri to the military post at Rock Island, in the State of Illinois, and held him there as a slave until the month of April or May, 1836. At the time last mentioned, said Dr. Emerson removed the plaintiff from said military post at Rock Island to the military post at Fort Snelling, situate on the west bank of the Mississippi river, in the Territory known as Upper Louisiana, acquired by the United States of France, and situate north of the latitude of thirty-six degrees thirty minutes north, and north of the State of Missouri. Said Dr. Emerson held the plaintiff in slavery at said Fort Snelling, from said last-mentioned date until the year 1838.

In the year 1835, Harriet, who is named in the second count of the plaintiff's declaration, was the negro slave of Major Taliaferro, who belonged to the army of the United States. [p398] In that year, 1835, said Major Taliaferro took said Harriet to said Fort Snelling, a military post, situated as hereinbefore stated, and kept her there as a slave until the year 1836, and then sold and delivered her as a slave at said Fort Snelling unto the said Dr. Emerson hereinbefore named. Said Dr. Emerson held said Harriet in slavery at said Fort Snelling until the year 1838.

In the year 1836, the plaintiff and said Harriet at said Fort Snelling, with the consent of said Dr. Emerson, who then claimed to be their master and owner, intermarried, and took each other for husband and wife. Eliza and Lizzie, named in the third count of the plaintiff's declaration, are the fruit of that marriage. Eliza is about fourteen years old, and was born on board the steamboat Gipsej, north of the north line of the State of Missouri, and upon the river Mississippi. Lizzie is about seven years old, and was born in the State of Missouri, at the military post called Jefferson Barracks.

In the year 1838, said Dr. Emerson removed the plaintiff and said Harriet and their said daughter Eliza from said Fort Snelling to the State of Missouri, where they have ever since resided.

Before the commencement of this suit, said Dr. Emerson sold and conveyed the plaintiff, said Harriet, Eliza, and Lizzie, to the defendant, as slaves, and the defendant has ever since claimed to hold them and each of them as slaves.

At the times mentioned in the plaintiff's declaration, the defendant, claiming to be owner as aforesaid, laid his hands upon said plaintiff, Harriet, Eliza, and Lizzie, and imprisoned them, doing in this respect, however, no more than what he might lawfully do if they were of right his slaves at such times.

Further proof may be given on the trial for either party.

It is agreed that Dred Scott brought suit for his freedom in the Circuit Court of St. Louis county; that there was a verdict and judgment in his favor; that, on a writ of error to the Supreme Court, the judgment below was reversed, and the same remanded to the Circuit Court, where it has been continued to await the decision of this case.

In May, 1854, the cause went before a jury, who found the following verdict, viz:

As to the first issue joined in this case, we of the jury find the defendant not guilty; and as to the issue secondly above joined, we of the jury find that before and at the time when, &c., in the first count mentioned, the said Dred Scott was a negro slave, the lawful property of the defendant; and as to the issue thirdly above joined, we, the jury, find that before and at the time when, &c., in the second and third counts mentioned, the said Harriet, wife of [p399] said Dred Scott, and Eliza and Lizzie, the daughters of the said Dred Scott, were negro slaves, the lawful property of the defendant.

Whereupon, the court gave judgment for the defendant.

After an ineffectual motion for a new trial, the plaintiff filed the following bill of exceptions.

On the trial of this cause by the jury, the plaintiff, to maintain the issues on his part, read to the jury the following agreed statement of facts, (see agreement above.) No further testimony was given to the jury by either party. Thereupon the plaintiff moved the court to give to the jury the following instruction, viz:

"That, upon the facts agreed to by the parties, they ought to find for the plaintiff. The court refused to give such instruction to the jury, and the plaintiff, to such refusal, then and there duly excepted."

The court then gave the following instruction to the jury, on motion of the defendant:

The jury are instructed, that upon the facts in this case, the law is with the defendant.

The plaintiff excepted to this instruction.

Upon these exceptions, the case came up to this court.

(The complete document can be found in <http://www.law.cornell.edu/supct/html/historics/USSC_CR_0060_0393_ZS.html> [verified May 30, 2012].)

EX PARTE MERRYMAN, 17 F. CAS. 144 (1861)

Circuit Court, D. Maryland.

April Term, 1861.

Syllabus [from Touro College Law Center]

1. On the 25th May 1861, the petitioner, a citizen of Baltimore county, in the state of Maryland, was arrested by a military force, acting under orders of a major-general of the United States army, commanding in the state of Pennsylvania, and committed to the custody of the general commanding Fort McHenry, within the district of Maryland; on the 26th May 1861, a writ of habeas corpus was issued by the chief justice of the United States, sitting at chambers, directed to the commandant of the fort, commanding him to produce the body of the petitioner before the chief justice, in Baltimore city, on the 27th day of May 1861; on the last mentioned day, the writ was returned served, and the officer to whom it was directed declined to produce the petitioner, giving as his excuse the following reasons: 1. That the petitioner was arrested by the orders of the major-general commanding in Pennsylvania, upon the charge of treason, in being 'publicly associated with and holding a commission as lieutenant in a company having in their possession arms belonging to the United States, and avowing his purpose of armed hostility against the government.' 2. That he (the officer having the petitioner in custody) was duly authorized by the president of the United States, in such cases, to suspend the writ of habeas corpus for the public safety. Held, that the petitioner was entitled to be set at liberty and discharged immediately from confinement, upon the grounds following: 1. That the president, under the constitution of the United States, cannot suspend the privilege of the writ of habeas corpus, nor authorize a military officer to do it. 2. That a military officer has no right to arrest and

detain a person not subject to the rules and articles of war, for an offence against the law of the United States, except in aid of the judicial authority, and subject to its control; and if the party be arrested by the military, it is the duty of the officer to deliver him over immediately to the civil authority, to be dealt with according to law. [Approved in *Re Kemp*, 16 Wis. 367.]

2. Under the constitution of the United States, congress is the only power which can authorize the suspension of the privilege of the writ. [Cited in *Ex parte Field*, Case No. 4,761; *McCall v. McDowell*, Id. 8,673.]

(The complete document can be found in <<http://tlc-patch.tourolaw.edu/patch/Merryman/>> [verified May 30, 2012].)

EX PARTE MILLIGAN, 71 U.S. 2 (1866)

Syllabus [from the Legal Information Institute of Cornell University]

Argued: March 5-9, 12-13, 1866 – Decided: April 3, 1886

1. Circuit Courts, as well as the judges thereof, are authorized, by the fourteenth section of the Judiciary Act, to issue the writ of habeas corpus for the purpose of inquiring into the cause of commitment, and they have [p3] jurisdiction, except in cases where the privilege of the writ is suspended, to hear and determine the question whether the party is entitled to be discharged.

2. The usual course of proceeding is for the court, on the application of the prisoner for a writ of habeas corpus, to issue the writ, and, on its return, to hear and dispose of the case; but where the cause of imprisonment is fully shown by the petition, the court may, without issuing the writ, consider and determine whether, upon the facts presented in the petition, the prisoner, if brought before the court, would be discharged.

3. When the Circuit Court renders a final judgment refusing to discharge the prisoner, he may bring the case here by writ of error, and, if the judges of the Circuit Court, being opposed in opinion, can render no judgment, he may have the point upon which the disagreement happens certified to this tribunal.

4. A petition for a writ of habeas corpus, duly presented, is the institution of a cause on behalf of the petitioner, and the allowance or refusal of the process, as well as the subsequent disposition of the prisoner is matter of law, and not of discretion.

5. A person arrested after the passage of the act of March 3^d, 1863, "relating to habeas corpus and regulating judicial proceedings in certain cases," and under the authority of said act, was entitled to his discharge if not indicted or presented by the grand jury convened at the first subsequent term of the Circuit or District Court of the United States for the District.
6. The omission to furnish a list of the persons arrested to the judges of the Circuit or District Court as provided in the said act did not impair the right of said person, if not indicted or presented, to his discharge.
7. Military commissions organized during the late civil war, in a State not invaded and not engaged in rebellion, in which the Federal courts were open, and in the proper and unobstructed exercise of their judicial functions, had no jurisdiction to try, convict, or sentence for any criminal offence, a citizen who was neither a resident of a rebellious State nor a prisoner of war, nor a person in the military or naval service. And Congress could not invest them with any such power.
8. The guaranty of trial by jury contained in the Constitution was intended for a state of war, as well as a state of peace, and is equally binding upon rulers and people at all times and under all circumstances.
9. The Federal authority having been unopposed in the State of Indiana, and the Federal courts open for the trial of offences and the redress of grievances, the usages of war could not, under the Constitution, afford any sanction for the trial there of a citizen in civil life not connected with the military or naval service, by a military tribunal, for any offence whatever.
10. Cases arising in the land or naval forces, or in the militia in time of war or public danger, are excepted from the necessity of presentment or indictment by a grand jury, and the right of trial by jury in such cases is subject to the same exception. [p4]
11. Neither the President nor Congress nor the Judiciary can disturb any one of the safeguards of civil liberty incorporated into the Constitution except so far as the right is given to suspend in certain cases the privilege of the writ of habeas corpus.
12. A citizen not connected with the military service and a resident in a State where the courts are open and in the proper exercise of their jurisdiction cannot, even when the privilege of the writ of habeas corpus is suspended, be tried, convicted, or sentenced otherwise than by the ordinary courts of law.

13. Suspension of the privilege of the writ of habeas corpus does not suspend the writ itself. The writ issues as a matter of course, and, on its return, the court decides whether the applicant is denied the right of proceeding any further.

14. A person who is a resident of a loyal State, where he was arrested, who was never resident in any State engaged in rebellion, nor connected with the military or naval service, cannot be regarded as a prisoner of war.

This case came before the court upon a certificate of division from the judges of the Circuit Court for Indiana, on a petition for discharge from unlawful imprisonment.

The case was thus:

An act of Congress -- the Judiciary Act of 1789, [n1] section 14 -- enacts that the Circuit Courts of the United States

Shall have power to issue writs of habeas corpus. And that either of the justices of the Supreme Court, as well as judges of the District Court, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment. Provided,
&c.

Another act -- that of March 3^d, 1863, [n2] "relating to habeas corpus, and regulating judicial proceedings in certain cases" -- an act passed in the midst of the Rebellion -- makes various provisions in regard to the subject of it.

The first section authorizes the suspension, during the Rebellion, of the writ of habeas corpus, throughout the United States, by the President.

Two following sections limited the authority in certain respects.
[p5]

The second section required that lists of all persons, being citizens of States in which the administration of the laws had continued unimpaired in the Federal courts, who were then held, or might thereafter be held, as prisoners of the United States, under the authority of the President, otherwise than as prisoners of war, should be furnished by the Secretary of State and Secretary of War to the judges of the Circuit and District Courts. These lists were to contain the names of all persons, residing within their respective jurisdictions, charged with violation of national law. And it was required, in cases where the grand jury in attendance upon any of these courts should terminate its session without proceeding by indictment or otherwise against any prisoner named in the list, that the judge

of the court should forthwith make an order that such prisoner, desiring a discharge, should be brought before him or the court to be discharged, on entering into recognizance, if required, to keep the peace and for good behavior, or to appear, as the court might direct, to be further dealt with according to law. Every officer of the United States having custody of such prisoners was required to obey and execute the judge's order, under penalty, for refusal or delay, of fine and imprisonment.

The third section enacts, in case lists of persons other than prisoners of war then held in confinement or thereafter arrested, should not be furnished within twenty days after the passage of the act, or, in cases of subsequent arrest, within twenty days after the time of arrest, that any citizen, after the termination of a session of the grand jury without indictment or presentment, might, by petition alleging the facts and verified by oath, obtain the judge's order of discharge in favor of any person so imprisoned, on the terms and conditions prescribed in the second section.

This act made it the duty of the District Attorney of the United States to attend examinations on petitions for discharge.

By proclamation, [n3] dated the 15th September following, [p6] the President, reciting this statute, suspended the privilege of the writ in the cases where, by his authority, military, naval, and civil officers of the United States hold persons in their custody either as prisoners of war, spies, or aiders and abettors of the enemy, . . . or belonging to the land or naval force of the United States, or otherwise amenable to military law, or the rules and articles of war, or the rules or regulations prescribed for the military or naval services, by authority of the President, or for resisting a draft, or for any other offence against the military or naval service.

With both these statutes and this proclamation in force, Lamdin P. Milligan, a citizen of the United States, and a resident and citizen of the State of Indiana, was arrested on the 5th day of October, 1864, at his home in the said State, by the order of Brevet Major-General Hovey, military commandant of the District of Indiana, and by the same authority confined in a military prison at or near Indianapolis, the capital of the State. On the 21st day of the same month, he was placed on trial before a "military commission," convened at Indianapolis, by order of the said General, upon the following charges, preferred by Major Burnett, Judge Advocate of the Northwestern Military Department, namely:

1. "Conspiracy against the Government of the United States;"
2. "Affording aid and comfort to rebels against the authority of the United States;"

3. "Inciting insurrection;"
4. "Disloyal practices;" and
5. "Violation of the laws of war."

Under each of these charges, there were various specifications. The substance of them was joining and aiding, at different times between October, 1863, and August, 1864, a secret society known as the Order of American Knights or Sons of Liberty, for the purpose of overthrowing the Government and duly constituted authorities of the United States; holding communication with the enemy; conspiring to seize munitions of war stored in the arsenals; to liberate [p7] prisoners of war, &c.; resisting the draft, &c.; . . . at a period of war and armed rebellion against the authority of the United States, at or near Indianapolis [and various other places specified] in Indiana, a State within the military lines of the army of the United States and the theatre of military operations, and which had been and was constantly threatened to be invaded by the enemy.

These were amplified and stated with various circumstances.

An objection by him to the authority of the commission to try him being overruled, Milligan was found guilty on all the charges, and sentenced to suffer death by hanging, and this sentence, having been approved, he was ordered to be executed on Friday, the 19th of May, 1865.

On the 10th of that same May, 1865, Milligan filed his petition in the Circuit Court of the United States for the District of Indiana, by which, or by the documents appended to which as exhibits, the above facts appeared. These exhibits consisted of the order for the commission; the charges and specifications; the findings and sentence of the court, with a statement of the fact that the sentence was approved by the President of the United States, who directed that it should "be carried into execution without delay;" all "by order of the Secretary of War."

The petition set forth the additional fact that, while the petitioner was held and detained, as already mentioned, in military custody (and more than twenty days after his arrest), a grand jury of the Circuit Court of the United States for the District of Indiana was convened at Indianapolis, his said place of confinement, and duly empaneled, charged, and sworn for said district, held its sittings, and finally adjourned without having found any bill of indictment, or made any presentment whatever against him. That at no time had he been in the military service of the United States, or in any way connected with the land or naval force, or the militia in actual service; nor within the limits of any State whose citizens were

engaged in rebellion against the United States, at any time during the war, but, during all the time aforesaid, and for twenty years last past, he had been an [p8] inhabitant, resident, and citizen of Indiana. And so that it had been wholly out of his power to have acquired belligerent rights or to have placed himself in such relation to the government as to have enabled him to violate the laws of war.

The record, in stating who appeared in the Circuit Court, ran thus: Be it remembered, that on the 10th day of May, A.D. 1865, in the court aforesaid, before the judges aforesaid, comes Jonathan W. Gorden, Esq., of counsel for said Milligan, and files here, in open court, the petition of said Milligan, to be discharged . . . At the same time comes John Hanna, Esquire, the attorney prosecuting the pleas of the United States in this behalf. And thereupon, by agreement, this application is submitted to the court, and day is given, &c.

The prayer of the petition was that, under the already mentioned act of Congress of March 3^d, 1863, the petitioner might be brought before the court and either turned over to the proper civil tribunal to be proceeded with according to the law of the land or discharged from custody altogether.

At the hearing of the petition in the Circuit Court, the opinions of the judges were opposed upon the following questions:

I. On the facts stated in the petition and exhibits, ought a writ of habeas corpus to be issued according to the prayer of said petitioner?

II. On the facts stated in the petition and exhibits, ought the said Milligan to be discharged from custody as in said petition prayed?

III. Whether, upon the facts stated in the petition and exhibits, the military commission had jurisdiction legally to try and sentence said Milligan in manner and form, as in said petition and exhibit is stated?

And these questions were certified to this court under the provisions of the act of Congress of April 29th, 1802, [n4] an act [p9] which provides that whenever any question shall occur before a Circuit Court upon which the opinions of the judges shall be opposed, the point upon which the disagreement shall happen shall, during the same term, upon the request of either party or their counsel, be stated under the direction of the judges and certified under the seal of the court to the Supreme Court, at their next session to be held thereafter, and shall by the said court be finally decided, and the decision of the Supreme Court and their order in the premises shall be remitted to the Circuit Court and be there entered of record,

and shall have effect according to the nature of the said judgment and order; Provided, That nothing herein contained shall prevent the cause from proceeding if, in the opinion of the court, further proceedings can be had without prejudice to the merits.

The three several questions above mentioned were argued at the last term. And along with them, an additional question raised in this court, namely:

IV. A question of jurisdiction, as -- 1. Whether the Circuit Court had jurisdiction to hear the case there presented? -- 2. Whether the case sent up here by certificate of division was so sent up in conformity with the intention of the act of 1802? in other words, whether this court had jurisdiction of the questions raised by the certificate? [p107]

(The complete document can be found in <http://www.law.cornell.edu/supct/html/historics/USSC_CR_0071_0002_ZS.html> [verified May 30, 2012].)

TEXAS v. WHITE, 74 U.S. 700 (1869)

Syllabus [from the Legal Information Institute of Cornell University]

Argued: February 5, 8-9, 1869 – Decided: April 12, 1869

1. The word “State” describes sometimes a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country; often it denotes only the country, or territorial region, inhabited by such a community; not unfrequently, it is applied to the government under which the people live; at other times, it represents the combined idea of people, territory, and government.

2. In the Constitution, the term “State” most frequently expresses the combined idea, just noticed, of people, territory, and government. A State, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries and organised under a government sanctioned and limited by a written constitution, and established by the consent of the governed.

3. But the term is also used to express the idea of a people or political community, as distinguished from the government. In this sense, it is used in the clause which provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion.

4. The Union of the States never was a purely artificial and arbitrary relation. It began among the Colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form and character and sanction from the Articles of Confederation. By these, the Union was solemnly declared to "be perpetual." And, when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained "to form a more perfect Union."

5. But 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. On the contrary, it may be not unreasonably said that the preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States.

6. When Texas became one of the United States, she entered into an indissoluble relation. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration or revocation, except through revolution or through consent of the States.

7. Considered as transactions under the Constitution, the ordinance of secession, adopted by the convention, and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give [p701] effect to that ordinance, were absolutely null. They were utterly without operation in law. The State did not cease to be a State, nor her citizens to be citizens of the Union.

8. But in order to the exercise, by a State, of the right to sue in this court, there needs to be a State government, competent to represent the State in its relations with the National government, so far at least as the institution and prosecution of a suit is concerned.

9. While Texas was controlled by a government hostile to the United States, and in affiliation with a hostile confederation, waging war upon the United States, no suit instituted in her name could be maintained in this court. It was necessary that the government and the people of the

State should be restored to peaceful relations to the United States, under the constitution before such a suit could be prosecuted.

10. Authority to suppress rebellion is found in the power to suppress insurrection and carry on war, and authority to provide for the restoration of State governments, under the Constitution, when subverted and overthrown, is derived from the obligation of the United States to guarantee to every State in the Union a republican form of government. The latter, indeed, in the case of a rebellion which involves the government of a State, and, for the time, excludes the National authority from its limits, seems to be a necessary complement to the other.

11. When slavery was abolished, the new freemen necessarily became part of the people, and the people still constituted the State, for States, like individuals, retain their identity, though changed, to some extent, in their constituent elements. And it was the State, thus constituted, which was now entitled to the benefit of the constitutional guaranty

12. In the exercise of the power conferred by the guaranty clause, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed. It is essential only that the means must be necessary and proper for carrying into execution the power conferred, through the restoration of the State to its constitutional relations, under a republican form of government, and that no acts be done, and no authority exerted, which is either prohibited or unsanctioned by the Constitution.

13. So long as the war continued, it cannot be denied that the President might institute temporary government within insurgent districts, occupied by the National forces, or take provisional measures, in any State, for the restoration of State government faithful to the Union, employing, however, in such efforts, only such means and agents as were authorized by constitutional laws. But the power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress, though necessarily limited to cases where the rightful government is subverted by revolutionary violence, or in imminent danger of being overthrown by an opposing government, set up by force within the State.

14. The several executives of Texas, partially, at least, reorganized under [p702] the authority of the President and of Congress, having sanctioned this suit, the necessary conclusion is that it was instituted and is prosecuted by competent authority.

15. Public property of a State, alienated during rebellion by an usurping State government for the purpose of carrying on war against the United States, may be reclaimed by a restored State government, organized in allegiance to the Union, for the benefit of the State.

16. Exact definitions, within which the acts of a State government, organized in hostility to the Constitution and government of the United States, must be treated as valid or invalid need not be attempted. It may be said, however, that acts necessary to peace and good order among citizens, such, for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful, government, and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void.

17. Purchasers of United States bonds issued payable to the State of Texas or bearer, alienated during rebellion by the insurgent government, and acquired after the date at which the bonds became redeemable, are affected with notice of defect of title in the seller.

The Constitution ordains that the judicial power of the United States shall extend to certain cases, and among them

to controversies between a State and citizens of another State; . . . and between a State, or the citizens thereof, and foreign States, citizens or subjects.

It ordains further, that in cases in which “a State” shall be a party, the Supreme Court shall have original jurisdiction.

With these provisions in force as fundamental law, Texas, entitling herself “the State of Texas, one of the United States of America,” filed, on the 15th of February, 1867, an original bill against different persons; White and Chiles, one Hardenberg, a certain firm, Birch, Murray & Co., and some others, [n1] citizens of New York and other States; praying [p703] an injunction against their asking or receiving payment from the United States of certain bonds of the Federal government, known as Texan indemnity bonds; and that the bonds might be delivered up to the complainant, and for other and further relief.

The case was this:

In 1851, the United States issued its bonds -- five thousand bonds for \$1,000 each, and numbered successively from No. 1 to No. 5,000, and thus making the sum of \$5,000,000 -- to the State of Texas, in arrangement of certain boundary claims made by that State. The bonds, which were dated January 1st, 1851, were coupon bonds, payable, by their terms, to the State of Texas or bearer, with interest at 5 percent semi-annually, and "redeemable after the 31st day of December, 1864." Each bond contained a statement on its face that the debt was authorized by act of Congress, and was "transferable on delivery," and to each were attached six-month coupons, extending to December 31, 1864. [n2]

In pursuance of an act of the legislature of Texas, the controller of public accounts of the State was authorized to go to Washington, and to receive there the bonds; the statute making it his duty to deposit them, when received, in the treasury of the State of Texas, to be disposed of "as may be provided by law;" and enacting further, that no bond, issued as aforesaid and payable to bearer, should be "available in the hands of any holder until the same shall have been indorsed, in the city of Austin, by the governor of the State of Texas."

Most of the bonds were indorsed and sold according to law, and paid on presentation by the United States prior to 1860. A part of them, however, -- appropriated by act of legislature as a school fund -- were still in the treasury of Texas, in January, 1861, when the late Southern rebellion broke out.

The part which Texas took in that event, and the position [p704] in which the close of it left her, are necessary to be here adverted to.

At the time of that outbreak, Texas was confessedly one of the United States of America, having a State constitution in accordance with that of the United States and represented by senators and representatives in the Congress at Washington. In January, 1861, a call for a convention of the people of the State was issued, signed by sixty-one individuals. The call was without authority, and revolutionary. Under it, delegates were elected from some sections of the State, whilst in others no vote was taken. These delegates assembled in State convention, and, on the 1st of February, 1861, the convention adopted an ordinance

to dissolve the union between the State of Texas and the other States, united under the compact styled "the Constitution of the United States of America."

The ordinance contained a provision requiring it to be submitted to the people of Texas, for ratification or rejection by the qualified voters thereof, on the 23^d of February, 1861. The legislature of the State, convened in extra session, on the 22^d of January, 1861, passed an act ratifying the election of the delegates, chosen in the irregular manner above mentioned, to the convention. The ordinance of secession submitted to the people was adopted by a vote of 34,794 against 11,235. The convention, which had adjourned immediately on passing the ordinance, reassembled. On the 4th of March, 1861, it declared that the ordinance of secession had been ratified by the people, and that Texas had withdrawn from the union of the States under the Federal Constitution. It also passed a resolution requiring the officers of the State government to take an oath to support the provisional government of the Confederate States, and providing, that if

any officer refused to take such oath, in the manner and within the time prescribed, his office should be deemed vacant, and the same filled as though he were dead.

On the 16th of March, the convention passed an ordinance declaring that, whereas the governor and the secretary of state had refused or omitted to take the oath prescribed, their offices were vacant; that [p705] the lieutenant-governor should exercise the authority and perform the duties appertaining to the office of governor, and that the deposed officers should deliver to their successors in office the great seal of the State, and all papers, archives, and property in their possession belonging or appertaining to the State. The convention further assumed to exercise and administer the political power and authority of the State.

Thus was established the rebel government of Texas.

The senators and representatives of the State in Congress now withdrew from that body at Washington. Delegates were sent to the Congress of the so-called Confederate States at Montgomery, Alabama, and electors for a president and vice-president of these States appointed. War having become necessary to complete the purposed destruction by the South of the Federal government, Texas joined the other Southern States, and made war upon the United States, whose authority was now recognized in no manner within her borders. The oath of allegiance of all persons exercising public functions was to both the State of Texas, and to the Confederate States of America, and no officer of any kind representing the United States was within the limits of the State except military officers, who had been made prisoners. Such was and had been for several months the condition of things in the beginning of 1862.

On the 11th of January, of that year, the legislature of the usurping government of Texas passed an act -- "to provide arms and ammunition, and for the manufacture of arms and ordnance for the military defences of the State." And by it created a "military board," to carry out the purpose indicated in the title. Under the authority of this act, military forces were organized.

On the same day, the legislature passed a further act, entitled "An act to provide funds for military purposes," and therein directed the board, which it had previously organized, to dispose of any bonds and coupons which may be in the treasury on any account, and use such funds or their proceeds for the defence of the State; and passed an additional act repealing the act [p706] which made an indorsement of the bonds by the governor of Texas necessary to make them available in the hands of the holder.

Under these acts, the military board, on the 12th January, 1865, a date at which the success of the Federal arms seemed probable, agreed to sell to White & Chiles one hundred and thirty-five of these bonds, then in the treasury of Texas, and seventy-six others deposited with certain bankers in England, in payment for which White & Chiles were to deliver to the board a large quantity of cotton cards and medicines. The former bonds were delivered to White & Chiles on the 15th March following, none of them being indorsed by any governor of Texas.

