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THE PART OF THE UNITED STATES CONSTITUTION MADE BY THE SUPREME COURT

HUGH E. WILLIS†

The purpose of this article is to set forth all those parts of our United States Constitution which have been made by the Supreme Court, as distinguished from those parts of our Constitution which were made in the Constitutional Convention or by formal amendments. The reason for writing such an article is to demonstrate that a large part of our Constitution, if not the greater part of it, has been made by the Supreme Court itself. In recent years people in the United States have probably begun to realize that the Supreme Court has been performing a function as a constitution maker, but it is very doubtful if they adequately realize to what extent the Supreme Court has been performing this function. In writing this article, the author hopes that by having definitely set down the various parts of the Constitution made by the Supreme Court, the people of the country will be helped to obtain full and accurate information on this point.

That there is a need for an article of this sort can be easily shown. A year or two ago a president of the American Bar Association, in an address in Indiana, said that he did not believe in the Constitution another man had been talking about; but he believed in the Constitution which was made in the Constitutional Convention presided over by George Washington, and he then proceeded to name the constitutional principles which he found in this Constitution. As a matter of fact, the principles thus named by him were incorporated into our Constitution, not by the Constitutional Convention but, for the most part, by formal amendments. Other prominent lawyers of the United States have been going up and down the country viewing with alarm all new changes in our Constitution—except those that they desire. In this way they have criticized the change in the method of selection of the President and of senators; changes in the balance of powers between the Federal Government and the state governments under our dual system; changes in the balance between the legislative, executive,

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and judicial branches of the Federal Government; changes in the power to levy income taxes and to regulate the traffic in intoxicating liquors. Yet parts of our Constitution which they prize the most highly we never should have had if there had not been changes made since the Constitutional Convention. We have laymen, as well as lawyers, who are championing what they call a movement back to the Constitution, but who know almost nothing about its fundamental principles. These people do not know what our Constitution is, whether it is a document that was created in the Convention once and for all or whether it is a document that has been growing and changing up to the present moment. There are other people who, although among the worst of the violators of constitutional principles, volunteer to protect the Constitution, as though a thing so precious could be trusted to hands as clumsy, if not as wicked, as these. Such facts as these show there is a need for not only a statement as to fundamental constitutional principles, but a statement as to the historical growth of these principles and the work of the Supreme Court in connection therewith.

SOVEREIGNTY

A large part of the Constitution is devoted to the topic of sovereignty, and upon this fundamental doctrine other doctrines depend to a considerable extent.

Yet sovereignty was neither created nor defined by the original Constitution. The preamble and even the main body seem to presuppose it; but statesmen, jurists, philosophers, and political scientists all differed in their opinions on the subject. Hence, it must be assumed that the original Constitution did not create and define this doctrine. It was created and defined by the Supreme Court and can be found only in the decisions of that august tribunal.¹

The Supreme Court established that sovereignty in the United States resides in the people, and not in the states nor the national government nor the organs of government.² The Supreme Court

¹ Willis, Constitutional Law (1936) ch. II.
² Chisholm v. Georgia, 2 Dall. 419 (U. S. 1793); Penhallow v. Doane, 3 Dall. 54 (U. S. 1793); M’Culloch v. Maryland, 4 Wheat. 316 (U. S. 1819); White v. Hart, 13 Wall. 646 (U. S. 1871); Gunn v. Barry, 15 Wall. 610 (U. S. 1878); Yick Wo v. Hopkins, 118 U. S. 356 (1886).
defined sovereignty as the power to establish law (social control) and held it to belong in the United States to the people as a whole, as organized under our federal form of government, rather than to the people of each state.

The Supreme Court has not only established and defined the doctrine, but it has in its decisions set forth in detail the nature and extent of the doctrine and the implications from it. According to the Supreme Court the sovereign people occupy the relation of principal and all the departments and organs of government are simply agencies of this principal. The sovereign people inherently possess the sovereign powers of police, taxation and eminent domain. They have delegated the exercise of these powers to various agencies like the states and the nation and the various branches of these governments, but the agencies to whom such powers have been delegated cannot (except as the court has created exceptions) redelegate these powers to other agencies. The doctrine of the amendability of the Constitution, of course, stems from the doctrine of sovereignty of the people. The establishment of a new Constitution by means of a revolution can be rationalized only by referring to this doctrine of sovereignty. Because of this doctrine of popular sovereignty the nature of our dual form of government can be changed either by formal amendment or by Supreme Court amendment so as to take from or add to the powers of either the states or the Federal Government, and, of course, the powers of the various branches of government can be changed in the same way. The Supreme Court may even exercise a supremacy over the other branches of the Federal Government and over the state governments on the theory that it may exercise this power as an agent of the sovereign people and that its assumption of this power is constitutional after acquiescence therein by the people.

Thus it is seen that the whole topic of sovereignty is the work of the United States Supreme Court.

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Field v. Clark, 143 U. S. 649 (1892).

Wood's Appeal, 75 Pa. 59 (1874).

National Prohibition Cases, 253 U. S. 350 (1920).

Marbury v. Madison, 1 Cranch 137 (U. S. 1803); Martin v. Hunter's Lessee, 1 Wheat. 304 (U. S. 1816); Cohens v. Virginia, 6 Wheat. 264 (U. S. 1821).
Another important part of the Constitution made by the Supreme Court is that which relates to the supremacy of the Supreme Court, or the power of judicial review. Here, the Supreme Court (1) introduced into the Constitution an entirely new doctrine, (2) made all of the law found in the doctrine, and (3) thereby remarkably increased its own powers and by arrogating to itself the power to determine the reasonableness of social policy, did so at the expense of the doctrine of separation of powers.

Some have contended that the doctrine of supremacy of the Supreme Court was introduced by the Constitutional Convention. But even these people have to admit that the Supreme Court usurped the power to declare legislation unconstitutional because unreasonable in the opinion of the majority of the justices (i.e., because not due process of law as a matter of substance). The fact that they are wrong is proven by the silence of the Constitution, by the fact that Jefferson and others interpreted this silence to mean that either the states or the nation could decide constitutional questions, and by the fact that at first Congress exercised legislative supremacy. The correct view is that the Supreme Court is the sole author of this part of the Constitution.  

In making this doctrine the Supreme Court gave itself the power to act as an umpire between the states and the nation and between the various branches of the national government, to decide what powers the Constitution gives to each, to decide what limitations the Constitution puts upon those powers, and to see that all constitutional guarantees are upheld and obeyed. The result of giving itself all of this power was that the Supreme Court gradually began to exercise a constitution-making function, not only with respect to its own supremacy, but with reference to doctrines put into the Constitution by the Constitutional Convention and by formal amendments and also with reference to new doctrines which it desired to introduce into the Constitution itself. It thus made itself supreme over the legislative and executive branches of the

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9 Beard, The Supreme Court — Usurper or Grantee (1912) 27 Pol. Sci. Q. 1; Hughes, The Supreme Court of the United States (1928) 78.

Federal Government, over state legislatures, over state courts, and over state executives. Of course the original Constitution made the Supreme Court supreme over the lower federal courts.

The Supreme Court has also made itself supreme over the Constitution through the process of interpretation. It has sometimes followed a rule of strict construction and again a rule of liberal construction. On the question of whether the Federal Government has a particular power, it has generally followed a rule of strict construction. But as to the scope of a power clearly given the Federal Government, it has generally invoked a rule of liberal construction. The supremacy of the Supreme Court over the Constitution has manifested itself the most strikingly as to those parts of the Constitution which it has itself made. This exercise of its supremacy is the subject matter of the present article. In this activity, the Supreme Court is giving a supreme manifestation of its supremacy.

All of this means that the Supreme Court is supreme over all the other branches of the Federal Government and over all the branches of the state government, not only so far as concerns the original Constitution and the formal amendments but also so far as concerns that part of the Constitution which it has made. The Supreme Court can add a provision to the Constitution whenever it desires to declare an act of legislation unconstitutional and then can declare the legislative act a violation thereof, as it did in the case of the A. A. A. decision.

The supremacy of the Supreme Court is not without limitations. The Supreme Court has not only given itself this judicial power, but it has put some limitations on it. Some of these limitations

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11 Hylton v. United States, 3 Dall. 171 (U. S. 1796); Marbury v. Madison, 1 Cranch 137 (U. S. 1803).
12 Ware v. Hylton, 3 Dall. 199 (U. S. 1796); Fletcher v. Peck, 6 Cranch 87 (U. S. 1810).
13 Martin v. Hunter's Lessee, 1 Wheat. 304 (U. S. 1816); Cohens v. Virginia, 6 Wheat. 264 (U. S. 1821).
15 Thompson v. Utah, 170 U. S. 343 (1898); Springville City v. Thomas, 166 U. S. 707 (1897).
17 United States v. Reese, 92 U. S. 214 (1875).
18 M'Culloch v. Maryland, 4 Wheat. 316 (U. S. 1819).
the Supreme Court was forced to put upon itself, because the original Constitution committed their decision to another department, or made provisions directory, or required a case or controversy for the court's jurisdiction. Other limitations the court has put upon itself for political reasons, as in the case of the question of what is a republican form of government. The Supreme Court has also said that it would never exercise its supremacy unless the unconstitutionality of some question was clear beyond a reasonable doubt. However, when the Supreme Court holds by five to four vote that an act of the legislature is unconstitutional beyond a doubt, it would seem to be paying only lip service to this limitation.

This then is the part of the Constitution made by the Supreme Court which relates to its own supremacy. Thus far we have undertaken to set forth only the broad outlines of what the Supreme Court has done in this part of its constitution making. For a complete understanding of this part of the Constitution all the other parts of the Constitution discussed in this article will have to be understood.

**Amendment**

Some of that part of our Constitution which is devoted to the topic of amendment was made by the Constitutional Convention; the rest has been made by the Supreme Court.

The Constitutional Convention made the Constitution subject to amendment; that is, it created a doctrine even though it did not create the doctrine of the amendability of the Constitution. The Constitutional Convention also provided for the general methods whereby the Constitution may be amended. It provided that amendments may be proposed either by two-thirds of both houses of Congress or by a convention called by Congress on the application of the legislatures of two-thirds of the states, and it provided for the ratification of proposed amendments either by the legislatures of three-fourths of the states or by conventions in three-fourths of the states as Congress may choose. (In the case of equal suffrage in the senate, ratification by the state involved as well as by the consent of three-fourths of the states is required.)

This looks at first as though the Constitutional Convention had written all of that part of our Constitution which relates to the matter of amendment, but a study of United States Supreme Court decisions shows the inaccuracy of this conclusion. Probably the
Supreme Court has made more of the doctrine of amendability than did the Convention.

The Supreme Court has written into the Constitution that the requirement of two-thirds of both houses of Congress means two-thirds of a quorum.\textsuperscript{20} It has written into the Constitution the provision that the approval of neither the President\textsuperscript{21} nor a governor\textsuperscript{22} is necessary to the amending process; that when Congress submits an amendment to state legislatures, it cannot be ratified by conventions in the states;\textsuperscript{23} that it is illegal for a state legislature to require a referendum on a constitutional amendment;\textsuperscript{24} that it is unnecessary for Congress, in proposing amendments, to make an expressed declaration that it deems it necessary;\textsuperscript{25} that a proposed amendment will last for ratification only a reasonable length of time;\textsuperscript{26} that there are no implied limitations upon amending power, either that an amendment shall be germane, or not a grant of new power, or that it shall not be in the form of legislation, or that it shall not destroy our dual form of government, or that the protection of personal liberty shall not be changed.\textsuperscript{27}

There are many other provisions on the subject of amendment which ought and undoubtedly will be written into the Constitution by the Supreme Court. Among such may be named a provision that a state may ratify after it has rejected but may not reject after it has ratified; a provision that Congress or a convention may propose an entire new Constitution; a provision that Congress may not withdraw an amendment after it has proposed it for ratification; a provision requiring Congress to call a convention after it has been requested to do so by the states; a provision that the states must act together in some way in requiring the calling of a convention; a provision that a state may provide that a proposed amendment shall be voted on only by a legislature chosen

\textsuperscript{20} National Prohibition Cases, 253 U. S. 350 (1920).
\textsuperscript{21} Hollingsworth v. Virginia, 3 Dall. 378 (U. S. 1798); Hawke v. Smith, 253 U. S. 221 (1920).
\textsuperscript{22} Smiley v. Holm, 285 U. S. 355 (1932).
\textsuperscript{23} United States v. Sprague, 282 U. S. 716 (1931).
\textsuperscript{24} Hawke v. Smith, 253 U. S. 221 (1920).
\textsuperscript{25} National Prohibition Cases, 253 U. S. 350 (1920).
\textsuperscript{26} Dillon v. Gloss, 256 U. S. 368 (1921).
\textsuperscript{27} Leser v. Garnett, 258 U. S. 130 (1922).
after such proposal; a provision that the power of amendment includes the power of repeal as well as the power to change or add to a provision; and a provision that an amendment to the Constitution may be made through acquiescence for a sufficient period of time.  

