Chapter 3

A GOVERNMENT OF LAWS: AMERICAN CONSTITUTIONALISM

INTRODUCTION

Constitutions should consist only of general provisions; the reason is that they must necessarily be permanent, and that they cannot calculate for the possible changes of things.

ALEXANDER HAMILTON

A constitution is framed for ages to come and is designed to approach immortality as nearly as human institutions can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen indeed if they have not provided it, so far as its nature will permit, with the means of self-preservation from the perils it may be destined to encounter. No government ought to be so defective in its organization as not to contain within itself the means of securing the execution of its own laws against other dangers than those which occur every day.

JOHN MARSHALL

We are under a Constitution, but the Constitution is what the judges say it is.

CHARLES EVANS HUGHES

IN THE UNITED STATES, to say that a law or an act of government is "unconstitutional" is the most fundamental objection that can be made to it. It is not the same to say "wrong," or "unjust," or "immoral"; all of these involve appeals to religion, reason, or custom, and may refer to what is transcendental or transitory. "Unconstitutional," on the contrary, is an appeal to a statement of principles for the organization of our national life that, although man-made, historical, and secular, is nevertheless thought of by almost every American as so fundamental as to be essentially permanent and the central focus of our political loyalty.

Against the charge of unconstitutionality, if it is widely accepted, no power in American political life can stand. Franklin D. Roosevelt, even at the height of his personal popularity, the peak of his prestige as a suc-

cessful President, and the apex of his power as the leader of a party given the largest popular and congressional majorities in our history up to that time, had to abandon his plan for reorganizing the Supreme Court in the face of the widespread opinion that the plan was unconstitutional. In fact, the changes he proposed in 1937 did not affect the status of the Court as defined in the Constitution itself but only as prescribed in a series of acts of Congress on points that the Constitution expressly leaves to congressional decision. Nevertheless, the proposed changes would have altered the way in which people for many years had been used to seeing the Court operate. We tend to think of ourselves as a nation without traditions; we even pride ourselves on the fact. But where the Constitution is concerned, tradition is probably the overriding consideration.

The above remarks should not be taken to mean that the notions of constitutionality and unconstitutionality are legal only. The constitutionality of a law is the ultimate arena for political conflict in the United States, and for social and economic conflict as well. The abstract, "legal" issue of constitutionality is vital in the polity, because we Americans have agreed to make it the final ground for political struggle in the highest sense. This agreement is an astonishing fact about American political life; but it is also a fact of American social and economic life. The being of the Constitution lives beyond the chaste language of the law.

Thus the meaning of "constitutionality," and of the Constitution itself, ramifies into every area of our national life, from international affairs to the place of religious belief. The agreements entered into by President Roosevelt at the Yalta Conference in February 1945 are widely held to be "unconstitutional" and hence not binding on the United States, because they were made without the "advice and consent" of the Senate, as prescribed in the Constitution for treaties with foreign powers. The questions of school prayers, of civil rights and of racial segregation, and of the investigative power of Congress in relation to the individual citizen's right to privacy have been the occasion of heated debates, not primarily on the merits of the questions themselves but on the grounds of their constitutionality.

Perhaps the surest evidence of the respect, bordering on awe, that Americans accord their Constitution is the fact that in 1861, when the Union suffered its greatest crisis and a group of states withdrew to try to establish another nation on this continent, those states drafted a constitution that was almost exactly the same as the federal Constitution they were defying. The Confederates made one significant change in the Preamble and a few minor changes in the main body, but the two documents were otherwise one.

Briefly, then, for a law or an act of government to be unconstitutional means that it violates the fundamental law of the land; in other words, that some official or agency of government has exceeded the powers of an office or jurisdiction, has departed from or upset the framework of government to which the people have given their consent, and has therefore acted without authority and in violation of "the American way of life" insofar as that is an affair of government or law. (In this sense, the worst thing about the Confederate constitution was that it was unconstitutional!) Hence to be unconstitutional is, at bottom, to be un-American (although to be un-American is not always to be unconstitutional) — and there are few worse things that an American can say about anything.

1. A GOVERNMENT OF LAWS

OUR AMERICAN FEAR AND DISTRUST of the unconstitutional is the same fear that John Locke expressed in his *Second Essay Con-*

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"The Game of Fox and Geese, or Legal Trials of the Period"; cartoon by Thomas Nast in "Harper's"

cerning Civil Government (1690), a book that was familiar to the framers of our Constitution and often quoted by them. "Tyranny," said Locke, "is the exercise of power beyond right, to which no one can have a right; and this is making use of the power anyone has in his hands, not for the good of those who are under it but for his private, separate advantage." Tyranny occurs, Locke went on to say, when the governor, however entitled, rules by his own will instead of by the law, and when "his commands and actions are not directed to the properties of his people but to the satisfaction of his own ambition, revenge, covetousness, or any other irregular passion."

Thus our hatred of the unconstitutional is the specifically American form of the fear of an undefined, arbitrary, and purely personal power; of unauthorized rather than authorized force. Unconstitutional power is the power of a bandit over his victim, not the power of an agent or delegate to act for his principal or "constituent" — the word itself is revealing — in some essentially limited way. Those powers are unconstitutional that are not granted to government or to its officers in the fundamental law of the land; powers to which the people did not originally, and do not now, consent. In the same sense, acts are unconstitutional that involve the exercise of unconstitutional power or powers.

Despotism, in short, is the government of men. Constitutional government is the government of laws.