It appeared that, in February, 1862, after the rebellion had broken out, it was made known to the Secretary of the Treasury of the United States, in writing, by the Hon. G. W. Paschal, of Texas, who had remained constant to the Union, that an effort would be made by the rebel authorities of Texas to use the bonds remaining in the treasury in aid of the rebellion, and that they could be identified, because all that had been circulated before the war were indorsed by different governors of Texas. The Secretary of the Treasury acted on this information, and refused in general to pay bonds that had not been indorsed. On the 4th of October, 1865, Mr. Paschal, as agent of the State of Texas, caused to appear in the money report and editorial of the New York Herald, a notice of the transaction between the rebel government of Texas and White & Chiles, and a statement that the treasury of the United States would not pay the bonds transferred to them by such usurping government. On the 10th October, 1865, the provisional governor of the State published in the New York Tribune, a "Caution to the Public," in which he recited that the rebel government of Texas had, under a pretended contract, transferred to White & Chiles "one hundred and thirty-five United States Texan indemnity bonds, issued January 1, 1851, payable in fourteen years, of the denomination of \$1,000 each,

and coupons attached thereto to the amount of \$1,287.50, amounting in the aggregate, bonds and coupons, to the sum of \$156,287.50.” [p707] His caution did not specify, however, any particular bonds by number. The caution went on to say that the transfer was a conspiracy between the rebel governor and White & Chiles to rob the State treasury, that White & Chiles had never paid the State one farthing, that they had fled the State, and that these facts had been made known to the Secretary of the Treasury of the United States. And a protest was filed with him by Mr. Paschal, agent of the State of Texas, against the payment of the said bonds and coupons unless presented for payment by proper authority.

The substance of this notice, it was testified, was published in money articles of many of the various newspapers of about that date, and that financial men in New York and other places spoke to Mr. Paschal, who had caused it to be inserted in the Tribune, about it. It was testified also, that after the commencement of the suit, White & Chiles said that they had seen it.

The rebel forces being disbanded on the 25th May, 1865, and the civil officers of the usurping government of Texas having fled from the country, the President, on the 17th June, 1865, issued his proclamation appointing Mr. A. J. Hamilton, provisional governor of the State; and directing the formation by the people of a State government in Texas.

Under the provisional government thus established, the people proceeded to make a constitution, and reconstruct their State government.

But much question arose as to what was thus done, and the State was not acknowledged by the Congress of the United States as being reconstructed. On the contrary, Congress passed, in March, 1867, three certain acts known as the Reconstruction Acts. By the first of these, reciting that no legal State governments or adequate protection for life or property then existed in the rebel States of Texas, and nine other States named, and that it was necessary that peace and good order should be enforced in them until loyal and republican State governments could be legally established, Congress divided the States named into five military districts (Texas with Louisiana being the fifth), and made it the duty [p708] of the President to assign to each an officer of the army, and to detail a sufficient military force to enable him to perform his duties and enforce authority within his district. The act made it the duty of this officer to protect all persons in their rights, to suppress insurrection, disorder, violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals, either through the local civil tribunals or through military commissions, which the act authorized. It provided, further, that when the

people of any one of these States had formed a constitution in conformity with that of the United States, framed in a way which the statute went on to specify, and when the State had adopted a certain article of amendment named, to the Constitution of the United States, and when such article should have become a part of the Constitution of the United States, then that the States respectively should be declared entitled to representation in Congress, and the preceding part of the act become inoperative, and that, until they were so admitted, any civil governments which might exist in them should be deemed provisional only, and subject to the paramount authority of the United States, at any time to abolish, modify, control, or supersede them.

A State convention of 1866 passed an ordinance looking to the recovery of these bonds, and, by act of October of that year, the governor of Texas was authorized to take such steps as he might deem best for the interests of the State in the matter, either to recover the bonds or to compromise with holders. Under this act, the governor appointed an agent of the State to look after the matter.

It was in this state of things, with the State government organized in the manner and with the status above mentioned, that this present bill was directed by this agent to be filed.

The bill was filed by Mr. R. T. Merrick and others, solicitors in this court, on behalf of the State, without precedent written warrant of attorney. But a letter from J. W. Throckmorton, elected governor under the constitution of 1866, ratified their act, and authorized them to prosecute [p709] the suit. Mr. Paschal, who now appeared with the other counsel, in behalf of the State, had been appointed by Governor Hamilton to represent the State, and Mr. Pease, a subsequent governor, appointed by General Sheridan, commander under the reconstruction acts, renewed this appointment.

The bill set forth the issue and delivery of the bonds to the State, the fact that they were seized by a combination of persons in armed hostility to the government of the United States, sold by an organization styled the military board, to White & Chiles, for the purpose of aiding the overthrow of the Federal government; that White & Chiles had not performed what they agreed to do. It then set forth that they had transferred such and such numbers, specifying them, to Hardenberg, and such and such others to Birch, Murray & Co., &c.; that these transfers were not in good faith, but were with express notice on the part of the transferees of the manner in which the bonds had been obtained by White & Chiles; that the bonds were overdue at the time of the transfer; and that they had never been

indorsed by any governor of Texas. The bill interrogated the defendants about all these particulars; requiring them to answer on oath, and, as already mentioned, it prayed an injunction against their asking, or receiving payment from the United States, that the bonds might be delivered to the State of Texas, and for other and further relief.

As respected White & Chiles, who had now largely parted with the bonds, the case rested much upon what precedes, and their own answers.

The answer of CHILES, declaring that he had none of the bonds in his possession, set forth:

1. That there was no sufficient authority shown to prosecute the suit in the name of Texas.
2. That Texas by her rebellious courses had so far changed her status, as one of the United States, as to be disqualified from suing in this court.
3. That whether the government of Texas, during the term in question, was one *de jure* or *de facto*, it had authorized the [p710] military board to act for it, and that the State was estopped from denying its acts.
4. That no indorsement of the bonds was necessary, they having been negotiable paper.
5. That the articles which White & Chiles had agreed to give the State, were destroyed *in transitu* by disbanded troops who infested Texas, and that the loss of the articles was unavoidable.

The answer of WHITE went over some of the same ground with that of Chiles. He admitted, however, that he was informed and believed that, in all cases where any of the bonds were disposed of by him, it was known to the parties purchasing for themselves, or as agents for others, that there was some embarrassment in obtaining payment of said bonds at the treasury of the United States, arising out of the title of this respondent and his co-defendant Chiles.

As respected HARDENBERG, the case seemed much thus:

In the beginning of November, 1866, after the date of the notices given through Mr. Paschal, one Hennessey, residing in New York, and carrying on an importing and commission business, then sold to Hardenberg thirty of these bonds, originally given to White and Chiles; and which thirty, a correspondent of his, long known to him, in Tennessee, had sent to him for sale. Hardenberg bought them "at the rate of 1.20 for the dollar on their face," and paid for them. Hennessey had heard from somebody that

there was some difficulty about the bonds' being paid at the treasury, but did not remember whether he heard that before or after the sale.

Hardenberg also bought others of these bonds near the same time, at 1.15 percent, under circumstances thus testified to by Mr. C. T. Lewis, a lawyer of New York:

In conversation with Mr. Hardenberg, I had learned that he was interested in the Texas indemnity bonds, and meditated purchasing same. I was informed in Wall Street that such bonds were offered for sale by Kimball & Co., at a certain price, which price I cannot now recollect. I informed Mr. Hardenberg of this fact, and he requested me to secure the bonds for him at [p711] that price. I went to C. H. Kimball & Co, and told them to send the bonds to Mr. Hardenberg's office and get a check for them, which I understand they did. I remember expressing to Mr. Hardenberg the opinion that these bonds, being on their face negotiable by delivery, and payable in gold, must, at no distant day, be redeemed according to their tenor, and were, therefore, a good purchase at the price at which they were offered.

My impression is that, before this negotiation, I had read a paragraph in some New York newspaper stating that the payment of the whole issue of the Texas indemnity bonds was suspended until the history of a certain portion of the issue, supposed to have been negotiated for the benefit of the rebel service, should be understood. I am not at all certain whether I read this publication before or after the date of the transaction. If the publication was made before this transaction, I had probably read the article before the purchase was made. My impression is that it was a paragraph in a money article, but I attributed no great importance to it. I acted in this matter simply as the friend of Mr. Hardenberg, and received no commission for my services. I am a lawyer by profession, and not a broker.

Kimball & Co. (the brokers thus above referred to by Mr. Lewis), testified that they had received the bonds thus sold, from a firm which they named, "in perfect good faith, and sold them in like good faith, as we would any other lot of bonds received from a reputable house." It appeared, however, that, in sending the bonds to Kimball & Co. for sale, the firm had requested that they might not be known in the transaction.

Hardenberg's own account of the matter, as declared by his answer, was thus:

That he was a merchant in the city of New York; that he purchased the bonds held by him in open market in said city; that the parties from whom

he purchased the same were responsible persons, residing and doing business in said city; that he purchased of McKim, Brothers & Co., bankers in good standing in Wall Street, one bond at 1.15 percent, on the 6th of November, 1866, when gold was at the rate of \$1.47 1/4, and declining; that when he purchased the same, he made no inquiries of [p712] McKim, Brothers & Co., but took the bonds on his own observation of their plain tenor and effect at what he conceived to be a good bargain; that afterwards, and before the payment of said bonds and coupons by the Secretary of the Treasury, and at the request of the Comptroller, Hon. R. W. Taylor, he made inquiry of said firm of McKim, Brothers & Co., and they informed him that said bonds and coupons had been sent to them to be sold by the First National Bank of Wilmington, North Carolina; that he purchased on the 8th of November, 1866, thirty of said bonds, amounting to the sum of \$32,475, of J. S. Hennessey, 29 Warren Street, New York City, doing business as a commission merchant, who informed him that, in the way of business, they were sent him by Hugh Douglas, of Nashville, Tennessee; that he paid at the rate of 120 cents at a time, to-wit, the 8th of November, 1866, when gold was selling at 146 and declining; that the three other bonds were purchased by him on the 8th of November, 1866, of C. H. Kimball & Co., 30 Broad Street, brokers in good standing, who informed him, on inquiry afterwards, that said bonds were handed them to be sold by a banking house in New York of the highest respectability, who owned the same, but whose names were not given, as the said firm informed him they could "see no reason for divulging private transactions," and that he paid for last-mentioned bonds at the rate of 120 cents, on said 8th day of November, 1866, when gold was selling at 146 and declining.

Further answering, he saith that he had no knowledge at the time of said purchase that the bonds were obtained from the State of Texas, or were claimed by the said State; that he acted on information obtained from the public report of the Secretary of the Treasury, showing that a large portion of similar bonds had been redeemed, and upon his own judgment of the nature of the obligation expressed by the bonds themselves, and upon his own faith in the full redemption of said bonds, and he averred that he had no knowledge of the contract referred to in the bill of complaint, nor of the interest or relation of White & Chiles, nor of any connection which they had with said complainant, or said bonds, nor of the law of the State of Texas requiring indorsement.

The answer of White mentioned, in regard to Hardenberg's bonds, that they were sold by his (White's) broker; [p713] that he, White, had no knowledge of the name of the real purchaser, who, however, paid 115 per-

cent for them; that, at the time of the sale, his (White's) broker informed him that the purchaser, or the person acting for the purchaser, did not want any introduction to the respondent, and required no history of the bonds proposed to be sold; that he only desired that they should come to him through the hands of a loyal person who had never been identified with the rebellion.

Another matter, important possibly in reference to the relief asked by the bill, and to the exact decree [n3] made, should, perhaps, be mentioned about these bonds of Hardenberg.

The answer of Hardenberg stated, that, on the 16th of February, 1867, the Secretary of the Treasury ordered the payment to the respondent of all said bonds and coupons, and the same were paid on that day.

This was literally true, and the books of the treasury showed these bonds as among the redeemed bonds, and showed nothing else. As a matter of fact, it appeared that the agents of Texas, on the one hand, urging the government not to pay the bonds, and the holders, on the other, pressing for payment -- it being insisted by these last that the United States had no right to withhold the money, and thus deprive the holder of the bonds of interest -- the Controller of the Treasury, Mr. Tayler, made a report, on the 29th of January, 1867, to the Secretary of the Treasury in which he mentioned that it seemed to be agreed by the agents of the State that her case depended on her ability to show a want of good faith on the part of the holders of bonds, and that he had stated to the agents that, as considerable delay had already been incurred, he would, unless during the succeeding week they took proper legal steps against the holders, feel it his duty to pay such bonds as were unimpeached in title in the holders' hands. He accordingly recommended to the secretary payment of Hardenberg's and of some others. The agents, on the same day that the controller made his report, [p714] and after he had written most of it, informed him that they would take legal proceedings on behalf of the State, and were informed in turn that the report would be made on that day, and would embrace Hardenberg's bonds. Two days afterwards, a personal action was commenced in the name of the State of Texas against Mr. McCulloch, the then Secretary of the Treasury, for the detention of the bonds of Hardenberg and others. This action was dismissed February 19th. On the 15th of the same February, the present bill was filed. On the 16th of the month, the personal suit against the secretary having at the time, as already above stated, been withdrawn, and no process under the present bill having then, nor until the 27th following, been served on Hardenberg, Mr. Tayler, Controller of the Treasury, and one Cox, the agent of Hardenberg, entered into an ar-

rangement by which it was agreed that this agent should deposit with Mr. Tayler government notes known as "seven-thirties," equivalent in value to the bonds and coupons held by Hardenberg, to be held by Mr. Tayler as indemnity for Mr. McCulloch, against any personal damage, loss, and expense in which he may be involved by reason of the payment of the bonds.

The seven-thirties were then delivered to Mr. Tayler, and a check in coin for the amount of the bonds and interest was delivered to Hardenberg's agent. The seven-thirties were subsequently converted into the bonds called "five-twenties," and these remained in the hands of Mr. Tayler, being registered in his name as trustee. The books of the treasury showed nothing in relation to this trust, nor, as already said, anything more or other than that the bonds were paid to Hardenberg or his agent.

Next, as respected the bonds of BIRCH, MURRAY & Co. It seemed in regard to these, that, prior to July, 1855, Chiles, wanting money, applied to this firm, who lent him \$5,000 on a deposit of twelve of the bonds. The whole of the twelve were taken to the treasury department. The department at first declined to pay them, but finally did pay [p715] four of them (amounting with the coupons to \$4,900) upon the ground urged by the firm that it had lent the \$5,000 to Chiles on the hypothecation of the bonds and coupons without knowledge of the claim of the State of Texas, and because the firm was urged to be, and was apparently, a holder in good faith, and for value, the other bonds, eight in number, remaining in the treasury, and not paid to the firm, because of the alleged claim of the State of Texas, and of the allegation that the same had come into the possession of said White and Chiles improperly, and without consideration.

The difficulty now was less perhaps about the four bonds than about these eight, whose further history was thus presented by the answer of Birch, one of the firm, to the bill. He said in this answer, and after mentioning his getting with difficulty the payment of the four bonds:

That afterwards, and during the year 1866, Chiles called upon him with the printed report of the First Comptroller of the Treasury, Hon. R. W. Tayler, from which it appeared that the department would, in all reasonable probability, redeem all said bonds; and requested further advances on said eight remaining bonds, and that the firm thereupon advanced said Chiles, upon the said eight bonds, from time to time, the sum of \$4,185.25, all of which was due and unpaid. That he made the said advances as well upon the representations of said Chiles that he was the bona fide holder of said bonds and coupons, as upon his own observation and knowledge of their legal tenor and effect; and of his faith in the redemption thereof by the government of the United States.

The answer said further, that:

At the time of the advances first made, the firm had no knowledge of the contract referred to in the bill, nor of the interest or connection of said White & Chiles with the complainant, nor of the law of the State of Texas referred to in the bill passed December 16, 1851; and that the bonds were taken in good faith.

It appeared further, in regard to the whole of these bonds, [p716] that, in June, 1865, Chiles, wanting to borrow money of one Barret, and he, Barret, knowing Mr. Hamilton, just then appointed provisional governor, but not yet installed into office, nor apparently as yet having the impressions which he afterwards, by his caution, made public, went to him, supposing him well acquainted with the nature of these bonds, and sought his opinion as to their value, and as to whether they would be paid. Barret's testimony proceeded:

He advised me to accept the proposition of Chiles, and gave it as his opinion that the government would have to pay the bonds. I afterwards had several conversations with him on the subject, in all of which he gave the same opinion. Afterwards (I can't remember the exact time), Mr. Chiles applied to Birch, Murray & Co. for a loan of money, proposing to give some bonds as collateral security, and, at his request, I went to Birch, Murray & Co. and informed them of my conversations with Governor Hamilton, and of his opinion as expressed to me. They then seemed willing to make a loan on the security offered. In order to give them further assurance that I was not mistaken in my report of Governor Hamilton's opinion verbally expressed, I obtained from him a letter [letter produced]. It reads thus:

NEW YORK, June 25th, 1865.

HON. J. R. BARRET.

DEAR SIR: In reply to your question about Texas indemnity bonds issued by the U.S., I can assure you that they are perfectly good, and the gov't will certainly pay them to the holders.

Yours truly,

A. J. HAMILTON

The witness mentioned the conversations had with Governor Hamilton, and also spoke of the letter, and sometimes read it to various parties, some of whom were dealing in these bonds, and, as he stated, had "reason to believe that Governor Hamilton's opinion in regard to the bonds be-

came pretty generally known among dealers in such paper.” The witness, however, did not know Mr. Hardenberg.

The questions, therefore, were:

1. A minor preliminary one: the question presented by Chiles’s answer as to whether sufficient authority was shown [p717] for the prosecution of the suit in the name and in behalf of Texas.
2. A great and principal one: a question of jurisdiction, viz., whether Texas, at the time of the bill filed or now, was one of the United States of America, and so competent to file an original bill here.
3. Assuming that she was, a question whether the respective defendants, any, all, or who of them, were proper subjects for the injunction prayed, as holding the bonds without sufficient title, and herein -- and more particularly as respected Hardenberg, and Birch, Murray & Co. -- a question of negotiable paper, and the extent to which holders, asserting themselves holders bona fide and for value, of paper payable “to bearer,” held it discharged of precedent equities.
4. A question as to the effect of the payments, at the treasury, of the bonds of Hardenberg and of the four bonds of Birch, Murray & Co.

(The complete document can be found in <http://www.law.cornell.edu/supct/html/historics/USSC_CR_0074_0700_ZO.html> [verified May 30, 2012].)

SLAUGHTER-HOUSE CASES, 83 U.S. 36 (1873)

Syllabus [from the Legal Information Institute of Cornell University]

Argued: February 3-5, 1873 – Decided: April 14, 1873

1. The legislature of Louisiana, on the 8th of March, 1869, passed an act granting to a corporation, created by it, the exclusive right, for twenty-five years, to have and maintain slaughterhouses, landings for cattle, and yards for inclosing cattle intended for sale or slaughter within the parishes of Orleans, Jefferson, and St. Bernard, in that State (a territory which, it was said -- see *infra*, p. 85 -- contained 1154 square miles, including the city of New Orleans, and a population of between two and three hundred thousand people), and prohibiting all other persons from building, keeping, or having slaughterhouses, landings for cattle, and yards for cattle intended for sale or slaughter, within those limits, and requiring that all cattle and other animals intended for sale or slaughter in that district,

should be brought to the yards and slaughterhouses of the corporation, and authorizing the corporation to exact certain prescribed fees for the use of its wharves and for each animal landed, and certain prescribed fees for each animal slaughtered, besides the head, feet, gore, and entrails, except of swine. Held, that this grant of exclusive right or privilege, guarded by proper limitation of the prices to be charged, and imposing the duty of providing ample conveniences, with permission to all owners of stock to land, and of all [p37] butchers to slaughter at those places, was a police regulation for the health and comfort of the people (the statute locating them where health and comfort required), within the power of the state legislatures, unaffected by the Constitution of the United States previous to the adoption of the thirteenth and fourteenth articles of amendment.

2. The Parliament of Great Britain and the State legislatures of this country have always exercised the power of granting exclusive rights when they were necessary and proper to effectuate a purpose which had in view the public good, and the power here exercised is of that class, and has, until now, never been denied.

Such power is not forbidden by the thirteenth article of amendment and by the first section of the fourteenth article. An examination of the history of the causes which led to the adoption of those amendments and of the amendments themselves demonstrates that the main purpose of all the three last amendments was the freedom of the African race, the security and perpetuation of that freedom, and their protection from the oppressions of the white men who had formerly held them in slavery.

3. In giving construction to any of those articles, it is necessary to keep this main purpose steadily in view, though the letter and spirit of those articles must apply to all cases coming within their purview, whether the party concerned be of African descent or not.

While the thirteenth article of amendment was intended primarily to abolish African slavery, it equally forbids Mexican peonage or the Chinese coolie trade when they amount to slavery or involuntary servitude, and the use of the word "servitude" is intended to prohibit all forms of involuntary slavery of whatever class or name.

The first clause of the fourteenth article was primarily intended to confer citizenship on the negro race, and secondly to give definitions of citizenship of the United States and citizenship of the States, and it recognizes the distinction between citizenship of a State and citizenship of the United States by those definitions.

The second clause protects from the hostile legislation of the States the privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citizens of the States.

These latter, as defined by Justice Washington in *Corfield v. Coryell*, and by this court in *Ward v. Maryland*, embrace generally those fundamental civil rights for the security and establishment of which organized society is instituted, and they remain, with certain exceptions mentioned in the Federal Constitution, under the care of the State governments, and of this class are those set up by plaintiffs.

4. The privileges and immunities of citizens of the United States are those which arise out of the nature and essential character of the national government, the provisions of its Constitution, or its laws and treaties made in pursuance thereof, and it is these which are placed under the protection of Congress by this clause of the Thirteenth amendment.

It is not necessary to inquire here into the full force of the clause forbidding a State to enforce any law which deprives a person of life, liberty, [p38] or property without due process of law, for that phrase has been often the subject of judicial construction, and is, under no admissible view of it, applicable to the present case.

5. The clause which forbids a State to deny to any person the equal protection of the laws was clearly intended to prevent the hostile discrimination against the negro race so familiar in the States where he had been a slave, and, for this purpose, the clause confers ample power in Congress to secure his rights and his equality before the law.

The three cases -- the parties to which, as plaintiff and defendants in error, are given specifically as a subtitle, at the head of this report, but which are reported together also under the general name which, in common parlance, they had acquired -- grew out of an act of the legislature of the State of Louisiana, entitled

An act to protect the health of the City of New Orleans, to locate the stock landings and slaughterhouses, and to incorporate "The Crescent City Live-Stock Landing and Slaughter-House Company," which was approved on the 8th of March, 1869, and went into operation on the 1st of June following, and the three cases were argued together.

The act was as follows:

SECTION 1. Be it enacted, &c., That from and after the first day of June, A.D. 1869, it shall not be lawful to land, keep, or slaughter any cattle, beeves, calves, sheep, swine, or other animals, or to have, keep, or establish any stock-landing, yards, pens, slaughterhouses, or abattoirs at any

point or place within the city of New Orleans, or the parishes of Orleans, Jefferson, and St. Bernard, or at any point or place on the east bank of the Mississippi River within the corporate limits of the city of New Orleans, or at any point on the west bank of the Mississippi River above the present depot of the New Orleans, Opelousas, and Great Western Railroad Company, except that the "Crescent City Stock Landing and Slaughter-House Company" may establish themselves at any point or place as hereinafter provided. Any person or persons, or corporation or company carrying on any business or doing any act in contravention of this act, or landing, slaughtering or keeping any animal or animals in violation of this act, shall be liable to a fine of \$250 for each and [p39] every violation, the same to be recoverable, with costs of suit, before any court of competent jurisdiction.

The second section of the act created one Sauger and sixteen other person named, a corporation, with the usual privileges of a corporation, and including power to appoint officers and fix their compensation and term of office, to fix the amount of the capital stock of the corporation and the number of shares thereof.

The act then went on:

SECTION 3. Be it further enacted, &c., That said company or corporation is hereby authorized to establish and erect at its own expense, at any point or place on the east bank of the Mississippi River within the parish of St. Bernard, or in the corporate limits of the city of New Orleans, below the United States Barracks, or at any point or place on the west bank of the Mississippi River below the present depot of the New Orleans, Opelousas, and Great Western Railroad Company, wharves, stables, sheds, yards, and buildings necessary to land, stable, shelter, protect, and preserve all kinds of horses, mules, cattle, and other animals, and from and after the time such buildings, yards, &c., are ready and complete for business, and notice thereof is given in the official journal of the State, the said Crescent City Live-Stock Landing and Slaughter-House Company shall have the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughterhouse business within the limits and privileges granted by the provisions of this act, and cattle and other animals destined for sale or slaughter in the city of New Orleans, or its environs, shall be landed at the livestock landings and yards of said company, and shall be yarded, sheltered, and protected, if necessary, by said company or corporation, and said company or corporation shall be entitled to have and receive for each steamship landing at the wharves of the said com-

pany or corporation, \$10; for each steamboat or other watercraft, \$5, and for each horse, mule, bull ox, or cow landed at their wharves, for each and every day kept, 10 cents; for each and every hog, calf, sheep, or goat, for each and every day kept, 5 cents, all without including the feed, and said company or corporation shall be entitled to keep and detain each and all of said animals until said charges are fully paid. But [p40] if the charges of landing, keeping, and feeding any of the aforesaid animals shall not be paid by the owners thereof after fifteen days of their being landed and placed in the custody of the said company or corporation, then the said company or corporation, in order to reimburse themselves for charges and expenses incurred, shall have power, by resorting to judicial proceedings, to advertise said animals for sale by auction, in any two newspapers published in the city of New Orleans, for five days, and after the expiration of said five days, the said company or corporation may proceed to sell by auction, as advertised, the said animals, and the proceeds of such sales shall be taken by the said company or corporation and applied to the payment of the charges and expenses aforesaid, and other additional costs, and the balance, if any, remaining from such sales, shall be bold to the credit of and paid to the order or receipt of the owner of said animals. Any person or persons, firm or corporation violating any of the provisions of this act, or interfering with the privileges herein granted, or landing, yarding, or keeping any animals in violation of the provisions of this act, or to the injury of said company or corporation, shall be liable to a fine or penalty of \$250, to be recovered with costs of suit before any court of competent jurisdiction.

The company shall, before the first of June, 1869, build and complete A GRAND SLAUGHTERHOUSE of sufficient capacity to accommodate all butchers, and in which to slaughter 500 animals per day; also a sufficient number of sheds and stables shall be erected before the date aforementioned to accommodate all the stock received at this port, all of which to be accomplished before the date fixed for the removal of the stock landing, as provided in the first section of this act, under penalty of forfeiture of their charter.

SECTION 4. Be it further enacted, &c., That the said company or corporation is hereby authorized to erect, at its own expense, one or more landing places for livestock, as aforesaid, at any points or places consistent with the provisions of this act, and to have and enjoy from the completion thereof, and after the first day of June, A.D. 1869, the exclusive privilege of having landed at their wharves or landing places all animals intend-

ed for sale or slaughter in the parishes of Orleans and Jefferson, and are hereby also authorized (in connection) to erect at its own expense one or more slaughterhouses, at any points or places [p41] consistent with the provisions of this act, and to have and enjoy, from the completion thereof, and after the first day of June, A.D. 1869, the exclusive privilege of having slaughtered therein all animals the meat of which is destined for sale in the parishes of Orleans and Jefferson.

