

I

Introduction

Above all else, American government is, in the familiar words of Lincoln, a “government of the people, by the people and for the people”.¹ It is merely the mechanism by which the people govern themselves, and the people alone give it purpose and authority. It is founded on principles of liberty, political equality, majority rule and individual sovereignty, and has as its primary objectives the preservation of individual rights and the promotion of the general welfare.² Its power is only as great as the sum of the power consentingly given up by its constituents, the people, from their own God-given sovereignty. This is the pact between citizen and state³ as it was set up at the time of the Founding of the nation, and this student knows of no time when it has been violated. Let us acknowledge from the outset that any increase in the size and power of the government over the people has come about not by the will of some tyrant or through an illegitimate use of the laws, but by the people’s own consent. There is no mandate, constitutional or otherwise, for a small government. It is limited by its constitutional

¹ Abraham Lincoln, “Gettysburg Address,” *The Avalon Project at Yale Law School* (December 13, 2006), <http://www.yale.edu/lawweb/avalon/gettyb.htm> (accessed, December 13, 2006).

² This description of the nature and objectives of the government is sufficient for the purposes of this paper, but it is certainly not the only one. Sources include the preamble of the constitution, the Declaration of Independence, and *The Federalist*, No. 23.

³ The word “state” is used generally in this paper and may refer to the federal government as well as the fifty individual “States” of the United States. By definition, the term describes “a politically organized body of people..., esp: one that is sovereign” (Merriam-Webster’s Collegiate Dictionary, 11th edition).

nature and its structure, but only the self-restraint of the people can keep it small. The responses they have made to the challenges they have faced over the years has dictated the course of American government.

With that said, let us proceed with our examination of the growth of American government. When I write about the size of government I mean its absolute size, the magnitude of its power, and the extent of its influence in the lives of its citizens. It seems clear though that these factors indicate a remarkable change in the character of American government, and in its relation to individual citizens. Perhaps the most significant political development in the nation's history has been the emergence of the activist state and the statist ideology that supports it. This represents a fundamental shift in the federal government's mandate. Whereas in the first century of the republic, the national government was expected to provide the few essential services that the states could not themselves provide, since the 1930s it has been expected to provide for the people's own comfort and personal welfare. This indicates not only a shift in the people's political preferences, but of their entire worldview. This paper will attempt to trace some of the movements, trends and events that led to this development at the federal level, and explore how they reflect changes that occurred in the collective political mind.

The Early American Republic

The founding of the American republic was an expression of a particular philosophy. Early Americans shared in common many values and convictions about government that gave them a solid basis on which to form a political society. They expressed them in their rebellion against British rule, in their writing, and ultimately in

the drafting and ratification of the constitution. The ideas of the English philosopher John Locke were of particularly great importance to the American founding. His ideas informed the Founders' construction of the government, but, more importantly, they provide much of the philosophical foundation on which the republic was built. The early United States was at least a "quasi-Lockian political order"⁴ in that it "was designed to insure *liberty*."⁵ Locke's model of the social order was constructed upon the individual. As the primary unit of society, the individual had in himself rights, privileges and freedom that were his own upon his birth and are inalienable. The fundamental concept that lies at the bottom of Locke's construction of society is that "all men are naturally in... a state of perfect freedom to order their actions, and dispose of their possessions and persons as they think fit..."⁶ The state is merely an instrument for preserving and administering civil society between sovereign individuals. It can act legitimately only on behalf of the governed, who retain their sovereignty as the source of all power, and possesses no power of its own. As the source of all power, so too the people are the ultimate source of political will. The people have a basic, fundamental function as the primary decision makers. Legitimate government is merely an expression of the peoples own political self-rule. "The freedom then of man, and liberty of acting according to his own will, is grounded on his having reason, which is able to instruct him in that law he is to govern himself by, and make him know how far he is left to the freedom of his own will."⁷ The liberty of the individual to exercise his will through the political process and in his own personal life then is the most important political imperative in a civil society,

⁴ Robert H. Horwitz, "John Locke and the Preservation of Liberty," in The Moral Foundations of the American Republic, ed. Horwitz (Charlottesville: University Press of Virginia, 1979), p. 156.

⁵ *Ibid*, p. 129.

⁶ John Locke, The Second Treatise On Civil Government, (Amherst, N.Y.: Prometheus Books, 1986), p. 8.

⁷ *Ibid*, p. 36.

without which the entire system breaks down. Without individual liberty there can be no political free will, and there can be no legitimate government.

This philosophical background bred in the early Americans an instinctive mistrust of public power. “Americans of the revolutionary era,” as Ballard Campbell writes, “believed that rulers were innately inclined to misuse their authority... Government, not private concentrations of power, was believed to be the prime threat to liberty.”⁸ This mistrust of government power was firmly rooted in history, theory and the Americans’ own struggle under British colonial tyranny. The Framers who designed the constitution understood very well that “power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it.”⁹ The structure of the constitution and American government as a whole was designed to do just that. Checks and balances within the central government divided power between three co-equal branches, each of which was accountable to the other two in some form or another, the system of “mixed” federalism by which sovereignty was divided between state and national governments, and the decentralization of political administration all served to temper the tendency of government power to centralize. From the beginning there was an understanding that, though the national government should be equipped with power equal to the purposes for which it was formed, it should be limited in its objectives as strictly as possible.¹⁰ Political functions would be carried out primarily by state and local governments, leaving only a limited sphere of responsibility for the federal government.

⁸ Ballard C. Campbell, The Growth of American Government: Governance From the Cleveland Era to the Present (Bloomington and Indianapolis: University of Indiana Press, 1995), p. 8.

⁹ Madison, James. “The Federalist, No 48,” in The Federalist Papers, The Gideon Edition. ed. George W. Carey and James McClellan. (Indianapolis: Liberty Fund, 2001), 256. All other references to this source are from the same edition.

¹⁰ See The Federalist, Nos. 23, 32 & 48.

In addition, the power of the federal government would be divided between the three branches- legislative, executive and judicial- each of which would hold certain powers over one another, and hold each other accountable.

Division of the supreme power of government between different branches of government had long been integrated into the western political tradition by the time the constitutional Framers met in Philadelphia. The foundations for it were laid by the experiences of the British constitutional government and the writings of Montesquieu. The American colonial governments integrated the same model with their own variations. By 1787 it was a widely accepted political maxim that “legislative, executive, and judicial departments, ought to be separate and distinct,” and that “accumulation of all powers... in the same hands, whether of one, a few, or many... may justly be pronounced the very definition of tyranny.”¹¹ For that reason, the federal constitution set up a government in which these powers were divided into three separate branches. It was less certain however what form this division of power might take, and what the relations between different branches might consist of.

Experience suggested that effective limitations upon each branch of government could not be achieved by simply erecting “parchment barriers”¹² to contain them. Instead, each branch must be equipped with certain powers over the others. “[Unless] these departments be so far connected and blended as to give each a constitutional control over the others, the degree of separation... [required], as essential to a free government, can never in practice be duly maintained.”¹³ The idea was to “devise a political system in

¹¹ Madison, The Federalist, No. 47, p. 249.

¹² Madison, The Federalist, No. 48, p. 256.

¹³ *Ibid*, 256.

which it would be difficult to adopt new policies.”¹⁴ For a bill to become law, it had to pass both houses of Congress, be approved by the Executive or get a two-thirds majority vote in Congress, and pass examination by the judiciary. Judicial review was, in Hamilton’s view, a particularly important ingredient in a limited government. “By a limited constitution I understand one which contains certain specified exceptions to the legislative authority; such for instance as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice.”¹⁵ No one branch may independently have the capability to affect its own will, which would leave open the door to despotism. The result of the built-in antagonism between branches is that the government has a natural tendency toward non-action, and when it does take act, it is subject to so much scrutiny before, during and after the act, that it is self-correcting. Conversely, each branch must have the means and motivation to defend itself from the encroachment of the others. The Founders saw that in dividing the power of government, “Ambition must be made to counteract ambition.”¹⁶

The national government was also limited to a specific sphere. State governments, which had for years been the primary governmental bodies, would retain responsibility for carrying out the greater share of governmental functions.¹⁷ These held the trust of the people and seemed “the natural homes of individual liberty.”¹⁸ But ultimate authority could not be given either to state or national government, because to do so would

¹⁴ James Q. Wilson, American Government: Brief Version, 7th ed. (New York: Houghton Mifflin, 2005), p. 360.

¹⁵ Hamilton, The Federalist, No. 78, p. 403.

¹⁶ Madison, The Federalist No. 51, p. 268.

¹⁷ Hamilton, The Federalist, No. 32, p. 154.

¹⁸ Herbert J. Storing, What the Anti-Federalists Were For (Chicago: University of Chicago Press, 1981), p. 15.

undermine the other. How the constitution would divide sovereignty between the two levels was a major question on which the success of the constitutional convention hung. A solution to the impasse was found in the reasoning of James Wilson, of Pennsylvania. He did not pretend that sovereignty could be divided equally, but conceded that there must be a single “power” that is “absolute, supreme, and uncontrollable.” That power “resides in the people as the fountain of government.” Therefore, neither state nor national government is supreme, but have “concurrent jurisdiction” over political affairs.¹⁹ The system that emerged was a kind of “mixed” federalism. The general government would be a national government in character, exercising its powers absolutely without limitation by the states. Likewise, within their own spheres, the states would act independently of the national government. Each would exercise a share of the power of the people, unlimited in its usage, but limited in sphere. The entire American system therefore, would have a mixed national and federal character; it would make the national government supreme without eliminating state sovereignty; it allowed the general government to achieve the advantages of Union, while preserving the essential quality of American self-government through the states.²⁰

By retaining specific governmental functions, the states rendered the greater share of political power inaccessible to the federal government, and thereby served as an essential check on centralized power. Hamilton, noted in *The Federalist* No. 32 that the very structure of the constitution implied that the national government was exceptional, and therefore restricted to only those functions which were given to it in the constitution. Section 10 of Article One of the constitution lists restrictions on the powers of the states,

¹⁹ Hamilton, *The Federalist*, No. 32, p. 157.

²⁰ Gordon S. Wood, *The Creation of the American Republic: 1776-1787* (Chapel Hill: University of North Carolina Press, 1969), p. 524-532.

giving preference in these matters to the general government. The very existence of such a list implies that all other powers not listed remain with the states and beyond the control of the national government. Moreover, the Tenth Amendment to the constitution reserves all “powers not delegated to the United States by the Constitution, nor prohibited by it to the States... to the States respectively, or to the people.”²¹ The constitution was meant only to form a “partial union”, which “would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States.”²² The necessity of this structure “is clearly admitted by the whole tenor of the instrument”²³, and indispensable to American government.

Tocqueville and American Society in the 1800s

Long after the ratification of the constitution, the federal government remained small in size and modest in its undertakings. This is due partially to the legal limits set on it, but even more so because there was no great need or desire for it. It conducted foreign policy promoted commerce and saw to a few functions that were its responsibility, but it did not involve itself through taxation, regulation or service in the lives or ordinary citizens a great deal. Most functions of government were carried out by local and state governments, as they always had since the early colonial days, and little changed during the first ninety or so years of the American republic that upset this order. So the

²¹ “The Constitution of the United States”, found in The Federalist, Appendix 10, p. 542.

²² Alexander Hamilton, The Federalist No. 32, p. 155. Note Hamilton’s use of the word “*exclusively*”, and the absence of the same or a similar word from the language of the Amendment itself. How strictly this amendment should be interpreted has been a major point of contention in constitutional law and politics. It is the fulcrum on which the powers of national and state governments are balanced.

²³ *Ibid*, p. 157.

government of the American republic remained small, not just because it was limited, but because there was no need for it to be big.

As has been noted above, the prevalent ideology worked as another check on government. Americans, especially in the early years of the republic, were generally hostile to any expansions of government power that tended to draw more power to the central government. The Federalist, whose platform seemed always to extend the power of the central government, won a great victory when their constitution was ratified, but the lasting sentiments of the great majority of people were reflected in the views of the party of Jefferson, the Democratic Republicans, who sought to restrain that national government. After a few years of Federalist power, the control of the federal government was given to men who used their own power sparingly. Americans have always had a strong democratic character, which led them to value individual rights above all else. These values conflicted with the Federalist advocacy of strong central government, and soon the party disintegrated. Americans still loved liberty above national prestige and commerce, and their fear of government power as a threat to it did not fade after ratification.²⁴

The decentralization of American society kept government small and free. Local and state governments, established long before the national government, remained “the workhorses of the republican polity.”²⁵ Municipal bodies retained many governmental functions that affected the people most directly. These bodies formed their own local codes, laws and ordinances, and enforced them using the same people who felt their effects most directly. In this way, local government saw to the particularly important job

²⁴ Alexis de Tocqueville, Democracy in America. First Perennial Classics Edition, ed. J. P. Mayer (New York: HarperCollins Publishers, Inc., 2000) p. 174-178.