This basic distinction has been made in many ways and has a long history in the Western world. Fundamentally, the distinction is between a government that can do as it pleases (or as it pleases the men who make up the government) and a government that must obey laws that it did not make, and cannot unmake. Control, by law, of the powers and acts of the men who govern is the core of the conception; but this control does not have to be exercised by means of written laws or sets of laws. The control may be effective because the basic law, the "constitution," derives from and is based on immemorial custom; or it may be based on the pronouncements of a lawmaker of great prestige; or it may be the result of an agreement of all the people assembled for the purpose, or of special representatives of the people. In modern times, the constitutions of states are usually — with the notable exception of Great Britain — written ones and are the product of "constituent assemblies" of representatives of the people at large. The American Constitution, of course, is of this kind.

That the Americans had a written constitution so early is of more than "historical" interest. The Americans' insistence on a written instead of an "implied" constitution, based on custom and tradition, resulted from the special circumstances in which they found themselves: they had no tradition, strictly speaking (they had just fought a war with Great Britain establishing their independence), and they were constantly

aware — the literature of the time makes this particularly clear — that the country had no past but only a future. Starting from scratch, as it were, they had to start with *something* — and such a thing would have to be on paper. This feeling of a lack of tradition, in fact, was not confined to the Founding Fathers alone; it can be traced back to the seventeenth century, and it may explain the continuing emphasis in American history on written or positive law rather than precedents. The American nation itself was just exactly that — unprecedented; it was made, formed, constituted; and its birth may be accurately dated, which was not true of any of the old nations of Europe at the time.

"Any government is free to the people under it (whatever be the frame)," wrote William Penn in 1682, "where the laws rule and the people are a party to those laws, and more than this is tyranny, oligarchy, or confusion." That, indeed, *is* the heart of the matter; but it is nevertheless important to recognize that laws, in actuality, cannot really rule; rule *is* always by men, who may, however, either exercise power under the law or outside the law. Thus the U.S. Constitution, like that of most modern states, is fundamentally a document that defines and relates the various political offices by which the government is organized. A constitution, as Aristotle wrote, "is the organization of offices in a state, and determines what is to be the governing body and what is the end of each community."

In addition, the Constitution determines the qualifications of officeholders; but of course it does not say *who* shall be selected, by processes that it also defines, for a given office. Unlike all the rest of our laws, therefore, it is the law that creates and regulates government itself rather than the law that the government creates, and by which it regulates men's conduct in relation to each other and to the state. The distinction has been recognized for centuries. "The fundamental law in every community," said Hobbes in *Leviathan* (1651), "is that which being taken away the commonwealth faileth and is utterly dissolved." Montesquieu distinguished what he called "the law politic," which constitutes the state, from ordinary legislation; and Rousseau also saw the difference between "political" or "fundamental" laws and "civil" laws — those that "determine the form of the government" and those that the government enacts and enforces once it is constituted.

The distinction was made in America from the beginning. Thus, for example, Article 98 of the *Body of Liberties of Massachusetts Colony*, written in 1641, declared that "because our duty and desire is to do nothing suddenly which fundamentally concerns us, we decree that these rights and liberties shall be audibly read and deliberately weighed at every General Court that shall be held within three years next ensuing." Ordinary acts of government under the proposed fundamental law were to be decided by simple majorities at the regular meetings of the General Court; thus the difference between the two kinds of law was reflected in an important difference in procedure, which in turn reflected the gravity of the distinction. Indeed, the necessity of having a fundamental law, by reference to which all other laws and regulations are judged and by which they gain their lawfulness, was revealed as early as 1620, in the signing of the Mayflower Compact by the Plymouth Pilgrims. *Mourt's Relation* tells how, on November 11, 1620, "being thus arrived, they first fall on their knees and bless the God of Heaven. But their design and patent being for Virginia, and not New England, which belongs to another jurisdiction, wherewith the Virginia Company have no concern; before they land they this day combine into a body politic by a solemn contract, to which they set their hands, as the basis of their government in this new-found country."

Having performed this solemn act, the *Relation* goes on, they then chose "Mr. John Carver, a pious and well-approved gentleman, their governor for the first year, and then set ashore fifteen or sixteen men, well-armed, to fetch wood and discover the land."

The making of constitutions did not end in 1620, of course, or even in 1641; it was still going on long after 1787, when the U.S. Constitution was itself framed, and indeed it goes on actively today. In 1845, *The Emigrants' Guide to Oregon and California* recorded a typical experience of 160 persons who set out overland from Independence, Missouri, on May 16, 1842. There was at first "high glee, jocular hilarity, and happy anticipation," the reader is told. "The harmony of feeling, the sameness of purpose, and the identity of interest . . . seemed to indicate nothing but continued order, harmony, and peace, amid all the trying scenes incident to our long and toilsome journey. But we had proceeded only a few days' travel from our native land of order and security when the 'American character' was fully exhibited. All appeared to be determined to govern, but not to be governed. Here we were, without law, without order, and without restraint; in a state of nature, amid the confused, revolving fragments of elementaty society! Some were sad, while others were merry; and while the brave doubted, the timid trembled! Amid this confusion, it was suggested by our captain that we 'call a halt' and pitch our tents for the purpose of enacting a code of laws for the future government of the company. The suggestion was promptly complied with."

And whenever a group of boys gets together to form a club — one to which adults usually are not allowed to belong — their first act is always to lay down a body of fundamental laws or rules. They have made a "constitution," and they have thereby "formed a political community," which is the same as to say a constituted one.