SECTION 5. Be it further enacted, &c., That whenever said slaughterhouses and accessory buildings shall be completed and thrown open for the use of the public, said company or corporation shall immediately give public notice for thirty days, in the official journal of the State, and within said thirty days' notice, and within, from and after the first day of June, A.D. 1869, all other stock landings and slaughterhouses within the parishes of Orleans, Jefferson, and St. Bernard shall be closed, and it will no longer be lawful to slaughter cattle, hogs, calves, sheep, or goats, the meat of which is determined for sale within the parishes aforesaid, under a penalty of \$100, for each and every offence, recoverable, with costs of suit, before any court of competent jurisdiction; that all animals to be slaughtered, the meat whereof is determined for sale in the parishes of Orleans or Jefferson, must be slaughtered in the slaughterhouses erected by the said company or corporation, and upon a refusal of said company or corporation to allow any animal or animals to be slaughtered after the same has been certified by the inspector, as hereinafter provided, to be fit for human food, the said company or corporation shall be subject to a fine in each case of \$250, recoverable, with costs of suit, before any court of competent jurisdiction; said fines and penalties to be paid over to the auditor of public accounts, which sum or sums shall be credited to the educational fund.

SECTION 6. Be it further enacted, &c., That the governor of the State of Louisiana shall appoint a competent person, clothed with police powers, to act as inspector of all stock that is to be slaughtered, and whose duty it will be to examine closely all animals intended to be slaughtered, to ascertain whether they are sound and fit for human food or not, and if sound and fit for human food, to furnish a certificate stating that fact to the owners of the animals inspected, and without said certificate no animals can be slaughtered for sale in the slaughterhouses of said company or corporation. The owner of said animals so inspected to pay the inspector 10 cents for each and every animal so inspected, one-half of which fee the said inspector shall retain for his services, and the other half of said fee shall be [p42] paid over to the auditor of public accounts, said payment

to be made quarterly. Said inspector shall give a good and sufficient bond to the State, in the sum of \$5,000, with sureties subject to the approval of the governor of the State of Louisiana, for the faithful performance of his duties. Said inspector shall be fined for dereliction of duty \$50 for each neglect. Said inspector may appoint as many deputies as may be necessary. The half of the fees collected as provided above, and paid over to the auditor of public accounts, shall be placed to the credit of the educational fund.

SECTION 7. Be it further enacted, &c., That all persons slaughtering or causing to be slaughtered cattle or other animals in said slaughterhouses shall pay to the said company or corporation the following rates or perquisites, viz.: for all beeves, \$1 each; for all hogs and calves, 50 cents each; for all sheep, goats, and lambs, 30 cents each, and the said company or corporation shall be entitled to the head, feet, gore, and entrails of all animals excepting hogs, entering the slaughterhouses and killed therein, it being understood that the heart and liver are not considered as a part of the gore and entrails, and that the said heart and liver of all animals slaughtered in the slaughterhouses of the said company or corporation shall belong, in all cases, to the owners of the animals slaughtered.

SECTION 8. Be it further enacted, &c., That all the fines and penalties incurred for violations of this act shall be recoverable in a civil suit before any court of competent jurisdiction, said suit to be brought and prosecuted by said company or corporation in all cases where the privileges granted to the said company or corporation by the provisions of this act are violated or interfered with; that one-half of all the fines and penalties recovered by the said company or corporation [sic in copy -- REP.] in consideration of their prosecuting the violation of this act, and the other half shall be paid over to the auditor of public accounts, to the credit of the educational fund.

SECTION 9. Be it further enacted, &c., That said Crescent City Livestock Landing and Slaughter-House Company shall have the right to construct a railroad from their buildings to the limits of the city of New Orleans, and shall have the right to run cars thereon, drawn by horses or other locomotive power, as they may see fit; said railroad to be built on either of the public roads running along the levee on each side of the Mississippi [p43] River. The said company or corporation shall also have the right to establish such steam ferries as they may see fit to run on the Mississippi

River between their buildings and any points or places on either side of said river.

SECTION 10. Be it further enacted, &c., That at the expiration of twenty-five years from and after the passage of this act, the privileges herein granted shall expire.

The parish of Orleans containing (as was said [n1]) an area of 150 square miles, the parish of Jefferson of 384, and the parish of St. Bernard of 620, the three parishes together 1154 square miles, and they having between two and three hundred thousand people resident therein, and, prior to the passage of the act above quoted, about 1,000 persons employed daily in the business of procuring, preparing, and selling animal food, the passage of the act necessarily produced great feeling. Some hundreds of suits were brought on the one side or on the other; the butchers, not included in the "monopoly" as it was called, acting sometimes in combinations, in corporations, and companies and sometimes by themselves, the same counsel, however, apparently representing pretty much all of them. The ground of the opposition to the slaughterhouse company's pretensions, so far as any cases were finally passed on in this court, was that the act of the Louisiana legislature made a monopoly and was a violation of the most important provisions of the thirteenth and fourteenth Articles of Amendment to the Constitution of the United States. The language relied on of these articles is thus:

AMENDMENT XIII

either slavery nor involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, nor any place subject to their jurisdiction.

AMENDMENT XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. [p44]

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The Supreme Court of Louisiana decided in favor of the company, and five of the cases came into this court under the 25th section of the Judiciary Act in December, 1870, where they were the subject of a preliminary motion

by the plaintiffs in error for an order in the nature of a supersedeas. After this, that is to say, in March, 1871, a compromise was sought to be effected, and certain parties professing, apparently, to act in a representative way in behalf of the opponents to the company, referring to a compromise that they assumed had been effected, agreed to discontinue “all writs of error concerning the said company, now pending in the Supreme Court of the United States;” stipulating further “that their agreement should be sufficient authority for any attorney to appear and move for the dismissal of all said suits.” Some of the cases were thus confessedly dismissed. But the three of which the names are given as a subtitle at the head of this report were, by certain of the butchers, asserted not to have been dismissed. And Messrs. M. H. Carpenter, J. S. Black, and T. J. Durant, in behalf of the new corporation, having moved to dismiss them also as embraced in the agreement, affidavits were filed on the one side and on the other; the affidavits of the butchers opposed to the “monopoly” affirming that they were plaintiffs in error in these three cases, and that they never consented to what had been done, and that no proper authority had been given to do it. This matter was directed to be heard with the merits. The case being advanced was first heard on these, January 11th, 1872; Mr. Justice Nelson being indisposed and not in his seat. Being ordered for reargument, it was heard again February 3^d, 4th, and 5th, 1873. [p57]

(The complete document can be found in <http://www.law.cornell.edu/supct/html/historics/USSC_CR_0083_0036_ZO.html> [verified May 30, 2012].)

CIVIL RIGHTS CASES, 109 U.S. 3 (1883)

Syllabus [from the Legal Information Institute of Cornell University]

Argued: – Decided: October 16, 1883

1. The 1st and 2^d sections of the Civil Rights Act passed March 1st, 1876, are unconstitutional enactments as applied to the several States, not being authorized either by the XIIIth or XIVth Amendments of the Constitution
2. The XIVth Amendment is prohibitory upon the States only, and the legislation authorized to be adopted by Congress for enforcing it is not direct legislation on the matters respecting which the States are prohibited from making or enforcing certain laws, or doing certain acts, but is corrective legislation such as may be necessary or proper for counteracting and redressing the effect of such laws or acts. [p4]

The XIIIth Amendment relates only to slavery and involuntary servitude (which it abolishes), and, although, by its reflex action, it establishes universal freedom in the United States, and Congress may probably pass laws directly enforcing its provisions, yet such legislative power extends only to the subject of slavery and its incidents, and the denial of equal accommodations in inns, public conveyances, and places of public amusement (which is forbidden by the sections in question), imposes no badge of slavery or involuntary servitude upon the party but at most, infringes rights which are protected from State aggression by the XIVth Amendment.

4. Whether the accommodations and privileges sought to be protected by the 1st and 2^d sections of the *Civil Rights Act* are or are not rights constitutionally demandable, and if they are, in what form they are to be protected, is not now decided.

5. Nor is it decided whether the law, as it stands, is operative in the Territories and District of Columbia, the decision only relating to its validity as applied to the States.

6. Nor is it decided whether Congress, under the commercial power, may or may not pass a law securing to all persons equal accommodations on lines of public conveyance between two or more States.

These cases were all founded on the first and second sections of the Act of Congress known as the *Civil Rights Act*, passed March 1st, 1875, entitled "An Act to protect all citizens in their civil and legal rights." 18 Stat. 335. Two of the cases, those against Stanley and Nichols, were indictments for denying to persons of color the accommodations and privileges of an inn or hotel; two of them, those against Ryan and Singleton, were, one on information, the other an indictment, for denying to individuals the privileges and accommodations of a theatre, the information against Ryan being for refusing a colored person a seat in the dress circle of Maguire's theatre in San Francisco, and the indictment against Singleton was for denying to another person, whose color was not stated, the full enjoyment of the accommodations of the theatre known as the Grand Opera House in New York, said denial not being made for any reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude.

The case of Robinson and wife against the Memphis & Charleston R.R. Company was an action brought in the Circuit Court of the United States for the Western District of Tennessee to recover the penalty of five hundred dollars [p5] given by the second section of the act, and the grava-

men was the refusal by the conductor of the railroad company to allow the wife to ride in the ladies' car, for the reason, as stated in one of the counts, that she was a person of African descent. The jury rendered a verdict for the defendants in this case upon the merits, under a charge of the court to which a bill of exceptions was taken by the plaintiffs. The case was tried on the assumption by both parties of the validity of the act of Congress, and the principal point made by the exceptions was that the judge allowed evidence to go to the jury tending to show that the conductor had reason to suspect that the plaintiff, the wife, was an improper person because she was in company with a young man whom he supposed to be a white man, and, on that account, inferred that there was some improper connection between them, and the judge charged the jury, in substance, that, if this was the conductor's bona fide reason for excluding the woman from the car, they might take it into consideration on the question of the liability of the company. The case was brought here by writ of error at the suit of the plaintiffs. The cases of Stanley, Nichols, and Singleton came up on certificates of division of opinion between the judges below as to the constitutionality of the first and second sections of the act referred to, and the case of Ryan on a writ of error to the judgment of the Circuit Court for the District of California sustaining a demurrer to the information.

The Stanley, Ryan, Nichols, and Singleton cases were submitted together by the solicitor general at the last term of court, on the 7th day of November, 1882. There were no appearances, and no briefs filed for the defendants.

The Robinson case was submitted on the briefs at the last term, on the 9th day of arch, 1883. [p8]

(The complete document can be found in <http://www.law.cornell.edu/supct/html/historics/USSC_CR_0109_0003_ZS.html> [verified May 30, 2012].)

PLESSY V. FERGUSON, 163 U.S. 537 (1896)

Syllabus [from the Legal Information Institute of Cornell University]

Argued: April 18, 1896 --- Decided: May 18, 1896

The statute of Louisiana, acts of 1890, c. 111, requiring railway companies carrying passengers in their coaches in that State, to provide equal, but separate, accommodations for the white and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations; and providing that no person shall be permitted to

occupy seats in coaches other than the ones assigned to them, on account [p538] of the race they belong to; and requiring the officer of the passenger train to assign each passenger to the coach or compartment assigned for the race to which he or she belong; and imposing fines or imprisonment upon passengers insisting on going into a coach or compartment other than the one set aside for the race to which he or she belongs; and conferring upon officers of the train power to refuse to carry on the train passengers refusing to occupy the coach or compartment assigned to them, and exempting the railway company from liability for such refusal, are not in conflict with the provisions either of the Thirteenth Amendment or of the Fourteenth Amendment to the Constitution of the United States.

This was a petition for writs of prohibition and certiorari, originally filed in the Supreme Court of the State by Plessy, the plaintiff in error, against the Hon. John H. Ferguson, judge of the criminal District Court for the parish of Orleans, and setting forth in substance the following facts:

That petitioner was a citizen of the United States and a resident of the State of Louisiana, of mixed descent, in the proportion of seven eighths Caucasian and one eighth African blood; that the mixture of colored blood was not discernible in him, and that he was entitled to every recognition, right, privilege and immunity secured to the citizens of the United States of the white race by its Constitution and laws; that, on June 7, 1892, he engaged and paid for a first class passage on the East Louisiana Railway from New Orleans to Covington, in the same State, and thereupon entered a passenger train, and took possession of a vacant seat in a coach where passengers of the white race were accommodated; that such railroad company was incorporated by the laws of Louisiana as a common carrier, and was not authorized to distinguish between citizens according to their race. But, notwithstanding this, petitioner was required by the conductor, under penalty of ejection from said train and imprisonment, to vacate said coach and occupy another seat in a coach assigned by said company for persons not of the white race, and for no other reason than that petitioner was of the colored race; that, upon petitioner's refusal to comply with such order, he was, with the aid of a police officer, forcibly ejected from said coach and hurried off to and imprisoned in the parish jail of [p539] New Orleans, and there held to answer a charge made by such officer to the effect that he was guilty of having criminally violated an act of the General Assembly of the State, approved July 10, 1890, in such case made and provided.

That petitioner was subsequently brought before the recorder of the city for preliminary examination and committed for trial to the criminal District Court for the parish of Orleans, where an information was filed against him in the matter above set forth, for a violation of the above act, which act the petitioner affirmed to be null and void, because in conflict with the Constitution of the United States; that petitioner interposed a plea to such information based upon the unconstitutionality of the act of the General Assembly, to which the district attorney, on behalf of the State, filed a demurrer; that, upon issue being joined upon such demurrer and plea, the court sustained the demurrer, overruled the plea, and ordered petitioner to plead over to the facts set forth in the information, and that, unless the judge of the said court be enjoined by a writ of prohibition from further proceeding in such case, the court will proceed to fine and sentence petitioner to imprisonment, and thus deprive him of his constitutional rights set forth in his said plea, notwithstanding the unconstitutionality of the act under which he was being prosecuted; that no appeal lay from such sentence, and petitioner was without relief or remedy except by writs of prohibition and certiorari. Copies of the information and other proceedings in the criminal District Court were annexed to the petition as an exhibit.

Upon the filing of this petition, an order was issued upon the respondent to show cause why a writ of prohibition should not issue and be made perpetual, and a further order that the record of the proceedings had in the criminal cause be certified and transmitted to the Supreme Court.

To this order the respondent made answer, transmitting a certified copy of the proceedings, asserting the constitutionality of the law, and averring that, instead of pleading or admitting that he belonged to the colored race, the said Plessy declined and refused, either by pleading or otherwise, to admit [p540] that he was in any sense or in any proportion a colored man.

The case coming on for a hearing before the Supreme Court, that court was of opinion that the law under which the prosecution was had was constitutional, and denied the relief prayed for by the petitioner. *Ex parte Plessy*, 45 La. Ann. 80. Whereupon petitioner prayed for a writ of error from this court, which was allowed by the Chief Justice of the Supreme Court of Louisiana.

(The complete document can be found in <http://www.law.cornell.edu/supct/html/historics/USSC_CR_0163_0537_ZS.html> [verified May 30, 2012].)

CHAPTER 6

THE PROGRESSIVE ERA AND THE NEW DEAL

Income tax: The Sixteenth Amendment – The election of Senators: The Seventeenth Amendment – The Prohibition: The Eighteenth and Twenty-first Amendment – Women’s suffrage: The Nineteenth Amendment – The Presidential and legislative terms: The Twentieth Amendment – The Supreme Court opinions during the Progressive Era and the *New Deal* – The Contractual Freedom and the Legislative Power: *Lochner v. New York* – A frustrated President: *A.L.A. Schechter Poultry Corp. v. United States* – The End of the Lockner Era: *West Coast Hotel Co. v. Parrish* – The Labor Unions Rights: *National Labor Relations Board v. Jones & Laughlin Steel Corporation*

In the United States, the period between the 1890s and the 1920s is known as the Progressive Era. Progressivism was a reforming movement that aimed to improve both society and political activity through the social and technological advances achieved by modernizers during the Second Industrial Revolution. The years following the Reconstruction Era were called, not without certain irony, the Gilded Age. During that Age, the United States had the greatest economic development of its history; but it was at the same time a period of financial excesses, social injustices, and big political corruption.

The Progressives aspired to fix all those social evils. To that end, they created new political parties, such as the Populist Party and the Bull Moose Progressive Party of Theodore Roosevelt. In 1912, Roosevelt innovatively proposed, among other social reforms, a National Health Service, social insurance for the elderly, the unemployed, and the disabled, an eight-hour workday, and a minimum wage for women. Many of these

reforms would come about during the Presidency of Franklin D. Roosevelt (distant cousin of Theodore) as part of his New Deal legislation.

On the political issues, the progressive parties proposed changes such as constitutional amendments to allow a Federal income tax, women's suffrage, and the direct election of Senators, all of which would be implemented in the years to follow. But they also proposed more radical political changes, such as to recall elected officials before their terms of office had ended, to have popular referendums and initiatives, and the provision for a judicial recall to override unpopular constitutional decisions of the Supreme Court. The Progressives were for banning alcohol, since its abuse was associated with all kinds of social disorders and, according to them, with political corruption since allegedly politicians met in the saloons to conspire.

INCOME TAX: THE SIXTEENTH AMENDMENT

Prior to the Civil War, the government of the United States did not collect any tax on personal income. The regulation of taxes was one of the important issues that forced the Constitutional Convention of 1787. The *Articles of Confederation* did not allow "the United States in Congress assembled" to collect any taxes directly from the taxpayers, but rather the financing of the Continental Army and other common expenses depended on the contributions made by the states. No procedure was specified to enforce any financial obligations upon the states, should these fail to meet those obligations. So, the *Perpetual Union* was therefore condemned to perpetual insolvency.

To correct that serious *deficiency*, the federal Constitution authorized Congress to lay and collect "Capitation or other direct Taxes" (Sections 2 and 9, Article 1), imposed basically over the land property and proportional to the census, as well as to levy other indirect "Duties, Imposts and Excises [...] uniform throughout the United States" (Section 8, Article 1).

To pay for the Civil War effort, Congress passed the *Revenue Act of 1861*, which created a tax on personal income. This was then considered an indirect tax, and consequently it was not proportional to the census. The tax was set at a fixed 3% of any income above a certain minimum amount. It was modified the following year, making it effective until the end of the war in 1866. The Act was not constitutionally challenged before it expired.

In 1894, Congress passed the *Wilson-Gorman Tariff Act*, which imposed a federal income tax of 2% over any income above \$4,000 dollars. The law was challenged and, in 1895, the Supreme Court ruled in *Pollock v. Farmers' Loan & Trust Co.* that such a tax was direct and, consequently, unconstitutional since it was not proportional to the census.

In 1909, President William Howard Taft asked Congress to approve a tax on the income of corporations and at the same time, to avoid a repetition of the constitutional problems in the *Wilson-Gorman Tariff Act*, to propose to the states for their ratification a constitutional amendment permitting this type of direct income taxation.

The 16th Amendment was ratified in 1913. Then, President Woodrow Wilson signed into law the pending *Revenue Act* initiated four years earlier by President Taft. The Act modified Section 9 of Article 1 of the Constitution, and thereby empowered Congress “to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration,” and moot *Pollock*. As of today, Congress may tax anything, anyway, and anywhere, without any restriction.

THE ELECTION OF SENATORS: THE SEVENTEENTH AMENDMENT

Perhaps the most peculiar circumstance of this 17th Amendment is the fact that it most nearly forced a “runaway convention.” This is a national constitutional convention –similar to the Philadelphia Convention of 1787– with unforeseeable consequences, which included the possibility of the drafting a new constitution.

In the original text of the Constitution, Senators were elected by the legislatures of the several states. At the time –in 1787– this procedure was justified as a way to prevent from reaching the Senate demagogues who could use either charm or brute force to seize the popular vote. Furthermore, the Framers thought that, if the Senate was by popular election, it would be no different than the House of Representatives, and it would lose its character as the “check and balance” element in Congress.

While this method of electing Senators worked reasonably well until the mid-19th century, bipartisan tensions across the country were beginning to impact its feasibility in the longer term. Even before the Civil War, on several occasions the Senate seats of some states, such as Delaware, California and Indiana, were left empty because their legislatures were unable to reach the required majorities to elect their Senators, so

radical were their divisions. In 1866 Congress passed an Act regulating the procedure the states were required to follow in electing their Senators. Nevertheless, many of the old divisions persisted and, between 1866 and 1906, several cases of bribery were reported in the senatorial elections. Between 1891 and 1905, more than one half of the states reported recur-

Theodore Roosevelt (1858-1919) was an American historian and politician, leader of the Progressive Movement Party, and the 26th President of the United States. Born in New York, into a wealthy family, he graduated from Harvard University. He dropped law studies to become a candidate to the New York General Assembly. From 1888 to 1895 Roosevelt was part of President Harrison's Administration. In 1898 he resigned his office as Assistant Secretary of the Navy to fight in the Spanish-American War. Returning from that war as a very popular figure, Roosevelt was chosen by President McKinley as his running mate in the Presidential elections of 1900. When McKinley was assassinated in 1901, Roosevelt became President. In the 1904 elections, Theodore Roosevelt won by a landslide, basing his campaign on an attack against the big monopolies. His mediation in a conflict between Russia and Japan earned him the Nobel Peace Prize. In the elections of 1908, Roosevelt decided not to run for a third term, but when the Republican Party split during the Presidential campaign of 1912, Roosevelt formed the Progressive Party and became its candidate. During the campaign he suffered an assassination attempt that forced him out of his campaign schedule and, as a result, Roosevelt lost the elections. Nevertheless, he remained in politics until his death.

ring deadlocks in the elections, so evenly matched were the electors. Vacant seats in the Senate meant lack of representation at the Federal level.

Paradoxically, the eventual solution to the problem became the one that had been avoided when the Constitution was drafted: the direct election of the Senators by the people, indeed in exactly the same way as the Representatives. However, unspoken interests in the Senate and in many state legislatures put a barrier in the way of implementing the proposed electoral change. Every year, from 1893 to 1902, Congress received proposals for a constitutional amendment to that end. And, year after

year, the proposals were rejected by the very same Senators whose election process the amendment tried to regulate. The Senators had become a political class of their own and had taken possession of a powerful branch of government. They were refusing to accept a change that would deprive them of power and privileges.

Changes, however, were taking place in the legislatures of many states, and, by 1910, twenty-nine states of the forty-six then in the Union elected their Senators through some form of popular endorsement. It should be remembered that Article v of the Constitution offers two methods of proposing an amendment to the states: either through the approval of a text by two-thirds of each House, or through a convention requested by the legislatures of two-thirds of the states. In 1910, "two-thirds of the states" meant "thirty-two states." With twenty-nine states already in favor of the amendment, the Senate understood that its refusal to pass a suitable text could make the "runaway convention" a reality. Getting ahead of possible unpleasant events, in 1911 the Senate itself proposed the amendment that, after almost a year of debates in the House of Representatives, was approved by the required majorities. It was submitted to the states for their ratifications and reached the three-fourths majority for its approval in 1913.

The Amendment modified the first and second paragraphs of Section 1, Article 1, of the Constitution, whereby for the future all Senators were to be "elected by the people" of each state. To ensure that Senate seats were always occupied the Amendment also provided for "temporary appointments until the people filled in the vacancies by regular elections."

Although the ratification of the 17th Amendment immediately resulted in a change in the political composition of the Senate and several of the former problems seemed to fade, the Amendment was not free of criticism. Scholars have pointed out the loss of power to Congress of the state legislatures. Popularly elected Senators have gained the freedom to ignore the directives of their own state legislature and an opportunity arises for special interest groups disguised within the electing citizenry to exert undue influence.

THE PROHIBITION: THE EIGHTEENTH AND TWENTY-FIRST AMENDMENT

The earliest temperance movements in the United States go back to 1789, in the State of Connecticut. The goal of temperance movements was to fight against the many evil consequences associated with alcohol con-

sumption, namely poverty, domestic violence, and crime in general. In 1826, the American Temperance Society was organized and a few years later it numbered more than one and one half million members and had the support of many of the Protestant churches. In the years to follow, temperance movements appeared in Anglo-Saxon countries around the world. From 1830 on, temperance lobbying pressured British legislatures

William Howard Taft (1857-1930) was an American jurist and politician, the 27th President of the United States and 10th Chief Justice of the Supreme Court. Born in Ohio, into a politically influential family, he graduated from Yale University in 1878 and from the Cincinnati Law School in 1889. Taft was appointed Solicitor General of the United States in 1890 and the next year became Judge of the Court of Appeals of the United States. In 1900, after the Spanish-American War, Taft was appointed Governor-General of the Philippines by President McKinley and, in 1904, Secretary of War by President Theodore Roosevelt. When in 1908 Roosevelt decided not to run for reelection, he gave his support to Taft who easily won the election. The factional break-up of the Republican Party in the following elections, and the re-entry of Theodore Roosevelt as a candidate, caused Taft to lose the Presidency. In 1921, William H. Taft was nominated Chief Justice of the United States, holding this office until his resignation one month before his death.

to pass laws limiting the consumption of alcohol across the domains of the British Empire. By the end of the 19th century, American temperance groups had many states in the United States pass local legislation with similar prohibitions.

In response to many years of groups such as the Woman's Christian Temperance Union lobbying Congressmen, both Houses proposed, in December of 1917, an amendment prohibiting "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States." Thus the amendment did not expressly prohibit the consumption of "intoxicating liquors," although it made it quite difficult. The 18th Amendment was ratified in January of 1919, taking effect one year later, as prescribed in the Amendment text itself.

Its enforcement was troubled from the very beginning. The Amendment gave “Congress and the several States [...] concurrent power to enforce [it] by appropriate legislation.” In 1919, before the Amendment took effect, Congress passed the *National Prohibition Act*, defining “intoxicating liquor” in detail and the penalties for violating the Prohibition. But when the Act was submitted to President Woodrow Wilson for his signature, Wilson vetoed it (although the House of Representatives overruled the veto the very same day and the Senate did the same the following day).

A novelty of this Amendment was the time limit –seven years– set for its ratification by the three-fourths of the states. The constitutional validity of this clause was contested, but in 1921 the Supreme Court affirmed it in *Dillon v. Gloss*, Deputy Collector. (Since then, most of the amendments proposed to the several states for their ratification included similar time-limited provisions.)

Despite the fanfares trumpeted by the temperance movements, the populism of many Congressmen, and the good intentions of the progressive groups, the conviction for sobriety was not, by far, universal in the United States, as the Presidential veto had already shown. Against the Amendment, and with manifest disregard for the tough penalties imposed by the implementing legislation, a large number of people chose to disobey the laws of prohibition, and so caused a huge increase in the clandestine manufacture and sale of liquor. As in many other countries, the illegal distilling of alcoholic beverages was an immemorial practice in the United States, although until then it had been done to evade the hefty taxes imposed on the sale of alcohol, and not to fight the constitutional prohibition on its “manufacture, sale, or transportation.”

