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# HAS THE CONSTITUTION GONE?

*John A. Fairlie* *

IN DISSENTING from the decisions of the Supreme Court of the United States in the recent Gold Clause cases,[1] Mr. Justice McReynolds, in delivering the minority opinion, said extemporaneously:

> "It would not seem too much to say that the constitution has gone. The guaranties to which men and women heretofore have looked to protect their interests have been swept away. The powers of Congress have been enlarged, and we stand, as a people, stripped of the very fundamentals of our government as the framers of the constitution saw it." [2]

Similar statements have been made before, by justices of the Supreme Court and by others, in connection with other matters; and it is the purpose of this paper to consider the general attitude indicated in such statements, rather than to present a technical legal discussion with special application to the recent cases.

As far back as 1828, Chief Justice Marshall is quoted as saying: "Should Jackson be elected, I shall look upon the government as virtually dissolved." [3] A few years later, when Taney was appointed Chief Justice by Jackson, Daniel Webster wrote: "Judge Story thinks the Supreme Court is *gone,* and I think so too." [4] Soon afterwards, when the newly constituted Court rendered decisions upholding statutes from which Story dissented, the latter wrote to Judge McLean: "There will not, I fear, ever in our day, be any case in which a law of a State or of Congress will be declared unconstitutional; for the old constitutional doctrines are fast fading away." [5] About the same time Chancellor Kent wrote to Story: "I have lost my confidence and hopes in the constitutional guardianship and protection of the Supreme Court." [6] Another writer of the time stated that, "Under the progres-

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[1] Norman v. Baltimore & O. R. R., (U. S. 1935) 55 Sup. Ct. 407; Nortz v. United States, (U. S. 1935) 55 Sup. Ct. 428; Perry v. United States, (U. S. 1935) 55 Sup. Ct. 432.

[2] Reported in 84 New York Times, No. 28,150, p. 16, col. 5 (Feb. 19, 1935).

[3] 4 BEVERIDGE, LIFE OF JOHN MARSHALL 463 (1919), quoted in PARRINGTON, THE ROMANTIC REVOLUTION IN AMERICA 26 (1927).

[4] 2 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 284 (1922).

[5] 2 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 302 (1922).

[6] 2 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 303 (1922).

sive genius of this new judicial administration we can see the whole fair system of the constitution beginning to dissolve, like the baseless fabric of a vision." [7]

In a much later case, where an act of Congress was upheld by a vote of five to four, Chief Justice Fuller, for the dissenting minority, said of the measure: "It is a long step in the direction of wiping out all traces of state lines, and the creation of a centralized government." [8]

When the Supreme Court decided against the Northern Securities Company, as a violation of the Sherman Anti-Trust Act, Mr. Justice White, dissenting, said, "the result would be not only to destroy the state and Federal governments, but by the implication of authority, from which the destruction would be brought about, there would be erected upon the ruins of both a government endowed with arbitrary power to disregard the great guaranty of life, liberty, and property and every other safeguard upon which organized civil society depends." [9]

Still more recently (but before 1933), James M. Beck, sometime Solicitor General of the United States, charged that many of the essential principles of the Constitution "have been insidiously subverted, and many others are today threatened by direct attack"; that "the commercial power of the Union has been utilized to attain unconstitutional ends, to the substantial destruction of the rights of the States"; and that "the system of governmental checks and balances has been destroyed by the persistent subordination . . . of the Legislature to the Executive." [10]

About the same time, President Judson of the University of Chicago published a small volume to establish the thesis that, "The drift towards centralization, both by direct change in the Constitution and by encroaching federal legislation, has gone so far as to endanger the vital principle of the republic." [11] He urged that there should be another amendment to the Constitution to repeal all amendments following the Fourteenth.[12]

[7] 46 NORTH AMERICAN REV. 154 (1838); *cf.* 2 NEW YORK REVIEW 372-404 (1838).

[8] JUDSON, OUR FEDERAL REPUBLIC 55 (1925).