2. CONSTITUTION MAKING — AND REMAKING

Ultimately, the makers of the U.S. Constitution were the people of America — and this means all the people, not just the "framers" who gathered in Philadelphia in May 1787 to write a document that, they hoped, would serve as our fundamental law for ages to come.

"The first human subject and origin of civil power," wrote John Wise in 1717, "is the people, for as they have a power every man over himself in a natural state, so upon a combination they ean and do bequeath this power unto others and settle it according as their united discretion shall determine." "When they are free," he added, "they may set up what species of government they please." And he went on to say that "the formal reason of government is the will of a community, yielded up and surrendered to some other subject, either of one particular person or more."

Essentially the same point was made by John Jay two generations later, when, in an *Address to the People of the State of New-York* (1788), he urged his readers to view with favor the work that had been done at the Constitutional Convention. "The Constitution only serves to point out that part of the people's business," he declared, "which they think proper by it to refer to the management of the persons therein designated — those persons are to receive that business to manage, not for themselves and as their own but as agents and overseers for the people to whom they are constantly responsible, and by whom only they are to be appointed."

The same point, indeed, was made in the Constitution itself, the Preamble of which declares that "We, the people of the United States . . . do ordain and establish this Constitution for the United States of America." It was concurred in as well by Alexander Hamilton, who, in *Federalist No. 16*

spoke of the people as "the natural guardians of the Constitution"; by James Wilson, who declared in 1790 that "in a free country, every citizen forms a part of the sovereign power"; and — among many others — by Chief Justice John Marshall, who observed in 1803: "That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected."

Marshall went on to say, however, that "the exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established are deemed fundamental. And as the authority from which they proceed is supreme and can seldom act, they are designed to be permanent." This point, too, is an important one. As the Declaration of Independence says, "Prudence . . . will dictate that governments long established should not be changed for light and transient causes."

Nevertheless, although the Constitution was written by a group of Americans in 1787, and ratified by a two-thirds majority of the states within a year — and thus became the permanent law of the land — it was in a fundamental sense not *made* at that time. The Constitution has been made — and remade — by every generation of Americans since.

Indeed, it has been subject to attempts — none of them successful — to destroy it. "We should not forget," wrote historian Henry Steele Commager in 1947, "that our tradition is one of protest and revolt, and it is stultifying to celebrate the rebels of the past — Jefferson and Paine, Emerson and Thoreau — while we silence the rebels of the present." Commager was referring, of course, to the efforts to "legislate loyalty," which were at the time only a cloud upon the horizon but that later became a national obsession during what is now called the McCarthy Era. And to make his point, Commager quoted Theodore Parker, known in his own day, Commager observed, as "the Great American Preacher," and who was the originator, so the quotation books tell us, of a distinction that was used with telling effect by Lincoln in his Gettysburg Address — "government of the people, for the people, and by the people." "We are a rebellious nation," Parker wrote. "Our whole history is treason; our blood was attainted before we were born; our creeds are infidelity to the mother church; our constitution, treason to our fatherland. What of that?"

Parker was writing in the context of the efforts by the Southern states to destroy, or at least to annul, the Constitution over the issue of slavery. But there have been recent attempts as well, not to destroy but to radically alter the Constitution — for example, the proposed amendment, which at the present time has been ratified by more than twenty states (ratification by thirty-five is required for adoption), that would erect a court, made up of the chief justices of the fifty states, as the last resort (above and beyond the Supreme Court) on all constitutional questions. This amendment, according to leading constitutional lawyers, will probably not be ratified by the requisite two-thirds of the states and so will not become the law of the land. But if it does — and the possibility must be reckoned with — the Constitution itself, and especially the machinery for interpreting it, will be much changed.

Nevertheless, the Constitution has been often amended — according to procedures, let it be said, that are laid down in the document itself. (In fact, the Constitution provides two ways by which it may be amended: Congress can either propose amendments to the states, which are declared adopted when two-thirds of the states ratify them; or, on the application of two-thirds of the state legislatures, Congress can call an

amending convention. The latter procedure has never been used.) In all, some 2,500 resolutions proposing constitutional changes have been introduced in Congress over the years. Of these, Congress has passed and submitted to the states 30, of which 5 were never ratified. Two of the 5 were part of the original Bill of Rights, another forbade the acceptance of titles of nobility (1810), another prohibited interference with slavery (1861), and the last authorized federal child labor legislation (1924).

Of the twenty-five amendments to the Constitution that have been adopted, none, with the possible exception of the Seventeenth (providing for the direct election of U.S. senators), has produced a really radical change in the original document. The first ten, the Bill of Rights, made explicit what was thought by many of the framers to be implicit in the Constitution as first drafted. Several others, notably the Fourteenth, in effect extended (by wider and wider interpretations of the "due process" clause) the constitutional prohibitions against federal action in the Bill of Rights to the state governments as well — in other words, put added emphasis on the fact that it is *we the people*, and not *we the states*, that "do ordain and establish this Constitution for the United States of America." Apart from this, the rest of the amendments have mainly had the effect of extending the suffrage — to women, for instance, and also to persons who were disenfranchised by state laws. But universal suffrage was also probably implicit, or at least was not expressly negated, in the original document.

The greatest activity at the present time in the amending and even the rewriting of constitutions is occurring at the state level. A number of states are now holding or have recently held constitutional conventions, mainly because of the Supreme Court's reapportionment decision in *Baker* v. *Carr* (1962). In the course of these revampings of state constitutions, perennial problems have arisen. Should the new state

Courtesy, Herblock, "The Washington Post"
"We'll Do All the Judging Around Here"; 1958

constitutions deal specifically with questions of old-age pensions and social security, of aid to education and to the cities, of open housing and equal job opportunities — or should they instead confine themselves to "general" statements of principle, leaving specific problems to the legislatures? The framers of the U.S. Constitution argued about these matters in 1787 (although of course in different terms), and we argue about them today. They are part and parcel of the issue of constitutionalism as it has manifested itself in the United States throughout this country's history.