²⁵ Campbell, Growth of American Government, p. 16.

of teaching citizens how to govern themselves freely, and instilling in them the “spirit of liberty.”²⁶ These bodies “are to liberty what primary schools are to science; they put it within the people’s reach; they teach people to appreciate its peaceful enjoyment and accustom them to make use of it.”²⁷ This prepared citizens for participation in the larger spheres of state and national politics by endowing them with a “civic spirit”, which is “inseparable from the exercise of political rights.”²⁸ They love and trust their government because they take part in the conduct of its affairs, and its success is closely connected to their own. They obey the laws not just for fear of punishment, but out of a sense that the laws are fair, right and just. Because the public will carries the authority of the people, and individual citizens are given a fair opportunity to participate in its direction, free-minded individuals are willing to subdue their own personal desires to the common good. In addition, citizens participate in the enforcement of laws in jury trials, where they are forced to deliberate on the full extent and consequences of the laws. These bodies “instill some of the habits of the judicial mind into every citizen, and just those habits are the very best way of preparing people to be free.”²⁹

By dispersing the great political power of administration of the laws throughout the people, the American system protects and ensures the survival of freedom. The federal system, by which the state governments carry the greater share of the political burden, and “communal institutions which moderate the despotism of the majority and give people both a taste for freedom and the skill to be free,”³⁰ puts political power within the reach of the people, and thus ensures the safety of liberty. With no central

²⁶ Tocqueville, *Democracy in America*, p. 63.

²⁷ *Ibid.*

²⁸ *Ibid.*, p. 236.

²⁹ *Ibid.*, p. 274.

³⁰ *Ibid.*, p. 287.

administration, supreme power over the lives of citizens cannot be seized even by the majority. Instead the primary responsibility for preserving freedom is put in the hands of the individual citizens who enjoy it. This certainly is one of the most important features of the American political system: that protection of those most precious rights and freedoms was not intended to be left completely up to the central, national government, but must be exercised and defended by the people themselves. It demands an active participation of the people, and assumes “much diverse knowledge and discernment... on the part of the governed.”³¹ Tocqueville noted with admiration how well suited the Americans were to live under a constitution that allowed them so much freedom. He also observed that such a constitution would “remain sterile in other hands.”³² The quality and vigor of the people alone made such a system possible. The survival of liberty therefore depends on the people’s ability to remain fit for it.

Early Developments of American Constitutional Commerce Law

In the American federal system power is divided up between distinct bodies of government operating on different levels. In order for administration to remain decentralized, governmental bodies on each level must retain a certain measure of autonomy. The more this autonomy is infringed upon, the more centralized government becomes. For this reason the legal definition of boundaries between one governmental body’s power and another’s are of great importance to the health of American political society.

³¹ Ibid, p. 164.

³² Ibid, p. 165.

These issues frequently arrive before federal courts in the form of commerce clause litigation. Governmental bodies exercise extensive power over the lives of citizens in the way that they regulate commerce. A person may only be directly affected by most activities of his government once in a while, but he comes in contact with the law every day through the conduct of his regular business affairs. For this reason, which body of government controls what aspects of commerce, and how it controls them are questions that bear directly on how government affects the lives of the citizens.

The federal government gets its authority to control economic activity in the commerce clause, found in Article One, Section Eight of the constitution: “The Congress shall have Power... To regulate Commerce with Foreign Nations, and among the several States...” The extent and nature of this power has always been a contentious issue, and over the course of American legal history it has undergone a series of revisions, changes and redefinitions.

For years, States retained regulatory power over most of the nation’s economic activity. This kept the role of the federal government reduced. The Supreme Court’s circumspect definition of congressional commerce authority, judged against a strict reading of the Tenth Amendment, was the main force guarding State economic powers, and expansion of congressional control over the national economy during the New Deal era occurred only when the Court had sanctioned certain intrusions into functions previously reserved for States.

In *Gibbons v. Ogden* 9 Wheat. (22 U.S.) 1 (1824), Chief Justice John Marshall, writing for the Court, lays the foundations of commerce clause case law. Much like

Aristotle's revision of Plato's forms was "designed to solve the problem of change,"³³ Marshall's construction of an abstract concept of commerce was designed to provide judges and lawyers with a complete and ultimate understanding of commerce that would withstand the tests that it would certainly be put to over the years. His intent was to establish early on the understanding of federal commerce power, its nature and its bounds, that would be the standard by which commerce cases would be judged indefinitely. In his own words from *Gibbons*: "Powerful and ingenious minds... may, by a course of well digested, but refined and metaphysical reasoning, founded on these premises, explain away the constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use. They may so entangle and perplex the understanding, as to obscure principles, which were before thought quite plain, and induce doubts where, if the mind were to pursue its own course, none would be perceived. In such a case, it is peculiarly necessary to recur to safe and fundamental principles to sustain those principles, and, when sustained, to make them the tests of the arguments to be examined."³⁴

The conception of commerce that he formulated was broad, giving Congress great latitude to regulate matters beyond even what it had yet sought to regulate. He did not see commerce as merely a transaction of goods for currency. Rather he said that it is "intercourse between nations, and parts of nations, in all its branches and is regulated [by Congress] by prescribing rules for carrying on that intercourse." By this understanding, "commerce" would comprehend navigation, or transportation for commercial purposes, and would therefore extend Congress' regulatory powers into the interior of the states

³³ W. T. Jones, *The Classical Mind*, 2nd ed. (New York: Harcourt Brace Jovanovich College Publishers, 1970), p. 217.

³⁴ *Gibbons v. Ogden*.

themselves, as far as that navigation was carried out. As broad as this power was though, it had limits. He goes on in *Gibbons* to describe commerce as “a unit”. Commerce, according to this model, was complete within itself, but defined by clear boundaries, consistent with the nature and the sphere of the federal government’s general power.³⁵ Congress’ power to regulate a thing, therefore, was absolute insofar as that thing was within the bounds of interstate or international commerce, but did not exist beyond those bounds.

In *Gibbons* and three years later in *Brown v. Maryland* 25 U.S. (12 Wheat.) 419 (1827), Marshall explores unitary commerce. In *Gibbons* the effect upon commerce of state inspection laws was used by the attorney for Maryland as a vehicle in which to cross the metaphysical boundary between what is commerce and what is not. If states can pass laws to inspect goods intended for shipment in interstate or international commerce, then those laws can effect, or even prevent the shipment of those goods, and therefore effectively regulate commerce. Marshall does not accept the equivocation, and goes on to differentiate the power to effect from the power to regulate. Even though “inspection laws may have a remote and considerable influence on commerce,” they do not regulate it because they “act upon the subject before it becomes an article of... commerce.”³⁶ The important factor is one not the effect, but the principle. There is a difference in what it is to regulate from what it is to inspect something, even if their effects can be shown to be the same.

Marshall expands on his unitary conception writing for the Court in *Brown v. Maryland*. He clearly marks the point at which a good coming into a state as an import

³⁵ See Hamilton, *The Federalist*, Nos. 23 & 32.

³⁶ *Gibbons v. Ogden*.

ceases to be an object of commerce subject to Congress' commerce powers, and becomes simply a part of the internal property of the state, beyond the reach of Congress' commerce power. As long as the good remains in its "original package", and in the possession of the importer, it remains an article of commerce. But when it is sold or broken up or altered in any way, it ceases to be in commerce.³⁷

These two opinions set up a formalistic methodology for determining commerce clause cases. The primacy of legal principles over the particulars of the cases attests to Marshall's fear of well-reasoned, but ultimately destructive decisions by the Court that could disturb the delicate balance of powers that made the federal system viable. He took great pains to define the scope of federal power, and thus emphasized the limited nature of the national government. His treatment of the commerce clause suggests first, that he understood the extraordinary potential for expansion of federal power within the clause, and second, that he believed that such an expansion would throw the federal system out of balance and threaten the integrity of the constitution.

³⁷ *Brown v. Maryland*.

II

The End of *Laissez Faire* and the Progressive Era

The latter nineteenth century was a period of dramatic economic revolution that changed the shape of the young American nation. An industrial revolution swept across the land, changing the way Americans lived, did business and perceived the world around them. “In the thirty years after the Civil War the factory system, which had started in the years after the War of 1812, had developed as the cornerstone” of the new American economy.³⁸ New technologies provided new opportunities throughout the economy, and innovation sparked a massive uproar of economic growth. Average increase in real GNP per capita between the late 1860s and early 1890s was more than 2 percent annually. Technological innovations benefited all, but the greatest gains from them were made in transportation and heavy industry.³⁹

Railroad companies were the pioneers of the industrial era. Entrepreneurs seized on the need for new lines of transportation throughout the country, and the availability of new technologies that could fulfill that need. The companies that succeeded reaped great rewards and became the first of a new generation of giant companies. These giant companies became the hallmark of the industrial era. Their size, among other things, distinguished them from companies of previous generations. They employed legions of workers and required vast amounts of capital investment to fund their construction and operation. Between 1860 and 1900, with encouragement through land grants from the

³⁸ Harold U. Faulkner, The Economic History of the United States, Vol. 7, “The Decline of Laissez Faire: 1897-1917” (New York: Rinehart & Company, Inc, 1951), p. 3.

³⁹ Ibid, p. 3-10; Robert Higgs, Crisis and Leviathan: Critical Episodes in the Growth of American Government (New York: Oxford University Press, 1987), p. 79-81.

federal government, total railroad mileage increased from 30,625 to 198,964.⁴⁰ This development greatly improved the ease of long distance transportation of both freight and passengers, and opened up a much wider marketing area to producers of both manufactured and agricultural goods. Rail travel quickly became one of the most vital functions of the new economy, and would remain the single most efficient means of long-range transportation until the advent of air travel in the twentieth century. By 1895 there were “innumerable independent systems” competing to achieve inter-regional monopoly.⁴¹

Both the size and the importance of heavy industry relative to other economic sectors increased dramatically throughout the 1880s and 90s. For about the first hundred years of the republic, agriculture had been the most important economic activity. Most manufacturing was done either in small factories or in the household. But increasingly manufactured goods were provided by large producers using machine technology to deliver a higher volume at a lower cost than their smaller competitors. The industrial sector grew rapidly, and eventually exceeded all others. By the end of this period, manufacturers in heavily mechanized industries like iron and foundry took the place of older, more labor intensive production of goods like shoes and textiles among the nation’s most important industries, ranked in value of their products.⁴² By the year 1900, the value of manufactured products in the United States surpassed that of agricultural

⁴⁰ Faulkner, Economic History, p. 187.

⁴¹ Ibid, p. 187-191; Higgs, p. 80-84.

⁴² Faulkner, Economic History, p. 9.

products by nearly 8.3 trillion dollars.⁴³ The old American economy had passed into memory, and a new mechanized, industrial economy had emerged.⁴⁴

The development of industrial capitalism and the prosperity that came from it led to increased profits and savings by the wealthy and middle class Americans and a resulting overall increase in liquid capital. As a surplus of money accumulated in the country, American banking houses began to replace those of Europe as the main source of investment capital for American ventures. Transportation facilities were the first major projects into which bankers poured their money. Then after 1897 “the investment market... widened to include public utilities, industrial enterprises, foreign properties, and the bonds of local and state governments and those of the federal government.”⁴⁵ Investment houses like J. P. Morgan & Co. and Standard Oil⁴⁶ controlled vast resources, and their influence was felt everywhere throughout the economy. Entrepreneurs, who had been the driving force throughout the initial phase of the industrial revolution, gradually ceded control of American economic life to investment bankers. This occurred on a large scale when “the expansion of industry reached a size beyond the resources of individual entrepreneurs or banks, and when the movement for consolidation reached a stage where the services of a central investment house became necessary to handle the finances involved.”⁴⁷ The few financial institutions with enough capital to fulfill this need bought large amounts of stock in companies engaged in virtually all sorts of enterprises.⁴⁸

⁴³ Ibid, p. 8.

⁴⁴ Ibid, pp. 3-10; Higgs, pp. 79-81.

⁴⁵ Faulkner, Economic History p. 36.

⁴⁶ Standard Oil was, of course, primarily involved in petroleum production, but by the 1890s it controlled enough wealth so that it was functioning as one of the largest and most powerful financial institutions in the country.

⁴⁷ Faulkner, Economic History p. 37.

⁴⁸ Ibid, pp. 22-45.

