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CHANGING CONCEPTS IN THE CONSTITUTIONAL PATTERN IN THE UNITED STATES—1865 TO 1917

By

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Many students of American government consider the period between the close of the War Between the States and the presidency of Woodrow Wilson to be one of utmost significance to the constitutional development of the nation. The changes effected in legal thinking during this span of time were not only numerous but profound, so profound in fact that the very nature of the government appears to have been altered by them.

To enumerate these changes would be impossible in the brief space allotted this paper. To meet the demands of brevity and yet to show something of the significance of these changes to constitutional development requires that we examine at least the concepts respecting (1) the theory of the state, (2) the nature of law, and (3) the use of the Constitution as a tool in executing the political will of the society which was formed during the latter part of the last century.

In discussing the changes occurring in the theory of the state, it is important to remember that between the adoption of the Constitution and the War Between the States there was persistent and erudite argument respecting the assumptions underlying the American state system. Although a nation had formed with the acquisition of the territory between the Appalachians and the Pacific, there was no general agreement among the people who made up that nation respecting the form of their political society. Some able men referred to the government as a perpetual union of sovereign states. Others called it a federal republic without succinctly defining the term. Some thought of it as a group of sovereign states, each of which, acting in a *sui juris* capacity, had consented, with the right to withdraw that consent, to a federal compact. Over the issue of slavery these disparate theories clashed. Accommodation, tenuous at best in the three decades preceding 1860, became impossible, and men went to war.

As the batteries on the shores of Charleston harbor reduced the defenses of Sumter, the uneasy compromises which had been effected between the southern states and the federal authority disappeared. After the arbitrament of arms, there emerged a new concept of the American state system. No longer would it be probable that a state or group of states could declare in all seriousness that it or they might legally withdraw from the federal compact. The Supreme Court had touched the note of this future theme of government when it had declared

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this nation to be indestructible. With the success of the northern arms it was to be a nation that would endure.[1] No longer was there to be legal justification for the "jealous particularism that . . . had obstructed . . . coalescing national unity."

Concomitant with the theory that henceforth the United States was an indestructible union came the idea of national citizenship. The abolition of slavery under the 13th Amendment freed a vast mass of persons whose servile status had been declared by the highest authority.[2] Under a new amendment to the Constitution these persons were to be made citizens not only of the states in which they resided but of the general government. National citizenship was at last formally decreed and defined.[3]

Under the theory of the state that the entire people of the United States was sovereign and supreme in its power to make law through legally constituted means, there was introduced into the constitutional thinking of the day the idea that the rights of the people were to be guaranteed by the national government. No longer were citizens of the United States to suffer denial of their unalienable rights which had been vouchsafed them under a theory of natural law. No longer could a person living in the United States be subjected to assaults upon his individual dignity by the government of a state without due process of law. "The inborn rights of every person within the jurisdiction of the nation" were not to be abridged "by the unconstitutional acts of any state."[4] No state was to deny any person life, liberty, or property without due process, and the federal government was bound to guarantee this provision. Thus a lever was given the national authority for making states respect both the concept of fair procedure in applying their laws against persons and the theory that substantive rights of life, liberty and property were ordained by a law superior to the power of a state legislature. This change in the source of competence with respect to the protection and guarantee of human rights bulked large in the course which constitutional development was to follow in the next century of American life.

The period between the Civil War and the First World War is not marked by as many learned discourses on political theory as is the *ante-bellum* period. Many of those students of American jurisprudence who attempted to develop a theory of American government during the latter half of the 19th century were infected with the organistic ideas of German political thought.[5] Although several men in high positions of state and in places of learning throughout the country pondered the abstract principles of government, the run of the American people were too busy with the material aspects of their culture to bother with