[9] Northern Securities Co. v. United States, 193 U. S. 197 at 397, 24 Sup. Ct. 436 (1904).

[10] BECK, THE CONSTITUTION OF THE UNITED STATES YESTERDAY, TODAY—AND TOMORROW? 271-272 (1925). *Cf.* BECK, THE VANISHING RIGHTS OF THE STATES (1927); BECK, OUR WONDERLAND OF BUREAUCRACY (1932).

[11] JUDSON, OUR FEDERAL REPUBLIC viii (1925).

[12] JUDSON, OUR FEDERAL REPUBLIC 267 (1925).

In view of these statements, it is not surprising that, with the advent of the New Deal under the present administration, others before Mr. Justice McReynolds have seen in the events of the past two years the complete centralization of power in the national government, the dictatorship of the president, and the disappearance of individual liberty. This attitude is reflected in more moderate language in former President Hoover's recent book on "The Challenge to Liberty." Under these circumstances it seems appropriate to examine the nature of the Constitution as viewed by its framers and others from time to time, and to consider whether the dictum of Mr. Justice McReynolds has a sounder basis than those of Story, Fuller, and White.

It is a commonplace to observe that the members of the Constitutional Convention of 1787 had widely differing views as to the needed changes in the government, that the Constitution proposed was the result of a series of compromises, and that a substantial minority of the convention were opposed to the document. Even the supporters of the new Constitution acknowledged that it was not perfect, and did not agree in their interpretations of its meaning. That its words were open to different interpretations may be seen in the statement of Gouverneur Morris, who drafted the language of the Constitution, that he had taken the opportunity "to select phrases, which expressing my own notions would not alarm others, nor shock their self-love." [13] Far from believing that their work was to be a final and eternal document, one member of the convention stated that he did not imagine that any member optimistically cherished the hope that the Constitution would last one hundred and fifty years.[14] That period has about passed, and it may be suggested that the framers of the Constitution would now expect important changes in the system they proposed.

It is also well known that the Constitution as submitted was strongly opposed by such men as Samuel Adams, George Mason, and Richard Henry Lee; and that its ratification was secured by an understanding that amendments would be made. It is perhaps significant that the first ten amendments adopted as a result, including the due process clause of the Fifth Amendment about which much of the later discussion has revolved, were not thought to be needed by the framers of the Constitution, but were adopted to meet the fears of men like Jefferson,

[13] Letter to Pinckney of Dec. 22, 1814, in 3 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, p. 419 at 420 (1911); CORWIN, THE TWILIGHT OF THE SUPREME COURT 127 (1934).

[14] BECK, THE VANISHING RIGHTS OF THE STATES 19 (1927).

who were more interested in personal liberty than in the rights of property.

The basic idea in the Constitution, as has been voiced by many others in varying terms, may be said to be that of a balance of powers—a balance between the central government and the states, a balance between the legislative, executive and judicial departments, and a balance between the powers of government and the rights of the people. How far that balance was secured in the original Constitution and its later application, as well as in the government of the several states, and also in the corresponding doctrine of the balance of power in international relations, has given rise to large differences of opinion; and some light may be thrown on the subject by a brief survey of our experience since the adoption of the Constitution.

An important corollary of our constitutional system has been the established function of the courts to pass on the validity of acts of Congress and of state legislatures. Into the merits of the controversy over this power it is not necessary to go here. It is enough to note that to a considerable extent, at least, the Constitution has become, as was said by Governor (now Chief Justice) Hughes, "What the judges say it is." [15] But it also is worth noting that Presidents Jefferson, Jackson, and Lincoln denied the *exclusive* right of the courts to determine such questions; and that the Supreme Court itself has recognized that there are "political questions" beyond the scope of its jurisdiction. The meaning and application of the Constitution may be seen also in the work of Congress and the president, and even in extra-legal and non-governmental practices.