Thus it is seen that even in regard to the matter of amendment, which is expressly provided for in the original Constitution, we are indebted to the Supreme Court as much as we are to the Constitutional Convention and the chances are that the Court will make a great deal more constitution upon the subject (while no more constitution will be made by formal amendments).

Separation of Powers

In the doctrine of separation of powers we have some of the principal work of the Constitutional Convention. Yet, even here, more of the Constitution has been made by the Supreme Court than was made by the Convention.

There is no question but that the Convention created a doctrine of separation of powers. It did not expressly say so, but by creating three separate branches of government and by vesting in Congress all legislative power, in the President all executive power, and in supreme and inferior Federal Courts all judicial power delegated to the Federal Government, the framers impliedly created a doctrine of separation of powers. The doctrine of separation of powers thus created was not a Simon pure doctrine because it was modified by the Convention’s scheme of checks and balances, whereby, for example, it gave the judicial power of impeachment to the legislative branch, the legislative function of veto to the President, and the legislative treaty-making power to the President except as the senate was given the power to advise and consent.

The doctrine thus created by the Convention has been so worked over by the Supreme Court that its present form bears very little resemblance to the original. The Court has gradually written into the Constitution a reassignment of the various powers of government by permitting the delegation of powers by the various branches and the encroachment of one branch upon another and the commingling of all the powers, but especially by its creation

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28 WILLIS, CONSTITUTIONAL LAW (1936) c. IV.
29 Id. at 133-35.
of its own judicial supremacy. The Supreme Court has sometimes endeavored to uphold what was probably the original theory of separation of powers. Thus, it has held that legislative jurisdiction cannot be given to the Supreme Court;\(^{30}\) that jurisdiction is always a judicial question;\(^{31}\) that a legislative branch of the government cannot now reverse a judgment of a court.\(^{32}\) It has also refused to decide political questions,\(^{33}\) or to enjoin or mandamus the President or Congress because of the doctrine of separation of powers.\(^{34}\)

Singularly, it has also held that the doctrine forbids Congress to provide for an income tax upon the salaries of federal judges.\(^{35}\) For the most part, however, it seems that the Supreme Court is more concerned with breaking down the doctrine of separation of powers than with upholding it.

As a result of the work of the Supreme Court, the Constitution now permits Congress to delegate legislative power to the territories,\(^{36}\) to delegate the power to determine conditions or contingencies or to make regulations or to ascertain facts to other branches of the government or other agencies, to delegate to administrative tribunals or executive officers the power to administer legislative standards;\(^{37}\) and permits the President to delegate administrative functions (absorbed by the executive department) to the heads of departments and subordinate officials.\(^{38}\) The Constitution also permits the legislative and judicial branches of the government to exercise the executive powers of appointment and removal of officers.\(^{39}\) It permits the legislative branch to exercise the judicial functions of granting divorces,\(^{40}\) making rules

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\(^{32}\) United States v. Peters, 5 Cranch 115 (U. S. 1809).

\(^{33}\) Luther v. Borden, 7 How. 1 (U. S. 1849).

\(^{34}\) Mississippi v. Johnson, 4 Wall. 475 (U. S. 1867).


\(^{36}\) Dorr v. United States, 195 U. S. 138 (1904). It should be noted that the Supreme Court has denied to Congress the privilege of delegating its own legislative power to the states, Knickerbocker Ice Co. v. Stewart, 253 U. S. 149 (1920), or to private individuals, Schechter Poultry Corp. v. United States, 295 U. S. 495 (1935); Carter v. Carter Coal Company, 298 U. S. 238 (1936).

\(^{37}\) Hampton v. United States, 276 U. S. 394 (1928).


\(^{39}\) Note (1929) 42 Harv. L. Rev. 426.

\(^{40}\) Maynard v. Hill, 125 U. S. 190 (1888).
of legal procedure,\(^4\) regulating the admission to practice and the
disbarment of attorneys,\(^4\) punishing for contempt,\(^3\) and to exercise
the executive power of pardon.\(^4\) It permits the judicial branch
to exercise the legislative function of judicial legislation.\(^4\) It
permits the executive branch of the government to exercise the
judicial function of pardoning for contempt of court.\(^6\) It permits
an executive officer to make a finding for probable cause for arrest.\(^4\)
It permits executive boards or commissions to perform quasi-judicial
functions. It permits the President to exercise the legislative power
of making treaties, to establish governments for conquered terri-
tory until legislation by Congress,\(^5\) to wage an offensive war with-
out a declaration of war by Congress.\(^5\) The Constitution also now
apparently permits the commingling of all governmental powers
in one tribunal like the Interstate Commerce Commission.\(^5\)

The Supreme Court has refused to enjoin or mandamus the
President or Congress,\(^4\) but it has mandamused lower Federal
executive officers and it has declared acts of both the legislative
and the executive branches unconstitutional in the exercise of its
supremacy as has heretofore been discussed.

These changes in our constitutional doctrine of separation of
powers made by the Supreme Court show that the Supreme Court
has left the three branches of government established by the
original Constitution; but has wholly remade the powers which
each may exercise, has permitted the commingling of powers, and

\(^{42}\) (1929) 13 Minn. L. Rev. 252.
\(^{44}\) *Ex parte* United States, 242 U. S. 27 (1916).
\(^{45}\) Loan Assn' v. Topeka, 20 Wall. 655 (1874). The final position of the
Supreme Court that it has the power to render declaratory judgments is not
an illustration of a change in the doctrine of separation of powers. Nashville
\(^{46}\) *Ex parte* Grossman, 287 U. S. 87 (1933).
\(^{47}\) Ocampo v. United States, 234 U. S. 91 (1914).
\(^{48}\) Cross v. Harrison, 16 How. 164 (U. S. 1854).
\(^{49}\) Putney, *Executive Assumption of the War Making Power* (1927) 7 Natl.
Univ. L. Rev. 1.

\(^{50}\) Willis, *Constitutional Law* (1936) 155.
\(^{51}\) Mississippi v. Johnson, 4 Wall. 475 (U. S. 1867); Rees v. City of Water-
town, 19 Wall. 107 (U. S. 1873); McChord v. Louisville & N. R. R., 183 U. S.
483 (1902).
has established its own supremacy over the other branches of government. To bring the constitutional doctrine of separation of powers down to date it should be reworded so as to read as follows:
The doctrine of separation of powers includes three branches of government with the legislative and executive subject to the judicial branch. Each of these branches of government may exercise those of its own appropriate powers, which the Supreme Court has not or the original Constitution has not given to another branch, and any of the powers of the other branches, which the original Constitution or the Supreme Court has given to it, but not all of the powers of any other branch; and to some extent all of the powers of government may be commingled in one branch of government. Hence it is seen that even in case of a doctrine put into our Constitution by the Constitutional Convention the work of the Court bulks larger than that of the Convention. The doctrine is now what the Supreme Court has made it.

**Universal Citizenship and Suffrage**

The doctrine of universal citizenship and suffrage is less important than some others, and yet it is a fundamental part of the United States Constitution. It has been created partly by the original Constitution, partly by the Fourteenth, Fifteenth, and Nineteenth Amendments, and partly by the Supreme Court. We have called the doctrine that of universal citizenship and suffrage. The Constitution makes citizenship practically universal. Of course, citizenship requires either birth in the United States or naturalization here. Congress, under its power of naturalization, has excluded from the privilege some Asiatics and a few people who cannot fulfill certain qualifications. As a matter of fact, suffrage is practically universal, and yet there is nothing in the Constitution to prevent limitations on suffrage. The original Constitution did not make much of our present doctrine. It recognized citizenship, both federal and state, prescribed United States citizenship as a qualification for the offices of President, Senator, and Representative, gave Congress the power of naturalization, and wrote into the Constitution the interstate privileges or immunities clause, but it did not define any of these terms nor set forth the scope of their operation.

The formal Fourteenth, Fifteenth, and Nineteenth Amendments

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52 Willis, *Constitutional Law* (1936) c. V.
were a little more precise than the original Constitution. The Fourteenth Amendment defined United States citizenship to include all persons born or naturalized in the United States and subject to the jurisdiction thereof, and made state citizenship derivative from United States citizenship. It also forbade any state to abridge the privileges or immunities of citizens of the United States. But this amendment did not define its terms. The Fifteenth Amendment gave an immunity against the United States and the states against discrimination on account of race, color, or previous condition of servitude and the Nineteenth Amendment immunity against both as to discrimination on account of sex.

The Supreme Court, because of the paucity of the above provisions in the original Constitution and amendments has had to create most of the doctrine of universal citizenship and suffrage. It has made the Constitution say that birth within the territory made a person a citizen of the United States both before and after the Fourteenth Amendment and that the Fourteenth Amendment was, therefore, only declaratory of prior law. Prior to the Fourteenth Amendment, however, the Supreme Court made federal citizenship derivative from and narrower than state citizenship so that a negro might be a citizen of a state but could not be a citizen of the United States.83 But after the Fourteenth Amendment the Supreme Court has made United States citizenship primary and paramount to state citizenship,84 so that persons may be United States citizens though not citizens of any state (like citizens of the District of Columbia, of the territories, and those residing abroad).85 Consequently, the Supreme Court has made the Constitution say that whites,86 negroes,87 and Asians,88 but not Indians,89 nor nationals,90 nor corporations,91 may be citizens of the United States by birth.

The Supreme Court has made the Constitution say that the

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88 Ibid.
90 WILLIS, CONSTITUTIONAL LAW (1936) 134.
91 Ibid. at 186.
power of naturalization is the power to confer citizenship and not a power to take it away, and hence cannot affect citizenship by birth, but that naturalization is only a privilege and not a right so that Congress has plenary power over the subject, not only to choose those races who shall be eligible to naturalization but to prescribe other qualifications, as, for instance, an oath to bear arms.

The Supreme Court, on the one hand, has made the Constitution say that the immunity against the abridgement of the privileges or immunities of citizens of the United States protects only those privileges and immunities which a citizen of the United States has because of his peculiar relation to the United States and not the general rights, powers, privileges, and immunities of citizens. Suffrage, the Supreme Court-made-Constitution says, is not a privilege of United States citizenship, but state citizenship is a privilege of United States citizenship. The Supreme Court has made the Constitution say that this guaranty applies only against discrimination by a state and not discrimination by a political party. The Supreme Court, on the other hand, has made the interstate privileges and immunities clause in the federal Constitution include all the civil rights, powers, privileges, and immunities and to require each state to give to the citizens of other states all such rights, powers, privileges, and immunities which it gives to its own citizens. This guaranty, the Supreme Court has said, does not protect aliens, negroes, citizens of a territory, Indians, and corporations.