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1 Texas v. White, 7 Wall. 700 (1869).
2 Dred Scott v. Sandford, 19 Howard 393 (1857).
3 U.S. v. Wong Kim Ark, 169 U.S. 649 (1898).
4 Speech of Sen. Bingham before Congress on report of the joint committee on Reconstruction, cited in C. B. Swisher, AMERICAN CONSTITUTIONAL DEVELOPMENT (Boston, 1943) p. 332.
5 F. G. Wilson, *The Revival of Organic Theory* in 36 A.P.S.R. 454 (1942).

mental meanderings into the realm of political assumptions. They saw the farms grow, the railroads span the continent; they smelled the smoke of the factories, and watched the cities spread. They believed they were fairly well off, and that they lived in a chosen land. They abhorred the attack by imported and home-grown radicals against the American system. They wanted no truck with radicalism. McKinley's death at the hands of an anarchist made the people fearful of everything foreign. Those who opposed the American way of life or questioned the institutions of the country were felt to be bent upon destroying the nation. If there was any articulate concept among the citizenry in late 19th century America respecting the state, it was that we were a nation with a glorious destiny. The chief obstacle in the path of American progress would be governmental action aimed at curtailing the free play of American initiative. It was the duty of those in authority to see that the path was kept clear. Whenever the political branches of the government failed to meet this injunction, the judicial authority was called upon. In observing how the Court went about its task of maintaining this basic idea of government, we must turn to the concepts held by the majority of the justices respecting the nature of law. It was from the theory of law held by the Court that the rationalization came which opposed the appeal made by many political reformers at the turn of the century for greater governmental control of the national economy.

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With the end of the Civil War the nation began a process of industralization the like of which the world had never seen. Factories, which had mushroomed to meet the needs of war, cast their shadows over budding metropolises. America became a mass of steel and stone in which a growing horde of humanity toiled and struggled and hoped.

Over this complex industrial civilization reigned a group of entrepreneurs, whose activities were rationalized under the doctrine of *laissez faire*. Although these captains of industry were often too busy to worry about such things as legal concepts, their lawyers realized that their actions would sooner or later have to be justified under a theory of law if they were to continue. The accuracy of this observation soon became apparent. The state legislature of Illinois, as early as the 1870's enraged at an attempt at monopoly in the storage of grain, had brought such action within the realm of the public interest and had declared such monopolies capable of regulation. To the Supreme Court of the United States went the legal retainers of the entrepreneurs.

Previously, a case had been decided in the Supreme Court upholding the creation of a monopoly by a state legislature.[6] At that time the Court had split five to four on the issue of whether the state's action interfered with the privileges and immunities of the citizens of the United States. The majority had

[6] Slaughterhouse Cases, 16 Wall. 36 (1873).

found it had not. Of greater interest to constitutional thinking, however, was the dissent of two justices, who referred to the newly ratified 14th Amendment's due process clause. That dissent introduced the concept of substantive due process to the American constitutional pattern. The right of property, held by Locke to be a sacred adjunct of man, was expanded to meet the demands of the rising corporations and the entrepreneur class for protection against legislative action on the part of state governments.

When the Illinois statute restricting the grain elevator operator in the manipulation of his property came before the Supreme Court, the justices again divided.[7] The majority still conceived of due process as procedural, and held the regulation of elevator rates justified under the doctrine of public interest. Justice Field looked with alarm upon such regulation. He had by now grasped the full significance of the dissent in the *Slaughterhouse* decision. He joined the concept of vested rights with that of substantive due process and used the mixture to protect the use of private property against political action. He declared the kind of regulation suggested by the Illinois legislature anathema to the concept of liberty guaranteed by the 14th Amendment. Such an invasion of private rights placed all property at the mercy of a majority of the legislature. This was tyranny.[8]

Though as yet a dissent, the doctrine of substantive due process was now sufficiently stated for it to become the beacon on the legal path which the corporation lawyers were to cut as America became an industrial colossus. The dissent in *Munn* v. *Illinois* marked the beginning of a long period of legal thinking in which state legislation affecting private property was subjected to the test of whether or not it met the personal concepts of rightness tucked in the recesses of the justices' minds. Commerce and industry in a big America were not to be placed at the mercy of the popular will, which might be opposed to "progress." America could progress only if "the skill, the business sense, and good fortune" of its industrial leaders were given free rein. Was this not the way of nature which had been fashioned by God and witnessed by a national prosperity whose bounds were unlimited? To interfere with business and the exercise of private property was to stem the hand of nature. Such action would be sure to bring chaos and utter destruction to a nation foolish enough to attempt it. Threaded throughout this religio-economic thinking was the idea of national supremacy. The right of a state legislature to foul the lines of national progress was inconceivable.