From the establishment of the new government in 1789 to the end of the century, it was in the hands of those who believed in a broad construction of the powers of the central government and of the powers of the executive; and under the leadership of Hamilton these powers were exercised to establish a protective tariff, a system of internal taxes, and a national bank, while later the Alien and Sedition Acts controlled aliens and restricted freedom of speech to a degree not equalled until the World War. This development was the work of Congress, in the face of strong opposition.

With the inauguration of Jefferson, the central government came

[15] Quoted in CORWIN, THE TWILIGHT OF THE SUPREME COURT xxviii (1934). As to the interpretation of the Constitution by other departments than the judicial, see COOLEY, CONSTITUTIONAL LIMITATIONS, 5th ed., pp. 52 and 83 (1883), and Kendall v. Inhabitants of Kingston, 5 Mass. 524 at 533 ff. (1809).

into the hands of those who advocated a strict construction of its powers and the dominance of the legislative over the executive department. Yet this is the period in which Chief Justice Marshall and the Supreme Court are said to have established the bases for the further extension of national power. But it should be noted that in the first decision holding unconstitutional a provision of an act of Congress, Marshall inaugurated an effective means for applying the Jeffersonian doctrine of limiting the powers of the national government, though the immediate effect was to allow the president's interpretation of his own powers to override that of the Supreme Court. So far as national powers were concerned, the work of the Supreme Court under Marshall was limited to accepting the views of Congress; and it is more significant that under Jefferson and his successors the scope of national power was increased by such measures as the Louisiana Purchase, the Embargo, the policy of internal improvements, the War of 1812, the renewal of the national bank charter, and the Monroe Doctrine. Jefferson, too, as President, maintained the policy of executive leadership; but under his successors (Madison, Monroe and John Quincy Adams) presidential influence declined in favor of Congress. At the same time, the decisions of the Supreme Court under Marshall tended to limit more strictly the scope of state action for the protection of vested rights, even in the face of the Eleventh Amendment limiting suits against a state.

Under Jackson we find a notable revival of presidential authority and a reassertion of national power against the South Carolina doctrine of state nullification. But from then until the Civil War the balance swings more towards state and legislative dominance, a revival of Jeffersonian principles. Yet in this period, the Attorney General under President Pierce (often considered the weakest president) rendered official opinions in support of a large measure of presidential authority. In the states, after the speculative era of internal improvements and the panic of 1837, there was a reaction against state activity in this field; but this was followed by an expansion of state action in the regulation of banking, the development of the public school system, the beginnings of health regulation and the first movement for the prohibition of the liquor traffic. The Supreme Court under Taney found in the doctrine of the police power a counterpoise to the obligation of contracts; and, while upholding extensions of national power in some directions, tended towards maintaining the constitutional equilibrium, or what has been called "dual federalism." But in the *Dred Scott*

case [16] there appeared an extended application of the due process clause of the Fifth Amendment to uphold the property rights of slave owners against the power of Congress, which was overruled as a result of the Civil War and the Thirteenth Amendment as to slave property, but reaffirmed as to other property by the Fourteenth Amendment as later interpreted by the Supreme Court.

The Civil War established a new high water mark in the exercise of national and presidential authority, and the constitutional amendments which followed imposed further restrictions on the states. After the war there was some natural decline of national authority for a time, but on a higher scale than before the Civil War, and a revival of congressional dominance; and at the same time a further development of state and local activity in the regulation of railroads and the expansion of public services. The Supreme Court, with five new members appointed from 1861 to 1864 (including Chief Justice Chase in 1864), on the whole upheld the exercise of national authority during the War, although the power to make government notes a legal tender was sustained only after two more new appointments were made in 1870. But even with the change in personnel the Court for a time limited the application of the Fourteenth Amendment in restricting the states, in the *Slaughter-House Cases*,[17] the *Civil Rights Cases*,[18] and in *Munn v. Illinois*.[19] One reflection of the enlarging scope of governmental activity was the increasing importance of the judicial department, and more particularly of the United States courts and the Supreme Court. Indications of this were the Act of 1869 [20] providing for circuit judges due to the increase of business before the Supreme Court, and the creation in 1890 of the Circuit Courts of Appeal.[21]

[16] Dred Scott v. Sandford, 19 How. (60 U. S.) 393, 15 L. ed. 691 (1856).