The Supreme Court has made the Constitution say that the United States has the power to deprive one of his United States
citizenship,\textsuperscript{72} that a United States citizen has the privilege of expatriation,\textsuperscript{73} and that the United States has the power either to exclude or to expel aliens who have not become United States citizens by naturalization.\textsuperscript{74}

From these references to the work of the Supreme Court there appears here another part of the United States Constitution which owes its place in our fundamental law more to the work of the Supreme Court than to the work of the members of the Constitutional Convention or the members of Congress who formulated the formal amendments to the Constitution which relate to this topic.

**DUAL FORM OF GOVERNMENT**

The Constitutional Convention probably really created a dual form of government; though it did not create a doctrine of federal supremacy over the states or a doctrine of Supreme Court supremacy over the other branches of the Federal Government and the states. The Constitutional Convention did this at the same time that it created a doctrine of separation of powers, and placed limitations on state and federal powers. By giving different powers to the three branches of the federal government and by the limitations referred to, it impliedly created a dual form of government and carried out the compromise between the small and large states. Yet, this fact was not everywhere accepted. Many prominent patriots continued to hold an extreme states' rights position and other patriots nurtured the idea of making the Federal Government a centralized government. For this reason the doctrine of a dual form of government was not part of our Constitution as a legal proposition until it was written in by Chief Justice Marshall in his celebrated opinion in the case of *McCulloch v. Maryland\textsuperscript{75}* and *Gibbons v. Ogden*.\textsuperscript{76} Hence, credit for the creation of this doctrine will have to be given to the Supreme Court rather than to the Convention. However, after the Court had created the doctrine, the work of the Convention helped to contribute to the making of the doctrine. The Constitutional Convention gave the Federal Government a great many express powers, though, of

\textsuperscript{72} MacKenzie v. Hare, 239 U. S. 299 (1915).
\textsuperscript{73} Ibid.
\textsuperscript{74} United States v. Ju Toy, 198 U. S. 253 (1905).
\textsuperscript{75} 4 Wheat. 316 (U. S. 1819).
\textsuperscript{76} 9 Wheat. 1 (U. S. 1824).
course, these powers have been interpreted by the Supreme Court, placed important limitations on state powers, and to this extent helped to make our dual form of government.\textsuperscript{77}

The doctrine of dual form of government written into our Constitution by the Supreme Court established not two separate sovereignties but two separate forms of government, the national government on the one hand and the governments of the various states on the other.\textsuperscript{78} The Supreme Court had already placed sovereignty in the people. All that our dual form of government means then is that there has been a division of governmental powers between the Federal Government and the various state governments. Under this arrangement certain powers have been delegated, either expressly or impliedly, to the Federal Government and powers not so delegated have been either delegated to the state governments or reserved to the people.\textsuperscript{79} The doctrine created by the Supreme Court does not mean that the powers thus delegated at one time are fixed and immutable, though they are so far as concerns the power of various states,\textsuperscript{80} but that such division of powers shall stand until there has been a re-division of powers through an exercise of the formal power of amendment in the original Constitution or the informal power of amendment exercised by the Supreme Court.\textsuperscript{81} However, the Supreme Court has limited our dual form of government to domestic relations. It has written into our Constitution that there is no dual form of government as to our foreign relations.\textsuperscript{82}

In order to draw the line more accurately between federal power on the one hand and state power on the other, the Supreme Court, in addition to limiting the powers of either or both these governments, has written into the Constitution further implied limitations resulting from the doctrine of federal supremacy. It has made it a part of the Constitution that the Tenth Amendment is not a limitation on implied powers, and that limitations in the original

\textsuperscript{77} WILLIS, CONSTITUTIONAL LAW (1936) cc. VII-XVI.

\textsuperscript{78} McCulloch v. Maryland, 4 Wheat. 316 (U. S. 1819); Gibbons v. Ogden, 9 Wheat. 1 (U. S. 1824).

\textsuperscript{79} Martin v. Hunter's Lessee, 1 Wheat. 304 (U. S. 1816).

\textsuperscript{80} Texas v. White, 7 Wall. 700 (U. S. 1868).

\textsuperscript{81} WILLIS, CONSTITUTIONAL LAW (1936) 206.

\textsuperscript{82} United States v. Curtis Wright Co., 299 U. S. 304 (1937).
Constitution and the formal amendments in favor of individuals do not affect the doctrine of dual form of government since they do not disturb the relative balance of powers between the states and the Federal Government but only the relative balance between individuals and these governments.

As a part of the doctrine of dual form of government, the Supreme Court has created the doctrine of the immunity of federal agencies from state taxation, police, and eminent domain powers, and the immunity of state agencies from similar exercises of power by the Federal Government; but in the application of its doctrine to specific cases the Supreme Court has rendered such inconsistent decisions and in upholding its doctrine of federal supremacy it has permitted so many encroachments upon state power by the Federal Government and has so favored the Federal Government over the states that a great deal of uncertainty in constitutional law has thus been created. However, the Supreme Court has made the Constitution forbid the delegation of federal power to the states or the delegation of states' powers to the Federal Government.

The Supreme Court has gradually modified the doctrine of the dual form of government so as to make it include the doctrine of federal supremacy and under this doctrine has permitted the encroachments on state powers by the Federal Government and favored the Federal Government as against state governments, as has heretofore been noted. The Court has not only made the doctrine of the dual form of government subject to the doctrine of federal supremacy but also subject to the doctrine of judicial supremacy so that the Court may declare unconstitutional an act

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83 McCulloch v. Maryland, 4 Wheat. 316 (U. S. 1819); Weston v. City of Charleston, 2 Pet. 449 (U. S. 1829); Collector v. Day, 11 Wall. 113 (U. S. 1870).

84 WILLIS, CONSTITUTIONAL LAW (1936) 228-48.

85 Cooley v. Board of Port Wardens, 12 How. 299 (U. S. 1852).

of a state legislature,\textsuperscript{87} enjoin a governor,\textsuperscript{88} and make the state courts inferior courts in the federal system.\textsuperscript{89}

Of course the Supreme Court has created no express powers for the Federal Government but it has decided whether such powers are exclusive\textsuperscript{90} or concurrent.\textsuperscript{91} And the Supreme Court has given the Federal Government all sorts of implied powers like the power to incorporate a bank,\textsuperscript{92} the power to issue legal tender notes,\textsuperscript{93} the power to take land by eminent domain,\textsuperscript{94} the power to punish officers of elections at which representatives are chosen,\textsuperscript{95} the power to prohibit the manufacture and sale of non-intoxicants,\textsuperscript{96} the power to establish farm loan banks,\textsuperscript{97} the power to pass an employer's liability act,\textsuperscript{98} the power to abolish gold clauses in private and public contracts,\textsuperscript{99} and the power to construct dams and to sell surplus electric energy and to buy transmission lines to market.\textsuperscript{100}

The Supreme Court, however, has held that the United States has no inherent powers in the case of internal affairs,\textsuperscript{101} although it has given Congress a number of resulting powers.\textsuperscript{102}

Nowhere has the function of the Supreme Court as a constitution-maker been better exemplified than in connection with the express

\textsuperscript{87} Ware v. Hylton, 3 Dall. 199 (U. S. 1796); Fletcher v. Peck, 6 Cranch 87 (U. S. 1810).

\textsuperscript{88} Sterling v. Constantin, 287 U. S. 378 (1932).

\textsuperscript{89} Martin v. Hunter's Lessee, 1 Wheat. 304 (U. S. 1816); Cohens v. Virginia, 6 Wheat. 264 (U. S. 1821); Ableman v. Booth, 21 How. 506 (U. S. 1859); Claflin v. Houseman, 93 U. S. 130 (1876).

\textsuperscript{90} Sturgis v. Crowninshield, 4 Wheat. 122 (U. S. 1819).

\textsuperscript{91} United States v. Lanza, 260 U. S. 377 (1922).

\textsuperscript{92} McCulloch v. Maryland, 4 Wheat. 316 (U. S. 1819).

\textsuperscript{93} Legal Tender Cases, 12 Wall. 457 (U. S. 1870); Juilliard v. Greenman, 110 U. S. 421 (1884).


\textsuperscript{95} Ex parte Siebold, 100 U. S. 371 (1879).

\textsuperscript{96} Ruppert v. Caffey, 251 U. S. 264 (1920).

\textsuperscript{97} Smith v. Kansas City Title & Trust Co., 255 U. S. 180 (1921).

\textsuperscript{98} Second Employer's Liability Cases, 223 U. S. 1 (1912).


\textsuperscript{100} Ashwander v. Tennessee Valley Authority, 297 U. S. 288 (1936).


\textsuperscript{102} Legal Tender Cases, 12 Wall. 457 (U. S. 1870).
powers given the Federal Government in the original Constitution and with the express limitations on state powers in this document. The powers alluded to are very extensive both in number and scope; they are set forth in express language in the original written document and yet their meaning today is just what the Court has given to them.

**New States.** The original Constitution gave Congress the power to admit new states into the union provided it did not undertake to form a new state within the jurisdiction of another state or form a new state by the junction of two or more states without the consent of the legislatures of the states. But the Supreme Court had to write into the Constitution that this express power did not give Congress any power over the status of the states after their admission.\(^{103}\)

**New Territory.** The original Constitution gave Congress the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States but the Supreme Court held that this power related only to the original Northwest Territory.\(^{104}\) The original Constitution did not give the Federal Government power to acquire any territory, to incorporate any territory acquired, nor to govern any other territory than the original Northwest Territory. The Supreme Court, however, has given the Federal Government the power to acquire new territory, implying this power from the treaty power, the war power, and its complete control over our foreign relations.\(^{105}\) The power to incorporate new territory acquired either by treaty or by act of Congress has been implied from the power to acquire,\(^{106}\) and the power to govern newly acquired territory has been implied from the necessities of the case.\(^{107}\) The Supreme Court has also written into the Constitution that the original laws of annexed territory continue to apply until they have been changed either by congressional or executive action,\(^{108}\) and that so far as the states

\(^{103}\) *Coyle v. Smith*, 221 U. S. 559 (1911).
\(^{104}\) *Dred Scott v. Sandford*, 19 How. 393 (U. S. 1857).
\(^{106}\) *Downes v. Bidwell*, 182 U. S. 244 (1901).
\(^{108}\) *The Osceola*, 189 U. S. 158 (1903); *Southern Pacific Co. v. Jensen*, 244 U. S. 205 (1917).
of the union are concerned all constitutional prohibitions on the Federal Government apply. So far as annexed territory incorporated is concerned all constitutional prohibitions apply except those limited to the states; so far as annexed territory unincorporated is concerned constitutional prohibitions limited to the states, which apply within the United States and the general artificial prohibitions do not apply; so far as concerns territory temporarily occupied only the absolute prohibitions apply; and so far as concerns territory within the limits of a foreign country only the absolute prohibitions apply.

Treaties. The original Constitution gave the President and the Senate a joint power to make treaties provided two-thirds of the senators present concur. But it has been necessary for the Supreme Court to make this power greater than the legislative power of Congress and not limited by our doctrine of a dual form of government. However, the Supreme Court has made the Constitution say that a treaty may be repealed by an act of Congress as an act of Congress may be repealed by a treaty. The Supreme Court should write into the Constitution a provision either granting or denying Congress this power where it has no coordinate jurisdiction over the subject matter of the treaty.