The 18th Amendment is one more example of how the road to hell is paved with good intentions. The benefits expected when the Amendment was approved, such as the protection of families against all evils and degradations caused by the consumption of liquor, or the decrease in diseases, poverty, child abuse, domestic violence, street brawls, etc., were not achieved. Instead, and as a direct result of the Prohibition, the end results were disastrous, magnifying some of the old problems, especially corruption and bribery, and causing new ones, such as organized crime.

By driving the use of alcohol underground, the illegal sale of liquor became big business monopolized by mafias. These criminal organizations bribed government officials to look the other way and not to interfere with their illegal businesses. The law was abused in all sorts of ways. For example, doctors could sign off whisky as a prescription drug, and thus pharmacies were able to sell alcohol by the millions of gallons. Federal

Woodrow Wilson (1856-1924) was an American scholar and politician and the 28th President of the United States. He was born in Virginia, the son of a Presbyterian minister and supporter of the Confederacy. Due to dyslexia, he did not learn to read until well past the age of ten. In 1879 Wilson graduated from Princeton, and then he went to study law in the University of Virginia, being admitted to the Bar in 1882. Not finding enough work as an attorney, Wilson enrolled in Johns Hopkins University to get a PhD in History and Political Sciences, and after his graduation he taught in several major universities: Cornell, Wesleyan, New York Law School, Princeton, to name but a few. From 1902 to 1910, he was President of Princeton University. In 1911 he was elected Governor of New Jersey and in 1912, as the Democratic candidate, was elected President of the United States. During his first term, Wilson endorsed such progressive legislation as the *Federal Reserve Act*, the *Federal Trade Commission Act*, the *Clayton Antitrust Act*, and the *Federal Farm Loan Act*, and he signed the *Revenue Act* that made of income tax the main means to raise federal and state revenues. In his reelection campaign, Wilson promised to keep America out of World War I, but once he was returned to office, and having learned from the intelligence services that Germany was encouraging Mexico to attack the United States, he asked Congress to declare war on Germany. Woodrow Wilson's active participation in the peace treaties signed after the war resulted in the formation of the League of Nations, a precursor of the United Nations. For his peace efforts, Wilson was awarded the 1919 Nobel Peace Prize. In October of that year Wilson suffered a stroke that incapacitated him. Without a procedure to discharge the President of his duties in case of incapacity, Woodrow Wilson remained formally in office until the end of his term, in March of 1921. During the intervening fifteenth months, the agenda of the Presidency was, to a large extent, in the hands of his wife. A year later, the 25th Amendment remedied this kind of situation. Well remembered for his accomplishments, Woodrow Wilson is popularly considered one of the best presidents of the United States.

agents of the Prohibition Unit acted with disregard for any constitutional guarantee, searching and seizing without judicial writs. Between 1920 and 1927, these agents shot down more than 200 suspected smugglers. At the same time, Federal judges routinely dismissed formal complaints of abuse by federal agents who were exceeding their authority. Moreover, the law was not always being enforced equally across the society.

In fact, Prohibition was enforced with less severity than the ensuing legend has suggested. Wine used in religious services (such as the Catholic communion or Jewish ceremony) was excluded, and the same

Warren G. Harding (1856-1923) was an American publisher and politician, and 29th President of the United States. Born in Ohio, at only 17 years of age he graduated from Ohio Central College. His father owned a local newspaper, working for which Harding learned the trade of journalism and, at the age of 30, he bought his own newspaper. In 1899, Harding was elected Senator for Ohio's Assembly, and in 1903, as a good party player, he was nominated for the position of Ohio's Lieutenant Governor. In 1915, he was elected U.S. Senator for Ohio, and in 1920 he won the Presidential election. Harding was noted for rewarding his cronies and more generous contributors with influential offices. This behavior eventually led to numerous scandals being brought to public attention, some of them ending in court, with sentences for defrauding the government. During his term, he signed the peace treaty with Germany and Austria that ended World War I, but kept the United States out of the League of Nations that had been sponsored by his predecessor, President Woodrow Wilson. Harding died suddenly in 1923. Because of the many corruption issues during his term, Harding is considered one of the worst presidents of the United States.

relaxation applied to alcoholic liquor prescribed by a medical doctor as mentioned. Farmers were allowed to manufacture for family consumption a certain volume of wine or cider each year. President Warren Harding, for instance, had a well-supplied wine cellar in the White House, most certainly for *raison d'état*! To escape the new law, all kinds of deceptions were attempted. Time magazine published in its issue of August 17th, 1931, an article about a grape juice concentrate, called "wine bricks," from the

Vino Sano (!) company. The concentrate carried a warning on the packaging “against dissolving the brick in a gallon of water, adding sugar, shaking daily and decanting after three weeks. Unless the buyer eschewed these processes, 13^o wine would be produced.”

After twelve years of Prohibition, in 1932 more than 75% of voters, and 46 of the 48 states in the Union, were in favor of repealing the 18th Amendment. The Democratic candidate for the Presidential elections that year was Franklin D. Roosevelt, who had promised in his campaign program to work with Congress to repeal the Amendment and all federal laws on Prohibition. Congress approved a text for the 21st Amendment but it did not send it to the state legislatures, addressing it instead to their governors.

As previously mentioned, Article v of the Constitution shows two possible paths for the ratification of amendments. It can be done by the legislatures of the states or by “ratification conventions” called in all of them. It is always Congress’s choice what form to use in each amendment. In all the twenty preceding amendments, Congress had decided to send the text to the state legislatures for its ratification. But in 1933 all the indications were that those legislatures were not representative of the popular will. Rather the pressures of interest groups associated with temperance movements were expected to prevail. The Woman’s Christian Temperance Union was again to be feared because, though a small minority, it was a very vociferous one. To circumvent these undesirable pressures, Congress decided to use the second path and to submit the proposed amendment text to conventions to be organized in each state. At the same time, President Franklin D. Roosevelt requested that Congress modify the National Prohibition Act to allow the sale of beer. The Amendment was ratified ten months later, on December 5th, at 5:30 pm. President Roosevelt signed its Proclamation at 7 pm and bars opened at the very same time, thereby ending the period of Prohibition.

WOMEN’S SUFFRAGE: THE NINETEENTH AMENDMENT

Lydia Chapin Taft, widow of Josiah Taft (an ancestor of President William Howard Taft), who had been the largest landowner in the city of Uxbridge, Massachusetts, has the distinction of being the first woman to vote in what is now the United States. At the time, the value of the vote was a function of the land owned by the individual. On two occasions, in 1756 and 1765, the town council of Uxbridge considered essential for the largest property in the municipality to support its position on some very important issues.

Since all the male children from the marriage were underage, the town council expressly authorized Josiah Taft's widow to vote by proxy.

From 1790 to 1807, the State of New Jersey granted all women residents in the state the right to vote. The next cases of women's suffrage in the United States took place in the Western federal territories, shortly after the Civil War had ended. First in 1869, in the Territory of Wyoming, and a year later in the Territory of Utah (both under the direct control of the Federal Government), women were franchised on equal terms with men, since in those same terms they shared the pains and difficulties of the Western migration. In 1887, the Congress of the United States removed such right from the women of the Territory of Utah (who were mainly Mormons) in punishment for voting in favor of polygamy; but when in 1896 Utah became a state, the women got their suffrage right restored.

In 1868, the New England Woman Suffrage Association—a group described by Henry James in his book *The Bostonians*—had been organized in Massachusetts, and in the following year, after a conflict among its members, the group split and the National Woman Suffrage Association was created.

In the elections that followed the ratification of the Fifteenth Amendment in 1870, many women took up their opportunity at the polling stations to exercise their votes. The Amendment text protected “the right of citizens of the United States to vote,” and it placed no restriction on the sex of the voters. However, the election boards decided not to allow the women to vote. In 1875, the Supreme Court held, in *Minor v. Happersett*, that the Constitution did not grant women the right to vote because this was not one of the constitutionally protected privileges of the 14th Amendment. “It is clear, therefore, we think,” said the Court, “that the Constitution has not added the right of suffrage to the privileges and immunities of citizenship as they existed at the time it was adopted” (88 U.S. 162, 171). The Court was “unanimously of the opinion that the Constitution of the United States does not confer the right of suffrage upon any one” (88 U.S. 162, 178), so no violation of the Constitution had occurred when the women were prevented from voting.

The female franchise was achieved piecemeal. In 1878, U.S. Senator for California Aaron Augustus Sargent submitted to Congress the first amendment proposal to grant women the right to vote; but his proposal failed. In 1896, women got their right to vote in the States of Idaho and Utah; in 1911 in California; in 1912 in Oregon, Arizona and Kansas; and in 1914 in Nevada and Montana. It is worth noticing that all these are Western states. In 1913, the Congressional Union for Woman Suffrage was or-

ganized on a national scale, and in 1917 it became the National Woman's Party, with one main objective: to obtain approval and ratification of a constitutional amendment that, similarly to the Reconstruction Amendments for African-Americans, would guarantee women every right and privilege, and particularly the right to suffrage, in equal terms with men.

In 1916, the State of Montana elected Jeannette Rankin as U.S. Representative, making her the first woman to have a seat in the Congress of the United States. In the same year, President Woodrow Wilson made women's suffrage part of his electoral campaign. Since they could not influence the election directly, members of the National Woman's Party began demonstrating permanently in front of the White House, picketing for women's rights. After 1917, when the United States entered the –until then– European conflict, the women also picketed against sending their young men to the war. At one point police arrested the demonstrators for breaking the code of public order, and a number of them were sentenced

Jeannette Pickering Rankin (1880-1973) was an American social worker and activist, and the first woman elected as a Representative to the Congress of the United States. Born in Montana, she studied in the University of Montana. After becoming a member of the National American Woman Suffrage Association, she was instrumental in getting women's suffrage approved in the State of North Dakota in 1913 and, in the following year, in her own state, Montana. In 1916 she was elected a U.S. Representative for Montana, winning the seat again in 1940. As a pacifist, Rankin voted against United States involvement in both World Wars. She was one of the founders of the American Civil Liberties Union (ACLU) and of the Women's International League for Peace and Freedom (WILPF).

to jail. Once in jail, the women started a hunger strike, following the example of the suffragettes in Great Britain in similar circumstances. As had happened in Great Britain too, prison officials force-fed the striking women, and President Wilson and the whole American Administration were characterized in the international press as in violation of human rights.

In January 1918, right at the start of his presidential campaign for reelection, the President announced publicly his support for a constitutional amendment to grant the suffrage to women. This was a public reaction to the scandal created by the detention and mistreatment of the

suffragettes. The same day, Jeannette Rankin proposed an amendment in the House of Representatives that was immediately approved. But the Senate postponed their vote until October, and then it failed to achieve the

Franklin D. Roosevelt (1882-1945) was an American politician and the 30th President of the United States. He was born in New York to a very wealthy family, and was a distant cousin of President Theodore Roosevelt. He graduated from Harvard University in 1904 and then went to study law at Columbia Law School, being admitted to the Bar in 1907 and working for an important law firm. In 1910, Roosevelt was elected Senator for the New York Assembly. President Woodrow Wilson appointed him Assistant Secretary of the Navy in 1913. Unfortunately, he contracted polio at the age of 39, and though he recovered, he was paralyzed from the waist down. In 1929 Roosevelt was elected governor of the State of New York. In 1932, in the middle of the worst economic crisis, he won the Presidential election. In the first 100 days of his term Roosevelt established a program for the economic recovery of the country, known as the *New Deal*. The Supreme Court of the United States declared unconstitutional a significant part of the *New Deal* legislation, blocking temporarily the efforts of his Administration to improve the economic and social conditions of the country. Despite this legal setback, the economy improved significantly from 1933 onward, and in the elections of 1936 Roosevelt was reelected by a landslide, carrying 46 of the then 48 states of the Union. Notwithstanding a new economic recession in 1937, by 1940 World War II had broken out and Roosevelt was successfully elected for a third term. In December of 1941 the Japanese attacked the United States, which had been neutral till this point. Much of the President's energies were engaged in the war. By the time of the 1944 elections, Roosevelt's health had deteriorated significantly, but even so he was elected once more. Roosevelt died of a massive stroke in April of 1945, one month after his fourth inauguration. Franklin D. Roosevelt is considered to be one of the best presidents of the United States and the person most admired and appreciated by his fellow citizens.

necessary two-thirds majority needed for approval. The response of the National Woman's Party was to campaign against the reelection of any of the Senators who had voted against the amendment. The next year, a new

text was proposed in Congress, this time identical to the one that Senator Sargent had proposed in 1878. The Senate approved the wording of the text, and the Amendment was ratified by the states in 1920.

Henry James (1843-1916) was a British writer born in the United States (New York) to a wealthy family. In his adolescent years, James traveled extensively through Europe, returning to the United States at the age of 19 to register in Harvard Law School; but he dropped law studies to become a writer. In 1871 James published his first novel, *Watch and Ward*, and in 1876 he moved permanently to England where he wrote the bulk of his works. Henry James was part of the literary realism movement of the last decades of the 19th century. In many of his novels, James describes the relationships between American expatriates and Europeans. Among his most prominent works are *The Portrait of a Lady* (1881), *The Bostonians* (1886), *What Maisie Knew* (1897), and *The Ambassadors* (1903). Disappointed by what he considered to be the desertion of Great Britain by the United States at the outbreak of World War I, Henry James renounced his American citizenship and became a British subject. Henry James was awarded the British Order of Merit shortly before his death.

THE PRESIDENTIAL AND LEGISLATIVE TERMS: THE TWENTIETH AMENDMENT

When the text of this Amendment was prepared in 1932, the Senate Committee wrote in the recommendation of its approval that “when our Constitution was adopted there was some reason for such a long intervention of time between the election and the actual commencement of work by the new Congress. [...] Under present conditions [of communication and transportation] the result of elections is known all over the country within a few hours after the polls close, and the Capital City is within a few days’ travel of the remotest portions of the country. [...] Another effect of the amendment would be to abolish the so-called short session of Congress. [...] Every other year, under our Constitution, the terms of Members of the House and one-third of the Members of the Senate expire on the 4th day of March. [...] Experience has shown that this brings about a very undesirable legislative condition. It is a physical impossibility during such a short session for Congress to give attention to much general legislation for the

reason that it requires practically all of the time to dispose of the regular appropriation bills. [...] The result is a congested condition that brings about either no legislation or ill-considered legislation. [...] The question is sometimes asked, Why is an amendment to the Constitution necessary to bring about this desirable change? The Constitution [before this amendment] does not provide the date when the terms of Senators and Representatives shall begin. It does fix the term of Senators at 6 years and of Members of the House of Representatives at 2 years. The commencement of the terms of the first President and Vice President and of Senators and Representatives composing the First Congress was fixed by an act of [the Continental] Congress adopted September 13, 1788, and that act provided 'that the first Wednesday in March next to be the time for commencing proceedings under the Constitution.' It happened that the first Wednesday in March was the 4th day of March, and hence the terms of the President and Vice President and Members of Congress began on the 4th day of March. Since the Constitution provides that the term of Senators shall be 6 years and the term of Members of the House of Representatives 2 years, it follows that this change cannot be made without changing the terms of office of Senators and Representatives, which would in effect be a change of the Constitution. By another act (the act of March 1, 1792) Congress provided that the terms of President and Vice President should commence on the 4th day of March after their election. It seems clear, therefore, that an amendment to the Constitution is necessary to give relief from existing conditions." [S. Rep. No. 26, 72^d Cong., 1st Sess., 2, 4, 5, 6 (1932).] All these reasons justified the change to the legislative sessions and the Presidential terms from March to January, since the two months from the elections to the date of inauguration gave sufficient time for the transfer of powers.

This Amendment has the popular name of the "Lame Duck Amendment." When a Congress convenes after new Representatives and Senators have already been elected but have not taken possession of their seats, the old Congresspersons find themselves in the awkward position of having to take decisions without the authority of the duly elected representatives of the people. This situation earned the popular name of "lame duck session." All kinds of problems resulted from that lack of popular legitimacy. Such was the case of the Congress that appointed the "midnight judges" of President John Adams in 1801. Before this Amendment, all final sessions of every Congress were "lame duck," thus the name of the Amendment. The same "lame duck" concept applies to a President or any elected official after his successor has been elected.

But even after the Amendment, “lame duck” sessions persisted because Congress cannot always adjourn from the election date –namely the first Tuesday after the first Monday in November– until the inauguration date. Moreover, it could be forced to reconvene by the President in circumstances he deemed demanded it. Since 1940, Congress has had sixteen such “lame duck sessions.”

The 20th Amendment modified temporarily Section 2 of Article I and Section 1 of Article II, reducing by 43 days the four-year term of the President and Vice-President elected in 1932, and by 60 days the terms of Senators and Representatives chosen in the elections of that same year. The Amendment modified both the references to “the fourth day of March” in the 12th Amendment and “the first Monday in December” in Section 4 of Article I.

THE SUPREME COURT OPINIONS DURING THE PROGRESSIVE ERA AND THE *NEW DEAL*

In the earliest years of the 20th century, state legislatures, the Congress of the United States and the Presidency were influenced by the progressive concepts and social tendencies of the times. Perversely, the Supreme Court of the United States remained the bastion of conservatism, writing opinions such as *Slaughter-House Cases* or *Plessy v. Ferguson*. Constructing a new meaning to the Fourteenth Amendment, which had been drafted to protect the rights of the emancipated slaves, the Supreme Court applied, in its resolutions, the so-called Substantive Due Process doctrine, aiming to annul and void state and federal laws that had been enacted to limit the abuses of powerful employers and producers over much weaker employees and consumers. The argument used time and again by the Supreme Court was that the Constitution granted full protection to the individual right to contract freely and to the sanctity of private property. State or federal laws, said the Supreme Court, could not impair these two fundamental rights. This position of the Court was one of the reasons that labor and social legislation failed to progress for quite some time in the United States.

That conservative position of the majority of Justices reached a crisis-point when the Supreme Court systematically declared unconstitutional those laws of President Roosevelt’s *New Deal* that were essential to rescue the nation from the acute economic crisis created after the Wall Street Crash of 1929.

The Constitution attributes to the President the appointment of the Justices and to the Senate their confirmation. But once confirmed, they hold “their Offices during good Behaviour” and cannot be removed by the President, and Congress can do it only through the impeachment process. But during the 1930’s, tensions between the Court and the President had reached such a point that Roosevelt threatened to modify the size of the Court, adding more positions of Associate Justices –that, obviously, he would appoint among the supporters of his social and economic policies– to reach the required majority to get his policies approved. This incident is known as the *Court-packing Plan*. It is uncertain whether the Court realized President Roosevelt was talking seriously about the Plan, or whether Justices genuinely changed their minds over what was or was not constitutional. The fact is that, all of a sudden, the Supreme Court’s criteria changed from an obstinately conservative position, to a radically liberal one. From that point on, the Court went to recognize during the mid part of the 20th century a large number of individual rights.

THE CONTRACTUAL FREEDOM AND THE LEGISLATIVE POWER: *LOCHNER V. NEW YORK*

The *Lochner v. New York* opinion, of 1905, ushered in a conservative period of the Supreme Court that would last until 1937 and that has been called the *Lochner* era. Actually, as we have seen in previous chapters, the conservative attitude of the Court can be traced to the *Dred Scott* opinion and even further back. But it is in the *Lochner* opinion where we can see the Court clearly elaborating the substantive due procedure doctrine. This doctrine established that the Constitution recognized that every citizen had certain inalienable rights –“life, liberty, [and] property”– that, according to the Fifth and Fourteenth Amendments, neither the states nor the federal government can limit “without due process of law.” Included in those “liberties” were the “liberty of contract” and freedom of action on private property. Given its “power of police,” a state could regulate those rights, but not in an absolute way. Otherwise those Amendments would be emptied of any significant value.

In 1895, the State of New York passed the *Bakeshop Act*, limiting the hours a baker could work to 10 in a day and 60 in a week, and fining employers who exceeded these norms. In 1901, Joseph Lochner was sentenced to pay \$50 for repeatedly violating the *Act* by requiring his employees to work longer hours. Defeated in all lower courts, Mr. Lochner appealed to the Supreme Court of the United States, alleging that the

Bakeshop Act was in violation of the Fourteenth Amendment because it deprived him of his right to run his business as he pleased and of his freedom to contract how and with whom he chose.

The Supreme Court ruled that the “general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution”. The Court went on to say that, although that “general right” was not absolute, since it was limited by “certain powers existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers” (198 U.S. 45, 53), these “police powers” of the state were also limited. Otherwise, the Court said, the Fourteenth Amendment would be meaningless and the state could regulate anything without any limit. The province of the Supreme Court, it said, was to decide if the state law was “a fair, reasonable and appropriate exercise of the police power of the State, or it [was] an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family” (198 U.S. 45, 56).

It could not be alleged that the state had a right or obligation to protect any citizen against his or her ignorance, since the citizens in general, and the bakers employed by Mr. Lochner in this particular case, “are in no sense wards of the State” (198 U.S. 45, 57). The Court said that bakers “are able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action” (198 U.S. 45, 57).

The Court thought “that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employee” (198 U.S. 45, 59). Consequently, the State of New York exceeded its powers when it passed the *Bakeshop Act*, since the regulation was not related to any health issue, and to regulate the hours that bakers could or could not work interfered with the right of the bakeshop owners to contract with their employees. Thus, the Supreme Court of the United States reversed the judgments of the states courts and remanded the case to the initial County Court “for further proceedings not inconsistent with this opinion” (198 U.S. 45, 65).

Four of the nine Justices dissented, arguing that the police power of the state extends “to prescribe regulations to promote the health, peace, morals, education, and good order of the people” (198 U.S. 45, 65). Citing

an extensive number of precedents, the dissenting Justices pointed out that “the power of the courts to review legislative action in respect of a matter affecting the general welfare exists only ‘when that which the legislature has done comes within the rule that, if a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law’” (198 U.S. 45, 68). Furthermore, said the dissenting Justices, “when the validity of a statute is questioned, the burden of proof, so to speak, is upon those who assert it to be unconstitutional” (198 U.S. 45, 68). And then, “[i]f there be doubt as to the validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation. If the end which the legislature seeks to accomplish be one to which its power extends, and if the means employed to that end, although not the wisest or best, are yet not plainly and palpably unauthorized by law, then the court cannot interfere” (198 U.S. 45, 68). In his particular dissent, Justice Oliver Wendell Holmes, Jr., accused the majority vote of trying to impose their personal beliefs and prejudices on the whole country and he maintained that “a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*” (198 U.S. 45, 75).

The specific detail of the “10-hour working day” in the *Lochner* opinion was repealed by *Bunting v. Oregon*, 243 U.S. 426 (1917); but the Supreme Court held the *Lochner* precedent, and the substantive due process doctrine, until *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), systematically turning down most of the state and federal legislation that had begun to limit the economic rights of employers.

A FRUSTRATED PRESIDENT: *A.L.A. SCHECHTER POULTRY CORP. V. UNITED STATES*

The Great Depression that followed the financial Crash of 1929 was an economic crisis that nearly paralyzed the commercial and social structures of the United States. The plunge of the stock market resulted in a massive fall in consumer spending and, misfortunes never travelling alone, a severe drought caused great damage to agricultural production. By comparison with the economic performance in 1929, industrial production in 1932 had dropped 46%, commodity prices 32%, and foreign trade 70%. Consequently, unemployment had risen, with six times the

number of people out of work in 1929, the hardships affecting up to 25% of the labor force.

Unable to formulate a program to solve the economic crisis or, at least to ameliorate it, President Hoover, who in the Presidential campaign of 1928 had promised “a chicken in every pot and a car in every garage,” failed in his bid for reelection in 1932. Within his first 100 days in office, his successor in the Presidency, Franklin D. Roosevelt, sent Congress a large number of bills, proposing public programs aimed at restoring the economy, which the Democrats-majority Congress consistently enacted. Among those public programs, known collectively as the New Deal, was the *National Industrial Recovery Act* (NIRA or NRA), whose general goals were “[t]o encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes.” By means of those laws, Congress intended “to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of Industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources.” As part of the NIRA execution process, the government issued a number of codes and regulations, one aimed specifically at the poultry industry.

Schechter Poultry Corporation was a slaughterer and wholesaler of poultry. The Schechter brothers purchased live chickens, slaughtered them following Orthodox Jewish rituals, and sold them mainly to butchers and retail stores, though they also sold to private individuals in the Orthodox Jewish community of New York. The federal government charged Schechter Poultry with, among other things, “the sale to a butcher of an unfit chicken,” sales to people without a commercial license, avoiding inspections and falsifying the accounting records, and conspiracy.

After being convicted in the lower courts, Schechter Poultry appealed to the Supreme Court of the United States. The Court unanimously reversed and held unconstitutional both the poultry code and the National Industrial Recovery Act enabling it. The Court ruled, in the first place, that the President had no power to issue those codes, since Article I of the Constitution granted all legislative powers to Congress and the legislature

could not bestow on others what was its own exclusive power. Secondly, the NIR Act allowed the President to issue “codes of fair competition.” But, said the Court, “fair competition” was a term vague enough to allow the President to regulate anything, even to create new laws without requiring the approval of Congress. Moreover the Court was of the view that the federal indictment in this case was against the Commerce Clause of the Constitution, which, though it allowed the federal government to

Oliver Wendell Holmes (1841-1935) was an American jurist and Associate Justice of the Supreme Court of the United States. He was born in Massachusetts to a prominent family and graduated from Harvard University in 1861. That same year Holmes enlisted in the Massachusetts militia to fight in the Civil War, where he was twice wounded. Once the war was over, Holmes returned to Harvard to study law. Having been admitted to the Bar in 1866, he practiced law with a small firm in Boston. In 1881 he published his book *The Common Law* and the following year was appointed Associate Justice of the Supreme Judicial Court of Massachusetts, eventually becoming its Chief Justice. In 1902, Oliver W. Holmes was appointed to the Supreme Court by President Theodore Roosevelt during recess, and was unanimously confirmed by the Senate later on. Holmes served as a Justice of the Court until he was 90 years of age. After Chief Justice John Marshall, whose wisdom guided the infancy of the United States, Oliver Wendell Holmes is the American jurist most frequently cited in and outside the United States. Among his contributions are the developments of legal realism or what is termed the “clear and present danger” doctrine by which the First Amendment he said the right to freedom of speech did not protect against “falsely shouting fire in a theatre and causing a panic” [in *Schenck v. United States*, 249 U.S. 47 (1919)]. With the time, Holmes was to be greatly influential in the critical legal studies movement and in the economic analysis of law.

regulate interstate commerce, would not apply to the commercial activities of Schechter Poultry because these were limited to the State of New York. Additionally, the Court did not find a clear connection between the regulation of minimum wages and the operation of interstate commerce.

In spite of President Roosevelt labeling the *NIRA Act* as “the most important and far-reaching ever enacted by the American Congress,” the Supreme Court of the United States held unanimously that the law exceeded constitutional limits because it illegally granted to the executive branch a power that was legislative in nature. The Court pointed out too that Congress was making an improper use of the Commerce Clause.

Once the NIRA had been declared unconstitutional, most of the New Deal programs depending on that Act came to a halt. One after another, all the cases of this nature reaching the Supreme Court were turned down and the federal laws declared unconstitutional. The continuous nullification of his programs frustrated President Roosevelt to the point of preparing a bill, entitled *Judicial Procedures Reform Bill of 1937*, which would change the number of justices in the Supreme Court, and described previously as the *Court-packing Plan*.