[17] 16 Wall. (83 U. S.) 36, 21 L. ed. 394 (1872); 111 U. S. 746, 4 Sup. Ct. 652 (1883).

[18] 109 U. S. 3, 3 Sup. Ct. 18 (1883).

[19] 94 U. S. 113, 24 L. ed. 77 (1876).

[20] 16 Stat. 44.

[21] 26 Stat. 826. The expanding importance of the Supreme Court is also indicated by the increasing volume of business. From 1862 to 1866, it rendered an average of 60 decisions a year, of which an average of 4½ involved interpretation of the Constitution. From 1866 to 1882 the total number of decisions each year ranged from 125 to 210, and an average of 15 decisions each year involved constitutional questions. From 1882 to 1890, the number of decisions averaged 275 each year, with an average of 26½ each year involving constitutional questions. Fairman, "Justice Samuel F. Miller," 50 POL. SCI. Q. 15 at 19 (1935). During the first decade after the adoption of the Fourteenth Amendment to the Constitution, only three cases involving its construction came before the Court. In the second decade there were 46 cases, and from 1896 to 1905, 297 cases.

The inauguration of President Cleveland in 1885 marked the return to power of a party which traditionally was opposed to centralized national and executive power. But his terms of office began a renewed assertion of presidential authority; and, while attempting a limitation of national activity through a reduction of tariff duties, also increased national power by the development of the new navy, the interstate commerce act, and an act for a national income tax. But the Supreme Court, with the support of new judges appointed by Cleveland, now became a more important factor in the situation. In the *Neagle* (1890)[22] and *Debs* (1895)[23] cases, it upheld presidential authority against the states; but in the Income Tax case (1895)[24] and that of *Smyth v. Ames* (1898)[25] it set new limits to the power of both Congress and the states. The Income Tax case reversed the ruling of a unanimous court in 1880 as to the meaning of direct taxes in the Constitution, and the *Ames* case culminated the application of the due process clause as a means of limiting legislative power to regulate railroad rates to what the court considered fair and reasonable.

As a result of the brief war with Spain in 1898, the importance of international relations was emphasized, and this added to the prestige and power of the national government. From the beginning of the new century the scope of national legislation expanded, notably under Theodore Roosevelt and in the first term of Woodrow Wilson, while the World War marked a further development of national control which went far beyond even that of the Civil War. By the policy of grants in aid, the national government began to direct in some degree the activities of the states in fields heretofore admitted to belong to them. The adoption of the Income Tax amendment in 1913 overcame the veto of the Supreme Court in 1895; and by this addition to the financial powers of the national government prepared the way for further exercise of national powers. But it was also a period of increasing activity of state and local governments. Executive influence was increasing, especially under Presidents Theodore Roosevelt and Woodrow Wilson and under such state governors as Hughes of New York, La Follette of Wisconsin and (to a lesser degree) Deneen of Illinois. This tendency has further developed by the reorganization of state administration since 1917.

[22] In re Neagle, 135 U. S. 1, 10 Sup. Ct. 658 (1890).

[23] In re Debs, 158 U. S. 564, 15 Sup. Ct. 900 (1895).

[24] Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 15 Sup. Ct. 673 (1895), rehearing 158 U. S. 601, 15 Sup. Ct. 912 (1895).

[25] 169 U. S. 466, 18 Sup. Ct. 418 (1898).

Following the World War, as after the Civil War, national activities declined to some extent for a few years, but state and local activities continued to increase; and beginning in 1926 the upward trend by the national government was resumed and gained rapidly following the depression from 1929. The Reconstruction Finance Corporation and the Federal Home Loan Banks, established in 1932 under the Hoover administration, laid the basis for two of the important developments of the present administration.