During the 1870's and 1880's state after state attempted to regulate railroads in their jurisdictions. Regulation of rail rates was interference with private property. This kind of legislation furnished the target against which the arrow

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[7] Munn v. Illinois, 94 U.S. 92 (1877).
[8] See Field's dissent in C. B. & Q. R. R. v. Iowa, 94 U.S. 96, (1877).

of substantive due process was directed by the Court. By 1890, the Court had begun the piecemeal destruction of state legislative attempts to fix the charges made by railroads. These statutes deprived the roads of their "right to a judicial investigation by due process of law," and were *ipso facto* unreasonable. Reasonableness of a statute was to be determined by a judicial survey. No longer was a legislature to be the judge of what was reasonable at law; the Court had preempted that role for itself.

Rate regulation was basically economic. The human element, though hidden deep within it, did not show on the surface. As the century made its turn, however, the state legislatures attempted the prevention of bad working conditions, long hours, and poor health among the workers. Abetted by the rising interest in sociology, psychology, and the statistical approach to these studies, the popular assemblies sought to ameliorate the conditions of industrial employment. Regulation of mines, bakeries and sweat shops was enacted. The Supreme Court, steeped in the philosophy of Field and his colleagues, looked with suspicion upon this new use of the state police power. In some cases the Court did not destroy the legislative effort;[9] in others it spoke against the statutes. Somewhere within the reasoning of the Court was the idea that some kind of regulation *was* needed. How far that regulation would or should go became a fundamental problem for the justices. Most of them were fearful that regulation would get out of hand and reduce the use of property to the point where private initiative would be stifled and American ingenuity would vanish. The majority of the justices firmly believed in the theory of *laissez faire,* but like a bit of yeast in a batch of dough the leaven of economic reform was beginning to work. *Laissez faire* was beset by a rival—the duty of the state to provide the means by which a decent standard of living could be obtained by a majority of the people. The gage of this battle was seen in the dissent in the baker's case.[10] Holmes' opinion marked the beginning of a new approach to the meaning of the Constitution. It was no longer to mean the embodiment of a "particular economic theory." Rather it was to be considered a *modus operandi* for the regulation of societal living "for people of fundamentally differing views"; it was not to serve as a strait-jacket confining a dynamic people within the clasp of the *mort main* of an outworn era. By 1917 this use of the Constitution had challenged the concept of the sanctity of private property.[11] It was not a full-out assault, however, and the phalanx of conservatism remained intact.

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While state regulation of economic activities languished under the severe gaze of a conservative majority on the Court, the federal Congress, reflecting the pressure of a more articulate electorate and the changes taking place in the

9 Holden v. Hardy, 169 U.S. 366 (1898).
10 Lochner v. N. Y., 198 U.S. 45 (1905).
11 Bunting v. Oregon, 243 U.S. 426 (1917).