Military Power. The original Constitution gave to Congress and the President the power to declare and wage war, the power to raise and support armies and navies and to call out the state militia, and the power to provide for the government of the army, the navy, and the militia. But the Court has made the Constitution say that the President may recognize the existence of a state of war; that a President may not, though a governor probably

109 Coyle v. Smith, 221 U. S. 559 (1911).
113 In re Ross, 140 U. S. 453 (1891).
116 Head Money Cases, 112 U. S. 590 (1884).
117 Prize Cases, 2 Black 635 (U. S. 1862).
118 Ex parte Milligan, 4 Wall. 2 (U. S. 1866).
may;\textsuperscript{119} declare martial law; that a war may be terminated by a treaty of peace as well as an act of Congress;\textsuperscript{120} that Congress has implied from the military powers the power to pass a selective draft law;\textsuperscript{121} that Congress may provide for service over seas;\textsuperscript{122} and that prohibition will not lie against a court martial.\textsuperscript{123} But the Court has not as yet made the Constitution tell us whether the President or Congress has the right to suspend the writ of habeas corpus.\textsuperscript{124}

\textbf{Taxation.} The original Constitution gave Congress a general power of taxation but it placed certain prohibitions and limitations on Congress, and the Court has placed other limitations and has interpreted or modified the express provisions in the original Constitution. The original document expressly provided that "no tax or duties shall be laid on articles exported from any state". The Court has made this clause read "exported to a foreign country".\textsuperscript{125} The original Constitution expressly provided that "all duties, imposts, and excises shall be uniform throughout the United States". The Court has made this read "geographical uniformity".\textsuperscript{126} The original Constitution expressly provided that "no capitation, or other direct, Tax shall be paid unless in Proportion to the Census". The Court has had to write into the Constitution what taxes are direct. It at first made the Constitution say that an income tax is not a direct tax;\textsuperscript{127} but more recently it has made the Constitution say that an income tax is a direct tax\textsuperscript{128} and after passage of the Sixteenth Amendment it still made the Constitution read that a tax on stock dividends is a direct tax.\textsuperscript{129} The original Constitution granted to Congress the "Power to lay and

\textsuperscript{119} Moyer v. Peabody, 212 U. S. 78 (1909).
\textsuperscript{120} But see Corwin, \textit{The Power of Congress to Declare Peace} (1920) 18 Mich. L. Rev. 669.
\textsuperscript{121} Selective Draft Law Cases, 245 U. S. 366 (1918).
\textsuperscript{122} Cox v. Woods, 247 U. S. 3 (1918).
\textsuperscript{123} Smith v. Whitney, 116 U. S. 167 (1886).
\textsuperscript{124} \textit{Ex parte Milligan}, 4 Wall. 2 (U. S. 1863).
\textsuperscript{125} Woodruff v. Parham, 8 Wall. 123 (U. S. 1868); Dooley v. United States, 182 U. S. 222 (1901).
\textsuperscript{126} Knowlton v. Moore, 178 U. S. 41 (1900).
\textsuperscript{127} Springer v. United States, 102 U. S. 586 (1881).
\textsuperscript{129} Eisner v. Macomber, 252 U. S. 189 (1920).
collect Taxes”, and “to pay the Debts, and provide for the common Defence and general Welfare of the United States”. But the Court had to make this mean not a grant of police power but a limitation on the power of taxation; and that as such limitation it gives the Federal Government a broad power of taxation and limits the power no more than due process of law does. The limitations which the Court has made the Constitution put upon the Federal Government’s taxing power are that taxation must be for a public purpose (through its general limitation of due process as a matter of substance); that federal taxation must not be class legislation (because of due process as a matter of substance); probably that federal taxation must not impair the obligation of contracts (because of due process as a matter of substance); that the federal taxing power must not be used to interfere with the state’s police power (so as to violate our dual form of government); and even that the Federal Government cannot levy income taxes on the salaries of federal judges. The Court has made the Sixteenth Amendment permit the Federal Government to levy income taxes on the basis of citizenship and has defined income; has made the original Constitution permit Congress to levy an estate tax, gift taxes, and other excise taxes.

Money. The original Constitution gave Congress the power “to coin Money, regulate the Value thereof and of foreign Coin” and “to provide for the Punishment of counterfeiting the Securities and current Coin of the United States”. The Court has added that Congress has the power to issue bills of credit; the power to

182 Ibid.
188 Knowlton v. Moore, 178 U. S. 41 (1900).
191 Hepburn v. Griswold, 8 Wall. 603 (U. S. 1869).
make its own notes legal tender;\textsuperscript{142} the power to override the gold clauses in private contracts;\textsuperscript{143} and the power to ban gold hoarding.\textsuperscript{144}

\textit{Bankruptcy.} The original Constitution gave Congress the power to establish "uniform Laws on the subject of Bankruptcies, throughout the United States". The Court has written into the Constitution that this is an unlimited power;\textsuperscript{145} that Congress and state legislatures have a concurrent power;\textsuperscript{146} that a federal bankruptcy law supersedes a state insolvency law.\textsuperscript{147} But the Constitution is even yet silent as to whether a bankruptcy law violates the obligation of contracts as applied to contracts already made.\textsuperscript{148}

\textit{Postal Power.} The original Constitution gave Congress the power "to establish Post Offices and post Roads" but the Court has written into the Constitution that Congress, under the postal power, has the power to exclude matter from the United States mails so long as its action is by due process of law,\textsuperscript{149} and the power to prevent obstructions of the United States mail.\textsuperscript{150}

\textit{Patents and Copyrights.} The original Constitution gave Congress the power to issue patents to inventors and copyrights to authors. But the Supreme Court has defined the nature of the rights of a patentee and of an author;\textsuperscript{151} and has given the states the power of taxation of royalties from patents.\textsuperscript{152}

\textit{Elections.} The original Constitution gave Congress the power to be judge over the election of its own members but provided that "the Times, Places, and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators".

\textsuperscript{142}Legal Tender Cases, 12 Wall. 457 (U. S. 1870); Julliard v. Greenman, 110 U. S. 421 (1884).
\textsuperscript{144}Ibid.
\textsuperscript{145}Sturgis v. Crowninshield, 4 Wheat. 122 (U. S. 1819).
\textsuperscript{146}Hanover National Bank v. Moyses, 186 U. S. 181 (1902).
\textsuperscript{147}E. g., Canada Southern R. R. v. Gebhard, 109 U. S. 527 (1883).
\textsuperscript{148}Ex parte Jackson, 96 U. S. 727 (1877).
\textsuperscript{149}In re Debs, 158 U. S. 564 (1895).
\textsuperscript{150}Wheaton v. Peters, 8 Pet. 591 (U. S. 1834).
\textsuperscript{151}Fox Film Corp. v. Doyal, 286 U. S. 123 (1932).
The Court has made the Constitution give Congress the power to protect the election of its members from corruption and violence\textsuperscript{153} and the power to prevent corruption in the election of electors,\textsuperscript{154} but has held that Congress has no power over primary elections.\textsuperscript{155}

\textit{Commerce}. The original Constitution gave Congress the power “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”. This grant of an important, specific police power occupies only a few words in the original Constitution but the commerce power that the Court has written into the Constitution occupies many pages.

The Court has made the Constitution say that the power of Congress over foreign commerce is not limited by due process of law as a matter of substance\textsuperscript{156} but that the power of Congress over interstate commerce is so limited by due process of law.\textsuperscript{157}

The Court has made the Constitution say what is commerce and what is not. At first it made the Constitution say that it included transportation as well as traffic\textsuperscript{158} and that transportation included transportation of persons as well as goods\textsuperscript{159} and the sending of telegrams.\textsuperscript{160} Then it apparently changed the wording of the Constitution so that commerce did not include traffic but only transportation.\textsuperscript{161} But once again the Court seems now to be making the Constitution say that commerce includes traffic as well as transportation.\textsuperscript{162} Yet even under this definition the Court has

\begin{itemize}
  \item \textit{Es parte} Yarbrough, 110 U. S. 651 (1884).
  \item \textit{Burroughs v. United States}, 290 U. S. 534 (1934).
  \item \textit{Newberry v. United States}, 256 U. S. 232 (1921).
  \item \textit{The Abby Dodge}, 223 U. S. 166 (1912).
  \item \textit{Monongahela Navigation Co. v. United States}, 148 U. S. 312 (1893).
  \item \textit{Gibbons v. Ogden}, 9 Wheat. 1 (U. S. 1824).
  \item \textit{Gloucester Ferry v. Pennsylvania}, 114 U. S. 196 (1885).
  \item \textit{Pensacola Tel. Co. v. Western Union Tel. Co.}, 96 U. S. 1 (1878).
  \item \textit{Carter v. Carter Coal Co.}, 298 U. S. 238 (1936). This position is also supported by cases holding that a sale of tangibles while still in the original package in transportation is interstate commerce, \textit{Leisy v. Hardin}, 135 U. S. 100 (1890); by cases holding that contracts for advertising may be interstate commerce, \textit{Indiana Farmers Guide Pub. Co. v. Prairie Farmer Pub. Co.}, 293 U. S. 268 (1934), and by cases holding that walking and driving may be interstate commerce, \textit{Covington Bridge Co. v. Kentucky}, 154 U. S. 294 (1894).
\end{itemize}
It has made the Constitution say that commerce becomes interstate whenever there is traffic between people in different states or the transportation of goods from one state to another state; and that commerce ceases to be interstate commerce when traffic or transportation is over but that this does not occur until the original package has been delivered and there has been one sale or the original package has been broken; or until goods to be assembled have been so assembled; or until the pressure or voltage of gas or electricity transmitted has been stepped down.

It made the Constitution say that the police power over interstate commerce was, up to 1851, a concurrent power of the states and the Federal Government; between 1851 and 1894, an exclusive power of the Federal Government, where the interstate commerce was national in scope and needed one uniform method of regulation (though otherwise the power continued to be concurrent), and the states could not exercise their general police power either directly or indirectly; after 1894, still an exclusive power of Federal Government, as it had been held between 1851 and 1894, but now it was held to be subject to the general police

\[103\] Willis, Constitutional Law (1936) 283–85.

\[104\] Gibbons v. Ogden, 9 Wheat 1 (U.S. 1824). Thus the soliciting by drummers of orders for goods to be shipped from another state, Real Silk Hosiery Mills v. City of Portland, 288 U.S. 25 (1925), and even a bailment of grain ultimately to be shipped to other states, Lemke v. Farmers' Grain Company of Embden, North Dakota, 258 U.S. 50 (1922), is interstate commerce.

\[105\] Bowman v. Chicago & N.W. R.R., 125 U.S. 507 (1888); May v. New Orleans, 178 U.S. 496 (1900). This rule was first announced in reference to foreign commerce, Brown v. Maryland, 12 Wheat. 419 (U.S. 1827), and was extended to interstate commerce, Austin v. Tennessee, 179 U.S. 343 (1900).


\[109\] Cooley v. Board of Port Wardens, 12 How. 299 (U.S. 1851).


power of the states, so that the states might indirectly regulate interstate commerce.\textsuperscript{172} The Court has said that a state, in the exercise of its police power, may forbid the shipment of wild animals\textsuperscript{173} and running water\textsuperscript{174} from the state, though it may not retain other natural resources,\textsuperscript{175} and that a state may exclude articles\textsuperscript{176} or persons\textsuperscript{177} if necessary to protect social interests of the state; but that a state cannot indirectly regulate interstate commerce except to protect paramount social interests\textsuperscript{178} and those of its own people,\textsuperscript{179} nor violate other constitutional limitations,\textsuperscript{180} nor establish regulations in conflict with federal regulations.\textsuperscript{181} The Court has said that the commerce clause gives the Federal Government police power over the persons and instrumentalities engaged in interstate commerce,\textsuperscript{182} over the goods carried in interstate commerce, so as to permit and regulate their transportation and even to prohibit the shipment of goods in interstate commerce, either absolutely,\textsuperscript{183} or on condition,\textsuperscript{184} and to regulate persons or


\textsuperscript{174} Hudson County v. McCarter, 209 U. S. 349 (1908).

\textsuperscript{175} Pennsylvania v. West Virginia, 262 U. S. 553 (1923).

\textsuperscript{176} Plumley v. Massachusetts, 155 U. S. 461 (1894).

\textsuperscript{177} Compagnie v. State Board, 186 U. S. 380 (1902).