What of the attitude of the Supreme Court toward these developments? For the first decade of the present century, it may be said to have followed the line of direction established by 1895, though the first step towards a change was indicated with the appointment of Mr. Justice Holmes in 1902, and his dissenting opinions attracted attention, while his opinion for the Court in the *Swift* case,[26] in 1905, formed what Chief Justice Taft later called "a milestone in the interpretation of the commerce clause of the Constitution." [27] In 1910 three new justices were appointed, including Hughes, and Mr. Justice White became chief justice; and in the next decade there are some further signs of change. The *Shreveport* case [28] upheld an extended application of the commerce clause to enable national control of intrastate rates; but the Child Labor cases [29] held that neither the commerce clause nor the power of taxation enabled Congress to control manufacturing conditions.

With the appointment of Mr. Justice Brandeis in 1916, and Taft as chief justice in 1921, the changing attitude became more noticeable. The later appointments of Mr. Justice Stone by President Coolidge, and of Hughes as chief justice and Roberts and Cardozo by President Hoover, have made a majority of the Court more favorable to the exercise of governmental power.

It may be said that under Marshall the Supreme Court tended to uphold national and to restrict state power; under Taney it was more favorable towards state authority; after 1880 it tended to restrict both

[26] Swift & Co. v. United States, 196 U. S. 375, 25 Sup. Ct. 276 (1905).

[27] Board of Trade v. Olsen, 262 U. S. 1 at 35, 43 Sup. Ct. 470 (1923). *Cf.* also Chief Justice Taft's opinion in Stafford v. Wallace, 258 U. S. 495 at 519, 42 Sup. Ct. 397 (1922), where he said: "The principles of the *Swift Case* have become a fixed rule of this court in the construction and application of the commerce clause."

[28] Houston, E. & W. T. Ry. v. United States, 234 U. S. 342, 34 Sup. Ct. 833 (1914).

[29] Hammer v. Dagenhart, 247 U. S. 251, 38 Sup. Ct. 529 (1918); Bailey v. Drexel Furniture Co., 259 U. S. 20, 42 Sup. Ct. 449 (1921).

national and state power; and in recent years it is more favorable to both national and state authority.

This recent attitude is shown in upholding both national and state laws as expressions of public policy in the public interest against the claims of private interests, in the Packers and Stockyards,[30] the Migratory Bird Act,[31] the Minnesota Moratorium,[32] and the New York Milk cases.[33] Moreover, by declining to limit the spending power of Congress the Court has made possible an enormous expansion of national activity.

This brief summary indicates that the Constitution of the United States includes much more than the document of 1787. What it meant to the framers of that document is by no means clear in all cases; and whatever their views, they have been supplemented by Congress, the presidents, and state governments, subject to the negative authority exercised by the Supreme Court. The meaning of the Constitution as expressed by these agencies has changed from time to time. To the original document a score of formal amendments have been added, and the meanings of these amendments and their effect on the original document have also been subject to varying interpretations. The general direction has clearly been that of extending and expanding national powers and executive powers; but the activities of state and local governments have not diminished, and they too have expanded and extended. Does this mean that the scope of individual action has been more and more restricted and is in danger of extinction? To some extent this is true, not only from the increase of governmental power, but equally if not more as a result of associations of individuals in corporations, trade unions, and a host of other organizations. One of the most important problems of today is how to control such associations so as to secure the largest amount of freedom to the individual; and this can only be done by a government representing the whole people.[34]

[30] Stafford v. Wallace, 258 U. S. 495, 42 Sup. Ct. 397 (1922).

[31] Missouri v. Holland, 252 U. S. 416, 40 Sup. Ct. 382 (1920).

[32] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U. S. 398, 54 Sup. Ct. 231 (1934).

[33] Nebbia v. People of State of New York, 291 U. S. 502, 54 Sup. Ct. 505 (1934).