On its face, the rise of big business appeared to be a very positive thing. The growth of American manufacturing capability coincided with and contributed to the rise of the United States as a world power. American capital began to flow abroad and the country's economic power was felt throughout the Western Hemisphere and the Pacific. The growth of American manufacturing capability met and exceeded most demands of the domestic market, which led to an increase in exports. Shortly after the beginning of World War I, for the first time in history, American exports exceeded imports. New York surpassed London as the financial center of the world. Both business and government began to flex their muscles abroad. During the McKinley, Roosevelt and Taft Administrations, the nation exerted its military and financial power in the Caribbean, Latin America, the Far East and the Pacific. American businessmen developed interests in mining, oil exploration, railroad transportation and agriculture in many of these areas. At home, Americans benefited from improved transportation, greater availability of a wider range of goods and at a lower price and a general rise in prosperity. The American star was rising. The U.S. was emerging as a leading world power, and it was due in large part to developments in American industry and finance capitalism.⁴⁹

There were however significant problems associated with the rise of big business. The benefits of growth were certainly not all shared equally. A new industrial working class struggling against impersonal corporate masters found itself commiserating with the old agrarian poor left behind by the advances in industry and clinging to a lifestyle which they perceived as being threatened by "progress". Neither group shared in the new wealth produced by industrial development; both suffered disregard by the wealthy capitalists

⁴⁹ Ibid, pp. 68-91.

that suddenly controlled such a large part of American life. An ill wind of discontent swirled throughout these populations, and a tide of reform began to build.⁵⁰

In the last decade of the nineteenth century, discontent flared to the surface of American affairs in two notable expressions: reaction to the depression crisis by industrial workers, and the rise and fall of the Populist movement. Labor issues had for decades been an area of unrest. Violent riots in the 1870s and 1880s by railroad employees, miners and factory workers plagued the nation. Hostility between impersonal employer and exploited employee, and an inability of the two to agree on a fair working relationship often resulted in violence and stoppage of vital economic functions. Politicians were caught between the desire to respect the right of employees and employers to freely engage in negotiations and to come to their own terms, and the need to protect the country from a disaster brought on by failure of the parties to do so.⁵¹

The government had long honored the freedom of employers to conduct their own affairs according to their own judgment without its interference. This posture, which came to be called *laissez faire*, was held by many as inseparable from individual property rights. On the other hand, it seemed irresponsible to some that government would sit idly by while questions of such high national importance were decided by unelected officials- businessmen and labor representatives- with only their own interests in mind. The first great test to the power of *laissez faire* ideology up to that point came in the 1890s when depression conditions enflamed the poor working class.⁵²

The Depression of the 1890s caused a national crisis between the years of 1893 and 1895 comparable in severity to those of the Civil War and the Great Depression of

⁵⁰ Higgs, *Crisis*, pp. 77-84.

⁵¹ *Ibid*, p. 91-92.

⁵² *Ibid*, pp. 91-92.

the 1930s. In the crucible of panic and financial ruin many traditional notions of government were put to the test, especially those dealing with the government's power to interject itself in economic affairs. In May of 1893, a panic on the New York Stock Exchange touched off a financial collapse, which led to the deterioration of industrial activity. By midsummer of that year, the country was experiencing severe, pervasive depression. Businesses, banks and railroads went belly up by the droves. Investment spending fell twenty percent in 1893, and continued to decline after that. Unemployment rose as high as 18 percent of the total work force. The worst effects of the depression were felt by urban industrial workers, of whom as many as half are estimated to have been out of work when unemployment reached its worst in 1894. In the midst of extreme discontent and social unrest, "industrial armies"⁵³ connected with labor unions, composed mostly of unemployed men appeared, protesting against big business and demanding relief from government. Proposals for public works projects to put these men to work received unprecedented credence. Never before was the call heard so loud for government to do something about the economy.⁵⁴

Labor unrest reached a fever pitch in early 1894 when the American Railway Union, led by Eugene Debs and supported by a horde of new supporters brought out by depression despair planned a great boycott in Chicago of any railroad using cars made by the Pullman Palace Car Company. The Pullman Company had cut its workers' wages without lowering rent in company housing and refused to negotiate either higher wages or lower rent. The protesters blocked the tracks in and around Chicago, effectively shutting down rail traffic in and out of the city. Since Chicago was the single most

⁵³ Ibid, p. 85.

⁵⁴ Ibid, pp. 84-87.

important American railway hub, the strike caused economic shutdown throughout the country. In light of the threat to interstate commerce, Attorney General Richard Olney requested, and was granted an injunction against the strike, and with the consultation of Illinois Governor John Altgeld, who was sympathetic to the causes of labor, sent some fourteen thousand troops into the Chicago area to enforce it. A bloody confrontation between soldiers and a mob left over twenty people dead, many more wounded, caused extensive property damage, and shocked the nation.⁵⁵

In the end, it was labor that lost. It found no ally in government or in public opinion. Repeated demands by the desperately unemployed for government work relief were denied, and the injunction was upheld by the Supreme Court as a legal means of preventing labor strikes.⁵⁶ Politicians repeatedly insisted that “each individual citizen of the United States should look to himself, and it is not the purpose of this Government to give work to individuals throughout the United States by appropriating money which belongs to other people and does not belong to the Senate.”⁵⁷ Even through such crisis as this depression, popular opinion favored leaving the natural processes of capitalist economics free of government interference.⁵⁸

In the midst of the depression era fervor, the Populist movement reached its peak. Loosely allied with the cause of labor unions, the Populist Party was composed mostly of poor southern and western farmers whose malcontent fixed on big business and the financial system. They called for an end to the Gold standard, “free and unlimited coinage of both silver and gold at the present legal ratio of 16 to 1”, which would have

⁵⁵ Ibid, pp. 91-97.

⁵⁶ *In re Debs*, 158 U.S. 564 (1895).

⁵⁷ Higgs, *Crisis*, p. 86 (quoting Arkansas Senator James H. Berry on the floor of the Senate, 1893).

⁵⁸ Ibid, pp. 84-87.

ensured inflation, expanded power of government regulatory bodies over business, especially over railroads, prohibition of “interest bearing bonds of the United States in time of peace”, an income tax, and, from the more extreme ranks, nationalization of public utilities and communication and transportation facilities. It was an outright rejection of and opposition to *laissez faire*.⁵⁹

In 1896, the Democratic Party nominated Populist William Jennings Bryan for the presidential election against Republican William McKinley. Had Bryan won that election and effectively enacted his platform, immeasurable damage would have likely been done to the country’s financial structure and business organizations. It would have marked the end of the era of *laissez faire*, and would have likely led to a great expansion of government regulatory power over the economy. But McKinley won handily on a platform of high protective tariffs and *laissez faire* non-regulation. One reason for the Populists’ defeat is that they were seen as acting merely in their own interests. It was clear that they were not out to enact the best policies for the country as a whole, and their policies would have merely given one group of people at an advantage at the expense of another. They never gained a broad enough base of support from ordinary citizens who were not directly associated with their cause. Despite the loudness of the cries demanding change, the movement for reform failed to capture the sympathies of anything like a majority of the population. Bryan’s defeat put to rest any hope of a Populist takeover, and marked the last great victory of classical liberalism until much later in the 1970s.⁶⁰

McKinley’s victory was not exactly a victory for limited government. Imposing high tariffs on imports is, in principle, as much an artificial interference with economic

⁵⁹ Ibid, p. 77.

⁶⁰ Ibid, p. 77-105.

forces as silverite inflation would have been. The only difference was in who reaped the benefits. As it happened, the status quo benefited the Republican party and its supporters, so there was no substantial increase in the government during McKinley's presidency. But neither party could truly be said to be the party of limited government. As James Bryce observed, "[N]either Republicans nor Democrats can be said to be friends or foes of state interference: each will advocate it when there seems a practical useful object to be secured, or when the popular voice seems to call for it."⁶¹ But in 1896, Republicans seemed to be friendlier to limited government than the Democrats, if only incidentally so. The Republican Party was the party of big business, and big business interests were protected by *laissez faire*. So though McKinley was perhaps only partially in favor of *laissez faire*, his term in office sustained it into the new century.

The Emergence of the "Trust Question"

No other issue that arose in the early years of the twentieth century had as profound an effect on the public mind and the political course of the country as the "trust question". The emergence of "private power" was perceived to present, "a new threat to liberty" and democracy.⁶² Small businessmen and consumers, farmers and workers, and many others, felt threatened by corporate giants who seemed suddenly to possess a new and irresistible power over their personal lives. Even worse, large companies and the individuals who ran them enjoyed a special relationship with many government officials, and apparently had enough sway to influence public policy. Government patronage of railroad companies through federal land grants established a suspicious relationship

⁶¹ James Bryce, The American Commonwealth (New York: The Macmillan Company, 1919), vol. 2: p. 28.

⁶² Campbell, Growth of American Government, p. 57.

between public and private power and introduced that specter of corruption. These gifts of land in large part were responsible for elevating railroad companies to the position of irresistible power over localities, regions and states that they eventually reached. Big business trusts used their resources to leverage political figures at every level of government, seeking, and often getting, special privileges from those susceptible to their persuasion. The power of private companies to influence government, whether legally or illegally, was probably exaggerated, but was nonetheless real to a large extent. Perception of corruption bred a new distrust among citizens of politician and businessman alike. The proposition that the government was run by corporations was very frightening and aroused a great deal of public concern. A new call for reform came in the early 1900s, this time not from a group of downtrodden malcontents, but from ordinary citizens from all walks of life.⁶³

There seems to be a remarkable difference, in both size and in nature, between the big business organizations that arose during industrialization from those that came to define the economy in the early twentieth century. The dominant companies of the industrial revolution ran large operations and grew to great size, but the largest companies of the twentieth century might have owned several companies that would have been among the nation's largest twenty or thirty years before. These were not just large companies, but combinations of large companies. Also, unlike the companies of the previous era which competed fiercely with each other, these big business trusts seemed less concerned with competition than with staking out a given sector of the economy and ruling over it. They were not primarily in the business of producing, but of owning. They sought to make themselves invulnerable to competition, to the public, and even to

⁶³ Higgs, *Crisis*, pp. 79- 81; Bryce, *American Commonwealth*, pp. 690-692.

government. Naturally, the existence of such institutions flies in the face of the American democratic character, and as a result resentment swelled against the big business trust.

The first phase of the rise of big business during industrialization came about as a response to competitive pressures on certain enterprises. The markets for many budding industries were fiercely competitive, so there was strong pressure for businesses to operate as efficiently as possible. Businessmen meticulously evaluated their operations to find ways to cut costs. Companies in some enterprises were able to improve productive efficiency by achieving “economies of scale”.⁶⁴ For these businesses, once start-up costs had been met, the cost per item was lower the more of a good or service it produced. For instance, railroad companies soon found that the longer the haul and the greater number of cars transporting freight, the lower the ton-per-mile cost of transporting goods would be. Additionally, managers in many industries found that increasing the scale of production allowed workers to specialize, which also improved productive efficiency. Within industries to which these factors applied, the bigger a company was, the larger the scale on which it operated, the more competitive it was.⁶⁵

Another way that businesses could improve efficiency was to eliminate transaction cost. These costs were incurred at every business relationship throughout the process of transforming raw materials into finished products and selling them to consumers. In the petroleum industry for example, oil fields had to be explored, wells had to be drilled to extract crude, and crude had to be transported to refineries. The oil was then refined, wholesaled, and finally retailed to customers. If each of these phases were completed by different companies, transaction costs occurring at every business

⁶⁴ Thomas K. McCraw, “Rethinking the Trust Question,” in Regulation in Perspective: Historical Essays, ed. Thomas K. McCraw (Cambridge: Harvard University Press, 1981), pp. 8-9.

⁶⁵ Ibid, pp. 8-9.

relationship throughout the process keep the price of the final product unnecessarily high. However, if a single company completes all phases and transaction costs are eliminated it can deliver a much cheaper product to the consumer. This technique came to be called “vertical integration”. The classic example of a successful vertically integrated company is J. D. Rockefeller’s Standard Oil, which started out refining crude oil, and integrated “backward” and “forward” to control all steps involved in the petroleum industry from exploration to retail.⁶⁶

These causes naturally tended to increase the size of individual business organizations. Competitive ability was the primary impetus for growth of this kind. Greater size meant greater productive efficiency, which meant lower prices to the consumer. Those companies that were not able to grow lost their ability to compete and failed. The ones that did achieved great size succeeded. The weeding out of weaker companies strictly through competition reduced the absolute number of establishments in the marketplace, and caused a natural consolidation in many industries. In such a fierce competitive environment where the strong fed on the bones of the weak, a certain degree of resentment built up against big businesses. However, these developments were “so obviously in line with the needs of the economic environment that it created little interest and less concern on the part of the general public.”⁶⁷ For the most part, the public understood the growth of big business to be a natural development of a free capitalist economy at work.

⁶⁶ Ibid, pp. 11-13.

⁶⁷ Faulkner, Economic History, p. 156.