Finally, it is important to remember that just as the U.S. Constitution was ultimately made by the people, so it has been changed, insofar as it has been changed (by being amended), ultimately by the people — and that if it is ever to be radically altered, this will have to be with the people's consent. As a case in point, consider the history of the Eighteenth Amendment, the solemn, formal, fully debated constitutional enact-

ment that forbade, after January 1920, the manufacture, sale, and transportation of alcoholic beverages. The amendment was repealed thirteen years later, and the reason is that the people, once they had had a taste of Prohibition, found that they did not really want it and would not live up to it. Rather than continue to disobey the highest law of the land, they changed the law. [For further discussion of some of the matters treated in this section, see Chs. 4: GOVERNMENT BY THE PEOPLE, 6: DOMESTIC TRANQUILLITY, and 11: INDIVIDUALISM.]

3. AMERICAN CONSTITUTIONAL PRINCIPLES

THE CONSTITUTION OF THE UNITED STATES, as the organizing instrument of the government, is based primarily on three principles. The first is that of the separation of powers; the second is that of the rights of citizens; and the third is best expressed, perhaps, in the national motto — "Out of many, one." The first two principles are very old; the third, as an important political principle and the basis of American federalism, is unique to our country.

The principle of the separation of governmental powers is as old as Aristotle and had been given, for the framers of our Constitution, new currency in the eighteenth century by Montesquieu and Locke. Combined with the notion of "checks and balances" in the governmental organization, it means in effect that no *one* agency of government, other than the people themselves in their role as constitution makers, has lawful power over *all* the business of society, and indeed that no one agency has exclusive power over any matter. In practice this means that the agreement of at least two separate organs of government is always needed to authorize any governmental action.

The two doctrines of checks and balances and separation of powers are usually stressed as applying mainly to the relations of the branches of the federal government. But both early and late in American history, the idea of a society whose complexity was not to be minimized, but, on the contrary, encouraged, has been applied at every level of the governmental hierarchy — in the division of the branches of the federal government, in the separation of the federal and of most state legislatures into two houses, in the relations of the federal and the state governments, and in the internal structure of the state and local governments.

These two doctrines were affirmed from the beginning of the American discussion of governmental organization. As early as 1682 William Penn declared that the "great end of all government is to support power in reverence with the people and to secure the people from the abuse of power"; and he urged a system of checks and balances as the means to this end. James Madison, a century later, concurred. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands," he wrote in *Federalist No. 47*, "whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." He went on to observe that "were the federal Constitution . . . chargeable with the accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system." But, he declared, "the charge cannot be supported." Indeed, as he was at great pains to show, the principle of the separation of powers imbued every article, almost every line, of the document that he was urging the people of New York State to support and approve.

Madison made the further point that a federal republic would work better over a larger rather than a smaller territory because the variety of interests thus included would help to prevent any one of them from dominating the whole either of society or of the acts of government. Similarly, Wendell

Willkie, arguing a century and a half later for the extension of the American federal idea to a world government, emphasized not that the world would thus be simply unified but that it might, like the United States, "learn to tolerate and use . . . diversities."

It is in *Federalist No. 10,* however, that the doctrine of the separation of powers for the control of particular interests or factions is most eloquently set forth. This paper, by Madison, opens with the statement that, "among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction." "By a faction," Madison explained, "I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." He added: "There are two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects."

The first method, according to Madison, is either impossible or undesirable, for it would involve either "giving to every citizen the same opinions, the same passions, and the same interests," which is out of the question, or destroying the liberty that is essential to the existence of faction, which, as a cure, would be worse than the disease. "The latent causes of faction," Madison declared in a famous phrase, "are . . . sown in the nature of man"; it being impolitic to control its causes, it becomes a question of controlling its effects. The means to this end is the application of the principles of separation of powers and governmental checks and balances.

The most important separation of powers in the federal Constitution, as it seemed to the framers themselves, was between the President (or the executive branch) — the inheritor, as it were, of regal power — and the Congress (the legislative branch) — the inheritor of the power of the people. The Constitution requires, in many and subtle ways, that they defer to each other, and although each is independent in its own sphere, each is also dependent on the other in fundamental respects. (Perhaps the most important sphere of independent action of the President is foreign policy, although he cannot enter into formal treaties without the Senate's advice and consent; and the Congress retains "the power of the purse," although its enactments are subject to presidential veto.) The basic, and largely independent, role of the third branch of the federal government — the judiciary — though intimated in the Constitution, was not spelled out until the beginning of the nineteenth century. It will be discussed in the next section.

The second of the great political principles on which our Constitution is based is that of the rights of citizens. Whatever political safeguards might be contrived by the doctrine of the separation of powers for the public interest, the framers recognized from the beginning that there were certain individual rights that needed to be put beyond the reach of *any* lawful act of government. Among these were rights that were necessary as safeguards of the liberty of the individual conscience (for example, free exercise of religion), and rights that were necessary as safeguards of the political process (for example, free expression and assembly). Provisions of this kind are called bills of rights, and the absence of such stipulations in the plan of the Convention of 1787 was a major argument against the adoption of the Constitution. The first ten amendments to the Constitution, together with the Thirteenth, Fourteenth, and Fifteenth, embody such proposals.