[34] This situation has been recognized for many years by well known English authorities. In 1882 the English economist W. S. Jervis wrote: "In social philosophy, or rather in practical legislation, the first step is to throw aside all supposed absolute rights or inflexible principles." THE STATE IN RELATION TO LABOR 9 (1882). At the beginning of this century the conservative Professor A. V. Dicey of Oxford noted the shift in the general trend of legislation in England from laissez-faire to collectivism beginning about 1870, and called attention to the paradoxical logical dilemma involved in the problems of freedom of contract and the right of association. "There is a perpetual danger that unlimited contractual capacity, which is looked upon as an extension of

The "New Deal" of the present administration has clearly involved a vastly greater assertion of national and executive authority in the regulation of economic affairs, in the fields of agriculture, industry and security issues; it has involved new methods for controlling the banking, currency and monetary system; it has included national aid on an enormous scale by means of loans and grants for state and local public works, for the relief of the unemployed, for the support of public education, and for banks, railroads, and other activities under private management. In most, if not all of these lines, there were precedents on a small scale before 1933; but there can be little question that the balance has swung a long way towards national control in fields formerly left mainly to the state and local governments, or not occupied at all; and that we have already reached a vastly more centralized system of government than was anticipated in 1787.

Two questions suggest themselves. What are the factors which account for these changes? Can they be sustained under the terms of the Constitution, or do they involve the destruction of that document?

Perhaps the most important factors have been those connected with economic developments of the last hundred years. The revolution in methods of transportation and the scale of commerce and industry, and the development of large scale business organizations have made it impossible for the state governments to deal effectively with the economic activities of the people. If the national government cannot deal with these matters there will be no adequate public control in the general interest.

Outside of the economic field, this situation can be illustrated by the problem of crime, where the geographical limits of state jurisdiction impose serious restrictions to the enforcement of long established criminal laws. There seems to be little objection to national action in this field, as shown in such measures as the Mann White Slave Act,[35] the Motor Vehicle Theft Act,[36] the Lindbergh Kidnapping Act,[37] and the more active co-operation of the department of justice with the state and local police authorities. National action in this field might well be

individual liberty, may yet be so used by some individual as to deprive him of the very freedom of which it is assumed to be the exercise." "The right of association has . . . a paradoxical character. A right which seems a necessary extension of individual freedom may . . . become fatal to the individual freedom which it seems to extend." DICEY, LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND 151-152, 154 (1905).

[35] 36 Stat. 825, U. S. C. tit. 18, secs. 397-404 (1910).

[36] 41 Stat. 324, U. S. C. tit. 18, sec. 408 (1919).

[37] 48 Stat. 781; U. S. C. tit. 18, secs. 408a-408e (1934).

further developed by means of financial aid to state and local agencies, with some measure of national supervision.

What is true of crime prevention and punishment is equally true of the problem of relief and economic regulation.

Other factors affecting the situation are of a legal and political nature. Some of these arise from defects in the state governments. State constitutions have been radically changed from those of the eighteenth century; and while many of the changes have been for the better, others now seriously hamper the effective exercise of power by the state governments. Many of the states are now controlled, not by the views of the founders of American government, but by provisions in the state constitutions adopted in the period from 1850 to 1870. Limitations on state legislatures, especially on the power of taxation, and a disorganized machinery of state government impose serious obstacles to state action. Some states, including Illinois, have so limited the power of constitutional amendment and revision as to make almost impossible changes now generally recognized to be necessary. To some extent a share of the responsibility for the trend to national control rests with the states for failure to adapt their governments to meet to some extent the needs of today — as was pointed out by Elihu Root early in the present century.

Further limitations on state action have been due to the rulings of the Supreme Court in the period from 1885 to 1915, which are by no means overthrown by the changing attitude of that Court in recent years.