The boom in production brought about by new technologies amounted to nothing less than a “productivity revolution”.⁶⁸ Supply met and exceeded demand in many markets, causing destructive price wars between competitors. Many businesses were driven into bankruptcy and many more saw their profits substantially reduced. Overcapacity was a very real problem for the entire economy. Markets burdened with excess supply were volatile. Industrial titans fought it out, turning entire economic sectors into battlegrounds. Together with the “boom-and-bust” business cycle this caused dramatic fluctuations in supply. It was a hostile and dangerous environment for businesses of any size.⁶⁹

One solution to overcapacity was “horizontal combination” through mergers and acquisitions. Businesses formed several kinds of combinations ranging from simple agreements between to the tightly controlled trust, which gave control over complex and wide ranging operations to a single individual or group. Once businesses were so combined, the agreement between them, or a committee representing an association, or a central governing authority would determine production and pricing. In other words, prices were deliberately controlled by people or groups, and not merely by economic forces. The solution to the overcapacity problem provided by horizontal combination was, effectively, to substantially reduce or eliminate competition in the marketplace. Centralizing decision making in this way put control of the economy into fewer hands, thus reducing the absolute level of economic freedom in the market. The Invisible Hand was assisted in its work by the hands leading bankers.⁷⁰

⁶⁸ McCraw, Regulation in Perspective, p. 14.

⁶⁹ Ibid, pp. 14-15.

⁷⁰ Ibid, pp. 14-16, 29-32; Faulkner, Economic History, p. 156-170.

Extensive consolidation of industries by this method occurred in the 1880s and again more actively in the late 1890s. It was by this method that companies grew to a size and level of power that frightened the public. Horizontal combination produced great monopoly trusts like Standard Oil, the American Sugar Refining Co., and the American Tobacco Company. At their height these companies were fully integrated and occupied enough of the market in their respective industries so that they effectively controlled them. The price of a gallon of gasoline in the United States was ultimately a result of what J. D. Rockefeller said it was.⁷¹

Americans did not look kindly on horizontal combination when it resulted in such an arrangement. Any benefit to the consumer seemed at best indirect and remote. Evidences and suspicion suggested that the overall result of horizontal combination was that prices were kept artificially high by producers enjoying one degree or another of monopoly control. It seemed like “artificial” economic development because it gave extraordinary wealth and power to a very few without providing any real benefits to the economy as a whole.⁷² As people realized this, it became harder and harder for businessmen to convince the public that consolidation was good for the country. Voters listened to the overtures of *laissez faire* politicians with a tin ear, while on the other hand the wave of criticism grew louder as more giant corporations gained monopoly control over markets. The public came to resent the incredible power that businessmen seemed to have over life in America. Who had given them this power? When did the people consent to such rule? The facts of life seemed to contradict the sacred principles of American society. Facing what they perceived to be a new tyranny, and feeling powerless against its

⁷¹ Faulkner, *Economic History*, pp. 153- 178; McCraw, *Regulation in Perspective*, pp. 1-17.

⁷² Faulkner, *Economic History*, p. 153. Woodrow Wilson also described this sort of business growth as “artificial” in the collection of his speech, “The New Freedom” (citation will appear below).

weight, people began to look to government for their salvation from corporate rule.⁷³ The ideology that had so long looked upon government power with suspicion began to give way to a new emerging ideology that regarded the government as the agent for achieving popular goals.

Government's response to the trust issue was mixed and slow, generally mirroring the moods of the public. In 1890, after a decade of heavy consolidation and public protest, Congress passed the Sherman Anti-trust Act. Its purpose was to establish control over big business by making any contracts, combinations or conspiracies "in restraint of trade or commerce" illegal, and gave the Executive branch the statutory authority to go after big business monopolies. However, the purposes of the act were largely unfulfilled for many years. Lack of enforcement by disinterested administrations, a hostile judiciary, and deep-seated reservations about the use of government power against private business kept the Sherman Act from fully achieving its purpose. A decade after its passage lawyers were advising their clients that it was a dead letter, unable to stop holding companies from merging and formed by mergers and consolidation as long as the company did not achieve a complete monopoly. For more than a decade after the act was passed, consolidation continued unhindered.⁷⁴

After the year 1897 another great wave of consolidation swept through the economy. The size of business organizations continued to grow naturally to meet competitive pressures as before, this period is was defined by the degree to which companies achieved their size by "artificial" growth through horizontal combination. The rise of finance capitalism which coincided with this latest phase of combination greatly

⁷³ Faulkner, Economic History, p. 153- 178; McCraw, Regulation in Perspective, p. 1-17.

⁷⁴ Sherman Anti-trust Act; Faulkner, Economic History, p. 160-161, 175-182.

contributed to the consolidation of the economy. The availability of greater concentrations of capital meant that larger, more complex business organizations could be financed. Great holding companies controlled large operations in a wide variety of industries. Their influence was felt throughout the country, and it seemed like the entire economy was being controlled by the wealthy capitalist at the top. Government power had not choked the freedom out of the economy, private power had. Unregulated wealth was perceived as restrictive of individual liberty. As this concept dawned on the American public, *laissez faire* policies and rhetoric lost their relevance.⁷⁵

After McKinley's death in 1901, the era of *laissez faire* came to an end. Theodore Roosevelt's administration witnessed the first extensive prosecution of monopolies under the Sherman Act. His "trust busting" campaign was aided by the 1903 Expediting Act, which gave precedence to Interstate Commerce Act and Sherman Act cases in federal courts. His greatest victory came in 1904 when prosecution of the Northern Securities Company, which had a monopoly on transportation in the Northwest, ended in ordered dissolution of the company. The decision made it much more difficult for holding companies with monopoly control to avert prosecution under the Sherman Act. Investigation of other monopolies including Standard Oil and the American Tobacco Company were also initiated. Both companies were ordered broken up in 1911. In 1903 Congress set up the Department of Commerce and Labor, and, within it, the Bureau of Corporations to investigate trusts and combinations, and advise the Justice Department in matters of litigation against them. It also increased the amount of funds available for anti-trust enforcement.⁷⁶

⁷⁵ Faulkner, *Economic History*, pp. 153-156.

⁷⁶ *Ibid*, pp. 163-180; Higgs, *Crisis*, pp. 109-110.

Roosevelt's crusade against monopoly trusts focused on reviving the Sherman Act, which he believed to be adequate if enforced. His successor, William H. Taft continued the fight with even greater urgency, more than doubling the number of proceedings initiated against combinations. He also called for new legislation that would set up a body "to supervise the granting of charters, and an end to stock watering and the erection of holding companies."⁷⁷ Congress however did not act on these recommendations.⁷⁸

As the need for government action to fix the trust problem became more evident, Democrats increasingly made it a central piece of their platform. Progressivism became the dominant intellectual thrust of the party. Their nomination of Woodrow Wilson for the 1912 presidential election was a clear indication that they intended to bring big business under public control. As governor of New Jersey, Wilson had sponsored a series of tough anti-trust laws, and it was expected that he would do the same as president.⁷⁹ Another key figure in the Progressive movement was Louise D. Brandeis, prominent Boston lawyer, appointed to the Supreme Court by Wilson in 1916. Both in his private career as a lawyer and a Supreme Court Justice, he established himself as the preeminent intellectual of the anti-trust movement. "As the 'People's Lawyer' of the Progressive Era, Brandeis symbolized the insurgent revolt against the domination of the nation's economic life by the new center firms."⁸⁰

The Progressives brought a new, more sophisticated, and more successful vision to the Democratic Party than the supporters of William Jennings Bryan a decade before.

⁷⁷ Faulkner, Economic History, p. 180.

⁷⁸ Ibid, p. 178-181.

⁷⁹ Ibid, p. 181-184.

⁸⁰ McCraw, Regulation in Perspective, p. 25.

Their objective was, as they perceived it, the restoration of essential aspects of the American republic that had been lost as a result of industrialization and the rise of big business. They perceived the existence of the trusts, as they existed at that time, to be a threat to individual freedom and autonomy, and other essentially American qualities. They saw a society dominated by elite businessmen, who had unprecedented control over the “business operations of the country and in the determination of the happiness of great numbers of people.”⁸¹ Giant corporations employed masses of people, subjected them to the absolute will of the few men controlling decision-making power, and meanwhile suppressed new and small competing businesses by means of unfair competitive methods. “American industry is not free, as once it was free; American enterprise is not free; the man with only a little capital is finding it harder to get into the field, more and more impossible to compete with the big fellow. Why? Because the laws of this country do not prevent the strong from crushing the weak.”⁸² Unlike the past, when the government could abstain from acting, “life is so complicated... that the law has to step in and create new conditions under which we may live.”⁸³

Wilson was direct about his intentions and fearless in his criticism of the “counsels of do-nothingism” clinging hopelessly to an antiquated philosophy. The “one great basic fact which underlies all the questions,” he stated, “is that nothing is done in this country as it was done twenty years ago.”⁸⁴ After the “new organization of society” brought about by the industrial revolution “old political formulas do not fit the present

⁸¹ Wilson, “The New Freedom,” p. 3.

⁸² Wilson, “The New Freedom,” p. 5.

⁸³ Ibid, p. 7-10.

⁸⁴ Woodrow Wilson, “The New Freedom: A Call For the Emancipation of the Generous Energies of a People,” *Project Gutenberg* (January 26, 2005). <http://www.gutenberg.org/files/14811/14811-8.txt> (accessed July 3, 2006), p. 2.

problems”.⁸⁵ He correctly perceived that it was not just the bigness of business that was the problem, but the conspiracies to manipulate the economy by trusts. This was a crucial distinction that the Populists had failed to make. “A trust is an arrangement to get rid of competition, and a big business is a business that has survived competition by conquering in the field of intelligence and economy... I am for big business, and I am against the trusts.”⁸⁶ He did not challenge capitalism and he did not criticize businessmen for their success. After all, they had done so by, strictly speaking, perfectly legal means. He instead faced the problem of correcting “the wrongs of [the] system” by “fitting a new social organization... to the happiness and prosperity of the great body of citizens.”⁸⁷

Under his leadership the Progressives went to work reshaping the structure of American government. In 1913, the Sixteenth Amendment to the constitution was ratified, making the federal income tax a part of fundamental American law. The same year, the Federal Reserve System was created to stabilize the “flow of commercial loans” and bring about a uniform currency.⁸⁸ The next year Congress passed the Clayton Anti-trust Act and the Federal Trade Commission Act. The Clayton Act, much more thorough than the Sherman Act, specifically outlawed many monopolistic practices, including price discrimination between purchasers, arrangements or contracts which forced one party to refuse to do business with another’s competitor, joint stock ownership that resulted in monopoly or restrained competition, interlocking directorates between competitors, and required notification of acquisition of voting securities to the Federal Trade Commission

⁸⁵ Ibid, p. 2.

⁸⁶ Ibid, pp. 46-47.

⁸⁷ Ibid, pp. 3-4.

⁸⁸ Campbell, Growth of American Government p. 75.

with a subsequent waiting period.⁸⁹ The Federal Trade Commission Act created the FTC, a regulatory body, for the purpose of “eliminating unfair methods of competition in commerce”. Wilson also expanded the power of the Interstate Commerce Commission to regulate railroad traffic.⁹⁰

Clearly these changes dramatically expanded the size and role of government in American life. After 1916, the country’s involvement in World War I “undercut American liberties and fed the growth of Big Government” even more than the Progressives’ reforms over the previous four years.⁹¹ Wilson’s presidency marks a decisive, unmistakable turn away from *laissez faire*, the small republic and governmental self-restraint. Conservative influence had weakened in the preceding decade as the Progressive movement grew, but Wilson’s program represents a clear expression of the popular will against big business control and the party that had allowed the corporate heist of the economy. The new ideology of the activist state, which had appeared briefly in the form of Populism in the 1890s, and had undergone a more serious development by liberal intellectuals in the years leading up to 1912, finally came into its own. After his election, government began to take on the role of protector of the people and guardian of the economy.⁹²

Wilson’s election is evidence the people widely began to view public power as a tool to correct social and economic problems. Government, which was for so long seen as the primary threat to liberty, was now seen as its protector. They had come to believe, in

⁸⁹ United States Congress, “Antitrust Division Manual, Chapter II: Statutory Provisions and Guidelines of the Antitrust Division: Clayton Anti-trust Act,” *Antitrust Division, U. S. Department of Justice* (December 28, 2005). <http://www.usdoj.gov/atr/foia/divisionmanual/ch2.htm#a1> (accessed July 8, 2006).

⁹⁰ Higgs, *Crisis*, pp. 106-116; Campbell, *Growth of American Government*, pp. 75-76.

⁹¹ Higgs, *Crisis*, p. 123. Because this paper is primarily concerned with the internal causes for government growth, we will not examine the effects of war in depth, but for a discussion of the political effects of World War I, see Higgs, *Crisis*, p. 123-158.