THE END OF THE LOCHNER ERA: *WEST COAST HOTEL CO. V. PARRISH*

The Supreme Court was originally constituted with six Justices, a Chief Justice and five Associate Justices. As the federal judiciary grew and new circuit courts were added, the number of Supreme Court Justices increased too. One of the functions of the Justices while the Supreme Court was not in session was to preside as circuit justices. As new states joined the Union, new circuit courts were created and, consequently, the number of Justices to preside over them also had to be increased. At its maximum, there were ten Justices in the Court, eventually being reduced to the present nine, which has been considered to be the most effective number.

Buried in the Judicial Procedures Reform Bill of 1937, was a clause that authorized the President to appoint a new Justice, up to a maximum of six, for every Justice older than 70 years of age. The justification given in the bill was the need to reduce the workload of older Justices. In truth, the clause would allow President Roosevelt to “pack” the Court with new Justices more favorable to his policies and supportive of his projects. At the time that the bill was going to be introduced in Congress, the Supreme Court had to decide on the *West Coast Hotel Co. v. Parrish* case.

Elsie Parrish was a chambermaid working for the West Coast Hotel Company. Parrish sued West Coast for receiving a lower salary than the minimum wage for a 48-hour week, determined by the Industrial Welfare Committee and the Supervisor of Women in Industry of the State of Washington. Using the current Supreme Court precedents, the lower state

court ruled for the employer. But the supreme court of the State of Washington reversed and found in favor of the employee. Then, the employer appealed to the Supreme Court of the United States.

Given the *Lochner* precedent, everything pointed toward a Court decision against the minimum wages and the limited working week. Surprisingly, the Court ruled 5 to 4 that the Constitution allowed state legislation to limit contractual freedom and the liberty of contract. Therefore, the state had the power to regulate working hours where such restrictions protected the community or the health and safety of vulnerable groups, such as women.

THE LABOR UNIONS RIGHTS: *NATIONAL LABOR RELATIONS BOARD V. JONES & LAUGHLIN STEEL CORPORATION*

Fifteen days after its ruling on *West Coast Hotel Co. v. Parrish*, and the same day that the *Judicial Procedures Reform Bill* was submitted to Congress, the Supreme Court decided in the case of *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, along with four more cases related to labor relations, in favor of the federal legislation comprised in the *National Labor Relations Act*.

The nullification of the *NIR Act* in the *Schechter* case by the Supreme Court had caused a retreat from President Roosevelt's *New Deal* policies. The response of the executive had been to push for a new law, the *National Labor Relations Act*, prohibiting labor practices considered unfair. (It should be noted that this law, with appropriated updates, is the law of the land to this day.) Among the practices considered unfair were: restraining or coercing employees from joining labor organizations, discriminating against employees for supporting a labor organization, and refusing to bargain collectively with the representative of the employees.

Jones & Laughlin Steel, one of the largest American steel producers in the 1930s, was charged by the *National Labor Relations Board* (NLRB) of discriminating against workers who wanted to join a labor union and firing ten employees at one of its plants in Pennsylvania after it had become unionized. The NLRB ruled against the company and ordered that workers be rehired and given back pay. But Jones & Laughlin refused to comply with the NLRB ruling and alleged that the *National Labor Relations Act* was unconstitutional on the basis that it attempted to regulate manufacturing, which was an intrastate activity and, consequently, beyond the scope of the Commerce Clause. Citing the existing Supreme Court precedent in *A.L.A. Schechter Poultry Corp. v. United States*, the

lower courts ruled in favor of Jones & Laughlin. The NLRB appealed then the case to the Supreme Court of the United States.

The Supreme Court posed three questions: 1. Does Congress have the powers to regulate manufacturing activity when this activity is significantly internal commerce within the state? 2. Is Congress within its powers to use the Commercial Clause to regulate labor relations? 3. What kind of activities may Congress regulate under the Commerce Clause? To the first two questions the Court answered categorically in the affirmative. To the third question the Court answered that “[a]lthough activities may be internal to the state in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control” (301 U.S. 1. 37). To determine its jurisdiction Congress no longer had to differentiate between the “direct” and “indirect” effects of state commerce, but rather had to determine whether the regulated activity could have a “significant effect” on interstate commerce.

The Court recognized “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection” (301 U.S. 1. 33) as fundamental rights. Thus, any violation of such fundamental rights was a proper subject for regulation by a competent legislative authority. And that “competent legislative authority,” i.e., the Congress of the United States, was not confined to regulate only in the case of “direct” obstacles to the intercourse of interstate commerce, but rather could extend to any other obstacles that could have any “significant effect” over that intercourse.

Nevertheless, the United States had a “dual system of government” and the power of the Commerce Clause “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.” The question was one of “degree”. The Court ruled that “Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause and it is primarily for Congress to consider and decide the fact of the danger and meet it.” (301 U.S. 1. 37.) In the case of *Jones & Laughlin Steel Corporation*, a halt in production caused by a labor con-

flict certainly had an immediate, direct and paralyzing effect on the industry and interstate commerce. By a vote of 5 to 4, the conclusion of the Supreme Court was “that the order of the [National Labor Relations] Board was within its competency and that the Act [was] valid as here applied” (301 U.S. 1. 49). The judgment of the lower court was reversed.

It cannot be said with certainty if the Justices sincerely changed their previous position regarding Roosevelt legislation, or if the threat of the *Court-Packing Plan* helped them change their mind. The fact is that, as already mentioned, the Supreme Court decided the same day four other cases – *National Labor Relations Board v. Fruehauf Trailer Co.*, 301 U.S. 49 (1937); *National Labor Relations Board v. Friedman-Harry Marks Clothing Co.*, 301 U. S. 58 (1937); *Associated Press v. National Labor Relations Board*, 301 U. S. 103 (1937); and *Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board*, 301 U. S. 142 (1937)– all of which were about labor relations and are known as the *Labor Board* cases. In all of them the Court followed the pattern that had been established few days earlier, in the case of *West Coast Hotel Co. v. Parrish*, in which the Court ruled for the federal government, thereby giving the green light to President Roosevelt’s *New Deal* programs. That pattern would continue all the way through the 1970’s.

CHAPTER 6 QUESTIONS

1. – What types of federal tax could the Federal Government impose prior to the Sixteenth Amendment?
2. – How was the intent of the Seventeenth Amendment frustrated and what were the eventual circumstances that enabled an acceptable formula to be proposed?
3. – What was “The Prohibition”?
4. – How are the 18th and 21st Amendments linked and what reasons underlay their ineffectiveness?
5. – What historical and social circumstances led to the necessity for the 19th Amendment?
6. – What was the *New Deal*? Was it necessary? Was it successful?
7. – What was the Supreme Court response to the initial measures of the *New Deal*?
8. – What was the *Court-packing Plan*? Why did the President consider it necessary and how was the situation eventually resolved?
9. – What are the differences between the opinions expressed by the Supreme Court in the cases of *Lochner v. New York* and of *West Coast Hotel Co. v. Parrish*?
10. – Are there any constitutional “trade union rights” in the United States? Explain your answer.

CHAPTER 6 DOCUMENTS

AMENDMENTS TO THE CONSTITUTION

AMENDMENT XVI

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

AMENDMENT XVII

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

AMENDMENT XVIII

{Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and

all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.}

AMENDMENT XIX

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XX

Section 1. The terms of the President and the Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3^d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3^d day of January, unless they shall by law appoint a different day.

Section 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may

choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

AMENDMENT XXI

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

SYLLABI OF SUPREME COURT DECISIONS

LOCHNER V. NEW YORK, 198 U.S. 45 (1905)

Syllabus [from the Legal Information Institute of Cornell University]

Argued: February 23, 24, 1905 – Decided: April 17, 1905

The general right to make a contract in relation to his business is part of the liberty protected by the Fourteenth Amendment, and this includes the right to purchase and sell labor, except as controlled by the State in the legitimate exercise of its police power.

Liberty of contract relating to labor includes both parties to it; the one has as much right to purchase as the other to sell labor.

There is no reasonable ground, on the score of health, for interfering with the liberty of the person or the right of free contract, by determining the hours of labor, in the occupation of a baker. Nor can a law limiting

such hours be justified a a health law to safeguard the public health, or the health of the individuals following that occupation.

Section 110 of the labor law of the State of New York, providing that no employes shall be required or permitted to work in bakeries more than sixty hours in a week, or ten hours a day, is not a legitimate exercise of the police power of the State, but an unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract in relation to labor, and, as such, it is in conflict with, and void under, the Federal Constitution.

This is a writ of error to the County Court of Oneida County, in the State of New York (to which court the record had been remitted), to review the judgment of the Court of Appeal of that State affirming the judgment of the Supreme Court, which itself affirmed the judgment of the County Court, convicting the defendant of a misdemeanor on an indictment under a statute of that State, known, by its short title, as the labor [p46] law. The section of the statute under which the indictment was found is section 110, and is reproduced in the margin, (together with the other sections of the labor law upon the subject of bakeries, being sections 111 to 115, both inclusive). The indictment averred that the defendant wrongfully and unlawfully required and permitted an employee working for him in his biscuit, bread and cake bakery and confectionery establishment, at the city of Utica, in this county, to work more than sixty hours in one week, after having been theretofore convicted of a violation of the same act, and therefore, as averred, he committed the crime or misdemeanor, second offense. The plaintiff in error demurred to the indictment on several grounds, one of which was that the facts stated did not [p47] constitute a crime. The demurrer was overruled, and the plaintiff in error having refused to plead further, a plea of not guilty was entered by order of the court and the trial commenced, and he was convicted of misdemeanor, second offense, as indicted, and sentenced to pay a fine of \$50 and to stand committed until paid, not to exceed fifty days in the Oneida County jail. A certificate of reasonable doubt was granted by the county judge of Oneida County, whereon an appeal was taken to the Appellate Division of the Supreme Court, Fourth Department, where the judgment of conviction was affirmed. 73 App.Div.N.Y. 120. A further appeal was then taken to the Court of Appeals, where the judgment of conviction was again affirmed. 177 N.Y. 145. [p52]

(The complete document can be found in <http://www.law.cornell.edu/supct/html/historics/USSC_CR_0198_0045_ZS.html> [verified May 30, 2012].)

A.L.A. SCHECHTER POULTRY CORP. v. UNITED STATES, 295 U.S. 495 (1935)

Syllabus [from the Legal Information Institute of Cornell University]

Argued: May 2, 3, 1935 --- Decided: May 27, 1935 [*]

1. Extraordinary conditions, such as an economic crisis, may call for extraordinary remedies, but they cannot create or enlarge constitutional power. P. 528.
2. Congress is not permitted by the Constitution to abdicate, or to transfer to others, the essential legislative functions with which it is vested. Art. I, § 1; Art. I, § 8, par. 18. *Panama Refining Co. v. Ryan*, 293 U.S. 388. P. 529.
3. Congress may leave to selected instrumentalities the making of subordinate rules within prescribed limits, and the determination of facts to which the policy, as declared by Congress, is to apply; but it must itself lay down the policies and establish standards. P. 530.
4. The delegation of legislative power sought to be made to the President by § 3 of the *National Industrial Recovery Act* of June 16, 1933, is unconstitutional (pp. 529 et seq.), and the *Act* is also unconstitutional, as applied in this case, because it exceeds the power of Congress to regulate interstate commerce and invades the power reserved exclusively to the States (pp. 542 et seq.).
5. Section 3 of the *National Industrial Recovery Act* provides that “codes of fair competition,” which shall be the “standards of fair competition” for the trades and industries to which they relate, may be approved by the President upon application of representative associations of the trades or industries to be affected, or may be prescribed by him on his own motion. Their provisions [p496] are to be enforced by injunctions from the federal courts, and “any violation of any of their provisions in any transaction in or affecting interstate commerce” is to be deemed an unfair method of competition within the meaning of the *Federal Trade Commission Act*, and is to be punished as a crime against the United States. Before approving, the President is to make certain findings as to the character of the association presenting the code and absence of design to promote monopoly or oppress small enterprises, and must find that it will “tend to

effectuate the policy of this title.” Codes permitting monopolies or monopolistic practices are forbidden. The President may “impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees and others, and in the furtherance of the public interest, and may provide such exceptions and exemptions from the provisions of such code,” as he, in his discretion, deems necessary “to effectuate the policy herein declared.” A code prescribed by him is to have the same effect as one approved on application.

Held:

(1) The statutory plan is not simply one of voluntary effort; the “codes of fair competition” are meant to be codes of laws. P. 529.

(2) The meaning of the term “fair competition” (not expressly defined in the Act) is clearly not the mere antithesis of “unfair competition,” as known to the common law, or of “unfair methods of competition” under the *Federal Trade Commission Act*. P. 531.

(3) In authorizing the President to approve codes which “will tend to effectuate the policy of this title,” § 3 of the Act refers to the Declaration of Policy in § 1. The purposes declared in § 1 are all directed to the rehabilitation of industry and the industrial recovery which was the major policy of Congress in adopting the Act. P. 534.

(4) That this is the controlling purpose of the code now before the Court appears both from its repeated declarations to that effect and from the scope of its requirements. P. 536.

(5) The authority sought to be conferred by § 3 was not merely to deal with “unfair competitive practices” which offend against existing law, or to create administrative machinery for the application of established principles of law to particular instances of violation. Rather, the purpose is clearly disclosed to authorize new and controlling prohibitions through codes of laws which would embrace what the formulators would propose, and what the President [p497] would approve or prescribe, as wise and beneficent measures for the government of trades and industries, in order to bring about their rehabilitation, correction and improvement, according to the general declaration of policy in § 1. Codes of laws of this sort are styled “codes of fair competition.” P. 535.

(6) A delegation of its legislative authority to trade or industrial associations, empowering them to enact laws for the rehabilitation and expansion of their trades or industries, would be utterly inconsistent with the constitutional prerogatives and duties of Congress. P. 537.

(7) Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade and industry. P. 537.

(8) The only limits set by the Act to the President's discretion are that he shall find, first, that the association or group proposing a code imposes no inequitable restrictions on admission to membership and is truly representative; second, that the code is not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and third, that it "will tend to effectuate the policy of this title" -- this last being a mere statement of opinion. These are the only findings which Congress has made essential in order to put into operation a legislative code having the aims described in the "Declaration of Policy." P. 538.

(9) Under the Act, the President, in approving a code, may impose his own conditions, adding to or taking from what is proposed, as "in his discretion" he thinks necessary "to effectuate the policy" declared by the Act. He has no less liberty when he prescribes a code on his own motion or on complaint, and he is free to prescribe one if a code has not been approved. P. 538.

(10) The acts and reports of the administrative agencies which the President may create under the Act have no sanction beyond his will. Their recommendations and findings in no way limit the authority which § 3 undertakes to vest in him. And this authority relates to a host of different trades and industries, thus extending the President's discretion to all the varieties of laws which he may deem to be beneficial in dealing with the vast array of commercial activities throughout the country. P. 539.

(11) Such a sweeping delegation of legislative power finds no support in decisions of this Court defining and sustaining the [p498] powers granted to the Interstate Commerce Commission, to the Radio Commission, and to the President when acting under the "flexible tariff" provisions of the Tariff Act of 1922. P. 539.

(12) Section 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead, it authorizes the making of codes to prescribe them. For that legislative undertaking, it sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion found in § 1. In view of the broad scope of that declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. The code-making authority thus sought to be conferred is an unconstitutional delegation of legislative power. P. 541.

6. Defendants were engaged in the business of slaughtering chickens and selling them to retailers. They bought their fowls from commission men in a market where most of the supply was shipped in from other States, transported them to their slaughterhouses, and there held them for slaughter and local sale to retail dealers and butchers, who in turn sold directly to consumers. They were indicted for disobeying the requirements of a "Code of Fair Competition for the Live Poultry Industry of the Metropolitan Area in and about the City of New York," approved by the President under § 3 of the National Industrial Recovery Act. The alleged violations were: failure to observe in their place of business provisions fixing minimum wages and maximum hours for employees; permitting customers to select individual chickens from particular coops and half-coops; sale of an unfit chicken; sales without compliance with municipal inspection regulations and to slaughterers and dealers not licensed under such regulations; making false reports, and failure to make reports relating to range of daily prices and volume of sales.

Held:

(1) When the poultry had reached the defendants' slaughterhouses, the interstate commerce had ended, and subsequent transactions in their business, including the matters charged in the indictment, were transactions in intrastate commerce. P. 542.

(2) Decisions which deal with a stream of interstate commerce -- where goods come to rest within a State temporarily and are later to go forward in interstate commerce -- and with the regulation [p499] of transactions involved in that practical continuity of movement, are inapplicable in this case. P. 543.

(3) The distinction between intrastate acts that directly affect interstate commerce, and therefore are subject to federal regulation, and those that affect it only indirectly, and therefore remain subject to the power of the States exclusively, is clear in principle, though the precise line can be drawn only as individual cases arise. Pp. 544, 546.

(4) If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to federal control. P. 546.

(5) The distinction between direct and indirect effects has long been clearly recognized in the application of the *Anti-Trust Act*. It is fundamental and essential to the maintenance of our constitutional system. P. 547.

(6) The Federal Government cannot regulate the wages and hours of labor of persons employed in the internal commerce of a State. No justification for such regulation is to be found in the fact that wages and hours affect costs and prices, and so indirectly affect interstate commerce, nor in the fact that failure of some States to regulate wages and hours diverts commerce from the States that do regulate them. P. 548.

(7) The provisions of the code which are alleged to have been violated in this case are not a valid exercise of federal power. P. 550.

CERTIORARI on the petition of defendants in a criminal case to review the judgment below insofar as it affirmed convictions on a number of the counts of an indictment and, on the petition of the Government, to review the same judgment insofar as it reversed convictions on other counts. The indictment charged violations of a "Live Poultry Code," and conspiracy to commit them. [p519]

(The complete document can be found in <http://www.law.cornell.edu/supct/html/historics/USSC_CR_0295_0495_ZS.html> [verified May 30, 2012].)

WEST COAST HOTEL CO. v. PARRISH, 300 U.S. 379 (1937)

Syllabus [from the Legal Information Institute of Cornell University]

Argued: December 16, 17, 1936 – Decided: March 29, 1937

1. Deprivation of liberty to contract is forbidden by the Constitution if without due process of law, but restraint or regulation of this liberty, if reasonable in relation to its subject and if adopted for the protection of the community against evils menacing the health, safety, morals and welfare of the people, is due process. P. 391.

2. In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. P. 393.

3. The State has a special interest in protecting women against employment contracts which through poor working conditions, long hours or scant wages may leave them inadequately supported and undermine their health; because:

(1) The health of women is peculiarly related to the vigor of the race;

(2) Women are especially liable to be overreached and exploited by unscrupulous employers; and

(3) This exploitation and denial of a living wage is not only detrimental to the health and wellbeing of the women affected, but casts a direct burden for their support upon the community. Pp. 394, 398, et seq.

4. Judicial notice is taken of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. P. 399.

5. A state law for the setting of minimum wages for women is not an arbitrary discrimination because it does not extend to men. P. 400.

6. A statute of the State of Washington (Laws, 1913, c. 174; Remington's Rev.Stats., 1932, § 7623 et seq.) providing for the establishment of minimum wages for women, held valid. *Adkins v. Children's Hospital*, 261 U.S. 525, is overruled; *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, distinguished. P. 400.

[p380] This was an appeal from a judgment for money directed by the Supreme Court of Washington, reversing the trial court, in an action by a chambermaid against a hotel company to recover the difference between the amount of wages paid or tendered to her as per contract and a larger

amount computed on the minimum wage fixed by a state board or commission. [p386]

(The complete document can be found in <http://www.law.cornell.edu/supct/html/historics/USSC_CR_0300_0379_ZS.html> [verified May 30, 2012].)

NATIONAL LABOR RELATIONS BOARD v. JONES & LAUGHLIN STEEL CORPORATION, 301 U.S. 1 (1937)

Syllabus [from the Legal Information Institute of Cornell University]

Argued: February 10, 11, 1937 – Decided: April 12, 1937

1. The distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal form of government. P. 29.
2. The validity of provisions which, considered by themselves, are constitutional, held not affected by general and ambiguous declarations in the same statute. P. 30.
3. An interpretation which conforms a statute to the Constitution must be preferred to another which would render it unconstitutional or of doubtful validity. P. 30.
4. Acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional [p2] power, and this includes acts, having that effect, which grow out of labor disputes. P. 31.
5. Employees in industry have a fundamental right to organize and select representatives of their own choosing for collective bargaining, and discrimination or coercion upon the part of their employer to prevent the free exercise of this right is a proper subject for condemnation by competent legislative authority. P. 33.
6. The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a “flow” of such commerce. Pp. 34-36.
7. Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential, or appropriate, to protect that

commerce from burdens and obstructions, Congress has the power to exercise that control. P. 37.

8. This power must be considered 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 would, in view of our complex society, effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree. P. 37.

9. Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce, is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. P. 37.

10. The close and intimate effect which brings the subject within the reach of federal power may be due to activities in relation to productive industry, although the industry when separately viewed is local. P. 38.

11. The relation to interstate commerce of the manufacturing enterprise involved in this case was such that a stoppage of its operations by industrial strife would have an immediate, direct and paralyzing effect upon interstate commerce. Therefore, Congress had constitutional authority, for the protection of interstate commerce, to safeguard the right of the employees in the manufacturing plant to self-organization and free choice of their representatives for collective bargaining. P. 41. [p3]

Judicial notice is taken of the facts that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace, and that refusal to confer and negotiate has been one of the most prolific causes of strife.

12. The National Labor Relations Act of July 5, 1935, empowers the National Labor Relations Board to prevent any person from engaging in unfair labor practices "affecting commerce"; its definition of "commerce" (aside from commerce within a territory or the District of Columbia) is such as to include only interstate and foreign commerce, and the term "affecting commerce" it defines as meaning in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

The “unfair labor practices,” as defined by the Act and involved in this case, are restraint or coercion of employees in their rights to self-organization and to bargain collectively through representatives of their own choosing, and discrimination against them in regard to hire or tenure of employment for the purpose of encouraging or discouraging membership in any labor organization. §§ 7 and 8. The Act (§ 9a) declares that representatives, for the purpose of collective bargaining, of the majority of the employees in an appropriate unit shall be the exclusive representatives of all the employees in that unit; but that any individual employee or a group of employees shall have the right at any time to present grievances to their employer. Held:

(1) That in safeguarding rights of employees and empowering the Board, the statute, insofar as involved in the present case, confines itself to such control of the industrial relationship as may be constitutionally exercised by Congress to prevent burden or obstruction to interstate or foreign commerce arising from industrial disputes. P. 43.

(2) The Act imposes upon the employer the duty of conferring and negotiating with the authorized representatives of the employees for the purpose of settling a labor dispute, but it does not preclude such individual contracts as the employer may elect to make directly with individual employees. P. 44.

(3) The Act does not compel agreements between employers and employees. Its theory is that free opportunity for negotiation [p4] with accredited representatives of employees is likely to promote industrial peace, and may bring about the adjustments and agreements which the Act, in itself, does not attempt to compel. P. 45.

(4) The Act does not interfere with the normal right of the employer to hire, or with the right of discharge when exercised for other reasons than intimidation and coercion, and what is the true reason in this regard is left the subject of investigation in each case, with full opportunity to show the facts. P. 45.

13. A corporation which manufactured iron and steel products in its factories in Pennsylvania from raw materials, most of which it brought in from other States, and which shipped 75% of the manufactured products out of Pennsylvania and disposed of them throughout this country and in Canada, was required by orders of the National Labor Relations Board to tender reinstatement to men who had been employed in one of the factories but were discharged because of their union activities and for the pur-

pose of discouraging union membership. The orders further required that the company make good the pay the men had lost through their discharge, and that it desist from discriminating against members of the union, with regard to hire and tenure of employment, and from interfering by coercion with the self-organization of its employees in the plant. Held that the orders were authorized by the National Labor Relations Act, and that the Act is constitutional as thus applied to the company. Pp. 30, 32, 34, 41.

14. The right of employers to conduct their own business is not arbitrarily restrained by regulations that merely protect the correlative rights of their employees to organize for the purpose of securing the redress of grievances and of promoting agreements with employers relating to rates of pay and conditions of work. P. 43.

15. The fact that the National Labor Relations Act subjects the employer to supervision and restraint and leaves untouched the abuses for which employees may be responsible, and fails to provide a more comprehensive plan, with better assurance of fairness to both sides and with increased chances of success in bringing about equitable solutions of industrial disputes affecting interstate commerce, does not affect its validity. The question is as to the power of Congress, not as to its policy, and legislative authority, exerted within its proper field, need not embrace all the evils within its reach. P. 46. [p5]

16. The National Labor Relations Act establishes standards to which the Board must conform. There must be complaint, notice and hearing. The Board must receive evidence and make findings. These findings as to the facts are to be conclusive, but only if supported by evidence. The order of the Board is subject to review by the designated court, and only when sustained by the court may the order be enforced. Upon that review, all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority, are open to examination by the court. These procedural provisions afford adequate opportunity to secure judicial protection against arbitrary action, in accordance with the well settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation. P. 47.

17. The provision of the National Labor Relations Act, § 10(c), authorizing the Board to require the reinstatement of employees found to have been discharged because of their union activity or for the purpose of discouraging membership in the union, is valid. P. 47.

18. The provision of the Act, § 10(c), that the Board, in requiring reinstatement, may direct the payment of wages for the time lost by the discharge, less amounts earned by the employee during that period, does not contravene the provisions of the Seventh Amendment with respect to jury trial in suits at common law. P. 48.

CERTIORARI, 299 U.S. 534, to review a decree of the Circuit Court of Appeals declining to enforce an order of the National Labor Relations Board. [p22]

(The complete document can be found in <http://www.law.cornell.edu/supct/html/historics/USSC_CR_0301_0001_ZS.html> [verified May 30, 2012].)

CHAPTER 7

CIVIL RIGHTS IN THE SECOND HALF OF THE 20TH CENTURY

The Constitutional Amendments of the Second Half of the 20th Century – Presidential Tenure: The 22nd Amendment – Poll Taxes: The 24th Amendment – Voting Age: The 26th Amendment – Congress Salaries: The 27th Amendment – The Supreme Court opinions on Civil Rights – Ending Racial Discrimination: *Brown v. Board of Education* – Rights of Detainees & Police Duties: *Miranda v. Arizona* – The Right to Abort: *Roe v. Wade* and *Planned Parenthood v. Casey* – The Rights of Unauthorized Immigrants: *Plyler v. Doe*

During the second half of the 20th century, the most significant issues on American constitutionalism have been related to citizens' rights and especially to the interpretation that the Supreme Court of the United States has made of those rights (Hall, p. 398). Some of those rights – recognized by constitutional amendments or by Supreme Court decisions – are studied in this chapter.