The adoption of amendments of this sort, both in the eighteenth century and later, has not always gone unopposed. For exam-

ple, Hamilton argued in *Federalist No. 84* that any attempt to guarantee specific substantive rights would in fact be effective only within the stable political structure that it was the primary purpose of the Constitution itself to erect; in other words, that if the Constitution were successful, a bill of rights was not necessary, and if it were unsuccessful, a bill of rights would be in vain. The right to bear arms, like the right of property, is not, according to Hamilton, absolute; both depend for their meaning on the processes of government; in reality, they can mean what the courts and the legislature will allow. (Thus, although the Constitution guarantees the right to bear arms, in many cities and states an individual is forbidden to carry a pistol without a permit.) But the courts and the legislature are ultimately controlled by the Constitution. Hence individual rights only have meaning in the context of the safeguards of the Constitution, which is itself (so Hamilton argued) the most effective Bill of Rights.

The third of the great principles that underlie the U.S. Constitution is that of federalism — the creation of a political unity out of independent states. The first of the stated aims in the Preamble is that of forming "a more perfect union"; and nearly a hundred years of turbulent history had to pass before it could be said that the principle had triumphed.

It was the Civil War, of course, that subjected the Constitution to its most stringent test. The challenge to the Union was thrown down in 1861 by the Southern states, which made "declarations of independence" similar to this one of Virginia, adopted April 17, 1861:

> The people of Virginia, in the ratification of the Constitution of the United States of America, adopted by them in convention, on the 25th day of June, in the year of our Lord one thousand seven hundred and eighty-eight, having declared that the powers granted under the said Constitution were derived from the people of the United States, and might be resumed whensoever the same should be perverted to their injury and oppression, and the Federal government having perverted said powers, not only to the injury of the people of Virginia but to the oppression of the Southern slaveholding states;
>
> Now, therefore, we, the people of Virginia, do declare and ordain, that the ordinance adopted by the people of this state in convention on the 25th day of June, in the year of our Lord one thousand seven hundred and eighty-eight, whereby the Constitution of the United States of America was ratified, and all acts of the General Assembly of this state ratifying or adopting amendments to said Constitution, are hereby repealed and abrogated, that the Union between the state of Virginia and the other states under the Constitution aforesaid is hereby dissolved, and that the state of Virginia is in the full possession and exercise of all the rights of sovereignty which belong and appertain to a free and independent state.

The constitutional questions raised by such declarations were of the utmost gravity, and they required a bloody, destructive war before they could be answered. (In fact, constitutional questions are almost always serious ones, for they go to the heart, as it may be said, of our national life and purpose; historically it has been true that discussions about the meaning of the Constitution tend to arise when there is deep conflict elsewhere in the society.) Simply, the Southern position was that the Union was a contract between the states and the federal government, that "the people" existed only as the people of the states, and that the states could therefore withdraw from the Union, and hence dissolve it, whenever they — or their people — chose. The Northern position, argued most eloquently, perhaps, by President Lincoln, was that the original creation of the Union by the consent of *all* the people had established a political entity that not only had the right but

also the sacred duty to fight against its own dissolution. This was the purport of Lincoln's First Inaugural Address, in which he observed that "no government proper ever had a provision in its organic law for its own termination"; and it was the purport of his Gettysburg Address, in which, on November 19, 1863, he declared in unforgettable words that the war then in process was a test of whether any nation that was conceived in liberty and dedicated to the proposition that all men are created equal could long endure — whether, in short, government of the people, by the people, for the people, would perish from the earth. And in a speech to the 164th Ohio Regiment, on August 18, 1864, he put it with consummate simplicity. "This nation," he said — he meant, as he made clear, the Union and all it implied — "is worth fighting for."

Problems of the relation of the federal to the state governments remain to this day, and will doubtless be with us for many years to come. Nevertheless, there is now general consent to the proposition that the Civil War did provide answers to the constitutional questions raised by the secession of the Southern states, and that the federal principle then became, and remains, unassailable. The Civil War, as President Woodrow Wilson put it in a Memorial Day Address in 1915, "created in this country what had never existed before — a national consciousness. It was not the salvation of the Union; it was the rebirth of the Union."

Which is not to say, of course, that the idea of secession is totally dead. There had been threats to the Union before 1860, notably on the part of New England during the period of the War of 1812; and the last two or three decades have seen other threats, both from the states and from the great cities, which, although lesser political units than the states, have become, in modern times, economic, social, and populational units far exceeding many of the states in size and power. Extremists in the South were particularly vocal in calling for secession in the years after the Supreme Court decision on school integration in 1954, and urban extremists in cities such as New York have also made "secessionist noises" in reaction to what they felt was an unfair allocation of state and federal revenues.

On the whole, these movements have not been taken too seriously — except, of course, insofar as they reflect deep trouble in the society, as constitutional questions always do. The Union, in short, is safe; a fact that is reflected in the modern custom of spelling the word with a small "u" instead of the capital "U" that was customary before, during, and directly after the Civil War. The implication would seem to be that the union is something to be taken for granted — the union as such, that is. The question of whether the union is healthy is another matter. [The above section deals with the theme of unity in diversity mainly from the point of view of governmental structure, for which see also Ch. 4: GOVERNMENT BY THE PEOPLE. For discussion of social, economic, and cultural diversity in America, and of the attempts of the country to deal with it, see Chs. 10: PLURALISM, 11: INDIVIDUALISM, and 21: EDUCATION.]