⁹² Higgs, *Crisis*, p. 113-116.

Wilson's words, "that the individual is caught in a great confused nexus of all sorts of complicated circumstances, and that to let him alone is to leave him helpless as against the obstacles with which he has to contend; and that, therefore, law in our day must come to the assistance of the individual... Without the watchful interference, the resolute interference, of the government, there can be no fair play between individuals and such powerful institutions as the trusts. Freedom today is something more than being let alone. The program of a government of freedom must in these days be positive, not negative merely."⁹³ By 1912, the public had accepted this widely enough that the proponents of limited government were in full retreat from an irresistible tide of reform.⁹⁴

The period from the industrial revolution through the Progressive Era was a period of political soul-searching. Americans were confronted with a new social and economic circumstance in which the old rhetoric and dogmas seemed irrelevant. They were living in a different world from the one that produced the constitution. The American society was no longer rural-agrarian as it had been in the early years of the republic. Americans were living in a new urban-industrial social condition from which the world looking out appeared quite differently. Industrialization brought about a paradigm shift, whose political manifestations generally increased the size of government and its involvement in every day life, especially in economic activity. By the early 1900s it could no longer be said simply that classical liberalism was the dominant philosophical foundation of voters and politicians. The structure of government remained essentially the same, but forces were at work whose inspiration came from sources outside of the cannon of classical liberalism, such as Marxism and Darwinism. Conflicts naturally arose

⁹³ Wilson, "The New Freedom," p. 73.

⁹⁴ Higgs, Crisis, p. 116.

out of the clash of worldviews. Over the forty-two years between 1895 and 1837 this friction erupted in the federal judiciary, where a revolution in American constitutional law was taking place.

Further Developments in American Constitutional Law

The cases examined in this chapter cover a span roughly of seventy years and show how the Court dealt with the problem of the extent of federal commerce powers in a time of great change and transition. Over this time period the United States was transformed from a quiet, isolationist, agrarian republic, small in territory and in influence, into the modern, global, industrial, military superpower. The cases of this era challenged many old notions of government and established the case law that would later make possible a judicial revolution.

In the years after Marshall's leadership, the Court interpreted his vision of commerce strictly to limit Congress' power in favor of the states. The central questions continued to concern the nature and extent of those powers, and Marshall's unitary conception of commerce was used to restrain the government. "By making rigid distinctions between production and commerce, it narrowed the scope of Congressional authority over industry."⁹⁵ The next Chief Justice after Marshall, Roger Taney⁹⁶ writing in the *License Cases*, 5 How. (46 U.S.) 504 (1847) used his reading of *Brown* to expound his vision of two separate, and mutually exclusive commerce powers of the state and national governments. Taney believed that a state's right to regulate its own internal

⁹⁵ William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (New York: Oxford University Press, 1995), p. 215.

⁹⁶ Interestingly, Taney had been one of the attorneys for the State arguing the case of *Brown v. Maryland* twenty years earlier

commerce was so extensive in fact that its laws could effectively annul national statutes so long as they did not directly contravene them in principle. But this theory was replaced just four years later in *Cooley v. Board of Wardens*, 12 How. (53 U.S.) 229 (1851) with a ruling that favored the states even more. The Court found that as to certain subjects in interstate commerce that were not "in their nature national, or admit only of one uniform system, or plan of regulation," could be regulated by the states in the absence of Congressional legislation. This not only gave states a new measure of power beyond that which they had held before, but it also breached the metaphysical boundary between state and national commerce powers.

As the nineteenth century drew to a close, the legal system was to be adjusted to deal with the problems of a modern, industrial economy. Multi-dimensional corporations whose reach and impact was felt throughout the country, who employed a massive workforce, and who did business on a national or international scale brought new issues before the courts. New kinds of litigation found their way to the Supreme Court dealing with issues like labor relations and anti-trust and railroad regulation, testing the constitutionality of Congress' laws passed to deal with such exigencies, and forcing a reevaluation of the constitutional law on the commerce clause. For years, the Court continued to interpret this power strictly and formalistically, maintaining rigid boundaries between the realms of state and national authority.

In *U.S. v. E. C. Knight Company* 156 U.S. 1, 15 S.Ct. 249 (1895) a challenge was brought before the Supreme Court to the validity of a court order, filed under the Sherman Antitrust Act of 1890, forbidding a merger of sugar refining companies which would have put 98 percent of the country's refining business in the hands of a single

corporation. The merger seemed obviously to form an illegal monopoly, the kind that the Sherman Act had been passed to stop. The Justice Department emphasized the importance of the sugar refining industry to the nation as a whole to show that the merger was a matter of national concern, and therefore subject to prevention under the Sherman act. The Court, however, adapting Marshall's model of commerce, refused to allow the government to interfere with the merger because sugar refining is manufacture, and manufacture is not commerce. To regulate in this way would be an unconstitutional extension of Congress' commerce power. In the words of Chief Justice Fuller, writing for the Court, "Commerce succeeds to manufacture, and is not part of it." Therefore, the power to regulate the company was a part of the reserved power of the states, and the Sherman act could not be used in the case.

By this time the Court had developed an understanding of productive industries, which included manufacturing, agriculture, and mining, by which such an industry was composed of distinctive parts, or stages. Each stage could be classified according to its nature as either interstate or intrastate and local. Once this had been determined, it would be clear which body of laws- state or federal- were to be used to decide the case. This favored the states because reasoning in this way provided a barrier to federal power at every point where one phase ended at the next began. In judging a case, the Justices removed the issues from the particulars of time and place and analyzed them within the context of the entire constitutional system. This meant that the real effects of a given activity on the nation as a whole were not reason enough to warrant regulation by the federal government. If an economic activity that took place within a state had an effect on the national economy, that effect in itself was not a legitimate avenue for federal power to

use to control the activity. To do so would violate the fundamental nature of division of powers and threaten the federal order, which, in the long run would harm the nation far more than any particular crisis or issue that might arise from time to time. In the words of the court, "acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality."⁹⁷

Decisions concerning regulation of productive industries continued to be determined according to this axiom well into the twentieth century. However, in *Hammer v. Dagenhart*, 247 U.S. 251, 38 S.Ct. 529 (1918), the Court outdid itself, striking down the Federal Child Labor Act on the basis of a moral judgment. Congress' purpose in passing this law had been to discourage factories from employing children, not by outlawing such employment outright, but by preventing goods produced by child labor from being shipped in interstate or international commerce. Although it would seem that Congress was acting within its power to regulate commerce, the Court found that it could not use its commerce power to discriminate against certain goods based on their manner of production. To do so would be, in effect, a regulation of a productive enterprise, which was beyond its power. It had upheld similar legislation in several cases,⁹⁸ but the Court differentiated them on the basis of the moral quality of the goods shipped. In the prior cases, the laws sought to discriminate against an evil that resided with the goods transported. In this case, the evil regulated- child labor- existed only during the manufacture of the goods transported. In a roundabout sort of way, the Court, in effect,

⁹⁷ *U.S. v. E.C. Knight*.

⁹⁸ *Champion v. Ames*, 188 U.S. 321 (1903), upholding a law banning shipment of lottery tickets in interstate commerce; *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911), upholding the Pure Food and Drug Act; and *Hoke v. United States*, 227 U.S. 308 (1913), upholding a law banning interstate traffic in women slaves for the purpose of prostitution.

second-guessed Congress' reasoning. Also, the Court ruled on the indirect effects of the law as if they were equivalent to an act of regulation by Congress. This was noted scathingly in the dissent by Justice Oliver Wendell Holmes, and the case was later overruled in 1941.

The Railroad Cases

In the early 1900s, the Supreme Court heard several cases involving interstate railroad regulation. The expansion of the railroads across the continent, and the increasingly important role that they played in the national economy gave rise to a flurry of litigation, which forced the courts to look at commerce clause case law in a new light. Unlike productive industries, railroad enterprises were highly integrated, and moved goods in interstate commerce as their primary activity. Because of its nature, the entire industry was brought under congressional regulatory power in a series of decisions tailored to deal specifically with railroads and similar industries.

In *Southern Railway Company v. United States*, 222 U.S. 20 (1911), the Court describes a railroad as a "highway of interstate commerce". Any part of the process that might be separately classified as intrastate was subject to Congress' power because of the close and substantial effect that all parts of the process had on each other. In other words, the whole process of railroad transportation was inseparable and had to be considered as one whole, over which Congress exercised complete power. The Court found that all vehicles operating on interstate railways were found to be within Congress' power to regulate, even if the vehicle itself were engaged only in intrastate transport. In the *Second Employers' Liability Cases*, 223 U.S. 1 (1912), the Court found that a national labor

liability law could be applied to workers on interstate railways who engaged only in intrastate commerce. The doctrine that emerged from these cases was that "the criterion of congressional power" should be the "effect upon interstate commerce" rather than "the source of the injury".⁹⁹ Therefore, Congress could regulate objects or activities that were strictly local in character if they were found to have "a close or direct relation or connection" to interstate commerce".¹⁰⁰

In the *Shreveport Rate Case*, 234 U.S. 342 (1914), the Court went one step further by upholding regulation of intrastate railway rates under federal law based on their effect on interstate commerce. The Texas Railroad Commission set rates for intrastate hauls that were below the standard interstate rates. On a railway running from cities in Texas to Shreveport, the ticket price per distance traveled was significantly higher in Louisiana than for points in Texas on the same line. The Court found that this caused an unjust economic discrimination against Shreveport, and therefore harmed interstate commerce. "[Congress'] authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic... The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter..."¹⁰¹ In order to eliminate the discrimination, prices for interstate and intrastate hauls had to be equalized. Because the Interstate Commerce Commission had already determined fair standards for interstate rates, the intrastate rates had to be raised. This effectively annulled the Texas Railroad

⁹⁹ *Second Employers' Liability Cases*, 223 U.S. 1 (1912).

¹⁰⁰ *Southern Railway Company v. U.S.*, 222 U.S. 20 (1911).

¹⁰¹ *The Shreveport Rate Case*, 234 U.S. 342 (1914).

Commission's rates, and allowed the government to nationalize railroad rates for all railway traffic that could be in any way connected with interstate commerce.¹⁰²

Another case involving railroad transportation, *Swift & Company v. United States*, 196 U.S. 375 (1905), introduced a new fluid concept of commerce. In this case, the Court was considering the legality of a scheme for price controlling in the beef market that involved railroads, stockyards and slaughterhouses. Although certain stages involved in this scheme were characteristically local, because of their interrelation to the entire scheme, they were found to be inextricably tied up with interstate commerce. The Court described the beef trade as a “current of commerce”. The adjectives “flow” and “stream” were later added on to describe the concept. In contrast to Marshall’s unitary conception, the emergent “flow of commerce” doctrine did not try to break down a process into separately classifiable abstract stages. Writing for the Court, Justice Oliver Wendell Holmes states: “commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business.”¹⁰³ His’ conception considered an entire process, and all its parts singularly as a great, interrelated movement, completely subject to congressional power. It took into account practical concerns for regulating a wide-ranging, complex and highly integrated enterprise, which might include many different systems.¹⁰⁴

The reconstruction of commerce in the railroad cases produced a practical conception of commerce to deal with real and imminent dangers to the national economy. Such a reconstruction was called for by developments in the economy that the law had previously not been able to deal with. The rules and principles and reasoning styles in

¹⁰² Ibid.

¹⁰³ *Swift & Company v. United States*, 196 U.S. 375 (1905).

¹⁰⁴ Ibid.

these cases were specifically formulated to deal with the railroad industry, which, by its nature, fell completely within Congress' commerce powers. For a time this reasoning was limited only to transportation cases, and was not applied to productive industries.

However, if the Court intended for the formula used in these cases to be so limited it did not state its intent. It seems now that it was only a matter of time before this formula was applied to other industries.

III

Franklin D. Roosevelt, the Great Depression and the New Deal

The Great Depression was a national crisis whose effects were so pervasive and were felt so acutely by all that the experience altered the fundamental assumptions upon which people based their views of government. Unlike previous depressions, this one did not simply go away after a few years. Conditions continued to get worse three and a half years after the stock market crash of 1929. The high-flying optimism of the twenties was dashed to pieces that day in October, then suffocated completely as people watched and waited, without hope or prospect, for the economy to rebound. Things were bad, and people were desperate. They began to blame the big business capitalists and the politicians who, it appeared, were in league with them. After a resurgence of *laissez faire* conservatism in the heady days of the 1920s, the people again became disillusioned with the traditional assumptions about government and economics. The Republicans, who had held control of the government throughout most of the decade, were cast as the stewards of a failed system, the advocates of a broken ideology. Their reign had brought the country poverty, misery and despair. Talk of collectivism and revolution became common. Change was inevitable.¹⁰⁵

Herbert Hoover, who had the misfortune of being president at the time, tried to respond to the crisis without laying waste to the country's economic structures and political traditions. Despite the perception, both historical and contemporary, of Hoover as a do-nothing president, he in fact worked feverishly to find a way out of the depression. His most important act was the creation of the Reconstruction Finance

¹⁰⁵ David A. Shannon, ed., The Great Depression (Englewood Cliffs, N. J.: Prentice Hall, 1960), p. x.