\textsuperscript{178} Minnesota v. Barber, 186 U. S. 313 (1899); Schollenberger v. Pennsylvania, 171 U. S. 1 (1898); Cleveland, Cin., Chi., & St. Louis Ry. v. Illinois, 177 U. S. 514 (1900).


\textsuperscript{181} McDermott v. Wisconsin, 228 U. S. 115 (1913).


\textsuperscript{183} Lottery Cases, 188 U. S. 321 (1903); Hipolite Egg Co. v. United States, 220 U. S. 45 (1911); Hoke v. United States, 227 U. S. 308 (1913); cf. Hammer v. Dagenhart, 247 U. S. 251 (1918).

things obstructing or burdening interstate commerce, if in all such cases there is sufficient social interest to make its action due process of law.

The Supreme Court has made the Constitution say that the states cannot tax the privilege of doing interstate commerce nor goods or persons while they are moving in interstate commerce, but that they may tax persons for the privilege of doing state business even though such persons are also engaged in interstate business; and that they may tax tangible goods carried by a company when they are at rest before transportation has begun, when they are at rest during transportation, and when at rest after transportation has ended. The Court has permitted the states to levy an excise tax on peddlers for peddling goods shipped in interstate commerce, but it has not permitted them to levy an excise tax on drummers for selling goods to be shipped in interstate commerce.

The Court has also permitted the states to levy taxes on the property of companies engaged in interstate commerce, whether on land, or tangibles, or intangibles, and has also permitted a net income tax on domestic corporations on income derived from interstate commerce, but it does not permit a net income tax on

180 In re Debs, 158 U. S. 564 (1895); Southern Ry. v. United States, 222 U. S. 20 (1911); Houston & Tex. Ry. v. United States (Shreveport Rate Cases), 234 U. S. 342 (1914); National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1 (1937).


183 Case of the State Freight Tax, 15 Wall. 232 (U. S. 1872); Passenger Cases, 7 How. 283 (U. S. 1849).

184 Woodruff v. Parham, 8 Wall. 123 (U. S. 1868); Coe v. Errol, 116 U. S. 517 (1886).


186 Brown v. Houston, 114 U. S. 622 (1885); Hinson v. Lott, 8 Wall. 148 (U. S. 1869).


188 Robbins v. Shelby County Taxing District, 120 U. S. 489 (1887).


192 United States Glue Co. v. Oak Creek, 247 U. S. 321 (1918).
foreign corporations on income derived from interstate commerce\(^{209}\) nor a gross income tax on either domestic corporations or foreign corporations.\(^{209}\) The Supreme Court has been allowing more latitude for state taxation and there is a possibility that in the course of time it may allow a state not only to tax interstate commerce and the privilege of doing interstate commerce but also to tax instrumentalities of the Federal Government, with the reciprocal federal taxation of instrumentalities of the state, provided that the taxes are nondiscriminatory. Such taxes would not interfere with the operation of either form of government and would afford much additional revenue.\(^{201}\) Of course the Supreme Court will hold that the Federal Government has the power to tax interstate commerce, but it has not as yet written this into the Constitution.\(^{203}\)

**Full Faith and Credit.** The original Constitution provided that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other state” but the Supreme Court had to write into the Constitution that the requirement applies only to civil judgments\(^{203}\) and statutes,\(^{204}\) not to contracts,\(^{205}\) nor to matters of procedure,\(^{206}\) nor to foreign judgments,\(^{207}\) but that the states must give full faith and credit to judgments of federal courts,\(^{208}\) and the federal courts must give full faith and credit to state judgments;\(^{209}\) and that a state has no option as to whether or not to give full faith and credit.\(^{210}\) How-


\(^{202}\) See Board of Trustees of University of Illinois v. United States, 289 U. S. 48 (1933).

\(^{203}\) Hanley v. Donoghue, 116 U. S. 1 (1885).


\(^{208}\) Claflin v. Horseman, 93 U. S. 130 (1876).


\(^{210}\) Roche v. McDonald, 275 U. S. 449 (1928).
ever, it has made the Constitution say that for a judgment to be entitled to the protection of the full faith and credit clause, a court must have jurisdiction over the person or the subject matter.211

Compacts. The original Constitution, in a left-handed way, gave the states the power to enter into a compact by providing “no State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State or with a foreign Power”. The Supreme Court has apparently made the Constitution prohibit compacts with a foreign country which amount to treaties.212 The intent of the Constitutional Convention was probably to confine compacts between states to questions of boundary lines and matters connected therewith, but the Court has given this provision a broader meaning.213

Extradition. The original Constitution provided that “a Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall, on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.” This provision seems to indicate that the Constitution places a legal duty upon the governor of the state of the asylum, but the Supreme Court has held that mandamus will not lie to compel a governor to extradite a fugitive from justice.214 The Court has also made the Constitution say that a state has no power to extradite a person to a foreign country;215 that the remedy of habeas corpus is available for a person to test the legality of extradition proceedings;216 that if a fugitive is kidnapped no process is available to return him to the state of asylum;217 that a person extradited for a crime may be tried for any other offenses with which the demanding state may charge him;218 and that the

216 Ex parte Royall, 117 U. S. 241 (1886).
constitutional provisions give legislative power to Congress on the subject.\textsuperscript{219}

Thus, it is seen again that that part of our present Constitution which relates to our dual form of government is for the most part the work of the Supreme Court. The doctrine of a dual form of government is just what the Court has made it. It has fixed the powers of the states and the powers of the nation. We have already referred to some questions involving our dual form of government which the Court has not as yet answered so as to make a Constitution upon those subjects. There are other questions on which the Supreme Court has not as yet written answers into the Constitution. For example, the Court has not as yet told us whether or not a state has the power to levy a sales tax on goods sold to persons in another state or to be shipped into another state. Undoubtedly, sometime in the future the Supreme Court will write further provisions into our Constitution upon such subjects.

\textbf{Protection of Personal Liberty Against Social Control}

The greatest and most significant part of our Constitution is concerned with the protection of personal liberty against social control, either by the Federal Government or by the States or by both. Very little of this part of our Constitution is found in the original document, the only provisions relating to it being found in Article I, Sections 9 and 10; personal liberty was not a problem in the Constitutional Convention. Much more of this part of our Constitution is found in the formal amendments. All of the formal amendments except the 10th, 11th, 12th, 17th, and 20th relate to this subject. But almost all of this part of our Constitution is found in the decisions of the Supreme Court scattered through the pages of the 302 volumes of the reports of the United States Supreme Court. In making this Constitution, the Court has sometimes rewritten the guaranties and limitations found in the original Constitution and the formal amendments and sometimes has written into the Constitution limitations and guaranties never there before.

At first there was some question whether or not the first ten amendments, constituting the Bill of Rights, were limitations only upon the Federal Government's action or upon the action of the States as well. The Supreme Court settled this question by making them merely limitations on federal action.\textsuperscript{220}

\textsuperscript{219} Roberts v. Reilly, 116 U. S. 80 (1885).
Guaranties of the First Amendment. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"; and Article VI of the original Constitution provides "but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States". Many religionists have thought that the guaranty of religious liberty in the First Amendment as well as in Article VI of the original Constitution was a guaranty in the broad sense so that they could do whatever their religion permitted or required. The Supreme Court has made the guaranty mean a very different thing. According to the Supreme Court the guaranty does not protect against unsocial conduct like the refusal of medical aid.\textsuperscript{221} It only protects against the establishment of a state religion and against the requirement of a religious test for office.\textsuperscript{222}

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press." This might have been treated as a general guaranty of freedom of speech and of the press against the Federal Government, and, by inclusion in the due process clause, against state governments. The Supreme Court, however, has made it a guaranty of freedom only (1) against censorship,\textsuperscript{223} and (2) against liability for publications, including those which cannot be censored, unless such liability is imposed in a proper exercise of the police power.\textsuperscript{224}

The First Amendment also provides that "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Many people may innocently believe that this guaranty means just what it says but under administrative practice people have been able to obtain very little protection from this guaranty or similar guaranties in state constitutions and the Supreme Court has not restored any greater protection to the guaranty.\textsuperscript{225}

\textsuperscript{221} Reynolds v. United States, 98 U. S. 145 (1879).

\textsuperscript{222} Meyer v. State of Nebraska, 262 U. S. 390 (1923).

\textsuperscript{223} For certain exceptions see Near v. Minnesota, 283 U. S. 697 (1931).

\textsuperscript{224} This occurs where liability is imposed for old crimes and for new crimes when the words spoken or written have a clear and present danger of giving rise to unlawful acts. Schenck v. United States, 249 U. S. 47 (1919); Stromberg v. California, 283 U. S. 359 (1931); Herndon v. Lowry, 301 U. S. 242 (1937).

\textsuperscript{225} WILLIS, CONSTITUTIONAL LAW (1936) 506-07.
Privilege to Bear Arms. The Second Amendment provides that "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." The Supreme Court has decided that there is here no guaranty of the personal liberty to bear arms, but only a protection of the personal liberty to bear arms in a militia in order to protect our political institutions against the danger of a standing army.226

Quartering Soldiers. The guaranty in the Third Amendment against the quartering of soldiers is one which the Supreme Court has not rewritten. Whatever protection of personal liberty it gives has not been changed.

Treason, Habeas Corpus, Etc. The original Constitution provides that "Treason against the United States shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason, unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court . . . no Attainder of Treason shall work Corruption of Blood, or Forfeiture, except during the Life of the Person attainted." The Supreme Court has held that to levy war a person must make direct effort to overthrow the government. A mere enrollment of men is not enough.227 It has held that to adhere to their enemies, giving them aid and comfort, one must be guilty of acts indicating disloyalty to his country and sympathy with the enemy, and must directly further their hostile designs; his motives are irrelevant.228 However, it permits the punishment of many acts as sedition which but for the constitutional protection might be punished as treason.229 The Supreme Court has not added or taken away from the meaning of the guaranty against passage of bills of attainder except that it has made it include bills of pains and penalties.230 The Court, in interpreting the guaranty of the privilege of the writ of habeas corpus, has said that this writ is available either where a person has been imprisoned for a crime or for an offense not known by the law.231 Chief Justice Taney expressed the opinion that Congress rather than the President possesses the power

227 Ex parte Bollman, 4 Cranch 75 (U. S. 1807).
228 Hanauer v. Doane, 12 Wall. 342 (U. S. 1870).
230 Ex parte Garland, 4 Wall. 333 (U. S. 1867).
to suspend the writ.\textsuperscript{232} The Court has held that the writ cannot be suspended in a state where the civil courts are in full operation and the Federal Government is unopposed.\textsuperscript{233} Otherwise this guaranty remains unchanged.

\textit{Unreasonable Searches and Seizures}. The Fourth Amendment provides that "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated." The Supreme Court has held that there is no search or seizure under this guaranty when officials open letters written in a penitentiary,\textsuperscript{234} or use a search light,\textsuperscript{235} or tap a telephone wire,\textsuperscript{236} but that a subpoena \textit{duces tecum} may come within the guaranty\textsuperscript{237} and that a corporation is protected.\textsuperscript{238} It has said that a search and seizure is reasonable where according to the common law it was legal to search and seize without a warrant and with a warrant, but that searches and seizures are unreasonable if they amount to writs of assistance, general warrants, or any other enterprises or expeditions not recognized by the common law as reasonable.\textsuperscript{239}

\textit{Rights in Judicial Proceedings}. In the Fifth Amendment there is a provision that "No person . . . shall be compelled in any criminal case to be a witness against himself." A casual reading of this guaranty might lead one to think that it means protection only to the accused in a criminal proceeding. The Supreme Court, however, has extended the protection to witnesses, against every branch of the government\textsuperscript{240} and as to testimony in any proceeding when it can be used in that jurisdiction in a later criminal prosecution,\textsuperscript{241} and even to protection against the production of books and papers.\textsuperscript{242} By a strange coupling of the Fourth Amendment to the Fifth, the Court also makes the guaranty protect

\textsuperscript{232} \textit{Ex parte} Merryman, 17 Fed. Cas. No. 9,487 (C. C. Md. 1861).