4. JUDICIAL REVIEW

THE EXECUTIVE BRANCH of the government "not only dispenses the honors but holds the sword of the community," Hamilton wrote in *Federalist No. 78*. "The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have

Courtesy, Reg Manning, "Arizona Republic"

"Urban Renewal"; 1964 cartoon by Reg Manning

neither force nor will but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." And he went on to say that "this simple view of the matter . . . proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power."

This "simple view" was not shared by some of Hamilton's contemporaries (Hamilton himself may have been oversimplifying the case for rhetorical effect), nor has it been shared by many others in the nearly two centuries since his pronouncement. John Marshall, in a series of opinions written during his long tenure as chief justice (1801-1835), made this abundantly clear. "It is, emphatically, the province and duty of the judicial department to say what the law is," he declared in 1803. "If a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty."

Others concurred in Marshall's conception of the duties and powers of the judiciary, and especially of the Supreme Court, and concurred also, it may be said, in the emphasis with which he affirmed them. As James B. Thayer wrote in 1893, "What really took place in adopting our theory of constitutional law was this: We introduced for the first time into the conduct of government through its great departments a judicial sanction, as among these departments. . . . The judges were allowed, indirectly and in a degree, the power to revise the action of other departments and to pronounce it null. In simple truth, while this is a mere judicial function, it involves, owing to the subject matter with which it deals, taking a part, a secondary part, in the political conduct of government."

Indeed, the proof of the strength, and not the weakness, of the judicial branch of the government is perhaps to be found more in the attacks on the Court than in the defenses of it. Jefferson, for one, objected strongly to the growing power of the judiciary under the leadership of Marshall. The Constitution was in danger of becoming, Jefferson wrote in 1819, "a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please. It should be remembered, as an axiom of eternal truth in politics, that whatever power in any government is independent, is absolute also; in theory only, at first, while the spirit of the people is up, but in practice, as fast as that relaxes."

The same point was made by the anonymous author of an article in the *United States Magazine and Democratic Review* in 1850. "There is, in truth, more danger in judicial encroachment than in any other kind," he declared. And he went on to say that "while encroachment by any other

branch of government is bold, open, and daring, that effected by the judiciary is covert, noiseless, and unknown; and as people find their rights vanishing one by one, they are more likely to think they have been lost by the fault of those whose duty it was to legislate for their protection than to attribute the result to their having been *construed* out of existence."

Opinions of this kind continued to be voiced during the next hundred years, and indeed are voiced today. "The veto power of the American courts over legislation — under the assumed right to declare legislation 'unconstitutional' — is one of the most ruthless checks upon democracy permitted by any civilized people," William Allen White caustically asserted in 1910. Justice John Marshall Harlan, the next year, had a similar complaint. "There is abroad in our land," he declared, "a most harmful tendency to bring about the amending of constitutions and legislative enactments by means alone of judicial construction." And Senator George Norris of Nebraska put the matter bluntly a generation later. "We have a legislative body, called the House of Representatives, of over 400 men," he observed. "We have another legislative body, called the Senate, of less than 100 men. We have, in reality, another legislative body, called the Supreme Court, of 9 men; and they are more powerful than all the others put together."

Franklin D. Roosevelt joined the critics in the early years of the New Deal. "Since the rise of the modern movement for social and economic progress through legislation," he said in 1937, "the Court has more and more often and more and more boldly asserted a power to veto laws passed by the Congress and state legislatures in complete disregard of [the original limitations of its power]. In the last four years the sound rule of giving statutes the benefit of all reasonable doubt has been cast aside. The Court has been acting, not as a judicial body but as a policy-making body."

The position may be summed up, perhaps, in a trenchant remark of Chief Justice Charles Evans Hughes. "We are under a Constitution," he said in what may have been a moment of special bitterness, "but the Constitution is what the judges say it is."

Of course, that is not really true; or if it is true, it is so in a very limited sense. On the whole, the Court has observed in the past, and still observes today, considerable restraint in declaring measures of the federal and of the state governments unconstitutional. It recognizes — the recognition was made explicit by Justice Louis D. Brandeis in the so-called Ashwander Rules (1936) — that any measure coming before it has been assumed to be in conformity with the Constitution by either the executive or legislative branch of the federal government, or by the legislature of a state; and its decisions to override that assumption are never taken lightly. The point, indeed, was made by William Allen White in the same paragraph in which he declared — as quoted above — that the judicial power is a ruthless check on democracy. "In the end," he conceded, "it seems to make for righteousness." And he went on to say that this was so "because under that power in America, people have developed a patience and a conscience and a patriotic self-abnegation which fits them to progress in the light of the vision within them." He might have said — but many others have said it for him — that what it has given the American people is a profound respect for law; and that, in the final analysis, is the very essence of constitutional government.

The foregoing remarks are misleading if they imply that the American doctrine of judicial review has remained static and unchanging throughout the nation's history. Just the opposite is the case. Although judi-

cial review — it has been called, along with federalism, "America's unique contribution to political science" — was probably implicit in the Constitution's Third Article, it was not explicitly affirmed at any time during the eighteenth century, even in the Judiciary Act of 1789, which set up the federal court system. In fact, the first time the Supreme Court declared a federal law unconstitutional was 1803, fifteen years after the Constitution was adopted; and the Court did not again take such a step until 1857, when in the famous (and notorious) Dred Scott case it declared invalid the Missouri Compromise of thirty-seven years before. And even after the Civil War the Court continued to exercise extraordinary restraint and to maintain that recourse should be had to the ballot box, not to the courts, for redress of grievances felt by citizens.