The most frequent reference to the individual rights and liberties guaranteed in the American Constitution is as “civil rights.” That term can be found as far back as the 17th century. For example, in the Charter of Rhode Island and Providence Plantations, of 1663, the text refers to “the free exercise and enjoyment of all their civill and religious rights, appertaining to them [the colonists], as our loveing subjects” (Grau 2009, vol. II, p. 16). The Fathers of the nation used that term in the earliest American constitutions, written during the years 1776 to 1778. The first constitution of New Jersey said, “no Protestant inhabitant of this Colony shall be denied the enjoyment of any civil right” (Ibid., vol. III, p. 100); the constitution of Pennsylvania said that no person shall “be justly deprived or

abridged of any civil right as a citizen” (Ibid., p. 148); Maryland protected its citizens “in their natural, civil or religious rights” (Ibid., p. 182); and the constitutions of Vermont written in 1777 and 1786 said that no man shall “be justly deprived or abridged of any civil right, as a citizen” (Ibid., p. 312, 550). The same thing occurred in the Southern states: The second constitution of South Carolina, of 1778, for example, had proclaimed that “Christian protestants in this State, demeaning themselves peaceably and faithfully, shall enjoy equal religious and civil privileges” (Ibid., p. 358). The Act for establishing religious freedom of Virginia, of 1786, stated “that our civil rights have no dependence on our religious opinions” (Ibid., p. 558). In the Ordinance for the Government of the Territory of the United States, North-West of the River Ohio, of 1787, laws and constitutions were enacted for “extending the fundamental principles of civil and religious liberty” (Ibid., p. 600).

Civil rights are defined as “the individual rights of personal liberty guaranteed by the Bill of Rights and by the 13th, 14th, 15th, and 19th Amendments to the Constitution, as well as by legislation such as the *Voting Rights Act*. Civil rights include especially the right to vote, the right of due process of law and the right of equal protection under the law” (*Black’s Law Dictionary*). To these should be added the 26th Amendment and those rights conferred in the Constitution itself, which included the writ of habeas corpus, intellectual property rights, the right to a trial by jury, and so on.

The “right to vote” is, thus, considered a civil right. But it is undoubtedly a political right too, defining “the right to participate in the establishment or administration of government, such as the right to vote or the right to hold public office” (Ibid.). Thus, in the United States the line separating civil and political rights is not clearly defined and frequently political rights are considered part of the civil rights.

A fundamental right, on the other hand, is “a right derived from natural or fundamental law.” Constitutionally, a fundamental right is “a significant component of liberty, encroachments of which are rigorously tested by courts to ascertain the soundness of purported governmental justifications” (Ibid.). The Supreme Court has considered “fundamental rights” those without which neither liberty nor justice would exist. Through the time, the Court has built a catalog of rights, which are considered “fundamental” in accordance with the previous definition. Among those rights are the rights of citizens to vote, to interstate travel, and certain aspects of personal intimacy, such as the right to marry or exercise

birth control. It should be noted that the last three rights do not appear explicitly in the Constitution, the Bill of Rights or any of the Amendments.

Other terms that are frequently used overseas, such as “social rights”, “cultural rights”, or “third-generation rights”, are not commonly used in the American constitutional literature or in the opinions of the Supreme Court. On the other hand, the term “civil liberty” defined as “freedom from undue government interference or restrain[t]” is widely employed. “The term usually refers to freedom of speech or religion” says the usual authority, *Black’s Law Dictionary*. “Civil liberties” include “economic liberties,” which are fundamental to American society and are interpreted as “constitutional rights concerning the ability to enter into and enforce contracts; to pursue a trade or profession; and to acquire, possess, and convey property” (Chemerinsky, p. 605).

Another important concept necessary to a coherent understanding of the American constitutional environment is that the Supreme Court, and by extension any federal court, can neither hear cases involving an abstract concept nor give “advisory opinions,” such as the relevance of a particular civil right. The jurisdiction of the federal courts extends exclusively to “cases” and “controversies” (U.S. Const. Art. III, Sec. 2). “Case” and “controversy” have much the same meaning, but the term “case” is used solely for civil claims. These “cases and controversies” cannot be “unripe,” meaning that the controversy has not arisen yet or is “moot,” which means that the controversy has already been resolved. The parties in the case or controversy must have “standing”, or “standing to sue,” meaning that they have a “right to make a legal claim or seek judicial enforcement of a duty or right.” To have standing in federal court, a plaintiff must show (1) that the challenged conduct has caused the plaintiff actual injury, and (2) that the interest sought to be protected is “within the zone of interest meant to be regulated by the statutory or constitutional guarantee in question” (*Black’s Law Dictionary*). What all this means is that the dispute must be actual and real, not faked. (One exception to these requirements was in the case of *Roe v. Wade*, which is studied later in this Chapter. The Supreme Court understood that pregnancies would always come to term before the judicial process could complete. So it heard the case although “Ms. Roe” had already given birth and her case had become “moot.”) The corollary of the mentioned *Cases and Controversies Clause* is that federal courts have no constitutional power to render “advisory opinions.”

Another general observation is that the principle of *stare decisis* does not apply rigidly to the United States Supreme Court in constitutional cases. *Stare decisis* – “to stand by things decided” – is a fundamental

principle in common law legal systems, used to maintain legal certainty. *Stare decisis* is defined as “the doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points are at issue in subsequent litigation.” “Precedent” is “a decided case that furnishes a basis for determining later cases involving similar facts or issues” (Ibid.). Although not a frequent occurrence, the Supreme Court has reversed previous opinions and it is not obliged to give much explanation of its reasons for doing so.

We can infer from all the above that it is not an easy task to determine precisely and specifically which rights are constitutionally protected in the United States. Previous references in our study of the Bill of Rights and other Amendments made obvious how insufficient they are to fix a definite outcome. To that we should add specific rights that particular states may recognize in their constitutions but are not included in the federal Constitution. Moreover, any list of rights made today will not be good tomorrow. Freedom of contract was a fundamental right during the *Lochner Era*, but after *West Coast Hotel Co. v. Parrish*, for instance, that was no longer true. In his edition of 1946 of *Leading Constitutional Decisions*, Robert Eugene Cushman said the most relevant civil and political rights of citizenship were; double jeopardy; privacy of personal communications; certain aspects of blacks’ voting right; freedom of the press; freedom of expression; freedom from coercion “to be a witness against himself;” “to have the Assistance of Counsel for his defense;” equal services for blacks and whites; and freedom of contract. (Note that *West Coast Hotel Co. v. Parrish* had already been decided in 1937!) Sixty-five years later, in 2012, cases involving civil rights were classified, though not exhaustively, into affirmative action; ballot access; constitutional poverty law; debtors’ rights; deportation; desegregation (in schools); disability rights; employment of aliens; employment discrimination; citizenship; permanent residence; welfare benefits; jurisdiction over Native Americans; indigents; juveniles; military personnel; reapportionment; residency requirements; rights of illegitimates; sex discrimination; “sit-in” demonstrations; voting; and so on. To these should be added rights deriving directly from the First Amendment, such as, again not exhaustively, campaign spending; commercial speech; conscientious objectors; establishment of religion; Federal internal security legislation; free exercise of religion; legislative investigation; libel; obscenity... as well as rights related to personal privacy, such as abortion; contraceptives; freedom of information; right to die; and everything pertaining to membership of trade unions and freedom of association. (The lists are derived from *The Oyez Project* at Chicago-Kent

College of Law: <<http://www.oyez.org/issues/Civil%20Rights>> [verified Aug. 16, 2012].)

Above and beyond those mentioned civil rights, are those conferred by the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments. The Supreme Court attaches more importance to the Due Process Clause than to any other constitutional clause when deciding whether government has illicitly invaded the fundamental rights of citizens. Of medieval English origin, due process means, basically, fundamental fairness and justice, and it is closely linked to the concept of the law of the land and its fair application in equal measure to everyone.

The Supreme Court recognizes two types of due process: procedural (in civil and criminal proceedings), and substantive due process. In this second type of due process, the Court first recognizes a given fundamental right (often not elaborated), such as the freedom of contract, and then applies—for example, as in the case of *Lochner*—the concept of substantive due process to invalidate those laws limiting the fundamental right. In the procedural due process, on the other hand, the Court verifies the process used by the government to deprive any citizen “of life, liberty, or property,” declaring unconstitutional and void the government’s action or law prescribed in the case if “it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental” (*Snyder v. Massachusetts*, 291 U.S. 97, 105). The Supreme Court has also read into the Due Process Clause a prohibition against vague laws, and it has used this as the key to incorporate the Bill of Rights in the state constitutions. Several examples of the use of the Due Process Clause can be found in the Court opinions included in this Chapter.

THE CONSTITUTIONAL AMENDMENTS OF THE SECOND HALF OF THE 20TH CENTURY

From 1951 to 1992, six amendments to the Constitution were ratified, making it the most active period in the constitutional development of the United States since the ratification of the Bill of Rights. During that period, the texts of two additional amendments were submitted to the states, but they failed to achieve the “three fourths of the several States” needed for ratification. Of the six amendments ratified, half were about the framing of the government, and the other half about citizens’ rights, specifically the right to vote. Of the first group, one amendment limits to two the Presidential terms of a candidate; another describes in complex detail the process for presidential succession; and the third places certain restraints

on the salaries of Congresspersons. By the other three amendments, any kind of polling taxes are prohibited (what once was considered a requirement to vote, was now an unjustifiable violation of the same right to vote); citizens of the Capital, Washington D.C. are granted the right to vote in the presidential elections; and the voting age is lowered to 18, being set the same as the recruitment age. Only four of the six amendments are discussed here (but the texts of the other two have been included with the documents of this Chapter).

The two amendments failing to achieve ratification in this period were the “Equal Rights Amendment,” proposed in 1972, making illegal any government discrimination based on a citizen’s sex; and the “District of Columbia Voting Rights Amendment,” proposed in 1978, giving the residents of Washington, D.C. equal representation in Congress as the rest of the citizens in the nation.

PRESIDENTIAL TENURE: THE 22ND AMENDMENT

The original text of the Constitution had established no limit to the number of terms a person could serve as President. None of the Presidents, however, served more than two terms, or eight years. That is, until Franklin D. Roosevelt reached the Presidency.

The first President, George Washington, did not seek reelection after his second term. He did not give a clear reason for his decision, but in a republican system of government, without offices for life (except for certain judges), tenure without limits would have turned the Presidency into an “elected monarchy.” In his Farewell Address, of 1796, Washington made excuse of his age. “[E]very day,” he said, “the increasing weight of years admonishes me more and more that the shade of retirement is as necessary to me as it will be welcome.” In 1879, an attempt to nominate President Ulysses S. Grant as the Republican candidate for what would have been his third term, failed. The first President to actually run for a third term was Theodore Roosevelt in 1912, but he was unable to muster enough electoral votes. For one reason or another, none of the 31 Presidents before Franklin D. Roosevelt served more than eight years. Without an explicit limit in the Constitution, the two-term limit had become a generally accepted custom or tradition. But in 1940, that custom changed.

In 1932, Franklin D. Roosevelt, popularly known as “FDR,” reached the Presidency in the middle of the Great Depression. As it has been indicated, that was one of the most complex periods of American history. FDR used his Inauguration speech to announce his *New Deal* plan and,

within the first 100 days of taking office, his Administration had pushed for legislation aimed toward an economic recovery. Four years later, FDR was reelected for a second term in a landslide victory, the result of the help of Catholics, union members, intellectuals, and the working class people at large, as well as a little improvement in the economy. For the elections of 1940, and with war in Europe already unleashed, Roosevelt joked at the Democratic Convention that he would have to be drafted to run for a third term. He was nominated by a 9 to 1 majority and won the election in 38 of the 48 states. Four years later, by the time of the elections in 1944, Roosevelt's health was precarious, but still he won the fourth term by a similar massive margin. In April of 1945, after more than twelve years in the Presidency, FDR died of a massive stroke.

The achievements of Roosevelt's administration were unquestionable and his fellow citizens showed him their appreciation in and out of the polls. (He is considered, after Abraham Lincoln, to have been the best President in the history of the United States.) But the twelve continuous years of his Presidency caused a debate in Congress on the wisdom of setting a constitutional limit to the number of Presidential terms. It was not an easy decision, and, as the accompanying text of the Report of the House of Representatives shows, "much discussion has resulted upon this subject. Hence it is the purpose of this ... [proposal] ... to submit this question to the people so they, by and through the recognized processes, may express their views upon this question, and if they shall so elect, they may ... thereby set at rest this problem" [H.R. Rep. No. 17, 80th Cong., 1st Sess. 2 (1947)]. And definitively there was no unanimity in the "views," because it took almost four years to "set at rest this problem" and get the 22nd Amendment ratified.

The text of the Amendment expressly excluded, from the eight-year rule, the President-in-office when the Amendment was proposed. He was President Harry S. Truman, who in 1952 tried to run for a third term, but having failed to get enough supporters, pulled out of the candidacy race at the beginning of the campaign.

The Amendment has been repeatedly criticized because the President is left in a lame duck situation toward the end of his second term, lacking effective power when he cannot be reelected. However, all attempts to repeal the amendment have failed so far. One of the alternatives under consideration has been to modify the Amendment to limit it to serve no more than two continuous terms. Nevertheless, the limit in duration of the President's office is a fundamental characteristic of a republican system, going back to the Revolutionary period. Today, everything

points both toward maintaining the two-term limit for the Presidency and imposing a similar restriction for the leadership positions of both Houses of Congress.

POLL TAXES: THE 24TH AMENDMENT

The right to vote had been linked to the ownership of land property since the earliest time, and to that ownership was tied the obligation to pay taxes. Most of the first state constitutions required a citizen to pay a tax to be allowed to vote for the election of representatives. In South Carolina, in 1776, the constitution established in its Sec. XI that “persons having property, which, according to the rate of the last preceding tax, is taxable at the sums mentioned in the election act, shall be entitled to vote” (Grau 2009, vol. III, p. 58). In Chap. II, Sec. 6, of Pennsylvania’s constitution, “[e]very freemen of the full age of twenty-one years, having resided in this state for the space of one whole year next before the day of election for representatives, and paid public taxes during that time, shall enjoy the right of an elector” (Ibid., p. 152). In Sections 8 & 9 of the constitution of North Carolina is stated “[t]hat all freemen of the age of twenty-one years, who have been inhabitants of any County within this State twelve months immediately preceding the day of any election, and shall have paid public taxes, shall be entitled to vote for members of the House of Commons for the county in which he resides;” and “[t]hat all persons possessed of a freehold in any Town in this State, having a right of representation, and also all freemen who have been inhabitants of any such town twelve months next before and at the day of election, and shall have paid public taxes, shall be entitled to vote for a member to represent such Town in the House of Commons (Ibid., p. 230). In Georgia, “Every male white inhabitant, of the age of twenty-one years, and possessed, in his own right, of ten pounds value, and liable to pay tax in this State, or being of any mechanic trade, and who shall have been a resident six months in this State, shall have a right to vote at all elections for Representatives, or any other officers herein agreed to be chosen by the people at large” (Ibid., p. 600). In the State of New York, Section VII of its constitution stated that “every male inhabitant of full age, who shall have personally resided within one of the counties of this state for six months immediately preceding the day of election, shall, at such election, be entitled to vote for representatives of the said county in assembly; if, during the time aforesaid, he shall have been a freeholder, possessing a freehold of the value of twenty pounds, within the said county, or have rented a tenement therein of the yearly

value of forty shillings, and been rated and actually paid taxes to this state” (Ibid., p. 284). And in New Hampshire, in 1784, “[e]very male inhabitant of each town and parish with town privileges in the several counties in this

Harry S. Truman (1884-1972) was an American politician and 33rd President of the United States. He was born in Missouri, into a humble farming family, had a basic education only and held menial jobs until enlisting in the Missouri National Guard in 1905, where he served for six years. Truman reenlisted in 1917 when the United States entered the World War I conflict, fighting in France as an artillery captain. After returning from France, Truman opened a haberdashery shop and joined the Democratic Party. In 1922 his business went bankrupt, but the same year he was elected county commissioner. In 1933 he was appointed Missouri’s director for the Federal Re-Employment program of the *New Deal*, and the next year was elected U.S. Senator for Missouri. In the Presidential elections of 1944, Truman was chosen as Vice-President on the Democratic ticket. When Roosevelt died in April of 1945, Truman became President of the United States. A few weeks later war ended in the European theater, but bloody fighting continued in the Pacific. Truman ordered the dropping of two atomic bombs over Japan in August of 1945, causing Japan’s unconditional surrender. During the Presidential campaign of 1948, Truman issued an Executive Order, racially integrating the U.S. Armed Forces and imposing a requirement that “there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin.” Against all odds, Truman won that election. The United Nations and the North Atlantic Treaty Organization were established during President Truman’s tenure, and he approved the Marshall Plan. Once his Presidency ended, and without any personal estate, Truman was left without any income and almost in poverty. In 1958, Congress passed the Former Presidents Act, offering a \$25,000 yearly pension to each former president.

state, of twenty-one years of age and upwards, paying for himself a poll tax, shall have a right [...] to vote in the town or parish wherein he dwells, for the senators in the county” (Ibid., p. 518).

In the other state constitutions, even though there was no express mention of the taxes, suffrage was a consequence of the ownership of land and, consequently, of paying taxes. In Massachusetts, for example, the Declaration of Rights guaranteed, in its Section IX, that “[a]ll elections ought to be free, and every inhabitant of the state having the proper qualifications, ha[d] equal right to elect, and be elected into office” (Ibid., p. 506), but in 1780 the “qualifications” to elect a senator were to be a “male inhabitant of twenty-one years of age and upwards, having a freehold estate within the Commonwealth, of the annual income of three pounds, or any estate of the value of sixty pounds” (Ibid., p. 406); and the members of the House of Representatives were elected by “[e]very male person, being twenty-one years of age, and resident in any particular town in this Commonwealth for the space of one year next preceding, having a freehold estate within the same town, of the annual income of three pounds, or any estate of the value of sixty pounds” (Ibid., p. 414).

Nevertheless, even prior to the Constitution of 1787 it was already acknowledged as an undemocratic approach to demand the payment of taxes for exercising the right to vote. Thus, the Declaration of Rights of Maryland, of 1776, recognized in its Section 13 “[t]hat the levying taxes by the poll is grievous and oppressive, and ought to be abolished” (Ibid., p. 178). The rejection of poll taxes grew from the first years of the Republic right up to the Civil War, with most of the qualifications requiring the payment of taxes being eliminated. But that situation changed after the Civil War and the Reconstruction Amendments, first in the Southern states, but later on extending to some of the Northern and Western states.

The Fourteenth Amendment, which extended the right to vote to African-Americans, was not favorably received in the Southern States. Since 1868, when the Amendment was adopted, many subterfuges were used to prevent blacks from exercising their right to vote. Among these was, firstly, to require voters a level of literacy that most African-Americans could not have and had no means of achieving; secondly, a process was introduced prior to the election date to “evaluate” the qualifications of the electors to vote, but African-Americans were not called for evaluation, so these voters were rejected at the booths for failing to meet the “previous requirement;” thirdly, primaries “for whites only” were organized to express a preference over the Party candidates, but then participation in the primary was a prerequisite for voting in the general election; fourth,

but not last, the crude and plain use of force against the blacks who dared to show up at the voting booths.

Another kind of obstacle attempted to prevent blacks –and other minorities– from voting was to pass special taxes, the revenues of which were directed to very legitimate ends, such as, for example, the improvement of the schools facilities, and that were collected not at the town treasury and during the fiscal year, but right at the booths and at the time of exercising the voting right.

Contrary to ordinary taxes, these “poll taxes” were not compulsory but payable only if the individual wanted to exercise his or her right to vote. In spite of all “reconstructioning” efforts, the black population was the weakest economically, and these poll taxes –often no more than one dollar– represented an amount most of them were unable to afford. Furthermore, in many districts, sophistries such as the “grandfather clause” exempted from paying such poll taxes those people whose fathers or grandfathers had voted before a given date. That date was always chosen carefully to be prior to the ratification of the Fifteenth Amendment, when African-Americans were not allowed to vote.

By 1902, all the eleven states of the former Confederacy had passed some kind of poll tax, the legality of which was often questioned. President Franklin D. Roosevelt tried to abolish such taxes through federal legislation, but placed against the opposition of the Southern members of his own Democratic Party, he was forced to withdraw it. To make things worse, in *Breedlove v. Suttles, tax collector*, of 1937, the Supreme Court of the United States recognized the constitutional validity of such poll taxes. In 1939, the House of Representatives prepared a Bill to void poll taxes in Federal elections; but the Senate filibustered it. The same situation happened again in 1946. In 1948, President Harry S. Truman organized the Civil Rights Committee, which reached the conclusion that the best way to abolish all poll taxes was through an amendment to the Constitution. During the 1950's, however, anti-communist priorities pushed all activities related to civil rights into the background, including the eradication of poll taxes. Finally, President John F. Kennedy sought to avoid new filibusters in the Senate and pushed for an amendment declaring any poll tax to be unconstitutional.

In 1962, Congress submitted to the states the 24th Amendment for their ratification, which was achieved in 1964, thereby abolishing any kind of poll tax in Federal elections. At the time of enactment, the States of Alabama, Arkansas, Mississippi, Texas, and Virginia, had some kind of poll tax legislation on their codes.

Even after the adoption of the 24th Amendment, the states continued to invent ways of preventing African-Americans and other minorities from voting. For example, Virginia required the voter to obtain a “resident’s certificate” six months in advance of the elections. This administrative process proved to be more expensive and inconvenient than the former “\$1 poll tax for the schools.”

In *Harman et al. v. Forssenius et al.*, of 1965, the Supreme Court unanimously decided that “[f]or federal elections, the poll tax [was] abolished absolutely as a prerequisite to voting, and no equivalent or milder substitute may be imposed. Any material requirement imposed upon the federal voter solely because of his refusal to waive the constitutional immunity subverts the effectiveness of the Twenty-fourth Amendment and must fall under its ban” (380 U.S. 528, 542). But since the text specifically stated that the Amendment applied to the elections “for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress,” many states continued to demand poll taxes for state and local elections. In 1966, the Supreme Court ruled, in *Harper v. Virginia Board of Elections*, that any poll tax, either in Federal or in state or local elections, was unconstitutional because it violated, not the 24th Amendment, but the *Equal Protection Clause* of the Fourteenth Amendment.

All these Amendments and Supreme Court opinions do not mean the problems in the electoral process have been totally resolved, as the 2000 Presidential election proved. Many votes in this election, paradoxically of African-Americans and other minorities mainly, were discarded due to problems caused by the complex design of the ballots. In other states, the electoral censuses had many errors in the spelling of names, addresses, Code Ids, etc., of voters, even though the information was taken directly from the files of the Motor Vehicle Administrations, which, paradoxically too, had no errors when processing traffic violations. Any discrepancy between the electoral census list and the voter identity document –normally a driving license issued by the same MVA!– results in the disallowance of the vote. This is a problem that gets solved within minutes by issuing an “exception vote” at the polling station itself. But these “exception votes” are not counted except in the case of a tied vote. Although improbable, this approach could change the final result and, in any case, it alters the statistics and distorts the published percentages.

VOTING AGE: THE 26TH AMENDMENT

In 1968, the involvement of the United States in the Vietnam War reached half a million troops, and to that date it had sustained more than 36,000 deaths. Many of these casualties were part of the regular draft that since 1942 had been fixed at the age of 18 years.

During WWII, many citizens were in favor of reducing the minimum age of voters to 18 years. The slogan “Old enough to fight, old enough to vote” became popular. Student protests grew during the Vietnam War, putting pressure on the President and Congress to lower the minimum age to vote from 21 to 18 years. In spite of knowing its questionable constitutionality, President Richard Nixon signed a law that set the voting age at 18 years for every kind of election, both federal and state. As expected, Oregon and Texas challenged in court the constitutionality of the law. When the case *Oregon v. Mitchell*, of 1970, reached the Supreme Court, it found for Oregon, ruling that Congress could set voting requirements in federal elections, but did not have the power to set the voting age for state elections.

By the next year, Congress had approved the final text of this amendment and sent it to the legislatures of the states for its ratification. Within a brief one hundred days, the Amendment had been ratified and adopted. President Nixon signed it three days later. The 26th Amendment partially overruled the Supreme Court decision in *Oregon v. Mitchell*, and modified Sec. 2 of the Fourteenth Amendment.

CONGRESS SALARIES: THE 27TH AMENDMENT

A curious anecdote of this Amendment is that it was one of the amendments originally proposed when the Bill of Rights was approved, back in 1789. In the original proposal sent to the states, the amendment was second in a list of twelve. The ultimate goal of this Amendment is to remind legislators that they are exclusively the administrators of the public treasury, not its owners.

Back when the Bill of Rights was ratified in 1791, this Amendment was rejected by five states –New Jersey, New Hampshire, New York, Pennsylvania, and Rhode Island– of the fourteen then in the Union, what thereby made its ratification impossible. Contrary to recent Amendments (after the 18th), the original text of the amendment did not include any clause limiting the time needed to reach the “three-fourths of the states” requirement for its ratification.

In 1873, almost one hundred years after the Amendment had first been originally proposed, the House of Representatives had passed a law, sarcastically dubbed the *Salary Grab Act*, by which, the salaries of the President and Supreme Court Justices were doubled and the salaries of all members of Congress were raised by 50 percent, all of them retrospective-

John F. Kennedy (1917-1963) was an American politician and 35th President of the United States. He was born in Massachusetts, to an Irish-Catholic family, and in 1940 graduated cum laude from Harvard University. In 1941 he joined the Navy and, when Japan declared war on the United States, Kennedy was promoted to Lieutenant and assigned to the Pacific theater, commanding a patrol torpedo boat, and winning a medal for heroism. In 1946, Kennedy was elected U.S. Representative for Massachusetts, and in 1952 U.S. Senator for the same state. In 1960 he won the Presidential election against Richard Nixon. In his brief term, popularly known as Camelot, Kennedy pushed for legislation in favor of civil rights; established the volunteer program Peace Corps; started the American space program; sent the first American troops to Vietnam; authorized the ill-fated Bay of Pigs invasion; and dealt with the Cuban Missile Crisis among many other activities. John F. Kennedy was assassinated in Dallas, Texas, in 1963, while campaigning for his reelection.

ly. Shortly afterward, in protest against what was perceived as an abuse of power, and recognizing that there was no possible way to repeal the Federal Act, the Ohio General Assembly decided to ratify the forgotten Amendment.

Again the Amendment was dormant until 1978 when, for similar reasons to those of 1873, Congresspersons having raised their own salaries, this time by 30 percent, Wyoming legislature ratified the Amendment, becoming the 8th state to do so.

In spite of these isolated efforts, the Amendment remained forgotten and with little chances to achieve the additional 30 ratifications needed for it to be adopted. But in 1982, Gregory Watson, a student in the University of Texas, started a postal campaign to the legislatures of the states that had not ratified the Amendment. He urged them to ratify it in order to avoid the abuses that were currently taking place in Congress.

Its members had raised their salaries well above the cost-of-living index, retroactively and with no more control than the improbable Presidential veto.