control of political power, increased its regulation of the social and economic activities of the citizen. With the passage of the Interstate Commerce Act and the attempt at control of monopolies in commerce, the federal government began the steady movement toward the establishment of far-flung economic controls, which have marked the activity of the federal authority during the past fifty years. These efforts met at first with serious challenge when the Court decreed that business of a manufacturing nature could not possibly be controlled by the federal government.[12] The rising tide of popular participation in the political arena, however, swept in upon the conservative philosophy. The Court, in decreeing the federal income tax unconstitutional, had unleashed a veritable fury in the opposition to the concept that the federal taxing power was strictly limited. Bryan charged the Court with reactionary leanings. Though defeated at the polls, his supporters underwent a change in party label and emerged as part of the Progressive and New Freedom movements. The force of their demands, coupled with the growing feeling among large segments of the citizenry that some reforms were needed, resulted in the enactment of the 16th and 17th Amendments. Incomes were now to be taxed and senators to be elected by popular vote. In the meantime the Court, sensing the ground swell, bent a bit and gave approval to more effective enforcement of the Sherman anti-trust statute and the railroad regulatory acts. In addition to these economic controls, the Congress set about to clean up the morals of the people. Lotteries were prohibited, traffic in loose women enjoined, and adulterated food condemned. The Court gave its approbation. Although it was as yet impossible to eliminate child labor because of its close connection, in the opinion of the Court, with the sacred right of property, economic and social reform was underway. The Constitution was fast becoming a tool in the fashioning of the political will into law.

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Between 1865 and 1917 at least three major changes took place in constitutional thinking in the United States. Fundamental was the change in the attitude toward the federal compact. Instead of a group of states, tenuously banded together under a theory containing incompatible elements of state sovereignty and federal supremacy, there was developed the idea of a nation of the American people. Along with this concept went the fact of national citizenship for all those born subject to the jurisdiction of the United States. Concomitant with the establishment of civil rights under the general government the theory of substantive due process and the doctrine of judicial review assumed greater proportions in determining the course of public policy. Popular assemblies were not to be entrusted with the protection of the sacred precincts of private property. Only the Court, guided by the dictates of reason extracted

12 U.S. v. E. C. Knight Co., 156 U.S. 1 (1895).

from the "brooding omnipresence" of the natural law, was fit to determine the limits of the constitutional injunctions concerning due process. The ability of the people to govern themselves through the medium of their chosen representatives apparently was challenged, although few judges would have admitted they had placed themselves in the position of the legislature.

Within recent years, the Court has shifted its rule respecting the sanctity of property, but the reincarnation of the concept of natural law, in the guise of substantive due process, has aided the justices in fashioning a formula for the protection of civil liberties against the action of a state authority. The 14th Amendment's due process clause is the weapon with which the Court has repelled local assaults upon personal freedom.

Turning to the commerce and taxing powers of the general government the Court has permitted the Congress to employ these powers as means for the regulation of social and economic activities which were considered detrimental to the health, safety, morals, and general welfare of the people of the United States. Though no blanket police power, as used by the states, has ever adhered to the federal government—and logically cannot under a theory of enumerated powers—the concept that Congress could use its commerce and taxing powers in a sumptuary manner bedded itself in the American constitutional pattern. With the development of an industrial economy the Court recognized the need for some controls over the use of property in order to promote the welfare of the greater number of citizens. It was this change of attitude which helped prepare the way for the evolvement of a jurisprudence of the welfare state. As the nation rolled into high gear industrially there was a decided need for a re-thinking of the place of the law in an industrialized society. The beginnings of that re-thinking are manifest in the decisions of the Court in recognizing the need for the Congress to adjust the operation of the industrial machinery, and by so doing keep it from jamming the complex mechanism of democratic government.

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The period between the wars is of great significance to a knowledge of the American constitutional system. It points dramatically to the effect which popular attitude can have upon such basic matters as the theory of the state. It shows the influence capable of being wielded by the Supreme Court in the determination of the type of national economy. It is in this period that one can see the tremendous flexibility of the Constitution, which makes it capable of adjustment to a rapidly changing social and economic environment. Perhaps there has been no other time when the American constitutional system was more seriously questioned than it was during the years between Lincoln and Wilson. The Constitution was shaken to its bed-rock by the catastrophe of civil strife; it was strained by the pressure of economic expansion; it was tested severely by

the presence of a sizable alien population concentrated in the political volcanoes of the eastern seaboard cities. Yet it survived. The fact that it did is mute testimony to the ingenuity of its farmers, the wisdom of its developers, and the ability of the American people to live under a system of law which permits politicial compromise and adjustment to the realities of social existence.