\textsuperscript{233} \textit{Ex parte} Milligan, 4 Wall. 2 (U. S. 1866).

\textsuperscript{234} Stroud v. United States, 251 U. S. 15 (1919).

\textsuperscript{235} United States v. Lee, 274 U. S. 559 (1927).

\textsuperscript{236} Olmstead v. United States, 277 U. S. 438 (1928).

\textsuperscript{237} Hale v. Henkel, 201 U. S. 43 (1906).

\textsuperscript{238} Ibid.

\textsuperscript{239} \textit{WILLIS, CONSTITUTIONAL LAW} (1936) 533–37.

\textsuperscript{240} Counselman v. Hitchcock, 142 U. S. 547 (1892).

\textsuperscript{241} Ibid.

\textsuperscript{242} Boyd v. United States, 116 U. S. 616 (1886).
It has refused to give the benefits of the guaranty to corporations. It has failed to make it protect against third-degree coercion, compulsory medical examination of parts of the body usually exposed to view, finger prints, lie-detector tests, and the exhibition of body and clothes.

The Fifth Amendment provides, among other things, that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." This guaranty in the Constitution says so little that it has required much more to be said by the Supreme Court. The clause is probably applicable to all indictable offenses, including misdemeanors. The Court has decided that, with certain exceptions, jeopardy occurs not when a person has been found guilty but after a valid indictment or information, arraignment, plea, and impanelment and swearing of the jury; and that there is double jeopardy only where the second prosecution is for the same offense as the first and within the same jurisdiction. The allowance of exemplary damages in a civil suit in addition to criminal punishment is probably not double jeopardy.

One clause in the Fifth Amendment provides "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a Grand Jury" (except in certain military cases). The Supreme Court has held that there is an infamous crime when there is punishment by imprisonment in a penitentiary or at hard labor in any place, but it has left in doubt whether other punishments such as the loss of political privileges indicate infamous crimes. It has also held that a grand jury must be constituted like a common-law grand jury as to its number, secrecy, and impartiality.

243 Silverthorne Lumber Co. v. United States, 251 U. S. 385 (1920).
244 Hale v. Henkel, 201 U. S. 43 (1906).
247 WILLIS, CONSTITUTIONAL LAW (1936) 529.
250 WILLIS, CONSTITUTIONAL LAW (1936) 530.
253 Martin v. Texas, 200 U. S. 316 (1906).
The original Constitution provides for trial by jury, within the state where committed, of all crimes except in cases of impeachment. The Sixth Amendment provides for a speedy and public trial, by an impartial jury of the State and district wherein the crime was committed in case of all criminal prosecutions. The Seventh Amendment provides for a trial by jury in suits at common law where the value in controversy exceeds $20. These guaranties leave many questions undecided. As yet the Supreme Court has not said whether jury trial means a trial where the jury is the dominant factor as it was in the early common law, or where the attorney is the dominant factor as is the fact in the United States, or where the judge is the dominant factor as in modern English trials; probably any one would be constitutional. It has, however, said that a jury trial is guaranteed only in the greater offenses and not in petty offenses. It has also held that the essentials of a jury trial are twelve men, impartiality, a unanimous verdict, supervision by a court, and the summoning of jurors from the vicinage. It has not as yet interpreted the guaranty of speedy and public trial, but it will undoubtedly hold that the right to a public trial is conditional on court room space and good conduct on the part of spectators and that the guaranty of a speedy trial means not immediately but as soon as possible. The Court, however, has held that a jury trial is not guaranteed in the case of petty offenses, nor in any admiralty court, nor in a probate court, nor in military tribunals, nor in equity courts, nor in disbarment proceedings, nor in administrative proceedings.

255 Thompson v. Utah, 170 U. S. 343 (1898).
257 Springville v. Thomas, 166 U. S. 707 (1897).
258 Quercia v. United States, 289 U. S. 466 (1933).
264 Ex re Debs, 158 U. S. 564 (1895).
265 Ex parte Burr, 9 Wheat. 529 (U. S. 1824).
266 Fong Yue Ting v. United States, 149 U. S. 698 (1893).
nor in the case of extraordinary legal remedies,\textsuperscript{297} nor in tax proceedings.\textsuperscript{298} It has not as yet decided whether or not a jury trial is required in a federal case, in eminent domain proceedings, or in case of declaratory judgments, or whether a corporation is entitled to a jury trial. It has, however, held that a jury trial in civil and criminal cases is a privilege which may be waived.\textsuperscript{299}

The Sixth Amendment guarantees to an accused the right "to be informed of the nature and cause of the accusation". This guaranty is so general that it has been necessary for the Supreme Court to fill in most of the details. The Court has made it mean that an indictment must accurately and clearly describe every ingredient of which an offense is composed so as not only to inform the court of the facts but to give the accused such notice as to enable him to make his defense and to lay the foundation for the defense of double jeopardy.\textsuperscript{270} This amendment also contains a general guaranty of the right of confrontation. The Supreme Court has made this guaranty safeguard the accused against secret inquisitorial methods, and secure him the right of cross examination and the right to see the witness' face and hear what he says during the whole of a trial in a felony case,\textsuperscript{271} but it does not give one the right to be present at a view of the premises,\textsuperscript{272} nor the right to exclude dying declarations or the testimony of witnesses on a former trial if now dead.\textsuperscript{273} The guaranty to an accused of the right "to have the assistance of counsel for his defense" has been made to mean that an attorney designated cannot decline such an appointment and that the accused has the privilege of communication and consultation with his counsel, and that the due process clause includes this guaranty so as to make it available in state courts.\textsuperscript{274}

\textsuperscript{299} Patton v. United States, 281 U. S. 276 (1930).
\textsuperscript{270} United States v. Cook, 17 Wall. 168 (U. S. 1872); United States v. Cruikshank, 92 U. S. 542 (1876); United States v. Cohen Grocery Co., 255 U. S. 81 (1921).
\textsuperscript{271} Fielitz v. Murphy, 201 U. S. 123 (1906); Hopt v. People of the Territory of Utah, 110 U. S. 574 (1884).
\textsuperscript{272} Snyder v. Commonwealth of Massachusetts, 291 U. S. 97 (1934).
\textsuperscript{273} Mattox v. United States, 156 U. S. 237 (1895).
\textsuperscript{274} Powell v. Alabama, 287 U. S. 45 (1932).
The Eighth Amendment has a guaranty against "excessive fines" and "excessive bail". The Supreme Court has made bail a matter of discretion, except in the case of higher offenses, permitting such as will secure the presence of the accused at the trial.\textsuperscript{275} The provision that "cruel and unusual punishment" shall not be inflicted has been interpreted as forbidding excessive fines,\textsuperscript{276} but not as prohibiting death by electricity,\textsuperscript{277} or by shooting,\textsuperscript{278} or a heavier punishment for a habitual criminal,\textsuperscript{279} or imprisonment for non-payment of certain debts.\textsuperscript{280}

Slavery and Involuntary Servitude. The Thirteenth Amendment provides "Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." This is a very important guaranty but its silences leave unanswered a great many questions. The Supreme Court has made the amendment apply to the actions of the Federal Government, of the States, and of individuals; and has made the amendment self-executing without any legislative action.\textsuperscript{281} It has made the amendment include protection against peonage and the Chinese coolie trade;\textsuperscript{282} against making a breach of contract a crime, punishable by compulsory labor;\textsuperscript{283} and against specific performance of personal service contracts. But the amendment has been held not applicable to work made a part of prison discipline,\textsuperscript{284} to compulsory service by a sailor for a breach of contract,\textsuperscript{285} to the compulsion of service by a parent or master of a child or servant,\textsuperscript{286}

\textsuperscript{275} United States v. Hamilton, 2 Dall. 17 (U. S. 1795); United States v. Lawrence, 26 Fed. Cas. No. 15,577 (C. C. D. C. 1835).
\textsuperscript{276} Weems v. United States, 217 U. S. 349 (1910).
\textsuperscript{277} In re Kemmler, 136 U. S. 436 (1890).
\textsuperscript{278} Wilkerson v. Utah, 99 U. S. 130 (1878).
\textsuperscript{279} McDonald v. Massachusetts, 180 U. S. 311 (1901).
\textsuperscript{280} Hill v. United States, 298 U. S. 460 (1936).
\textsuperscript{281} Hodges v. United States, 203 U. S. 1 (1906).
\textsuperscript{282} Slaughterhouse Cases, 16 Wall. 36 (U. S. 1872).
\textsuperscript{283} Bailey v. Alabama, 219 U. S. 219 (1911).
\textsuperscript{284} Ex parte Karstendiek, 93 U. S. 396 (1876).
\textsuperscript{285} Robertson v. Baldwin, 165 U. S. 275 (1897). (Purely historical reasons underlie this decision.)
\textsuperscript{286} Clyatt v. United States, 197 U. S. 207 (1905).
to jury service and work on the highways,\textsuperscript{287} to compulsory military service,\textsuperscript{288} or to deprivation of the ordinary civil rights.\textsuperscript{289} Whether or not employees engaged in interstate commerce may be compelled to continue service has not been definitely settled.\textsuperscript{290}

\textit{Ex Post Facto Laws.} The original Constitution forbids both the Federal Government’s and the States’ passing any \textit{ex post facto} law. But the Court limited this guaranty to protection against criminal legislation only.\textsuperscript{291} The Court then made penal laws \textit{ex post facto}, (1) when an act is made criminal which was innocent when done, (2) when a crime is made greater than it was when it was committed, (3) when punishment is made greater than the punishment prescribed at the time an act was committed, (4) when the rules of evidence are so changed as to deprive a defendant of a substantial right, (5) when retrospective qualifications for office are made which are not proper exercises of police power.\textsuperscript{292}

\textit{Obligation of Contracts.} The original Constitution forbids the States’ passing a “law impairing the obligations of contracts”. This language in the original Constitution says so little that the Supreme Court has had to fill in practically all that has been said on this subject. The contract clause by its own language applies only to state action, and the Supreme Court has made it apply only to the legislative branch of the state governments.\textsuperscript{293} But the Court has made the due process clause protect against the impairment of the obligation of contracts so as to give protection against the Federal Government,\textsuperscript{294} but in such case evidently only against Congress.\textsuperscript{295} It also has made the guaranty in the contract clause protect both state contracts and private contracts, either with

\begin{itemize}
  \item \textsuperscript{287} Butler v. Perry, 240 U. S. 328 (1916).
  \item \textsuperscript{288} Selective Draft Law Cases, 245 U. S. 366 (1918).
  \item \textsuperscript{289} Civil Rights Cases, 109 U. S. 3 (1883).
  \item \textsuperscript{290} Adair v. United States, 208 U. S. 161 (1908); Wilson v. New, 243 U. S. 332 (1917).
  \item \textsuperscript{291} Calder v. Bull, 3 Dall. 386 (U. S. 1798).
  \item \textsuperscript{292} Ibid.; Thompson v. Utah, 170 U. S. 343 (1898); \textit{Ex parte} Garland, 4 Wall. 333 (1867); Hawker v. New York, 170 U. S. 189 (1898). It should be noted that the \textit{ex post facto} clause is not in general subject to the police power, taxation, and eminent domain.
  \item \textsuperscript{293} Central Land Co. v. Laidley, 159 U. S. 103 (1895).
  \item \textsuperscript{294} United States v. Northern Pac. Ry., 256 U. S. 51 (1921).
  \item \textsuperscript{295} \textit{Willis, Constitutional Law} (1936) 601.
\end{itemize}
individuals or other states, 293 but not quasi-contracts, 297 nor tort judgments, 298 nor public office. 299 The original clause protects only the obligation of contracts, but the Supreme Court has made this include both executed contracts, including grants, 300 and executory contracts. 301