Over the course of ten years, the Amendment achieved the required number of ratifications for adoption and, in 1992, two hundred years after

Richard M. Nixon (1913-1994) was an American politician and 37th President of the United States. Born in California, into a poor, strict Quaker family, he attended Duke University School of Law through a scholarship, graduating in 1937 third in his class. After the Pearl Harbor attack, Nixon joined the Navy, reaching the rank of Lieutenant Commander. In 1946, Nixon was elected U.S. Representative for California and in 1950 U.S. Senator for that state. In 1952 he was appointed Vice-President on the Republican ticket of Eisenhower, remaining in that office during Eisenhower's two terms. In the 1960 Presidential election, Nixon was defeated by John F. Kennedy; but he won the Presidency in 1968, after the withdrawal of President Johnson as a candidate and the assassination of Robert F. Kennedy. Reelected in 1972, Nixon resigned the Presidency in 1974, in the midst of the Watergate scandal and the threat of impeachment. A few months later, his successor, President Gerald Ford, granted him a general pardon for any federal crimes or misdemeanors that Nixon could have committed. Initially condemned to a political wilderness, by 1975 Nixon was again in public life, granting interviews and giving speeches, and his activities continued until 1991, a few years before his death. During his Presidency, Nixon negotiated a cease-fire with North Vietnam, ending the Vietnam War; he initiated diplomatic relations with the Popular Republic of China; he signed the first antiballistic missile treaty with the USSR; he established the Environmental Protection Agency; he pushed forward civil rights legislation; he enforced school desegregation in Southern states; he furthered cancer research; and he initiated the war on drugs, among many other accomplishments.

it was originally proposed, it became the 27th, and for now, last, Amendment to the Constitution.

The controversy did not end with the belated ratifications from the states. Title 1 of the *Code of Laws of the United States* (also known

as *United States Code*, or *USC*) had been modified shortly beforehand. It now assigned to the Archivist of the United States (the chief official overseeing the operation of the National Archives and Records Administration) the task of certifying the state ratifications of all constitutional amendments. Fulfilling strictly his legal assignment, the Archivist published the adoption of the 27th Amendment without previously notifying Congress, and this caused irate protests from some of its most important and relevant members. They complained that tradition demanded that the legislators, as direct representatives of the People, be notified first.

THE SUPREME COURT OPINIONS ON CIVIL RIGHTS

During the second half of the 20th century, the Supreme Court of the United States was even more diligent than Congress in its consideration of civil rights issues. In a very large number of Court opinions, new rights were recognized, old rights became ratified, and proper enforcement was demanded of the states. It is not feasible within these pages to make an exhaustive study of all the Supreme Court opinions of the period. The five cases we explore below give an outline of the work of the court in matters of universal interest.

After 1954, with the arrival of Chief Justice Earl Warren and the decision *Brown v. Board of Education*, the Court took a very proactive attitude toward the recognition of many civil rights. This is in remarkable contrast to the decision made ten years previously, when the Court had issued one of its most infamous decisions in *Korematsu v. United States*, of 1944. Then it had affirmed the sentence of an inferior court convicting an American citizen, of Japanese ancestry, who, in defiance of an Executive Order, remained in his home and did not voluntarily report to an internment camp, as people of Japanese origin had been required to do during World War II. The most positive side of the *Korematsu* decision in 1944 was that it applied the strict scrutiny standard to racial discrimination by government, although the Court failed in its intentions by contradicting its own position.

In addition to *Brown v. Board of Education*, the Court decisions described here include one case on the rights of detainees and the requirements on police interrogation; two cases on the right of a woman to abort, showing the original position of the Court and its subsequent evolution; and finally one case on the rights of illegal immigrants.

ENDING RACIAL DISCRIMINATION: *BROWN V. BOARD OF EDUCATION*

From the foregoing discussion of Amendments and Supreme Court opinions, we can see that the path to racial equality, or, at the very least, the elimination of racial segregation in the United States, has been long and tortuous. After decisions such as *Dred Scott* or *Plessy*, the real condition of black citizens, and generally of any "Non-Caucasian," was one of great inferiority, socially, politically, and even legally, as compared to white citizens. Finally, in 1954, the attitude of the Justices of the Supreme Court, from their lofty position on the bench, changed to the point of declaring that such situations were radically unacceptable.

Mr. Oliver L. Brown and another thirteen parents, all of them black citizens, filed in the Federal District Court a class action suit against the Board of Education of the City of Topeka, Kansas, demanding an end to the policy of racial segregation in the "separate but equal" elementary schools of the city. Such policy, for example, forced Mr. Brown's daughter, of eight years of age, to walk six blocks to her school bus stop and then to ride one mile to her segregated black school, while a school designated for white-only children was just seven blocks from her house.

The plaintiffs argued that the state laws requiring racial segregation, in this case in public schools, but equally in restaurants, public transportation, theaters, or even in the drinking fountains on the street, deprived them of equal rights. They claimed that, even in those circumstances where conditions in black and white schools were the same –what was already doubtful–, they were deprived of the Equal Protection guaranteed by the Fourteenth Amendment. Using *Plessy v. Ferguson* as the precedent, the inferior courts found for the Board of Education. But when the case reached the Supreme Court, the decision was unanimously in favor of the Plaintiffs.

The Court asked itself: "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive children of a minority group of equal educational opportunities? We believe that it does," the Court categorically affirmed. It "conclude[d] that, in the field of public education, the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we [the Court] hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."

In spite of the categorical language in the decision, the desegregation of schools did not happen instantly. Furthermore, understanding the difficult task ahead, the Court left to the discretion of the executive powers of the states the decision of the specific measures that each state had to take to carry out the ruling. Many Southern states tried all kinds of evasions to keep their public schools segregated. So the Supreme Court was called upon to decide several subsequent cases, declaring unconstitutional many subterfuges employed by the states to avoid desegregation. In 1964, in the case *Griffin v. County School Board of Prince Edward County* – commonly known as *Brown II* – the Court declared unconstitutional the policy of closing all public schools in the county and handing vouchers to the students, both white and black, to pay for private schooling. At the time, all private schools in Prince Edward County were segregated, and since these were not constitutionally required to desegregate, they could turn down any black student trying to register. The Court unanimously ordered the School Board to reopen the public schools.

The County School Board of New Kent County set up a “freedom of choice desegregation plan” that allowed parents to choose freely the school they wanted their own children to attend. The result of the plan was that the majority of white parents sent their children to white schools, and black parents did much the same, sending their children to black schools. Thus, a de facto segregation remained. In *Green v. County School Board of New Kent County*, of 1968, the Supreme Court held that the “freedom of choice desegregation plan” did not comply with *Brown v. Board of Education* and was, therefore, unconstitutional. The Court ordered the county to find different means to integrate its schools.

The school system of the Charlotte-Mecklenburg County, in North Carolina, was highly segregated simply because of the distribution of schools in areas populated by the white and the black citizens. Since most white students lived in predominantly white neighborhoods and black students lived in black neighborhoods, the schools in each area were accordingly predominantly white or black. In 1965, James E. Swann and other black parents filed suit in federal court asking for the school system to be desegregated. One of the plans proposed to balance the number of black and white students in a given school was “busing.” It meant transporting the children by bus to a school outside their residential area as a means of achieving racial balance in a particular school, regardless of the existence of another school closer to the residence of the students. In *Swann v. Charlotte-Mecklenburg County Board of Education*, of 1971, the Court unanimously held that “busing” was constitutionally sound in

pursuance of racial balance, even if the imbalance was solely the result of the proximity of the students' homes to a particular school. By moving students to different schools, students would be "properly" integrated and thereby would receive equal educational opportunities. (Intriguingly, Mecklenburg County was the first American community to declare, in 1775, that "Great Britain, was an enemy to this country –to America– and to the inherent and inalienable rights of man" and declared independence from the mother nation.)

RIGHTS OF DETAINEES & POLICE DUTIES: *MIRANDA V. ARIZONA*

In *Miranda v. Arizona*, of 1966, the Supreme Court recognized that the police violated the Fifth, Sixth and Fourteenth Amendments by interrogating detainees without previously notifying them of their constitutional rights, which allowed them to remain silent and to have their attorneys present during their interrogation.

Ernesto Miranda was convicted of rape and kidnapping on the basis of his own-signed confession after two hours of police interrogation, during which he had not been told of his rights. In a 5-to-4 decision, the Court ruled "that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation [...] As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right" (384 U.S. 436, 471-472). The Court even specifies that "[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease," and "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent" (384 U.S. 436, 473-474).

Because these stipulations had not been followed during the interrogation of Miranda, the Court reversed the previous conviction. He was retried in 1967 (the previous one was a mistrial) and, using this time the testimony of witnesses and other evidence and without using the confes-

sion, the prosecution achieved a conviction of 20-to-30 years imprisonment.

As a consequence of this Supreme Court decision, the police are required to inform arrested persons of their rights by what is called the “Miranda warning.” The decision does not spell out the precise terms of the warning and every state can regulate its own one. A typical Miranda warning could say: “You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney, and to have him or her present during your questioning. If you cannot afford an attorney, one will be provided for you by the government.” In many districts, the detainee is asked to sign a document acknowledging that he has been read his rights.

Although the Miranda doctrine has been in force since 1966, the Supreme Court has refined its requirements in subsequent decisions. To have a confession suppressed for a violation of the Miranda doctrine, there must be six circumstances:

1. Evidence must have been gathered.
2. The evidence must be testimonial. Evidence such as fingerprints, DNA, hair, and dental impressions, are physical evidence and not a confession; thus no warning is needed to gather them.
3. The confession must have been obtained while the suspect was in custody.
4. The confession was obtained during interrogation.
5. Government officials carried out the interrogation.
6. The prosecution must introduce the confession in the course of a criminal trial.

Without the concurrence of all these circumstances, the confession must be thrown out and not used in a criminal court unless the prosecution can prove that the suspect had been duly informed of his or her rights and he or she renounced the rights.

After just five years in jail (of the 20-to-30 years to which he had been sentenced) Ernesto Miranda was paroled in 1972. He made some money autographing police officers’ “Miranda cards” with the text of the warning. He was stabbed to death in a bar in 1976.

THE RIGHT TO ABORT: *ROE V. WADE* AND *PLANNED PARENTHOOD V. CASEY*

One of the most famous and universally cited decisions of the Supreme Court of the United States is *Roe v. Wade*. The precedent granting a woman the right to terminate a pregnancy in certain circumstances is, at least in the United States, one of the most controversial Court decisions and subjected to continuous risk of being overturned. The topic of abortion raises extreme public reaction and, in this case, the Supreme Court was confronting the right to privacy of women with the reserved powers of the states. The particular issue was to determine whether the state laws prohibiting or regulating abortion procedures violated the constitutional right of a woman to her privacy or her freedom to decide a particular outcome in family or marriage matters.

“Jane Roe” –a fictitious name used in the legal proceedings to protect the actual identity of Norma L. McCorvey, a resident of Texas– decided to interrupt her pregnancy. But Texas legislation in 1969 made it a crime to “procure an abortion,” with only few exceptions “for the purpose of saving the life of the mother” (410 U.S. 113, 117-118), or cases of rape or incest. Unable to get an abortion either legally or illegally, Ms. McCorvey challenged the constitutionality of the Texas anti-abortion laws, alleging these laws violated the right to individual liberty protected by the Fourteenth Amendment and the right to privacy included in the Bill of Rights. (*Wade*, in this case, was Henry Wade the Dallas County District Attorney, representing the State of Texas.)

In a 7-to-2 decision, the Supreme Court resolved in 1973 that the legitimate right to privacy under the due process clause of the Fourteenth Amendment extended to a woman’s decision to have an abortion. But her right to privacy had to be balanced against the state’s legitimate interests to protect the life of the unborn or, in the words of the Court’s opinion, the “potentiality of human life” (410 U.S. 113, 164), and the woman’s health. According to the Court, these legitimate state interests increased as the pregnancy progressed.

The Constitution does not explicitly mention any right to privacy. In a line of decisions, however, going back to 1891, the Court had recognized that a right to personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. The Supreme Court found the roots of that right in the First, Fourth, Fifth, and Ninth Amendments, and in the penumbras (rights guaranteed by implication) of the Bill of Rights, or in the concept of liberty guaranteed by the first section

of the Fourteenth Amendment. Only personal rights that can be deemed “fundamental,” or “implicit in the concept of ordered liberty,” are included in this guarantee of personal privacy. The right to privacy has some extension to activities relating to marriage, procreation, contraception, family relationships, childrearing, and education (410 U.S. 113, 152-153).

The Court considered that the fundamental right to privacy could only be limited when the legitimate interest of the state was compelling, such as when the life of the fetus is viable out of the womb. As soon as the child’s life is viable outside the womb, a constitutional protection arises for the new human being that is superior to the right to privacy of the mother.

To balance in a practical way the right to privacy of the woman with the legitimate interest of the state, the Court decided in the first instance to consider the nine months of pregnancy in three trimesters, but then the Court adjusted its approach to the consideration of a viable fetus, “that is, potentially able to live outside the mother’s womb, albeit with artificial aid” (410 U.S. 113, 161). In the first three months, when the abortion procedure is considered to be safer than bearing the child, the state could not interfere and the decision to abort was left to the mother and her physician. Prior to the viability of the fetus, the state has the freedom to intervene if it becomes necessary to protect the health of the mother. After the fetus reaches viability, the state can “regulate” –that is, “prohibit”– abortion, provided that due consideration is given to any consequent health risk to the mother. Additionally, the Court held that, in the absence of a compelling interest of the state, the physician had a right to practice medicine freely. On the other hand, the Court did reject the existence of an inalienable “right to life” of the fetus.

As indicated previously, the decision in *Roe v. Wade* has always been controversial and found opposition from many conservative fronts. Many states enacted laws regulating those aspects of abortion considered out of the right to privacy, such as parental consent in the case of minors attempting to get an abortion, spousal notification or mutual consent, waiting periods before an abortion, and other similar measures.

In 1988 and 1989, the State of Pennsylvania modified its laws on abortion, adding five new requirements that had to be checked before carrying on an abortion procedure:

1. “[T]hat a woman seeking an abortion [had to] give her informed consent prior to the procedure, and [...] she [had to] be provided with certain information at least 24 hours before the abortion is performed;”

2. “the informed consent of one parent for a minor to obtain an abortion, but provides a judicial bypass procedure;”
3. “that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband;”
4. “a ‘medical emergency’ that will excuse compliance with the foregoing requirements;” and
5. “impos[ing] certain reporting requirements on facilities providing abortion services.”

Five abortion clinics, a physician representing himself, and a class of doctors who provide abortion services, brought a suit in the District Court, seeking a declaratory judgment that each of the provisions was unconstitutional on face value, as well as injunctive relief to stop Pennsylvania in its intentions to hinder abortions. The District Court held all the provisions unconstitutional and permanently enjoined their enforcement. The Court of Appeals affirmed in part and reversed in part, striking down the requirement that a husband be notified, but upholding the others.

The case, termed *Planned Parenthood of Southeastern Pennsylvania, et al. v. Robert P. Casey, et al.* (where “Planned Parenthood of Southeastern Pennsylvania” was the name of one of the abortion clinics, and Robert P. Casey was then the Governor of Pennsylvania), reached the floor of the Supreme Court in 1992, on a writ of certiorari. The plaintiffs alleged that the new law imposed “substantial obstacles to the woman’s effective right to elect the [abortion] procedure” (505 U.S. 833, 834). The defendant, the State of Pennsylvania, and President George H. W. Bush’s Administration as *amicus curiae*, urged the Court to overturn *Roe v. Wade*, alleging it had been wrongly decided. The composition of the Court had changed substantially since *Roe*. A majority of liberal Justices then had changed to a much conservative majority now. In 1992, eight of the nine Justices had been appointed by Republican presidents. Initially, five Justices were for the overturning of the original finding, but finally Justice Antony Kennedy switched sides, and the Court issued a “plurality opinion” (that is, without a majority in all the issues), written jointly by three of the Justices, and with a divided judgment on the whole. The Court declared the law that required spousal notification prior to obtaining an abortion, unconstitutional under the Fourteenth Amendment because it created an undue burden on married women seeking an abortion. The other requirements –for parental consent for minors, informed consent, and 24-hour waiting period– were not considered an “undue burthen” or

a “substantial obstacle,” but rather constitutionally valid requirements. Certain aspects of *Roe* were, nevertheless, modified.

The plurality opinion changed the formula used in *Roe* to weigh in favor of the woman’s interest in obtaining an abortion against the State’s interest in the life of the fetus. In 1973, medical science considered viable a 28-week fetus, while by 1992, fetuses of 22 or 23 weeks survived regularly. The plurality opinion recognized viability as the point at which the state interest in the life of the fetus outweighs the rights of the woman, and the states could ban abortion entirely “except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother” (505 U.S. 833, 837).

On the other hand, four Justices “concluded that a woman’s decision to abort her unborn child is not a constitutionally protected ‘liberty’ because (1) the Constitution says absolutely nothing about it, and (2) the long-standing traditions of American society have permitted it to be legally proscribed” (505 U.S. 833, 841).

THE RIGHTS OF UNAUTHORIZED IMMIGRANTS: *PLYLER V. DOE*

Unauthorized immigration has long been an issue in the United States, and particularly in those states along the border with Mexico. The Government of the United States represented by the U.S. Department of Homeland Security does not use such terms as “illegal” or even “undocumented” immigrants, but it rather names them “unauthorized resident immigrants.” People in this category are defined as “all foreign-born non-citizens who are not legal residents [because they...] either entered the United States without inspection or were admitted temporarily and stayed past the date they were required to leave.” Since the 1970’s, the number of immigrants who have been entering the United States by irregular ways, i.e., without proper authorization, has been increasing steadily to reach almost 12 million, believed to be living within the borders by the year 2011. (Hoefler, *et al.*)

In May 1975, the Texas Legislature withheld from local school districts any state funds for the education of children who were not “legally admitted” into the United States, allowing local school districts to charge them \$1,000 yearly tuition, or even to deny them enrollment in their public schools.

A number of lawsuits were filed in both state and federal courts against different Texas School Boards by the affected families. The cases reached the Supreme Court of the United States on appeal, and were de-

cided as a class action under the full title of *James Plyler, Superintendent, Tyler Independent School District, et al. v. John Doe, et al.* Plyler appealed to the U.S. Supreme Court against an injunction of the inferior courts barring the state, and particularly the Tyler School Board, from denying free public schooling to the undocumented immigrant children. The respondents appeared in the docket as John Doe, to protect them against raids from the Immigration and Naturalization Service, given their irregular status.

To the Court, the questions to be considered were, firstly, whether the Fourteenth Amendment's Equal Protection clause applied to school-age children who have not been "legally admitted" into the United States, and, secondly, whether that same clause required the State of Texas and the Tyler Independent School District to provide to school-age children, who have not been "legally admitted" into the United States, a free public education on an equal basis with children who were legally residing in the state.

The appellants argued that the Equal Protection clause did not protect the children and alleged that the children were not "persons" within the state's jurisdiction, but individuals unlawfully living in the state and subject to deportation; that there was a "substantial state interest," which justified an exception to the equal protection clause, because Texas spent an estimated 62 million per year on these children, moneys that could better be spent on legally resident children; that free public education for undocumented children will encourage the continued influx of undocumented immigrants into Texas; that undocumented children place "special burdens" on the Texas education system, such as the hiring of additional bilingual teachers. Additionally, the state alleged that the U.S. Supreme court had earlier held that a free public education was not a "fundamental right" under the Constitution.

To the respondents, the Equal Protection clause definitively protected the undocumented children, and they rejected the allegation that the U.S. Supreme Court had previously ruled that free public education was not a fundamental right. They said that the Equal Protection provided in the Fourteenth Amendment applied to both citizens and to "any person," including aliens; that the children in this case were "persons" living within the jurisdiction of the state of Texas and subject to its laws; that the discrimination against the undocumented children was not justified by any "substantial state interest" since they represented just 1% of the school population in Texas, and the state funds to educate these children would not reduce the quality of schooling of the rest of the children. Further-

more, undocumented immigrants came to Texas seeking jobs, not educational benefits for their children; and that bilingual education and related special needs were mainly for legally resident pupils. They also claimed that, although education was not to be a “fundamental right” under the Constitution, the *Equal Protection clause* of the Fourteenth Amendment required that when a state established a public school system (as it was the case in the State of Texas), no child living in that state could be denied equal access to that schooling.

The respondents added that children should not be penalized for the illegal acts of their parents coming into the United States without proper authorization; and that failure to educate undocumented children would eventually lead to higher social costs from unemployment, welfare services, and crime. Denying a proper education to the children would keep them forever in the lowest socio-economic class.

In its opinion, by 5 votes to 4, the Court decided that, first, “[w]hatsoever his status under the immigration laws, an alien is surely a “person” in any ordinary sense of that term,” and that “[a]liens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments” (457 U.S. 202, 210). “The Equal Protection Clause,” the Court continued, “directs that ‘all persons similarly circumstanced shall be treated alike.’ [...] But so too, ‘[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.’ [...] In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose” (457 U.S. 202, 216). The legitimate public purpose was not demonstrated to be clearly behind the classification of legal and illegal resident children.

The Court then took a position removing the possibility of the sins of the parents resulting in the punishment of children. “The children who are plaintiffs in these cases are special members of this underclass [of undocumented residents]. [...] A] State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct [...]; but the children who are plaintiffs in these cases ‘can affect neither their parents’ conduct nor their own status.’ [...] L]egislation directing the onus of a parent’s misconduct against his children does not comport with fundamental conceptions of justice. (457 U.S. 202, 219-220)

As the Court had held earlier, “[p]ublic education is not a “right” granted to individuals by the Constitution [...] but the ‘American peo-

ple have always regarded education and [the] acquisition of knowledge as matters of supreme importance.’ [...] We have recognized ‘the public schools as a most vital civic institution for the preservation of a democratic system of government,’ [...] and as the primary vehicle for transmitting ‘the values on which our society rests’” (457 U.S. 202, 221).

Then, the Court made its most powerful statement in this opinion: “By denying these [undocumented] children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation” (457 U.S. 202, 223).

The Court sided with the respondents on the basis that the laws of Texas will not achieve any “preservation of the state’s limited resources for the education of its lawful residents”. Moreover, it will not “protect itself from an influx of illegal immigrants. [...] To the contrary, the available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax money to the state fisc. [...] The dominant incentive for illegal entry into the State of Texas is the availability of employment; few if any illegal immigrants come to this country, or presumably to the State of Texas, in order to avail themselves of a free education. [...] T]he record in no way supports the claim that exclusion of undocumented children is likely to improve the overall quality of education in the State” (457 U.S. 202, 228).

Lastly, the Court refuted the appellants’ argument that “undocumented children [...] because their unlawful presence within the United States renders them less likely than other children to remain within the boundaries of the State, and to put their education to productive social or political use within the State. [...] The State has no assurance that any child, citizen or not, will employ the education provided by the State within the confines of the State’s borders. In any event, the record is clear that many of the undocumented children disabled by this classification will remain in this country indefinitely, and that some will become lawful residents or citizens of the United States” (457 U.S. 202, 229-230).

The Court ruled that “if the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here. Accordingly, the judgment of the Court of Appeals in each of these cases is Affirmed” (457 U.S. 202, 230).

CHAPTER 7 QUESTIONS

1. – What are the pros and cons of limiting the office of the President to two terms?
2. – What are “poll taxes” and why are they prohibited now?
3. – Before the 26th Amendment, what was the reason for the minimum voting age of 21 years of age, while the age set for the draft was 18?
4. – What major significance does the decision in *Brown v. Board of Education* have with respect to the fight for civil rights?
5. – Describe in detail the consequences of the precedent set in the case of *Brown v. Board of Education*.
6. – What are the similarities and differences between findings in the cases of *Brown* and *Plyler*?
7. – Why do detainees have to be notified of their constitutional rights?
8. – What is the fundamental right that allows a woman to undergo a voluntarily termination to her pregnancy?
9. – Why is it constitutionally sound to require a minor to notify her parents of having a pregnancy termination? Why is it not constitutional to require a married woman to notify her husband of such a procedure?
10. – Does the *Planned Parenthood* opinion reverse *Roe v. Wade*? Explain the details.

CHAPTER 7 DOCUMENTS

AMENDMENTS TO THE CONSTITUTION

AMENDMENT XXII

Section 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

AMENDMENT XXIII

Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and

they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XXIV

Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XXV

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers

and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

AMENDMENT XXVI

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XXVII

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

SYLLABI OF SUPREME COURT DECISIONS

BROWN ET AL. V. BOARD OF EDUCATION OF TOPEKA ET AL., 347 U.S. 483 (1954)

Syllabus [from the Legal Information Institute of Cornell University]

Argued: Argued December 9, 1952 – Reargued December 8, 1953 – Decided: Decided May 17, 1954

Segregation of white and Negro children in the public schools of a State solely on the basis of race, pursuant to state laws permitting or requiring such segregation, denies to Negro children the equal protection of the laws guaranteed by the Fourteenth Amendment – even though the physical facilities and other “tangible” factors of white and Negro schools may be equal. Pp. 486-496.

(a) The history of the Fourteenth Amendment is inconclusive as to its intended effect on public education. Pp. 489-490.

(b) The question presented in these cases must be determined not on the basis of conditions existing when the Fourteenth Amendment was adopted, but in the light of the full development of public education and its present place in American life throughout the Nation. Pp. 492-493.

(c) Where a State has undertaken to provide an opportunity for an education in its public schools, such an opportunity is a right which must be made available to all on equal terms. P. 493.

(d) Segregation of children in public schools solely on the basis of race deprives children of the minority group of equal educational opportunities, even though the physical facilities and other “tangible” factors may be equal. Pp. 493-494.

(e) The “separate but equal” doctrine adopted in *Plessy v. Ferguson*, 163 U.S. 537, has no place in the field of public education. P. 495.

(f) The cases are restored to the docket for further argument on specified questions relating to the forms of the decrees. Pp. 495-496.

(The complete document can be found in <http://www.law.cornell.edu/supct/html/historics/USSC_CR_0347_0483_ZO.html> [verified May 30, 2012].)

MIRANDA v. ARIZONA, 384 U.S. 436 (1966)

Syllabus [from the Legal Information Institute of Cornell University]

Argued: February 28-March 1, 1966 – Decided: June 13, 1966

In each of these cases, the defendant, while in police custody, was questioned by police officers, detectives, or a prosecuting attorney in a room in which he was cut off from the outside world. None of the defendants was given a full and effective warning of his rights at the outset of the interrogation process. In all four cases, the questioning elicited oral admissions,

and, in three of them, signed statements as well, which were admitted at their trials. All defendants were convicted, and all convictions, except in No. 584, were affirmed on appeal.

Held:

1. The prosecution may not use statements, whether exculpatory or inculpatory, stemming from questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way, unless it demonstrates the use of procedural safeguards effective to secure the Fifth Amendment's privilege against self-incrimination. Pp. 444-491.

(a) The atmosphere and environment of incommunicado interrogation as it exists today is inherently intimidating, and works to undermine the privilege against self-incrimination. Unless adequate preventive measures are taken to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice. Pp. 445-458.