However, even though the celebrated *Marbury* v. *Madison* case of 1803 had few consequences for two generations or more, it is of first importance in U.S. constitutional history. In the course of his decision, Chief Justice Marshall not only overturned a federal law, and thus established a power in the government superior to Congress, but he also asserted that the ultimate authority of the Court was superior to that of the executive. "It is emphatically the province and duty of the judicial department," Marshall declared, "to say what the law is."

President Andrew Jackson, for one, disagreed, maintaining instead that the executive department, either in itself or through appeals to the ballot, was the highest constitutional authority in the land. His opinion in fact prevailed, as has been noted, until roughly 1890, when the great era of judicial review began. From that date until 1937 some 69 acts of Congress were declared invalid (as opposed to the 2 before the Civil War), and in the same period the Court disallowed more than 225 acts of state legislatures.

Courtesy, Reg Manning, "Arizona Republic"

"The Versatile Umpire"; cartoon by Manning, 1957

The high tide of judicial review came during the early New Deal, when, in the three years beginning with the October 1933 term, the Court struck down a significant part of the Roosevelt program in twelve decisions that followed rapidly upon one another. The response of the President was the "Court-packing" bill of February 1937, of which mention has already been made, which was rejected by Congress and the people generally for reasons that also have been described. The bill nevertheless had the desired effect, and in one of the most remarkable turnabouts in its history, the Court proceeded to uphold rather than to disallow much important New Deal legislation, in the process giving the federal government wider powers than it had ever had before to tax and spend for the general welfare.

From 1937 to the late 1950s the Court continued to presume the constitutionality of both federal and state measures, resolutely refusing to rule on constitutional ques-

tions unless it was forced to by continuing controversy between the other two branches of the federal government or between the federal government and the states. In one area alone — that of freedom from discrimination because of race or color — it undertook to rule on the constitutionality of laws and executive decrees, adopting in all other areas the attitude expressed by Justice Oliver Wendell Holmes, Jr., some years before. "My boy," Justice Holmes remarked, "about seventy-five years ago I learned I was not God. And so, when the people of the various states want to do something and I can't find anything in the Constitution expressly forbidding them to do it, I say, whether I like it or not: 'Damn it, let 'em do it!' "

The Court may have made another turnabout in recent years, when, under the leadership of Chief Justice Earl Warren, it seems to have adopted once again the role of arbiter of the national conscience that it claimed to play — or was charged with playing — between 1890 and 1937. This change may be merely illusory. In any event, whether or not judicial review is quiescent at the present time — and there are sharply opposed views on the matter — it is certainly not dead, and the third branch of government in the United States will continue to be a factor to reckon with in the history of the nation. [For discussion of several of the matters dealt with in this section, but from other points of view, see Chs. 5: General Welfare and 6: Domestic Tranquillity.]

5. THE CONSTITUTION TODAY — AND TOMORROW

The main constitutional questions of the present day involve, first, the relations of the power of the executive branch to that of the legislative branch; second, the role of the Supreme Court as an agency of social change; and, third — most fundamental of all — the problem of the adequacy of a 200-year-old document for the modern world.

"The executive power shall be vested in a President of the United States of America," the Constitution declares in Article II, and thereupon goes on to describe his specific powers, as well as the qualifications for the office. Considering the modern complexities of the presidency, not much is said about it in the Constitution itself. In particular, the relations between the President and Congress, although of course touched on, are not spelled out.

Henry Clay felt in 1840 that "the first . . . and most important object, which should engage the serious attention of a new administration, is that of circumscribing the executive power, and throwing around it such limitations and safeguards as will render it no longer dangerous to the public liberties." He advocated limiting the term of the office to four years; more precisely defining and also restricting the veto power; restricting the power of dismissal (of government appointees) from office; and giving Congress exclusive control of the Treasury.

Clay went further in his proposals than most critics, but his general position has been adopted by many. A high point of feeling was reached, of course, in the impeachment of President Andrew Johnson in 1868 — an effort to convict the President of malfeasance in office that failed by the slim margin of a single Senate vote. Another high point was reached in 1953-54 when a powerful minority of "neo-isolationists" in Congress sought, by means of the so-called Bricker Amendment, to restrict the power of the executive branch to make treaties and agreements that might limit American sovereignty. On the crucial motion to send a somewhat watered-down version of this amendment to the states for ratification, the vote in the Senate was 60-31

again only one less than the requisite two-thirds majority.

The defeat was in part the result of President Eisenhower's strong opposition to the measure, which he expressed on many occasions. In a letter to Senator William F. Knowland of California, an advocate of the measure, Eisenhower declared that "the President must not be deprived of his historic position as the spokesman for the nation in its relations with other countries." But the problem went beyond even the important question of the power of the President to conduct the foreign affairs of the country. It was but one in a long series of crises and near-crises in the continuing struggle between the President and Congress, a struggle that came to the fore again during the Kennedy administration, when to some observers it seemed that Congress was making a successful effort to obstruct the presidential program, and then again during the Johnson administration, when some feared that the power of the executive branch, owing to the energy and political sagacity of the President himself, was becoming too great.

"Under judicial doctrine since 1937 the Supreme Court has largely removed itself as a practical factor in determining the economic policies of the states and the nation," the Commission on Intergovernmental Relations concluded in 1955. The Commission's report added that the Court "has not, however, eliminated the historic role of judicial review in our federal system." The report observed that the Court has been most active in recent years in two areas: first, "the duty of judging when the states have overstepped and encroached on whatever area should be the exclusive domain of federal regulation," and, second, "the guardianship of civil liberties."