Does the Constitution, through the contract clause, protect corporate charters? The Supreme Court might have held that a corporate charter is not a contract. It has so held in the case of charters of municipal corporations. 302 However, it has made the charters of private corporations contracts, 303 and at first it made the Constitution protect such contracts against the power of taxation, the police power, and probably the power of eminent domain. 304 After making this constitutional law, the Court saw that it had gone too far and began to modify and amend the Constitution which it had thus created, (1) by a rule of strict construction, 305 (2) by reading into the contract in charters a reservation of a power to alter so that there would be no impairment, 306 and (3) by directly changing the Constitution made by itself so as to make all charter contracts subject to (a) the power of eminent domain, 307 and (b) the police power, 308 except as to rates and franchises of public utilities. 309 It is still questionable,

293 Sturgis v. Crowninshield, 4 Wheat. 122 (U. S. 1819); Green v. Biddle, 8 Wheat. 1 (U. S. 1823).
297 Morey v. Lakeshore Ry., 146 U. S. 162 (1892).
301 Fletcher v. Peck, 6 Cranch 87 (U. S. 1810); New Jersey v. Wilson, 7 Cranch 164 (U. S. 1812) (granting away tax power).
302 Green v. Biddle, 8 Wheat. 1 (U. S. 1823).
however, whether it has made charter contracts subject to the power of taxation.\textsuperscript{310}

Where there is not a proper exercise of the police power, the Court holds that the Constitution makes a destruction of a remedy on a contract an impairment of a contract,\textsuperscript{311} although it holds that the Constitution permits remedies to be changed.\textsuperscript{312} Since the Court extended the due process clause to include protection against the impairment of the obligation of contracts, it necessarily put itself in a position where it had to extend the due process clause to protect against all civil retroactive legislation which is not a proper exercise of the power of eminent domain, taxation, or police power.\textsuperscript{313} It has not as yet settled the question of whether the protection against civil retroactive social control applies only against the legislative branch or all three branches of the government; nor has it as yet decided whether or not the Constitution protects against the operation of changes in the period of the statute of limitations after debts have been outlawed.

Equality. Section one of the Fourteenth Amendment provides that “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” The Supreme Court has made this clause applicable to action by any of the branches of the state governments,\textsuperscript{314} and it has probably made the due process clause of the Fifth Amendment include a guaranty of equality so as to give people this protection against the Federal Government;\textsuperscript{315} but the guaranty gives no protection against the action of private individuals.\textsuperscript{316}

At first the Court made the equality clause of the Fourteenth Amendment protect the personal liberty of negroes only,\textsuperscript{317} but it

\textsuperscript{310} Hale v. Iowa, 58 Sup. Ct. 102 (1937).

\textsuperscript{311} Von Hoffman v. City of Quincy, 4 Wall. 535 (U. S. 1867).

\textsuperscript{312} Terry v. Anderson, 95 U. S. 628 (1877); Watson v. Mercer, 9 Pet. 88 (U. S. 1834).

\textsuperscript{313} United States v. Heinszen & Co., 206 U. S. 370 (1907); Tiaco v. Forbes, 228 U. S. 549 (1913).

\textsuperscript{314} Home Tel. & Tel. Co. v. Los Angeles, 227 U. S. 278 (1913); Ex parte Virginia, 100 U. S. 339 (1880).

\textsuperscript{315} Dent v. West Virginia, 129 U. S. 114 (1889); Second Employer's Liability Cases, 223 U. S. 1 (1912).

\textsuperscript{316} Civil Rights Cases, 109 U. S. 3 (1883).

\textsuperscript{317} Slaughter-House Cases, 16 Wall. 36 (U. S. 1872).
has gradually extended the scope of the guaranty until it now protects the personal liberty of all natural persons including aliens\textsuperscript{318} and private corporations which are domestic,\textsuperscript{319} or engaged in interstate commerce,\textsuperscript{320} or which have been admitted to the state;\textsuperscript{321} but it does not protect corporations not admitted to the state, unless a state undertakes to impose a condition which would require the surrender of some interest either of the United States or of another state.\textsuperscript{322}

The protection which the Court has made the equality clause give the persons referred to is protection against class legislation. In other words, it has made the guaranty one not of the equal protection of the laws but of the protection of equal laws.\textsuperscript{323} The Constitution thus created permits classification for the police power, the power of taxation, and for eminent domain according to persons,\textsuperscript{324} geography,\textsuperscript{325} objects,\textsuperscript{326} occupations,\textsuperscript{327} and kinds of taxes.\textsuperscript{328}

The equality clause does not, according to the Supreme Court, require uniformity. However, the original Constitution requires uniformity for duties, imposts, and excises; but the Court has made this requirement more or less innocuous by limiting it to geographical uniformity.\textsuperscript{329}

\textit{Due Process of Law.} The Fifth Amendment forbids the Federal Government's and the Fourteenth Amendment forbids any State's

\textsuperscript{318} Patsone v. Pennsylvania, 232 U. S. 138 (1914); Truax v. Raich, 239 U. S. 33 (1915).

\textsuperscript{319} Santa Clara County v. Southern Pac. Ry., 118 U. S. 394 (1886).

\textsuperscript{320} Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1 (1877).


\textsuperscript{322} Atlantic Refining Co. v. Commonwealth of Virginia, 27 Sup. Ct. 75 (1937); \textit{WILLIS, CONSTITUTIONAL LAW} (1936) 576-79.

\textsuperscript{323} Barbier v. Connolly, 113 U. S. 27 (1885); Pembina Consolidated Silver M. & M. Co. v. Pennsylvania, 125 U. S. 181 (1888).

\textsuperscript{324} Plessy v. Ferguson, 163 U. S. 537 (1896); Terrace v. Thompson, 263 U. S. 197 (1923).

\textsuperscript{325} Barbier v. Connolly, 113 U. S. 27 (1885); Kansas City Southern Ry. v. Road Improvement Dist. No. 3, 266 U. S. 379 (1924).


\textsuperscript{327} Holden v. Hardy, 169 U. S. 366 (1898).

\textsuperscript{328} Hart Refineries v. Harmon, 278 U. S. 499 (1929).

\textsuperscript{329} Knowlton v. Moore, 178 U. S. 41 (1900).
depriving any person "of life, liberty, or property, without due process of law". The Supreme Court has done some of its most mysterious and marvelous work in constitution-making in connection with these clauses. At first it made these clauses apply only to legal procedure and the clause in the Fourteenth Amendment was held to apply only to the protection of negroes\textsuperscript{330} and not to include other constitutional guaranties. But through the years the Court has more and more extended the scope of the clauses.

For one thing, it has extended due process until now the guaranty of due process of law includes the other constitutional guaranties of protection against impairment of the obligation of contracts,\textsuperscript{331} equality,\textsuperscript{332} freedom of speech and of the press,\textsuperscript{333} religious freedom,\textsuperscript{334} right to have counsel,\textsuperscript{335} to confront witnesses,\textsuperscript{336} and to know the nature of the accusation,\textsuperscript{337} the right of assembly,\textsuperscript{338} the protection against cruel and unusual punishment,\textsuperscript{339} and against double jeopardy,\textsuperscript{340} and perhaps the guaranty of a public trial.\textsuperscript{341} The Court has made due process of law include so many other constitutional guaranties that it might well extend it until it should include all of them and there is a possibility that sometime in the future this may be done.

For another thing, the Court has extended the protection of due process as to legal procedure so as to protect all natural persons and even corporations\textsuperscript{342} and in so doing, except against legislative bodies, certain executive officers, and in matters of trifling importance,\textsuperscript{343} it has made it guarantee: (1) notice sufficient to inform a person of the time and place of the trial and the tribunal before

\begin{itemize}
  \item \textsuperscript{330} Slaughter-House Cases, 16 Wall. 36 (U. S. 1872).
  \item \textsuperscript{331} United States v. Northern Pac. Ry., 256 U. S. 51 (1921).
  \item \textsuperscript{332} McCray v. United States, 195 U. S. 27 (1904).
  \item \textsuperscript{333} Near v. Minnesota, 283 U. S. 697 (1931).
  \item \textsuperscript{334} Meyer v. Nebraska, 262 U. S. 390 (1923).
  \item \textsuperscript{335} Powell v. Alabama, 287 U. S. 45 (1932).
  \item \textsuperscript{336} Snyder v. Commonwealth of Massachusetts, 291 U. S. 97 (1934).
  \item \textsuperscript{337} Connally v. General Construction Co., 269 U. S. 385 (1926).
  \item \textsuperscript{338} De Jonge v. State of Oregon, 57 Sup. Ct. 255 (1937).
  \item \textsuperscript{339} McElvaine v. Brush, 142 U. S. 155 (1891).
  \item \textsuperscript{340} Shevlin-Carpenter Co. v. State of Minnesota, 218 U. S. 57 (1910).
  \item \textsuperscript{341} Gaines v. Washington, 277 U. S. 81 (1828).
  \item \textsuperscript{342} Minneapolis Ry. v. Beckwith, 129 U. S. 26 (1889).
\end{itemize}
whom a claim is to be made, to apprise him of the nature of the cause against him, and to afford him sufficient opportunity to prepare and make his answer;244 (2) a reasonable opportunity to be heard in cases involving the police power,245 the power of eminent domain, and taxation where taxes are levied according to value or by local assessment;246 (3) an impartial tribunal,247 and where questions of law are involved, a judicial tribunal;248 and (4) an orderly course of procedure according to what the Supreme Court thinks reasonable. This last guaranty requires a review by a court over an administrative tribunal’s exercise of judicial power,249 mental competence of judges and jurors,250 freedom from mob domination,251 presence of witnesses, a public trial,252 and counsel and opportunity for counsel to prepare the case.253

The Supreme Court has extended due process to the requirement of jurisdiction as a condition precedent to the exercise of governmental powers. The Court has not as yet made clear what it requires as the basis of jurisdiction. It has played with the various explanations of physical power, consent, submission, presence, and grant of power; but apparently no one of these, with the possible exception of the last, is sufficient at all times and under all circumstances.254 For judicial jurisdiction over persons, it has required personal or constructive service of process within territorial boundaries,255 or outside territorial boundaries on one whose domicil is within the territorial boundaries,256 and over things, substituted service by publication of notice.257 For jurisdiction for

244 Roller v. Holly, 176 U. S. 398 (1900).
246 Central of Georgia Ry. v. Wright, 207 U. S. 127 (1907).
254 WILLIS, CONSTITUTIONAL LAW (1936) 579.
taxation it has required situs for property taxes in the case of land\textsuperscript{358} and in the case of tangibles, except where the unit rule applies;\textsuperscript{359} and domicil in the case of tangibles even though evidenced by tangibles, except where the unit rule applies and where a business situs has been acquired.\textsuperscript{360} For inheritance taxes the same requirements have been established as for property taxes, situs in the case of land\textsuperscript{361} and tangibles,\textsuperscript{362} and domicil in the case of intangibles,\textsuperscript{363} except in case of foreign intangibles evidenced by tangibles.\textsuperscript{364} For other excise taxes, there is required the grant of a privilege by the taxing agency;\textsuperscript{365} for incomes taxes domicil,\textsuperscript{366} or situs,\textsuperscript{367} or nationality is required.\textsuperscript{368} For jurisdiction for divorce it has required either domicil of both parties or jurisdiction over the matrimonial status.\textsuperscript{369}

The most wonderful work of the Supreme Court, finally, has been the extension of due process to matters of substance. This occurred in the eighties, very largely through the influence of Justice Field. Meanwhile no change in the language in the formal amendments occurred. The Supreme Court merely made due process of law thenceforth apply to matters of substance where before it had held that it did not apply to such matters. The meaning of this new constitutional provision made by the Court is that all social control, either by the states or the United States, is unconstitutional unless it is reasonable in the judgment of the Supreme Court. The Court will say it is reasonable if it is a proper exercise of the police power, or of the power of taxation, or of the power of eminent

\textsuperscript{358}Witherspoon v. Dungan, 4 Wall. 210 (U. S. 1866).
\textsuperscript{359}Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194 (1905); Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18 (1891).
\textsuperscript{360}Baldwin v. Missouri, 281 U. S. 586 (1930); Adams Express Co. v. Ohio, 166 U. S. 185 (1897); Metropolitan Life Ins. Co. v. New Orleans, 205 U. S. 395 (1907).
\textsuperscript{361}Rhode Island v. Doughton, 272 U. S. 567 (1926).
\textsuperscript{363}Bolton v. Silberman, 277 U. S. 1 (1928).
\textsuperscript{365}United States v. Bennett, 232 U. S. 299 (1914).
\textsuperscript{366}Lawrence v. State Tax Commission, 286 U. S. 276 (1932).
\textsuperscript{367}People v. Graves, 57 Sup. Ct. 237 (1937).
\textsuperscript{368}Cook v. Tait, 265 U. S. 47 (1924).
\textsuperscript{369}Atherton v. Atherton, 181 U. S. 155 (1901); Haddock v. Haddock, 201 U. S. 562 (1906).
domain and the method adopted by government bears some substantial relation to the end to be accomplished. The Supreme Court, in other words, in each case balances personal liberty on the one hand against these forms of social control on the other hand. If it thinks personal liberty the more important, it declares the social control unconstitutional; if it decides social control the more important and that the method bears some substantial relation to the end, it will decide in favor of social control.