(b) The privilege against self-incrimination, which has had a long and expansive historical development, is the essential mainstay of our adversary system, and guarantees to the individual the "right to remain silent unless he chooses to speak in the unfettered exercise of his own will," during a period of custodial interrogation [p437] as well as in the courts or during the course of other official investigations. Pp. 458-465.

(c) The decision in *Escobedo v. Illinois*, 378 U.S. 478, stressed the need for protective devices to make the process of police interrogation conform to the dictates of the privilege. Pp. 465-466.

(d) In the absence of other effective measures, the following procedures to safeguard the Fifth Amendment privilege must be observed: the person in custody must, prior to interrogation, be clearly informed that he has the right to remain silent, and that anything he says will be used against him in court; he must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation, and that, if he is indigent, a lawyer will be appointed to represent him. Pp. 467-473.

(e) If the individual indicates, prior to or during questioning, that he wishes to remain silent, the interrogation must cease; if he states that he wants an attorney, the questioning must cease until an attorney is present. Pp. 473-474.

(f) Where an interrogation is conducted without the presence of an attorney and a statement is taken, a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his right to counsel. P. 475.

(g) Where the individual answers some questions during in-custody interrogation, he has not waived his privilege, and may invoke his right to remain silent thereafter. Pp. 475-476.

(h) The warnings required and the waiver needed are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement, inculpatory or exculpatory, made by a defendant. Pp. 476-477.

2. The limitations on the interrogation process required for the protection of the individual's constitutional rights should not cause an undue interference with a proper system of law enforcement, as demonstrated by the procedures of the FBI and the safeguards afforded in other jurisdictions. Pp. 479-491.

3. In each of these cases, the statements were obtained under circumstances that did not meet constitutional standards for protection of the privilege against self-incrimination. Pp. 491-499.

(The complete document can be found in <http://www.law.cornell.edu/supct/html/historics/USSC_CR_0384_0436_ZS.html> [verified May 30, 2012].)

JANE ROE, ET AL. V. HENRY WADE, DISTRICT ATTORNEY OF DALLAS COUNTY, 410 U.S. 113 (1973)

Syllabus [from the Legal Information Institute of Cornell University]

Argued: December 13, 1971 – Decided: January 22, 1973

A pregnant single woman (Roe) brought a class action challenging the constitutionality of the Texas criminal abortion laws, which proscribe procuring or attempting an abortion except on medical advice for the purpose of saving the mother's life. A licensed physician (Hallford), who had two state abortion prosecutions pending against him, was permitted to intervene. A childless married couple (the Does), the wife not being pregnant, separately attacked the laws, basing alleged injury on the future possibilities of contraceptive failure, pregnancy, unpreparedness for parenthood, and impairment of the wife's health. A three-judge District Court, which consolidated the actions, held that Roe and Hallford, and members

of their classes, had standing to sue and presented justiciable controversies. Ruling that declaratory, though not injunctive, relief was warranted, the court declared the abortion statutes void as vague and overbroadly infringing those plaintiffs' Ninth and Fourteenth Amendment rights. The court ruled the Does' complaint not justiciable. Appellants directly appealed to this Court on the injunctive rulings, and appellee cross-appealed from the District Court's grant of declaratory relief to Roe and Hallford.

Held:

1. While 28 U.S.C. § 1253 authorizes no direct appeal to this Court from the grant or denial of declaratory relief alone, review is not foreclosed when the case is properly before the Court on appeal from specific denial of injunctive relief and the arguments as to both injunctive and declaratory relief are necessarily identical. P. 123.

2. Roe has standing to sue; the Does and Hallford do not. Pp. 123-129.

(a) Contrary to appellee's contention, the natural termination of Roe's pregnancy did not moot her suit. Litigation involving pregnancy, which is "capable of repetition, yet evading review," is an exception to the usual federal rule that an actual controversy [p114] must exist at review stages, and not simply when the action is initiated. Pp. 124-125.

(b) The District Court correctly refused injunctive, but erred in granting declaratory, relief to Hallford, who alleged no federally protected right not assertable as a defense against the good faith state prosecutions pending against him. *Samuels v. Mackell*, 401 U.S. 66. Pp. 125-127.

(c) The Does' complaint, based as it is on contingencies, any one or more of which may not occur, is too speculative to present an actual case or controversy. Pp. 127-129.

3. State criminal abortion laws, like those involved here, that except from criminality only a life-saving procedure on the mother's behalf without regard to the stage of her pregnancy and other interests involved violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy. Though the State cannot override that right, it has legitimate interests in protecting both the pregnant woman's health and the potentiality of human life, each of which interests grows and reaches a "compelling" point at various stages of the woman's approach to term. Pp. 147-164.

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician. Pp. 163, 164.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. Pp. 163, 164.

(c) For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. Pp. 163-164; 164-165.

4. The State may define the term "physician" to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined. P. 165.

5. It is unnecessary to decide the injunctive relief issue, since the Texas authorities will doubtless fully recognize the Court's ruling [p115] that the Texas criminal abortion statutes are unconstitutional. P. 166.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C.J., and DOUGLAS, BRENNAN, STEWART, MARSHALL, and POWELL, JJ., joined. BURGER, C.J., post, p. 207, DOUGLAS, J., post, p. 209, and STEWART, J., post, p. 167, filed concurring opinions. WHITE, J., filed a dissenting opinion, in which REHNQUIST, J., joined, post, p. 221. REHNQUIST, J., filed a dissenting opinion, post, p. 171. [p 116]

(The complete document can be found in <http://www.law.cornell.edu/supct/html/historics/USSC_CR_0410_0113_ZS.html> [verified May 30, 2012].)

JAMES PLYLER, SUPERINTENDENT, TYLER INDEPENDENT SCHOOL DISTRICT, ET AL. V. JOHN DOE, ET AL., 457 U.S. 202 (1982)

Syllabus [from the Legal Information Institute of Cornell University]

Argued: December 1, 1981 – Decided: June 15, 1982

Held: A Texas statute which withholds from local school districts any state funds for the education of children who were not "legally admitted" into the United States, and which authorizes local school districts to deny

enrollment to such children, violates the Equal Protection Clause of the Fourteenth Amendment. Pp. 210-230.

(a) The illegal aliens who are plaintiffs in these cases challenging the statute may claim the benefit of the Equal Protection Clause, which provides that no State shall “deny to any person within its jurisdiction the equal protection of the laws.” Whatever his status under the immigration laws, an alien is a “person” in any ordinary sense of that term. This Court’s prior cases recognizing that illegal aliens are “persons” protected by the Due Process Clauses of the Fifth and Fourteenth Amendments, which Clauses do not include the phrase “within its jurisdiction,” cannot be distinguished on the asserted ground that persons who have entered the country illegally are not “within the jurisdiction” of a State even if they are present within its boundaries and subject to its laws. Nor do the logic and history of the Fourteenth Amendment support such a construction. Instead, use of the phrase “within its jurisdiction” confirms the understanding that the Fourteenth Amendment’s protection extends to anyone, citizen or stranger, who is subject to the laws of a State, and reaches into every corner of a State’s territory. Pp. 210-216.

(b) The discrimination contained in the Texas statute cannot be considered rational unless it furthers some substantial goal of the State. Although undocumented resident aliens cannot be treated as a “suspect class,” and although education is not a “fundamental right,” so as to require the State to justify the statutory classification by showing that it serves a compelling governmental interest, nevertheless the Texas statute imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. These children can neither affect their parents’ conduct nor their own undocumented status. The deprivation [p203] of public education is not like the deprivation of some other governmental benefit. Public education has a pivotal role in maintaining the fabric of our society and in sustaining our political and cultural heritage; the deprivation of education takes an inestimable toll on the social, economic, intellectual, and psychological wellbeing of the individual, and poses an obstacle to individual achievement. In determining the rationality of the Texas statute, its costs to the Nation and to the innocent children may properly be considered. Pp. 216-224.

(c) The undocumented status of these children *vel non* does not establish a sufficient rational basis for denying them benefits that the State affords other residents. It is true that, when faced with an equal protection

challenge respecting a State's differential treatment of aliens, the courts must be attentive to congressional policy concerning aliens. But in the area of special constitutional sensitivity presented by these cases, and in the absence of any contrary indication fairly discernible in the legislative record, no national policy is perceived that might justify the State in denying these children an elementary education. Pp. 224-226.

(d) Texas' statutory classification cannot be sustained as furthering its interest in the "preservation of the state's limited resources for the education of its lawful residents." While the State might have an interest in mitigating potentially harsh economic effects from an influx of illegal immigrants, the Texas statute does not offer an effective method of dealing with the problem. Even assuming that the net impact of illegal aliens on the economy is negative, charging tuition to undocumented children constitutes an ineffectual attempt to stem the tide of illegal immigration, at least when compared with the alternative of prohibiting employment of illegal aliens. Nor is there any merit to the suggestion that undocumented children are appropriately singled out for exclusion because of the special burdens they impose on the State's ability to provide high-quality public education. The record does not show that exclusion of undocumented children is likely to improve the overall quality of education in the State. Neither is there any merit to the claim that undocumented children are appropriately singled out because their unlawful presence within the United States renders them less likely than other children to remain within the State's boundaries and to put their education to productive social or political use within the State. Pp. 227-230.

No. 80-1638, 628 F.2^d 448, and No. 80-1934, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. MARSHALL, J., post, p. 230, BLACKMUN, J., post, p. 231, and POWELL, J., post, p. 236, filed concurring opinions. BURGER, C.J., filed a dissenting opinion, in which WHITE, REHNQUIST, and O'CONNOR, JJ., joined, post, p. 242. [p 205]

(The complete document can be found in <http://www.law.cornell.edu/supct/html/historics/USSC_CR_0457_0202_ZO.html> [verified May 30, 2012].)

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA ET AL. V. CASEY, GOVERNOR OF PENNSYLVANIA, ET AL., 505 U.S. 833 (1992)

Syllabus [from the Legal Information Institute of Cornell University]

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

Argued April 22, 1992 – Decided June 29, 1992

At issue are five provisions of the Pennsylvania Abortion Control Act of 1982: § 3205, which requires that a woman seeking an abortion give her informed consent prior to the procedure, and specifies that she be provided with certain information at least 24 hours before the abortion is performed; § 3206, which mandates the informed consent of one parent for a minor to obtain an abortion, but provides a judicial bypass procedure; § 3209, which commands that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband; § 3203, which defines a “medical emergency” that will excuse compliance with the foregoing requirements; and §§ 3207(b), 3214(a), and 3214(f), which impose certain reporting requirements on facilities providing abortion services. Before any of the provisions took effect, the petitioners, five abortion clinics and a physician representing himself and a class of doctors who provide abortion services, brought this suit seeking a declaratory judgment that each of the provisions was unconstitutional on its face, as well as injunctive relief. The District Court held all the provisions unconstitutional and permanently enjoined their enforcement. The Court of Appeals affirmed in part and reversed in part, striking down the husband notification provision but upholding the others.

Held: The judgment in No. 91-902 is affirmed; the judgment in No. 91-744 is affirmed in part and reversed in part, and the case is remanded.

947 F. 2^d 682: No. 91-902, affirmed; No. 91-744, affirmed in part, reversed in part, and remanded.

Justice O’Connor, Justice Kennedy, and Justice Souter delivered the opinion of the Court with respect to Parts I, II, and III, concluding that:

1. Consideration of the fundamental constitutional question resolved by *Roe v. Wade*, 410 U.S. 113, principles of institutional integrity, and the rule of stare decisis require that Roe's essential holding be retained and reaffirmed as to each of its three parts: (1) a recognition of a woman's right to choose to have an abortion before fetal viability and to obtain it without undue interference from the State, whose previability interests are not strong enough to support an abortion prohibition or the imposition of substantial obstacles to the woman's effective right to elect the procedure; (2) a confirmation of the State's power to restrict abortions after viability, if the law contains exceptions for pregnancies endangering a woman's life or health; and (3) the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. Pp. 1-27.

(a) A reexamination of the principles that define the woman's rights and the State's authority regarding abortions is required by the doubt this Court's subsequent decisions have cast upon the meaning and reach of Roe's central holding, by the fact that The Chief Justice would overrule Roe, and by the necessity that state and federal courts and legislatures have adequate guidance on the subject. Pp. 1-3.

(b) Roe determined that a woman's decision to terminate her pregnancy is a "liberty" protected against state interference by the substantive component of the Due Process Clause of the Fourteenth Amendment. Neither the Bill of Rights nor the specific practices of States at the time of the Fourteenth Amendment's adoption marks the outer limits of the substantive sphere of such "liberty." Rather, the adjudication of substantive due process claims may require this Court to exercise its reasoned judgment in determining the boundaries between the individual's liberty and the demands of organized society. The Court's decisions have afforded constitutional protection to personal decisions relating to marriage, see, e. g., *Loving v. Virginia*, 388 U.S. 1, procreation, *Skinner v. Oklahoma*, 316 U.S. 535, family relationships, *Prince v. Massachusetts*, 321 U.S. 158, child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510, and contraception, see, e. g., *Griswold v. Connecticut*, 381 U.S. 479, and have recognized the right of the individual to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child, *Eisenstadt v. Baird*, 405 U.S. 438, 453. Roe's central holding properly invoked the reasoning and tradition of these precedents. Pp. 4-11.

(c) Application of the doctrine of stare decisis confirms that Roe's essential holding should be reaffirmed. In reexamining that holding, the Court's judgment is informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling the holding with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling. Pp. 11-13.

(d) Although Roe has engendered opposition, it has in no sense proven unworkable, representing as it does a simple limitation beyond which a state law is unenforceable. P. 13.

(e) The Roe rule's limitation on state power could not be repudiated without serious inequity to people who, for two decades of economic and social developments, have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. The Constitution serves human values, and while the effect of reliance on Roe cannot be exactly measured, neither can the certain costs of overruling Roe for people who have ordered their thinking and living around that case be dismissed. Pp. 13-14.

(f) No evolution of legal principle has left Roe's central rule a doctrinal anachronism discounted by society. If Roe is placed among the cases exemplified by *Griswold*, *supra*, it is clearly in no jeopardy, since subsequent constitutional developments have neither disturbed, nor do they threaten to diminish, the liberty recognized in such cases. Similarly, if Roe is seen as stating a rule of personal autonomy and bodily integrity, akin to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection, this Court's post-Roe decisions accord with Roe's view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims. See, e. g., *Cruzan v. Director, Missouri Dept. of Health*, 497 U. S. ____, ____. Finally, if Roe is classified as *sui generis*, there clearly has been no erosion of its central determination. It was expressly reaffirmed in *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (*Akron I*), and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747; and, in *Webster v. Reproductive Health Services*, 492 U.S. 490, a majority either voted to reaffirm or declined to address the constitutional validity of Roe's central holding. Pp. 14-17.

(g) No change in Roe's factual underpinning has left its central holding obsolete, and none supports an argument for its overruling. Although subsequent maternal health care advances allow for later abortions safe to the pregnant woman, and post-Roe neonatal care developments have advanced viability to a point somewhat earlier, these facts go only to the scheme of time limits on the realization of competing interests. Thus, any later divergences from the factual premises of Roe have no bearing on the validity of its central holding, that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions. The soundness or unsoundness of that constitutional judgment in no sense turns on when viability occurs. Whenever it may occur, its attainment will continue to serve as the critical fact. Pp. 17-18.

(h) A comparison between Roe and two decisional lines of comparable significance--the line identified with *Lochner v. New York*, 198 U.S. 45, and the line that began with *Plessy v. Ferguson*, 163 U.S. 537--confirms the result reached here. Those lines were overruled--by, respectively, *West Coast Hotel Co. v. Parrish*, 330 U.S. 379, and *Brown v. Board of Education*, 347 U.S. 483--on the basis of facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions. The overruling decisions were comprehensible to the Nation, and defensible, as the Court's responses to changed circumstances. In contrast, because neither the factual underpinnings of Roe's central holding nor this Court's understanding of it has changed (and because no other indication of weakened precedent has been shown), the Court could not pretend to be reexamining Roe with any justification beyond a present doctrinal disposition to come out differently from the Roe Court. That is an inadequate basis for overruling a prior case. Pp. 19-22.

(i) Overruling Roe's central holding would not only reach an unjustifiable result under stare decisis principles, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law. Where the Court acts to resolve the sort of unique, intensely divisive controversy reflected in Roe, its decision has a dimension not present in normal cases and is entitled to rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation. Only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to

political pressure and an unjustified repudiation of the principle on which the Court staked its authority in the first instance. Moreover, the country's loss of confidence in the Judiciary would be underscored by condemnation for the Court's failure to keep faith with those who support the decision at a cost to themselves. A decision to overrule Roe's essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy and to the Nation's commitment to the rule of law. Pp. 22-27.

Justice O'Connor, Justice Kennedy, and Justice Souter concluded in Part IV that an examination of *Roe v. Wade*, 410 U.S. 113, and subsequent cases, reveals a number of guiding principles that should control the assessment of the Pennsylvania statute:

(a) To protect the central right recognized by Roe while at the same time accommodating the State's profound interest in potential life, see, *id.*, at 162, the undue burden standard should be employed. An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability.

(b) Roe's rigid trimester framework is rejected. To promote the State's interest in potential life throughout pregnancy, the State may take measures to ensure that the woman's choice is informed. Measures designed to advance this interest should not be invalidated if their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.

(c) As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion, but may not impose unnecessary health regulations that present a substantial obstacle to a woman seeking an abortion.

(d) Adoption of the undue burden standard does not disturb Roe's holding that regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.

(e) Roe's holding that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother" is also reaffirmed. *Id.*, at 164-165. Pp. 27-37.

Justice O'Connor, Justice Kennedy, and Justice Souter delivered the opinion of the Court with respect to Parts V-A and V-C, concluding that:

1. As construed by the Court of Appeals, § 3203's medical emergency definition is intended to assure that compliance with the State's abortion regulations would not in any way pose a significant threat to a woman's life or health, and thus does not violate the essential holding of *Roe, supra*, at 164. Although the definition could be interpreted in an unconstitutional manner, this Court defers to lower federal court interpretations of state law unless they amount to "plain" error. Pp. 38-39.

2. Section 3209's husband notification provision constitutes an undue burden and is therefore invalid. A significant number of women will likely be prevented from obtaining an abortion just as surely as if Pennsylvania had outlawed the procedure entirely. The fact that § 3209 may affect fewer than one percent of women seeking abortions does not save it from facial invalidity, since the proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom it is irrelevant. Furthermore, it cannot be claimed that the father's interest in the fetus' welfare is equal to the mother's protected liberty, since it is an inescapable biological fact that state regulation with respect to the fetus will have a far greater impact on the pregnant woman's bodily integrity than it will on the husband. Section 3209 embodies a view of marriage consonant with the common law status of married women but repugnant to this Court's present understanding of marriage and of the nature of the rights secured by the Constitution. See *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 69. Pp. 46-58.

Justice O'Connor, Justice Kennedy, and Justice Souter, joined by Justice Stevens, concluded in Part V-E that all of the statute's recordkeeping and reporting requirements, except that relating to spousal notice, are constitutional. The reporting provision relating to the reasons a married woman has not notified her husband that she intends to have an abortion must be invalidated because it places an undue burden on a woman's choice. Pp. 59-60.

Justice O'Connor, Justice Kennedy, and Justice Souter concluded in Parts V-B and V-D that:

1. Section 3205's informed consent provision is not an undue burden on a woman's constitutional right to decide to terminate a pregnancy. To the extent *Akron I*, 462 U. S., at 444, and *Thornburgh*, 476 U. S., at 762, find a constitutional violation when the government requires, as it does here,

the giving of truthful, nonmisleading information about the nature of the abortion procedure, the attendant health risks and those of childbirth, and the “probable gestational age” of the fetus, those cases are inconsistent with *Roe’s* acknowledgement of an important interest in potential life, and are overruled. Requiring that the woman be informed of the availability of information relating to the consequences to the fetus does not interfere with a constitutional right of privacy between a pregnant woman and her physician, since the doctor-patient relation is derivative of the woman’s position, and does not underlie or override the abortion right. Moreover, the physician’s First Amendment rights not to speak are implicated only as part of the practice of medicine, which is licensed and regulated by the State. There is no evidence here that requiring a doctor to give the required information would amount to a substantial obstacle to a woman seeking abortion.

The premise behind *Akron I’s* invalidation of a waiting period between the provision of the information deemed necessary to informed consent and the performance of an abortion, *id.*, at 450, is also wrong. Although § 3205’s 24-hour waiting period may make some abortions more expensive and less convenient, it cannot be said that it is invalid on the present record and in the context of this facial challenge. Pp. 39-46.

2. Section 3206’s one parent consent requirement and judicial bypass procedure are constitutional. See, e. g., *Ohio v. Akron Center for Reproductive Health*, 497 U. S. ____, ____. Pp. 58-59.

Justice Blackmun concluded that application of the strict scrutiny standard of review required by this Court’s abortion precedents results in the invalidation of all the challenged provisions in the Pennsylvania statute, including the reporting requirements, and therefore concurred in the judgment that the requirement that a pregnant woman report her reasons for failing to provide spousal notice is unconstitutional. Pp. 10, 14-15.

The Chief Justice, joined by Justice White, Justice Scalia, and Justice Thomas, concluded that:

1. Although *Roe v. Wade*, 410 U.S. 113, is not directly implicated by the Pennsylvania statute, which simply regulates and does not prohibit abortion, a reexamination of the “fundamental right” *Roe* accorded to a woman’s decision to abort a fetus, with the concomitant requirement that any state regulation of abortion survive “strict scrutiny,” *id.*, at 154-156, is warranted by the confusing and uncertain state of this Court’s post-*Roe* decisional law. A review of post-*Roe* cases demonstrates both that they have expanded upon *Roe* in imposing increasingly greater restrictions

on the States, see *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 783 (Burger, C. J., dissenting), and that the Court has become increasingly more divided, none of the last three such decisions having commanded a majority opinion, see *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502; *Hodgson v. Minnesota*, 497 U.S. 417; *Webster v. Reproductive Health Services*, 492 U.S. 490. This confusion and uncertainty complicated the task of the Court of Appeals, which concluded that the “undue burden” standard adopted by Justice O’Connor in *Webster* and *Hodgson* governs the present cases. Pp. 1-8.

2. The Roe Court reached too far when it analogized the right to abort a fetus to the rights involved in *Pierce v. Society of Sisters*, 268 U.S. 510; *Meyer v. Nebraska*, 262 U.S. 390; *Loving v. Virginia*, 388 U.S. 1; and *Griswold v. Connecticut*, 381 U.S. 479, and thereby deemed the right to abortion to be “fundamental.” None of these decisions endorsed an all-encompassing “right of privacy,” as *Roe, supra*, at 152-153, claimed. Because abortion involves the purposeful termination of potential life, the abortion decision must be recognized as *sui generis*, different in kind from the rights protected in the earlier cases under the rubric of personal or family privacy and autonomy. And the historical traditions of the American people--as evidenced by the English common law and by the American abortion statutes in existence both at the time of the Fourteenth Amendment’s adoption and *Roe’s* issuance--do not support the view that the right to terminate one’s pregnancy is “fundamental.” Thus, enactments abridging that right need not be subjected to strict scrutiny. Pp. 8-11.

3. The undue burden standard adopted by the joint opinion of Justices O’Connor, Kennedy, and Souter has no basis in constitutional law and will not result in the sort of simple limitation, easily applied, which the opinion anticipates. To evaluate abortion regulations under that standard, judges will have to make the subjective, unguided determination whether the regulations place “substantial obstacles” in the path of a woman seeking an abortion, undoubtedly engendering a variety of conflicting views. The standard presents nothing more workable than the trimester framework the joint opinion discards, and will allow the Court, under the guise of the Constitution, to continue to impart its own preferences on the States in the form of a complex abortion code. Pp. 22-23.

4. The correct analysis is that set forth by the plurality opinion in Webster, *supra*: A woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest. P. 24.

5. Section 3205's requirements are rationally related to the State's legitimate interest in assuring that a woman's consent to an abortion be fully informed. The requirement that a physician disclose certain information about the abortion procedure and its risks and alternatives is not a large burden and is clearly related to maternal health and the State's interest in informed consent. In addition, a State may rationally decide that physicians are better qualified than counselors to impart this information and answer questions about the abortion alternatives' medical aspects. The requirement that information be provided about the availability of paternal child support and state-funded alternatives is also related to the State's informed consent interest and furthers the State's interest in preserving unborn life. That such information might create some uncertainty and persuade some women to forgo abortions only demonstrates that it might make a difference and is therefore relevant to a woman's informed choice. In light of this plurality's rejection of Roe's "fundamental right" approach to this subject, the Court's contrary holding in Thornburgh is not controlling here. For the same reason, this Court's previous holding invalidating a State's 24 hour mandatory waiting period should not be followed. The waiting period helps ensure that a woman's decision to abort is a well considered one, and rationally furthers the State's legitimate interest in maternal health and in unborn life. It may delay, but does not prohibit, abortions; and both it and the informed consent provisions do not apply in medical emergencies. Pp. 24-27.

6. The statute's parental consent provision is entirely consistent with this Court's previous decisions involving such requirements. See, e. g., *Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft*, 462 U.S. 476. It is reasonably designed to further the State's important and legitimate interest "in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely," *Hodgson, supra*, at 444. Pp. 27-29.

7. Section 3214(a)'s requirement that abortion facilities file a report on each abortion is constitutional because it rationally furthers the State's legitimate interests in advancing the state of medical knowledge concerning maternal health and prenatal life, in gathering statistical information

with respect to patients, and in ensuring compliance with other provisions of the Act, while keeping the reports completely confidential. Public disclosure of other reports made by facilities receiving public funds--those identifying the facilities and any parent, subsidiary, or affiliated organizations, § 3207(b), and those revealing the total number of abortions performed, broken down by trimester, §3214(f)--are rationally related to the State's legitimate interest in informing taxpayers as to who is benefiting from public funds and what services the funds are supporting; and records relating to the expenditure of public funds are generally available to the public under Pennsylvania law. Pp. 34-35.

Justice Scalia, joined by The Chief Justice, Justice White, and Justice Thomas, concluded that a woman's decision to abort her unborn child is not a constitutionally protected "liberty" because (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed. See, e. g., *Ohio v. Akron Center for Reproductive Health*, 497 U. S. ____, ____ (Scalia, J., concurring). The Pennsylvania statute should be upheld in its entirety under the rational basis test. Pp. 1-3.

O'Connor, Kennedy, and Souter, JJ., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, V-A, V-C, and VI, in which Blackmun and Stevens, JJ., joined, an opinion with respect to Part V-E, in which Stevens, J., joined, and an opinion with respect to Parts IV, V-B, and V-D. Stevens, J., filed an opinion concurring in part and dissenting in part. Blackmun, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part. Rehnquist, C. J., filed an opinion concurring in the judgment in part and dissenting in part, in which White, Scalia, and Thomas, JJ., joined. Scalia, J., filed an opinion concurring in the judgment in part and dissenting in part, in which Rehnquist, C. J., and White and Thomas, JJ., joined.

(The complete document can be found in <<http://www.law.cornell.edu/supct/html/91-744.ZS.html>> [verified May 30, 2012].)

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