Corporation, which would extend loans to businesses, private organizations and states for relief and economic revitalization. But his initiatives were mired by red tape and constrained by his convictions about government, which prevented him from taking the sort of action that might have made him appear more competent, or at least more compassionate. He clung to the old republican beliefs in fiscal conservatism and “laissez-faire constitutionalism,”¹⁰⁶ which led him to insist that it was not the job of the federal government to provide employment or income assistance, and that people should look to private charities, state and local governments, and to their own resources for relief.¹⁰⁷

This approach was political suicide. Hoover’s unwillingness to go beyond the bounds of tradition marked him as a relic from the past, unable to generate relevant policy in the new depression era. If anything, his actions were seen as benefiting only the Wall Street bankers and big business capitalists, who many people held responsible for the entire depression in the first place. He was not just the victim of bad publicity though. Most of his plans were impracticable. Stringent credit restrictions by fearful, pessimistic bankers constricted the money supply, mitigating the possible benefits of Hoover’s initiative to generate credit. His demand that relief be provided by private charities, states and municipalities was impracticable. Private charities and local governments had responded with relief first, but were quickly drained, and the impediments to hasty use of state power within state constitutions prevented them from doing so when haste was precisely what was needed. By the 1932 election season things were only getting worse,

¹⁰⁶ Maxwell Bloomfield, Peaceful Revolution: Constitutional Change and American Culture from Progressivism to the New Deal (Cambridge: Harvard University Press, 2000), p. 99.

¹⁰⁷ Higgs, Crisis, pp. 162-165.

now for the third year in a row. Americans demanded strong leadership from the federal government, and Hoover seemed clearly unable to provide it.¹⁰⁸

Franklin Delano Roosevelt brought a dramatic new vision to the presidency. While Hoover and the Republican Party preached measured restraint, Roosevelt promised to use his presidential power to ease the suffering of the masses. Considering the audience, Roosevelt's was by far the stronger argument. He won the presidency by a landslide with 472 to Hoover's 59 electoral votes,¹⁰⁹ and his party took both houses of Congress. From the first words of his Inaugural Address on March 4 Roosevelt made it clear to the American people that things were going to change and a new approach would be implemented. He did not try to minimize the situation as Hoover had done, but stated plainly: "Only a foolish optimist can deny the dark realities of the moment."¹¹⁰ He indicted the "rulers of mankind's goods" for having brought about and prolonged the effects of the depression. Hoover and his administration had allowed a national emergency to occur on their watch, blindly following "an outworn tradition"¹¹¹ and allowing selfish capitalist exploiters to run the economy into the ground. He would not make such a mistake. He treated the emergency of the depression as equal to that of war, and assured the people that he would move quickly to make bold reforms. His plan included government employment of workers to build public works, raising the price of agricultural goods, curbing foreclosures on homes and farms, lowering taxes and

¹⁰⁸ Higgs, *Crisis*, pp. 162-167, Campbell, *Growth of American Government*, pp. 84-85, 137, Shannon, *The Great Depression*, p. 36-44, Bloomfield, *Peaceful Revolution*, p. 100-102..

¹⁰⁹ U.S. Electoral College. "Historical Election Results: Electoral College Box Scores 1789-1996." (NARA: 2006). <http://www.archives.gov/federal-register/electoral-college/scores.html#1932> (accessed October 15, 2006).

¹¹⁰ Roosevelt, Franklin D., "First Inaugural Address: March 4, 1933," *The Avalon Project at Yale Law School* (November 17, 2006), <http://www.yale.edu/lawweb/avalon/presiden/inaug/inaug.htm> (accessed November 17, 2006).

¹¹¹ *Ibid.*

imposing national control over privately held infrastructural components “which have a definitely public character” like transportation and communication facilities, and utilities.¹¹²

Roosevelt’s election was the first in a series of events that would eventually transform the American state. His election, and the Democrat takeover of the legislative branch gave the Democrats a great deal of latitude to reform. They immediately went to work equipping the federal government with mechanism to fulfill a new mandate: that of the activist state. At this point liberal reformers had little ideological common ground, except for the “[belief] that something was wrong with capitalism and that it was the responsibility of the government to fix it,”¹¹³ Many programs were in fact largely experimental. Within days of inauguration though, Roosevelt and his Congress began to implement his New Deal. He began directing money toward relief and enacting new business regulations.¹¹⁴

In the period called the first Hundred Days immediately after Roosevelt’s inauguration, he and Congress initiated a new economic policy aimed at accomplishing both of the tasks of relief and recovery. They suspended all bank activity and financial advisers drafted an emergency banking bill that was passed unanimously in a special session of Congress just a few days later. The bill legitimized Roosevelt’s bank closure, created new rules for banking and gave the executive “control over banks”¹¹⁵ and

¹¹² Ibid.

¹¹³ Alan Brinkley, “The New Deal and the Idea of the State,” in Steve Fraser and Gary Gerstle, ed., The Rise and Fall of the New Deal Order, 1930-1980 (Princeton, N. J.: Princeton University Press, 1989), p. 87.

¹¹⁴ William E. Leuchtenburg, Franklin D. Roosevelt and the New Deal: 1932-1940 (New York: Harper & Row, 1963), p. 43.

¹¹⁵ Congressional Record, Vol. 77, Part 1, p. 45. Franklin D. Roosevelt in a message to Congress, March 9, 1933.

currency. After its passage, all “sound banks”¹¹⁶ reopened and others were reorganized. Ironically, this was largely the work of many of Hoover’s top financial advisers.¹¹⁷

Before it adjourned on June 16, Congress rolled out another package of reforms. It cut federal pay to veterans and federal employees to keep spending down and ended prohibition in hopes of generating revenue. To reverse the course of deflation that had accelerated after the bank closures, it took the United States off the gold standard. Doing this would also allow Roosevelt to control prices and create inflation, which he believed would stimulate economic activity. A Securities Act was passed, which aimed at cleaning up and- for the first time ever- regulating securities trade on Wall Street. The Glass-Steagal Act made certain reforms of the Federal Reserve System, and created the Federal Deposit Insurance Corporation, giving federal backing to client banks and restoring a degree of confidence in the nation’s banking system.¹¹⁸

With the financial reforms passed, Congress took bold action to fix specific problems areas in the economy. They began formulating and debating a farm bill, and eventually passed the Agricultural Adjustment Act and the Farm Credit Act, which subsidized staples farmers, boosted the price of agricultural goods and allowed farmers to refinance their mortgages, stemming the flood of foreclosures on farms respectively. The Home Owners’ Loan Act saved hundreds of thousands of urban homeowners from foreclosure as well. To aid the states’ relief efforts, Congress sent a half a billion dollars in direct federal grants their way. In an effort to get America’s restless young unemployed men off the city streets where they could cause trouble, the New Dealers

¹¹⁶ Congressional Record, Vol. 77, Part 1, p. 45. Franklin D. Roosevelt in a message to Congress, March 9, 1933.

¹¹⁷ Leuchtenburg, Franklin D. Roosevelt and the New Deal, p. 43.

¹¹⁸ Ibid.

decided send them for a “furlough in the country”¹¹⁹, through the Civilian Conservation Corps. The Tennessee Valley Authority was created to control floods, generate hydroelectricity, and at the same time put people to work.¹²⁰ To revitalize industry, Roosevelt worked with the cooperation of business and union representatives to create the National Industrial Recovery Act. This gave the president extensive powers to govern business. It allowed him to determine what was fair competition, set minimum wages and maximum weekly work hours, and determine suitable working conditions, effectively suspending anti-trust and labor laws.¹²¹

The most important of these acts in terms of their lasting impact of the course of government were the AAA, the NIRA and the TVA. These were the three major precedent-setting acts that set the stage for later government welfare, intrusion and involvement in business and infrastructure. The idea of giving someone something for nothing was a novel idea in 1933. That is essentially what the AAA did. It gave numerous advantages to farmers at a huge cost to the government. The Agricultural Adjustment Administration (created by the act) had the authority to make acreage and production controls, regulate marketing agreements and licensing, lend government money directly to farmers, and pay farmers not to use their land. Its stated purpose was to raise commodities prices to pre-depression levels. This was direct government manipulation of the economy. It was sold as a temporary emergency assistance plan, yet the government programs it created remain in effect to this day. The National Industrial Recovery Act was a “tremendous intrusion into the economic life of the country, completely without

¹¹⁹ Ibid, p. 52.

¹²⁰ Ibid, p. 41-62.

¹²¹ Higgs, Crisis, p. 177-179.

peacetime precedent.”¹²² Never before had a president had this kind of power to manage the economy. The TVA set the government on the path to control over public utilities and asserted itself in regional planning. It built dams that generated hydroelectricity, which it then sold to the public. The dams also controlled floodwaters in the Tennessee Valley.¹²³

The Legacy of the New Deal

By the end of Congress’ first session, Roosevelt and his Congress had accomplished some truly remarkable feats. For one thing, Roosevelt had provided the kind of executive leadership that the nation was so desperately in need of. Whatever one might think of the particular policies of the New Deal, at least it brought back a sense of hope to a nation deprived of it. Roosevelt led the people like a “trained and loyal army” and convinced them to “submit [their] lives and property”¹²⁴ to his leadership. That submission gave extraordinary power over to the president and his administration. At no other time in the country’s history had the people been so willing to put such power in the hands of the government in a time of peace. Roosevelt was not shy about using that power either. The sheer volume of legislation that was passed under his leadership in just the first congressional session is truly breathtaking.¹²⁵

It is the institutional and ideological effects that this wave of legislation had on the country that is important. The work done by the Democrats during the New Deal outfitted the federal government for a new and very different role than it had ever played in American life. By taking on such ambitious objectives, the New Deal perpetuated the

¹²² Ibid, 178.

¹²³ Leuchtenburg, The Supreme Court Reborn , p. 213; Higgs, Crisis, p. 176-179.

¹²⁴ Roosevelt, “First Inaugural Address: March 4,1933.”

¹²⁵ Higgs, Crisis, p. 189-193.

shift toward the statist ideology that had begun in the Progressive Era. The resurgence of *laissez faire* during the twenties showed that even after the Progressive reforms and war-time measures, modern liberal ideology was not the uncontested dominant force in the American political mind. However, by the end of the Hundred Days the dominant political order up until the Regan era was that of “New Deal liberalism”.¹²⁶ By 1937 this began to develop into a coherent ideology, marked by the belief in the use of the state to solve the problems of capitalism, first, by regulating or managing the conduct of business, and second, by “making more energetic use of its fiscal powers- its capacity to tax and spend- to stimulate economic growth and solve social problems.” What this meant for the political system was that the government would take on a permanent active role in economic and social affairs.¹²⁷

The Social Security Act of 1935 was the first major social welfare program. This broke down the barrier of personal responsibility that had stood so long between the government and the individual by creating income assistance for the elderly, the indigent and the unemployed. Later increases and amendments, including “assistance for workers forced into retirement by a medical condition (disability) in 1956 and health insurance for the elderly (Medicare) in 1965”, expanded the program dramatically.¹²⁸ By 1980, one out of six Americans received assistance, Social Security spending accounted for 5.6% of GNP, and amounted to one quarter of the federal budget.¹²⁹ This act gave birth to a

¹²⁶ Brinkley, “The Idea of the State,” p. 87.

¹²⁷ Ibid, p. 94.

¹²⁸ Campbell, The Growth of American Government, p. 141.

¹²⁹ Ibid, p. 139-141.

multitude of entitlements, and led to the emergence of what would come to be called the “welfare state”.¹³⁰

Monetary policy was carried out primarily through taxation and the Federal Reserve Board, which regulated inflation, unemployment and the supply of money by adjusting interest rates. In addition, the federal government now employed large numbers of economic experts in agencies like “the Treasury, the Department of Commerce, the Bureau of the Budget,” and the Federal Reserve to analyze and micromanage the economy.¹³¹ The new confidence that New Deal liberals had in their ability to create and ensure prosperity through the use of government power let them to the passage in 1946 of the Full Employment Act.¹³²

The Act states: “The Congress hereby declares that it is the continuing policy and responsibility of the Federal Government to use all practicable means consistent with its needs and obligations and other essential considerations of national policy, with the assistance and cooperation of industry, agriculture, labor, and State and local governments, to coordinate and utilize all its plans, functions, and resources for the purpose of creating and maintaining... conditions under which there will be afforded useful employment opportunities... and to promote maximum employment, production and purchasing power.”¹³³ This is perhaps the clearest expression of the ideology of New Deal liberalism. They believed that government should have the permanent responsibility for ensuring prosperity, and this act gave government the legal mandate to do so.