It is a proper exercise of the police power if it is for the protection of a paramount social interest. Such social interests are bodily health, property, physical safety, certain freedom of contract, livelihood, general economic progress, the protection of natural resources, or human resources, or the individual life, the prevention of fraud, aesthetic feelings, political institutions, general morals, general political progress, domestic and religious institutions, or general cultural progress. It is not as yet a proper exercise of the police power to make a homogenous race by requiring the use of the English language or by required attendance at public schools. There is no substantial relation to

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570 Buchanan v. Warley, 245 U. S. 60 (1917).
573 Chicago v. Sturges, 222 U. S. 313 (1911).
575 Allgeyer v. Louisiana, 165 U. S. 578 (1897).
576 Adams v. Tanner, 244 U. S. 590 (1917).
577 Sligh v. Kirkwood, 237 U. S. 52 (1915); Munn v. Illinois, 94 U. S. 113 (1876).
the end to be accomplished in requiring the ownership of drug stores to be by pharmacists where the end is the protection of health. At first the Supreme Court could find no substantial relation between bodily health and the regulation of hours of labor or the regulation of minimum wages, but now it is able to find such a relation both in the case of hours of labor and in the case of minimum wages.

It is a proper exercise of the power of taxation when taxation is for a public purpose rather than for a private purpose. There is such a public purpose in the case of governmental functions, including schools and pensions for teachers, and the operation of public utilities or in the case of subsidies for the benefit of fire and famine sufferers where the number benefited is large, or where private enterprise is inadequate and there is sufficient public need. Taxation for a private individual is unconstitutional if done directly, but it may be done indirectly through the form of exemptions, and the Supreme Court apparently puts no limitations on the spending power of Congress.

It is a proper exercise of the power of eminent domain when it is for a public use and for just compensation, no matter what kind of property is taken. At first the Supreme Court required a physical taking and use by the public, but now it holds that there is a taking when any of the incidents of ownership are taken.

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392 Adkins v. Children's Hospital, 261 U. S. 525 (1923).
394 West Coast Hotel Co. v. Parrish, 57 Sup. Ct. 578 (1937).
395 Loan Ass'n v. Topeka, 20 Wall. 655 (U. S. 1874).
397 Standard Oil Co. v. City of Lincoln, 275 U. S. 504 (1927).
399 Milheim v. Moffat Tunnel Improvement Dist., 262 U. S. 710 (1923).
400 Smith v. Kansas City Title & Trust Co., 255 U. S. 180 (1921).
403 Pumpelly v. Green Bay Co., 13 Wall. 166 (U. S. 1871).
404 Hairston v. Danville & Western Ry., 208 U. S. 598 (1908).
and where the taking will be useful or beneficial to the public.\textsuperscript{406}
But the due process clause protects against the taking of private property for a private use\textsuperscript{407} or for a public use without just compensation.\textsuperscript{408}

In the future the Supreme Court may find other social interests, other public purposes, and other public uses, in which case further social control will be constitutional; or it may throw out some of the social interests, public purposes, and public uses which it now recognizes, in which case individuals will be guaranteed more personal liberty. In this way the Supreme Court has arrogated to itself the power to draw the line between personal liberty and substantive social control and to determine how much such social control shall be permitted in the United States.

\textit{In General.} There are found in the original Constitution and the formal amendments various other constitutional guaranties and limitations, which have been interpreted and rewritten by the Supreme Court so as to be made to mean what it thinks they ought to mean. Among these may be named the interstate privileges and immunities clause which has already been considered in connection with citizenship and suffrage and which not only protects the personal liberty of individuals but, as expanded, decreases the powers of the state governments and thereby changes our dual form of government.\textsuperscript{409}

Other provisions which have received similar treatment include the provision against the repudiation of debts in Article VI and in the Fourteenth Amendment; the provision against discrimination in the matter of suffrage on account of race or sex in the Fifteenth and Nineteenth Amendments, which the Court has held do not prevent qualifications for voting;\textsuperscript{410} the provision forbidding the Federal Government to tax exports and the provision forbidding the states to tax either exports or imports, which the Court has interpreted as applying only to goods going to or coming from a foreign country;\textsuperscript{411} the provision requiring capitation and other

\begin{itemize}
  \item \textsuperscript{406}Clark v. Nash, 198 U. S. 361 (1905).
  \item \textsuperscript{407}Missouri Pac. R. R. v. Nebraska, 164 U. S. 403 (1896).
  \item \textsuperscript{408}Searl v. School Dist., 133 U. S. 553 (1890).
  \item \textsuperscript{409}Colegate v. Harvey, 296 U. S. 404 (1935).
  \item \textsuperscript{410}McPherson v. Blacker, 146 U. S. 1 (1892).
  \item \textsuperscript{411}Fairbank v. United States, 181 U. S. 283 (1901); Woodruff v. Parham, 8 Wall. 123 (U. S. 1858).
\end{itemize}
direct taxes to be apportioned, which were first held not to include income taxes\textsuperscript{412} but which were later held to include such taxes;\textsuperscript{413} and the provision against diminishing judicial salaries, which the Court has held makes it unconstitutional to require the judges to pay an income tax.\textsuperscript{414}

While the foregoing guaranties and limitations and the work of the Supreme Court directly protect personal liberty, other constitutional doctrines have a similar but indirect effect and the work of the Court has added to the effect which the doctrines would otherwise have. Thus, the doctrine of separation of powers has the direct effect or purpose of delimiting the powers of the various branches of government, but it has the indirect effect of protecting the personal liberty of individuals, because as the Court holds that any given branch of government does not have power it thereby protects personal liberty. In the same way our dual form of government has the same effect. The purpose of this doctrine is directly to delimit the powers of the state governments on the one hand and of the Federal Government on the other; but indirectly, when a power is denied to either the Federal Government or the states, it has the effect of protecting personal liberty. As a matter of fact, it almost seems that when the states are acting but the Federal Government is not acting, the Supreme Court has denied state power in order to protect personal liberty;\textsuperscript{415} and when the Federal Government is acting but the states are not acting, it has denied federal power in order to protect personal liberty.\textsuperscript{416} What is true of these doctrines is more or less true of the other great constitutional doctrines: the supremacy of the Supreme Court, sovereignty, amendability of the Constitution, and universal citizenship and suffrage.

From this survey it is very clear that the protection of personal liberty and the permission of social control is just what the Supreme Court says it shall be. A great part of the Constitution on this subject has been written by the Court alone. Any parts of the Constitution on this subject written by others, it has rewritten. The

\textsuperscript{412} Springer v. United States, 102 U. S. 586 (1880).
\textsuperscript{414} Evans v. Gore, 253 U. S. 245 (1920).
\textsuperscript{416} United States v. Butler, 297 U. S. 1 (1936).
guaranties and limitations in the original Constitution and the formal amendments do not mean what those who originally wrote them thought they meant nor what the ordinary layman might think they mean, but they mean just what the Court has decided that they shall mean. In other words the doctrine of the protection of personal liberty against social control as it now stands is practically entirely the work of the United States Supreme Court.

CONCLUSION

So far as the rest of the Constitution is concerned, the work of the Supreme Court does not bulk as large as it does in connection with personal liberty and social control, but even here the work of the Court bulks larger than that of all other agencies of constitution making combined. The Constitution may be divided into four parts: the original Constitution, the formal amendments, an unwritten Constitution, and the Constitution made by the Supreme Court. The unwritten Constitution includes the political Constitution made by Congress, as exemplified in the development of the cabinet and commission systems, and perhaps a rule against a third term for the President. The original Constitution includes the doctrine of separation of powers and the doctrine of amendability of the Constitution with some materials for the doctrine of sovereignty, the doctrine of a dual form of government and the doctrine of protection of personal liberty against social control. The formal amendments include the doctrine of universal citizenship and suffrage and the protection of personal liberty against social control. That part of the Constitution made by the Supreme Court includes the doctrine of sovereignty, the doctrine of a dual form of government, and the doctrine of the supremacy of the Supreme Court. In addition, that part of the Constitution made by the Supreme Court includes all the changes which the Supreme Court has made in the other constitutional law doctrines. Where it has practically rewritten a doctrine like the doctrine of protection of personal liberty against social control, it includes the whole doctrine. Where it has only added to or modified other doctrines, it includes only such additions and modifications. When the work of the Supreme Court is stated in this form, it is easy to see that the Supreme Court has been the supreme constitution-maker. It has been a perpetual constitutional convention. It practically never sits without making some part of our Constitution. The part of the Constitution made
by the Supreme Court is harder to find because it is scattered through 302 volumes of reports of its decisions, but when it is found it is found to include all of the things which have been enumerated in this article. The part of the Constitution made by the Supreme Court is, therefore, more than one-half of our present Constitution. The Constitution is truly what the Supreme Court says that it is.

In making the Constitution the Supreme Court has performed a necessary and triumphant function. It is appalling to think of what would have happened if the Court had done nothing of this sort. We can be sure that we should have witnessed revolutions, the break down of democracy, and the abandonment of the Constitution. It is inconceivable that a better Constitution could have been obtained in any other way. The Court has made the Constitution what a growing, changing civilization has demanded. It has made our fundamental law not an anchor holding us back to a stagnant past but a rudder guiding us into an expanding and unfolding future. In creating it the Supreme Court has created the greatest and best thing on the North American continent, and "the most wonderful work" not "struck off at one time" but struck off during the last one hundred and fifty years "by the brain and purpose of man".

Except for what it has done in connection with due process as a matter of substance and in connection with the protection of corporations against economic social control, the work of the Supreme Court is not subject to criticism. The chief criticism of the Court must be in connection with its determination of questions of social policy under the due process clause as a matter of substance—a legislative function. Its extension of the due process clause to matters of substance and its usurpation of the power thereby given to itself was undoubtedly originally a mistake. Probably now this mistake should be corrected. The only feasible way to correct it is by an amendment to the United States Constitution providing that the judicial power of the United States shall not extend to such matters. Where the rest of the work of the Supreme Court is subject to criticism the cure should be found not in an amendment to the Constitution but in waiting for the Court itself to correct its own mistakes. Even if the Supreme Court has sometimes apparently been power-mad in its restraint of the Federal Government and the state governments for the protection of private business, in connection with the doctrine of separation of powers and the doctrine
of our dual form of government, it will be better to allow it to
make its own corrections rather than to take from the Supreme
Court jurisdiction to decide controversies between the states and
the nation on the one hand and between the various branches of
the national government on the other hand — a judicial function.