The trend towards national control might be checked to some extent if a general revision of state boundaries could be made. If the New England states were combined into one state many matters could be controlled by the state government which must now be taken over by the national government or not done at all. Similar groupings of states throughout the country would make possible similar results, and proposals of this sort have been made. Others have proposed that the larger metropolitan regions be organized as separate states. But none of these proposals seem likely of accomplishment in the near future.[88]

Whether or not the state governments can be adapted to meet in some degree the needs of the present, the question remains how far the recent trend towards national control may be upheld under the Constitution of the United States. What the Supreme Court will decide in particular cases remains to be seen; and it is not proposed to offer here any predictions of a specific character. But it may be repeated

[88] *Cf.* ELLIOTT, THE NEED FOR CONSTITUTIONAL REFORM, c. 9 (1935).

that the trend of recent decisions is toward a more liberal construction of both national and state powers, and a stricter construction of the limitations on governmental power. A statement of general principle made by Senator Sutherland (now one of the dissenting justices in the Gold Clause cases) may be quoted in this connection. "In thus parceling out the totality of political power, it must be assumed that the intention was to vest in one government or the other [national or state], every power, the exercise of which would contribute to the usefulness of government as an agency to promote the public good, and to withhold only such as, for sound reasons of public policy, ought not to be vested in any government." [39] There remains, however, the question who is to decide the sound reasons of public policy as to what powers ought not to be vested in any government?

With reference to contract and property rights in relation to governmental power, the Supreme Court has held that: "It is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community." [40]

In the recent Gold Clause cases, Chief Justice Hughes applied this doctrine to the powers of Congress: [41]

> "Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but, when contracts deal with a subject-matter which lies within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them. . . . This principle has familiar illustration in the exercise of the power to regulate commerce."

The increase of presidential and executive authority has also been of large and significant proportions. But it should be noted that these have been authorized by a series of measures each of limited application, and that there has been no complete abdication, as by the parlia-

[39] SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS 34 (1919).

[40] Atlantic Coast Line R. R. v. City of Goldsboro, 232 U. S. 548 at 558, 34 Sup. Ct. 364 (1914).

[41] Norman v. Baltimore & O. R. R., (U. S. 1935) 55 Sup. Ct. 407 at 416. *Cf.* Addyston Pipe & Steel Co. v. United States, 175 U. S. 211 at 229, 20 Sup. Ct. 96 (1899); Louisville & Nashville R. R. v. Mottley, 219 U. S. 467, 31 Sup. Ct. 265 (1911); New York v. United States, 257 U. S. 591 at 601, 42 Sup. Ct. 239 (1922). As to limitations on property rights, see statements by Mr. Justice Chase in Calder v. Bull, 3 Dall. (3 U. S.) 386 at 394, 1 L. ed. 648 (1798), and by Chief Justice Marshall in Ware v. Hylton, 3 Dall. (3 U. S.) 199 at 211, 1 L. ed. 568 (1796), and in Ogden v. Saunders, 12 Wheat. (25 U. S.) 213 at 346, 6 L. ed. 606 (1827).

ments of Italy and Germany to Mussolini and Hitler. American legislation has always been of a much more detailed character than that of European parliaments, or even than that of England; and has long been subject to criticism on that account. The right of Congress to delegate powers of regulation was upheld by Chief Justice Marshall and the Supreme Court as far back as 1825, in a case involving the delegation to the Supreme Court of authority to adopt rules of procedure.[42] Other delegations to the president and to executive and administrative authorities have also been upheld by the Supreme Court, even to the extent of authorizing the president to alter the rates of customs duties, and authorizing the Interstate Commerce Commission to determine railroad rates. The great extension of such delegation by means of the National Recovery Codes followed a precedent established by the Federal Trade Commission without specific authority. The expansion of governmental powers makes necessary a larger delegation of detailed regulation to executive and administrative authorities. At the same time, the Supreme Court has held, in the recent Petroleum case,[43] that delegation had gone too far, although it seems to be no greater than the Court had previously upheld in regard to customs duties.