¹³⁰ Higgs, *Crisis*, p. 11-12.

¹³¹ Campbell, *The Growth of American Government*, p. 111.

¹³² Higgs, *Crisis*, p. 190.

¹³³ Full Employment Act of 1946, in Higgs, *Crisis*, p. 227.

To this day the ideological revolution has never been rolled back. Though there has been some resurgent demand for limited government since the election of Ronald Reagan in 1980, nothing substantial has been done to cut back institutions or reverse the ideology of big government. Government continued to grow long after the Depression and World War II. The most significant period of growth was during the 1960s when the Lyndon Johnson administration launched an “unconditional war on poverty” and attempted to implement their vision of a “Great Society”.¹³⁴

In a flurry of legislation between 1964 and 1967 Congress passed new legislation that “adopted civil rights protections for racial minorities, women, and the elderly; substantially increased national assistance for the nation’s cities and educational institutions; took significant steps toward initiating environmental and consumer protection policies; and confronted important public health issues, such as the use of tobacco and the cost of medical care for the elderly.”¹³⁵ Among the institutional additions were Medicaid (financial assistance to the poor for health care) and a commitment by the government to achieving not just full employment, as had been done in 1946, but also “income adequacy”.¹³⁶ This period only sped government along on its course toward total abrogation of private property rights and personal responsibility.

¹³⁴ Higgs, *Crisis*, p. 256-257.

¹³⁵ Campbell, *The Growth of American Government*, p. 147.

¹³⁶ *Ibid.*

New Deal Cases on Productive Industry

When the nation was in the throws of the Great Depression, pressure began to mount on the Judiciary from the public and the other branches of government to adapt its jurisprudence to the needs of the country. However, the "Four Horsemen", a group of elderly Justices inhabiting the Court made up of Willis Van Devanter (appointed 1911), James Clark McReynolds (1914), George Sutherland (1921), and Pierce Butler (1923), consistently opposed the New Deal programs. As long as they could sway one other Justice to join them, they would control the majority. Up until 1937, they succeeded in holding the majority, and the Court dismantled the New Deal program by program. However, government attorneys, convinced that they had found the key to legitimizing New Deal legislation, continually tried new ways of applying the reasoning used in the railroad cases to cases arising out of productive industries.

Two cases in particular, *Schechter Poultry Company v. United States* 295 U.S. 495, 55 S.Ct. 837 (1935), and *Carter v. Carter Coal* 298 U.S. 238 (1936) show the Court's reference to the railroad cases, bringing the principles used in those decisions to bear on productive industry cases. Schechter Poultry Company was a Brooklyn slaughterhouse that bought live chickens from out of state, slaughtered them, and sold them locally in and around New York. It was convicted of violating provisions of the Live Poultry Code regulating the sale of chickens and hourly wages of workers in the slaughterhouse. The Code was written by the National Recovery Administration, which was set up to carry out the goals of Congress as stated in the National Industrial Recovery Act, one of the biggest pieces of the New Deal. In setting up the framework for deciding whether the offences of the company were subject to congressional power, the Court

referenced each of the railroad cases mentioned in the previous chapter, including the "flow of commerce" test from *Swift*.

The particulars of the case failed to meet the criterion for congressional regulation. The Court briefly commented on the "precise line" that could be drawn between what constitutes a direct and an indirect effect on interstate commerce, and held up the railroad cases as the standard for delineation between them. In this particular case, neither the sale, nor the conditions within the slaughterhouse were found to have such an effect on interstate commerce. The company's sales were completely limited to stores within the State of New York, and any effect that those sales might have had on interstate chicken prices were "merely indirect" and "remain within the domain of state power".

Additionally, the "flow of commerce" test from *Swift* could not be invoked. Whatever flow of interstate commerce there may have been ended before the live chickens entered the slaughterhouse. Given the local character of the actions regulated, and the absence of any legal standard that could be used to bring them under the national authority, Schechter was found to be outside the control of the national government, and the Court found that the NIRA sought to regulate beyond its authority. The act was struck down.¹³⁷

In 1935, Congress passed the Bituminous Coal Conservation Act to stabilize the nation's supply of coal. Because of its importance to the national economy, Congress sought to guarantee the dependability of the coal supply by regulating its production, distribution and marketing, including labor relations. The act asserted the right of miners to collective bargaining, and set up price controls and rules for fair competition. The

¹³⁷ The act was also found to have given the Executive an unconstitutional delegation of power by allowing the NRA write its own codes and policies.

rationale claimed that the effects of disruptions, such as labor violence, during the productive phases were felt throughout the entire industry, and therefore affected the whole nation. If this framework were conceded, the entire coal industry, like the railroad industry, would fall under congressional regulation. In a sharply split decision, the Court struck down the act, holding back the power of Congress again from entering into production.

Writing for the Court, Justice Sutherland constructed his argument on the Court's traditional formalistic approach to commerce. He regarded Congress' justification for the act as unfounded, resting on "some general federal power, thought to exist, apart from the specific grants of the Constitution" allowing Congress to "enact laws to promote the general welfare".¹³⁸ Strictly speaking, such a power does not exist. Sutherland considers all parts or stages used in coal mining separately, deciding what may and what may not be regulated according to the nature of the thing regulated. Using prior manufacturing cases as his model, Sutherland distinguished commerce from productive industries. "[Commerce]... includes transportation, purchase, sale, and exchange of commodities between the citizens of the different states." But productive industries primarily involve "the fashioning of raw materials into a change of form for use."¹³⁹ The two are essentially different activities. Furthermore, Congress' power to regulate one cannot be extended to the other under the "flow of commerce" doctrine from *Swift* because, as in *Schechter*, the flow or current or stream of interstate commerce does not encompass productive phases.

Sutherland's strict delineation focuses on the nature of the thing regulated as the primary determinant of whether or not Congress can exercise its power. In this case,

¹³⁸ *Carter v. Carter Coal*.

¹³⁹ *Ibid*.

effects on interstate commerce are almost disregarded. In railway cases, the Court regarded it a "mistaken theory" that "treats the source of the injury, rather than its effect upon interstate commerce, as the criterion of congressional power".¹⁴⁰ Clearly Justice Sutherland refused to consent to this reasoning being applied to coal mining. Had he thought that the effects-based criterion from the railroad cases could be fitted to cases involving productive industries he would have surely written a very different opinion. However, the line between *Carter* and *Schechter* is a very fine one, so fine in fact that the differentiation in the Courts treatment of the two seems almost arbitrary. Both cases are essentially productive industry cases. In *Carter* the Court reasoned as it had done so many times before, rejecting wholesale the notion that the logic of the railroad cases was an acceptable framework for judging the case. However, in *Schechter* the Court took on that logic and defeated it. In both cases the Court arrived at the same end: it defeated a vital piece of New Deal legislation. But the fact that the Court applied the logic from the railroad cases in *Schechter*, a productive industry case only slightly different in its essence from *Carter*, shows that the majority was treading on shaky ground. Implicit in *Schechter* is the message that, given the right circumstances, the Court might be ready to broaden its framework for judging commerce cases, and deliver to the federal government sweeping regulatory powers that it had withheld since the time of John Marshall.

Sutherland seems aware of the implications. If the railway doctrine were applied to the coal industry, the *Swift* doctrine could be used to put it completely under the control of the national government. If this happened, there would be nothing to prevent the same thing from happening in other industries. "The result would be," he warns, "that

¹⁴⁰ *Second Employers' Liability Cases*.

Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining- in short, every branch of human industry."¹⁴¹ With a foreboding tone, he continues:

"Every journey to a forbidden end begins with a first step; and the danger of such a step by the federal government in the direction of taking over the powers of the states is that the end of the journey may find the states so despoiled of their powers, or- what may amount to the same thing- so relieved of the responsibilities which possession of the power necessarily enjoins, as to reduce them to little more than geographical subdivisions of the national domain."¹⁴²

The opinion in *Carter* had treacherous weaknesses. In light of *Schechter*, the reasoning employed was cast into doubt. Sutherland's words seemed to hold out against precedent for the sake merely of political preference, and his legal reasoning seemed anachronistic. The Four Horsemen had strong convictions about *laissez faire*, and the proper role of the national government,¹⁴³ and their primary weakness was that they came to rely more on those convictions than on solid reason. The integrity of their judgments therefore depended on the acceptance of a system of political beliefs, which by this time were far from being commonly accepted. Sutherland and the other Horsemen were relics of a prior era. The old Justice feared that if federal commerce power could be extended to cover production, it would herald the end of *laissez faire*, the nationalization of the nation's major industries, and the subjugation of the states to the national will. In short, it

¹⁴¹ *Carter v. Carter Coal*.

¹⁴² *Ibid*.

¹⁴³ Leuchtenburg, *Supreme Court Reborn*, p. 214.

would mean the end of the legal and political tradition that corresponded with the republican system of government, as it had been understood since the ratification of the constitution, and the cannon of classical liberalism.

Justice Cardozo, dissenting in part, exposed the weakness in the Court's ruling. He accused the majority of subjecting the direct effects requirement to an "over-literal" interpretation, contending that "a great principle of constitutional law is not susceptible of comprehensive statement in an adjective," such as, "direct", and a degree of flexibility must be used in applying those principles. He pointed out that such flexibility was demonstrated by the railroad cases, and reinforced in *Schechter*. If similar flexibility were used in this case, it would easily be demonstrated that the intrastate price of coal had a "direct" or "intimate" effect on the interstate coal trade. The Carter Company sold "substantially all" of its coal in interstate commerce, therefore, the price of locally produced coal in the location of its markets had a close relationship to the sale of coal coming from out of state. In other words, local, or intrastate coal prices were brought into direct competition with interstate coal prices. These facts closely parallel those of the *Shreveport Case*. "One of the most common and typical instance of a relation characterized as direct has been that between interstate and intrastate rates for carriers by rail where the local rates are so low as to divert business unreasonably from interstate competitors." By striking down the act on the basis that its regulation of intrastate coal prices was an unjust extension of congressional power, the Court's ruling was inconsistent with the standards that it had set up for adjudicating such cases in previous rulings.¹⁴⁴

¹⁴⁴ *Carter v. Carter Coal*.

The next year the Court heard a case similar to *Carter* under somewhat different circumstances. In early 1937, Roosevelt announced to the surprise of the nation and Congress his court-packing scheme. The rationale for the plan suggested that men over the age of seventy began to lose their ability to work and reason correctly, and therefore, for every Justice on the Supreme Court over that age (there were six) the president should be allowed to appoint an additional judge to help bear the workload.¹⁴⁵ Aside from its insulting insinuation, the plan presented a threat, many believed, to the essential design of the Founders, and, to Roosevelt's surprise, the plan met with fierce opposition by Congressional members of both parties, and the public.¹⁴⁶ However, while the debate raged in the press and the Houses of Congress, the Court itself settled the matter when it handed down its decision in *National Labor Relations Board v. Jones & Laughlin Steel, Corp.*, 301 U.S. 1 (1937), in which it upheld the National Labor Relations Act, or Wagner Act, and essentially reversed its position on the entire New Deal. This was brought about simply by the conversion of Justice Owen Roberts. Though never a solid ally of the Four Horsemen, Roberts had voted with them consistently enough over the past years to give them the majority in several of the key 5-4 decisions. The reasons for Roberts' conversion have been the subject of a great deal of speculation. Many believed that it was a work of persuasion by Chief Justice Hughes, a man who himself stood mostly in the middle, but with one foot in the liberal camp. Whatever the reason, it turned a majority against the New Deal into a majority for it.¹⁴⁷

The case itself dealt with labor relations between Jones & Laughlin Steel Corporation, the fourth largest steel producer in the country, and its employees who were

¹⁴⁵ Leuchtenburg, *Supreme Court Reborn*, p. 132-134.

¹⁴⁶ *Ibid*, p. 134-142.

¹⁴⁷ *Ibid*, p. 142-147.

affiliates of the Amalgamated Association of Iron, Steel and Tin Workers of America. The National Labor Relations Act was passed in 1935 to protect workers' right to collective bargaining, and it set standards for fair labor relations. It set up the National Labor Relations Board to enforce the act. The rationale was that labor disputes arising out of unfair labor practices threatened commerce, and by protecting workers right to collective bargaining, such disputes could often be avoided, and the crisis averted. Jones & Laughlin Steel fired ten employees who worked in the production sector of their operation in Aliquippa, Pennsylvania for their involvement with the union, and therefore violated the laws set by the Labor act and provoked action by the Labor Board.

The most significant issue in this case was the application of the act's fair labor provisions to relations between employers and employees engaged only in manufacturing. The government tried to apply the "stream of commerce" principle from the *Swift* case to respondent's whole enterprise, emphasizing the wide-ranging, and highly integrated nature of the company's operations. The company responded by pointing out that any "stream" or "flow" must cease prior to manufacture, which transforms raw materials into something else. The "flow of commerce" test clearly could not be used to bring the entire industry under national control.

However, Chief Justice Hughes writing for the Court outflanked both the government and the company, stating that the Court did "not find it necessary" to use the "stream of commerce" analogy. Rather it proceeded to apply the reasoning of the railroad cases, based on the "fundamental principle" that "the power to regulate commerce... is plenary and may be exerted to protect interstate commerce 'no matter what the source of

the dangers which threaten it.’’¹⁴⁸ The reasoning in the railroad cases opened the doors for national power to regulate whatever could be shown to have a substantial effect on commerce, whether the effect was actual or potential, regardless of its source. As to what limits to the exercise of this power existed, Hughes remarked only vaguely:

“Undoubtedly the scope of 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 commerce so 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 is necessarily one of degree.”¹⁴⁹

He declined to specify to what degree the Court might allow the government to centralize.

In disposing of the arguments maintaining the metaphysical boundary between commerce and manufacturing, Hughes argued that the barrier had been removed before to make way for the Sherman Anti-trust Act. The ruling in *U.S. v. E.C. Knight*, which denied the government access to this power, had effectively been replaced by a set of later cases, the *Coronado* cases¹⁵⁰, in which the Court found that Congress could regulate mining activities.

With this achieved, Hughes set about establishing the “effects” connection between the activities at the steel mill in Aliquippa and the national economy. In this

¹⁴⁸ Quoting *Second Employers' Liability Cases*.

¹⁴⁹ *National Labor Relations Board v. Jones & Laughlin Steel, Corp.* 301 U.S. 1 (1937).

¹⁵⁰ *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 407, 408.

context, Hughes resurrects the argument that the government made in its attempt to invoke the “stream of commerce” test. Regardless of the “break in the complete continuity” of such a stream, “the stoppage of [manufacturing] operations by industrial strife would have a most serious effect upon interstate commerce.” In view of the environment in which Hughes wrote, in which the entire nation depended so heavily on such a few industrial superpowers, it seemed to make little sense to bind up the hands of Congress with outdated legal strictures. Addressing this issue with an air of rebellion, Hughes states:

“We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum... When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?”

He saw a need for a revision of the country’s judicial tradition, and emphasized the value of practical considerations above abstract principles in jurisprudence. This was a break with the Marshall conception of commerce, which elevated questions into abstraction so that they could be considered independently of present circumstances. Hugh’s language explicitly rejects such an approach. From then on the Court was inclined to give Congress

the legal latitude that it needed to accomplish its goals within the bounds of practical reason.¹⁵¹

The decision in *NLRB* revolutionized the constitutional law on the commerce clause by opening the door to a much broader range of legislation. After 1937 Congress was able to pass laws on virtually anything that could be connected in any way with interstate commerce. But the success of the revolution was ensured by a subsequent alteration of the composition of the Court itself. Later the same year as the decision in *NLRB* Willis Van Devanter submitted his resignation, the first of the Four Horsemen to leave the Court. He was followed by Justices George Sutherland in 1938, Pierce Butler in 1939, and finally James Clark McReynolds in 1941. Roosevelt replaced each of them with men who would read the law in a manner favorable to his style of aggressive usage of government power. In all, Roosevelt seated eight Justices, more than any other president since George Washington.¹⁵²

The effects of the rulings of the Roosevelt era on American constitutional law are still widely felt. “Beginning in 1937, the Supreme Court upheld every New Deal statute that came before it.”¹⁵³ It tended to be deferential to the Congressional will, and seemed to share, or at least approve, its new vigor for pursuing social objectives. “After 1937, the most significant matters on the docket were civil liberties and other personal rights.”¹⁵⁴ Congress passed laws- legally now- regulating virtually everything from price controls, to economic incentives, to social programs, greatly expanding the size of government, and its role in the lives of American citizens. *NLRB* was *the* watershed in U.S. constitutional

¹⁵¹ Leuchtenburg, *The Supreme Court Reborn*, p. 232-233.

¹⁵² David M. O’Brien, *Constitutional Law and Politics*, Vol. 1. Fifth Edition. (New York: W. W. Norton & Co., 2003), p. 1009.

¹⁵³ Leuchtenburg, *The Supreme Court Reborn*, p. 220.

¹⁵⁴ *Ibid*, p. 235.

history. The fundamental elements of the revolution that took place in 1937 are the precedents upon which today's Supreme Court continues to base its jurisprudence.

Certain notable cases show the progression by which the Court expanded the reach of Congressional commerce power after 1937. In *United States v. Darby Lumber Company* 312 U.S. 100, 61 S.Ct. 451 (1941) the Court upheld a law forbidding the shipment in interstate commerce of goods produced by companies that paid their employees less than the national minimum wage, overturning *Hammer v. Daggenhart*. In *Wickard v. Filburn* 317 U.S. 111, 63 S.Ct. 82 (1941), the Court upheld quotas on wheat grown, and applied the regulation to the use of grain as feed for livestock on the same farm from which it was harvested. In *Heart of Atlanta Motel, Inc. v. United States* 379 U.S. 241, 85 S.Ct. 348 (1964) and *Katzenbach v. McClung* 379 U.S. 294, 85 S.Ct. 377 (1964) the Court upheld provisions of the Civil Rights Act based on the effect of racism on interstate commerce. Finally, in *United States v. Lopez* 514 U.S. 549, 115 S.Ct. 1624 (1995), the Rehnquist Court curtailed the legislative free-for-all by striking down the Gun-Free School Zones Act of 1990, which imposed a ban on firearms within 1,000 feet of a public or private school based on the potential effect of school violence on interstate commerce. This case set up a three-step test for determining the extent of Congress' commerce power, finally acknowledging that limits to it still remained. *Lopez* stopped far short though of returning the Court to its former role as a limiting agent on federal power. The 1937 ruling "began a revolution in jurisprudence that ended, apparently forever, the reign of laissez-faire and legitimated the arrival of the Leviathan State."¹⁵⁵

¹⁵⁵ Ibid, p. 236.

Conclusions

This paper has attempted to trace the developments that transformed the American republic from a small, modest, unassuming body into the powerful and ambitious giant that it is today. There is certainly a great deal that remains to be said, but what we have covered is sufficient to make certain evaluations. The central, most important question in evaluating the overall merits of this change has less to do with the actual size of the government than its effect on the people. What is the effect of the modern big government on the American people? Has it made them more prosperous and happy? Has it increased their freedom? By these questions alone can the present condition and character of government be judged.

One may at least say that the present regime was created for a people less independent than the people that founded the nation and settled its territory. Over time, it seems that people increasingly saw themselves as limited being by the world around them. Politicians and heads of organized labor began to speak about a people victimized and helpless in the late nineteenth century during the labor movements and in the campaigns of the Populists. William Jennings Bryan stands out as the most prominent of these. He appealed to the “humblest citizen in all the land” for support, and vowed to lead the “cause of humanity”.¹⁵⁶ His infamous Cross of Gold speech portrayed a disadvantaged majority crucified by the powerful rich, and the politicians who did their bidding.¹⁵⁷ These were not independent and self-sufficient freethinkers that he was speaking to, but a rebellious faction men who felt powerless against the great power of

¹⁵⁶ Higgs, *Crisis*, p. 90.

¹⁵⁷ *Ibid*, p. 90-91.

the corporate trusts, who seemed to have absolute power over both the wages they earned and the prices they paid.

Woodrow Wilson's rhetoric in the 1912 campaign struck upon the same chord, but he spoke to a much more general audience. He saw a nation bewildered by the furious changes in American life, in which "most men are the servants of corporations," and "the individual has been submerged."¹⁵⁸ The economic growth and the emergence of American industrial might had redrawn every social dynamic and redefined American life to such an extent that "a new nation seems to have been created".¹⁵⁹ Unlike Bryan, who had spoken to the worker, directly victimized by a corporate master, Wilson appealed to people's concern for society. He declared, "There has come over the land that un-American set of conditions which enables a small number of men who control the government to get favors from the government".¹⁶⁰ Special interests had captured the control of government and left the people as a whole deprived of their sovereign political power. Wilson spoke of a tyranny unlike the tyranny feared by the Founders. It was not oppression by the hands of government, but "control of the law, of legislation and adjudication, by organizations which do not represent the people, by means which are private and selfish."¹⁶¹ Only "creative statesmanship"¹⁶² could set America back on the right course and restore freedom to the people.

The Depression of the 1930s was so extensive that by 1932 Roosevelt hardly needed to convince the people that they were powerless. It was the chaos of unregulated industrial capitalism that had led to "the overbalance of population in our industrial

¹⁵⁸ Wilson, "The New Freedom," p. 3.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid, p. 6.

¹⁶¹ Ibid, p. 14.

¹⁶² Ibid, p. 9.

centers,” which lay at the root of the unemployment problem.¹⁶³ Comfortingly told the people, “the only thing we have to fear is fear itself,” and pledged “action, and action now” to bring about the reforms that would restore the nation to prosperity.¹⁶⁴ The content of the programs that he and his colleagues enacted, which we have discussed, is further evidence of the general feeling of powerlessness. The government took over many activities that were very personal in nature. The ability for a person to find a job and provide for himself and his family now became not just his own responsibility, but also that of the government. How could this have come about if people had generally lost their confidence in their ability to do these things themselves?

All three of these great leaders, Bryan, Wilson and Roosevelt, perceived real, deep problems in American society, and responded with the reforms that they believed would best correct them. It seems clear that, to a degree, American society had in fact become less free by the late nineteenth century than it had been in its earliest years, and how could it have been any different? In 1800 the population was a fraction of what it was a century later, the closest powerful neighbors were on the other side of the Atlantic, and seemingly endless free land stretched away to the West. By the late nineteenth century, America’s territorial bounds had been mostly established, developments in transportation brought the rest of the world closer to home, and a great share of the population spent their lives in crowded, clustered cities.

Still, though it seems clear that government was in desperate need of reform, it is important that we are aware of the dangerous circumstances which reform may have brought about. Tocqueville warned of a unique and new kind of despotism that threatened

¹⁶³ Roosevelt, “First Inaugural Address.”

¹⁶⁴ Ibid.

American society. He saw its latent causes imbedded in society and the in the political system long in advance. He envisaged “an innumerable multitude of men, alike and equal, constantly circling around in pursuit of the petty and banal pleasures with which they glut their souls. Each of them, withdrawn into himself, is almost unaware of the fate of the rest... He touches them but feels nothing. He exists in and for himself, and though he still may have a family, one can at least say that he has not got a fatherland.”

He continues: “Over this kind of men stands an immense, protective power which is alone responsible for securing their enjoyment and watching over their fate. That power is absolute, thoughtful of detail, orderly, provident, and gentle. It would resemble parental authority if, fatherlike, it tried to prepare its charges for a man’s life, but on the contrary, it only tries to keep them in perpetual childhood... Thus it daily makes the exercise of free choice less useful and rarer, restricts the activity of free will within a narrower compass, and little by little robs each citizen of the proper use of his own faculties.”¹⁶⁵

How can we help but feel at least some sense of dread as we read that passage? Certainly it would be an exaggeration to say that we are now living under exactly such a despotism, but everywhere we feel the presence of a government that seeks to protect us so well as to retard our God-given intellect and free will. It has assumed responsibility for our own personal well-being. It coerces us to wear seatbelts when we drive, it warns us that smoking cigarettes is bad for our health, it provides us with an income when we are too old to work. The food we eat, what we listen to on the radio and watch on television, the schools our children to go, the buildings we work in; all of these, and other things as well, carry the touch of the government into our private lives.

¹⁶⁵ Tocqueville, Democracy in America, p. 691-692.

Most of these things are generally agreed to be positive. The reforms of the Progressives and New Deal liberals stabilized the country's monetary system, gave the masses of workers a collective voice, chased corruption from government and the marketplace, and defeated laws that discriminated between citizens by race. There can be no doubt that the statist have from time to time made definite improvements to our government. But like every good idea, positive use of government power is only good so far. The fault of the statist lies not in the principle behind their philosophy, but in the extent to which they carried it. Each expansion of government should be measured against its effects on the human soul and American society as a whole. It is a fine line that divides the kind of government action that improves the world we live in, and that which tends to make us weak and indolent. If our improvements make us a nation of fools and cowards there is nothing- no law or program, no president- that can save us from our destruction. The strength of the United States is in its people; no comfort or convenience can possibly be worth their degradation.

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