In noting that recent developments have in the main followed earlier precedents recognized and accepted by the Supreme Court, it is not intended to uphold all that has been done as sound and wise measures of public policy. The Court has recognized that it is not its function to control other governmental agencies in the exercise of discretionary powers conferred on them, though some of the decisions may seem to be due to the convictions of the justices on questions of policy. The question under consideration is whether the bars are down and the limitations of the Constitution have disappeared.

A brief answer to the question suggested by Mr. Justice McReynolds' statement involves an understanding of what is meant by the Constitution. Is it the written document of 1787? That still remains, with the formal amendments adopted from time to time, which have changed its character to some extent. Is it what the framers of that document intended? That is necessarily a matter of interpretation, and it may safely be said that on some questions there is no clear indication what was intended. Is it the interpretation of the Supreme Court?

[42] Wayman v. Southard, 10 Wheat. (23 U. S.) 1 at 41, 6 L. ed. 253 (1825).

[43] Panama Refining Co. v. Ryan, (U. S. 1935) 55 Sup. Ct. 241. *Cf.* also the decision of the Supreme Court on May 6, 1935, holding invalid the Railroad Retirement Act. Railroad Retirement Board v. Alton R. R., (U. S. 1935) 55 Sup. Ct. 758, 79 L. ed. 803.

That has varied from time to time with changes in the personnel of the Court; and the decisions of the majority in the Gold Clause cases presents the latest interpretation of the Court on the questions involved.

This much more may be said. Both the national and state governments are still functioning; and the proceedings of the present session of Congress indicate that while national powers may be further extended in some directions, there may be a recession in other directions, as in the proposals for the continuation of the National Industrial Recovery Act.

Within the national government, Congress, the president, and the courts are still in active operation. In the present session, Congress has shown no signs of abdication or surrender, as in the dictatorships of Europe, though many no doubt are more distrustful of Congress than of the president. The Supreme Court, while upholding the gold clauses, has already ruled against Congress in the Petroleum case; while the decisions by district judges holding invalid various measures under the National Industrial Recovery Act suggest that some of these decisions may be sustained by the Supreme Court.[44]

We may then conclude that government in the United States is still acting under the Constitution. But it is a Constitution which, as the Supreme Court has said, "was made for an undefined and expanding future," [45] and as Marshall said, "must be adapted to the various crises of human affairs." [46] *

[44] In considering the constitutionality of the New Deal legislation, Professor E. S. Corwin has recently expressed the view that "the Supreme Court is vested with substantially complete freedom of choice whether to sustain or to overturn the New Deal." CORWIN, THE TWILIGHT OF THE SUPREME COURT 182 (1934). Professor Thomas Reed Powell of the Harvard Law School has stated his opinion that,

> "The words of the commerce clause and of the necessary-and-proper clause leave the court completely free to decide for itself how far Congress may go. The formulæ found in Supreme Court opinions are broad enough to be invoked in approval of every administrative determination that a transaction is one 'affecting interstate commerce.' No judicial veto of past Congressional action has any close bearing on the issue whether this or that transaction is too remote from interstate commerce to be subject to national power. The Supreme Court can go as far as it likes in allowing Congress and the administration to go as far as they like." Powell, "The Scope of the Commerce Power," in ESSAYS ON THE LAW AND PRACTICE OF GOVERNMENTAL ADMINISTRATION 197 at 199 (1935).

[45] Mr. Justice Matthews in Hurtado v. California, 110 U. S. 516 at 530-531, 4 Sup. Ct. 111 at 292 (1884).

[46] Quoted in CORWIN, THE TWILIGHT OF THE SUPREME COURT 180 (1934).

* The decisions of the Supreme Court on May 27, 1935, holding invalid important provisions of the National Industrial Recovery Act, the Farm Mortgage Act and the President's removal of a member of the Federal Trade Commission, confirm the conclusions of this paper that the Constitution of the United States as interpreted by the Supreme Court is still in effect—whatever may be thought of the merits of these decisions.