The second has perhaps occasioned more comment and produced more controversy than the first. As the report indicates, "The Court during the past thirty years [to 1955] has become noticeably more stern in construing state responsibilities under the Fourteenth Amendment to protect civil and political rights. Beginning in 1925, earlier doctrine has in effect been reversed, and the guarantees of freedom of speech, press, and religion, as well as some (but not all) of the procedural safeguards in criminal cases written in the Bill of Rights against the national government, have been read also into the due process clause of the Fourteenth Amendment against the states."

The report went on to say, in addition, that "more recently, racial discriminations have been brought further under the ban of the equal protection clause of the same amendment. In this whole area, in contrast to the field of economic affairs, the Congress has moved slowly and the Supreme Court has become the principal instrument of federal surveillance."

Congress has probably moved faster in the years since 1955 than in the years immediately preceding that date; witness, among other legislation, the Civil Rights Act of 1964. But the judgment of the 1955 commission, whether supportable in fact or not, has led to widespread charges that the Court has undertaken a role not envisioned by the Founding Fathers — that it has become, not so much the protector and interpreter of the laws but a maker of basic government policy.

Notable examples of recent Supreme Court decisions that have had far-reaching social effects are the school desegregation decision of 1954, which probably will have produced, by the end of the century, what can only be called a social revolution in the South; the decision outlawing prayer in the public schools (1962), which seemed to reenforce an already strong movement toward the complete secularization of public education; the decision in *Baker* v. *Carr* that resulted in the redistricting of most of the state legislatures, and that may ultimately bring about an almost complete restructur-

Courtesy, Edward Kuekes, Cleveland "Plain Dealer"

"What has happened to our gal?"; cartoon by Kuekes, 1965

ing of the major American political parties; the decision in a group of obscenity cases in 1966 that may go far, in the years to come, to determine the kind of literature Americans will read; and the decisions in a group of cases in 1966 and 1967 involving the police power that bid fair to alter radically methods of crime prevention and crime investigation in the country. These are all social and cultural changes of first import; and it cannot be denied that it was the Supreme Court, and not the President or Congress, that gave the primary impetus to their occurrence.

At the same time, it is important to remember that it was a basic strategy of the Founding Fathers to make unnecessary frequent appeals to the constituent power of the people. They did this, not alone by allowing for change through the cumbersome and slow amendment process but also by setting up a form of government that internalizes the popular will by allowing the Supreme Court to measure the changing will of the people, as it were, against the ideal will of the people as expressed in the Constitution itself. Hence the Court, even if in recent years it has gone further in the direction of becoming a "national conscience" and an agency of social change than ever before in our history — and even that point is debatable — may in fact be doing no more than was envisioned, though doubtless vaguely and obscurely, by the writers and early interpreters of the original document.

This point brings us to the third and last of the great constitutional questions mentioned at the beginning of this section. Is the Constitution that was drafted in 1787 and under which we have lived since its ratification in 1788, adequate to the problems of today? Or, to turn Lincoln's famous statement into a question, are the dogmas of the quiet past adequate to the stormy present?

There are those who feel that the answer to the question must be no. They point to the vast changes that have occurred in American life since the eighteenth century and ask how, if the Constitution were to be rewritten today, these changes would be reflected in a new and improved document.

Would a twentieth-century U.S. Constitution make specific mention of the problems, the rights, and the responsibilities of organized labor? Would it define, and perhaps restrict, the role of the giant industrial and financial corporations that have come into existence in the last hundred years? Would it take account of the technological revolution that is so marked a characteristic of our time? Would the Constitution be different because of the radical improvements that have occurred in transportation and communication? Would a new Constitution have a different conception of, and attitude toward, private property? Would it view the "disadvantaged minorities," such as the American Negroes, in a different

light, and would it make specific provision for their economic and political rights? Would it define the power of the executive branch in a different way, taking account of the proliferation of government agencies that is also a marked characteristic of our time? (Technology and bureaucracy, it has been said, go hand in hand.) Would it make mention of modern problems of national defense? Of modern methods and goals of taxation? Of modern conceptions of universal public education? Would it, in short, try to describe the ideals of Americans in our day and to incorporate them into "the supreme law of the land"?

Of course no final answers to these questions can be given — which does not mean that the questions themselves are not as useful as they are provocative. At the same time, it should not be forgotten that the Founding Fathers recognized, when they wrote the federal Constitution, that they were framing a document that, if it endured, would have to undergo changes of interpretation and even perhaps storms of controversy. It was for this reason that Hamilton, in a speech in 1788, insisted that "constitutions should consist only of general provisions, [for] they must necessarily be permanent, and . . . they cannot calculate for the possible change of things."

Jefferson also foresaw the need for changing, if not the wording of the document itself, then at least the interpretation of it. "Some men look at constitutions with sanctimonious reverence and deem them like the Ark of the Covenant," he wrote in his later years, "too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human." Just the contrary is the case, he declared. "Laws and institutions must go hand in hand with the progress of the human mind. . . . We might as well require a man to wear the coat that fitted him as a boy, as civilized society to remain ever under the regime of their ancestors."

A final point about our Constitution needs to be made. The document itself may change; and certainly the *interpretation* of many of its fundamental provisions has changed radically in 200 years. But one thing remains firmly the same, and this is its import for the world. George Washington, in a letter written in 1788 describing the Constitutional Convention at Philadelphia the previous year, declared that "a greater drama is now acting on this theater than has heretofore been brought on the American stage, or any other in the world. We exhibit at present the novel and astonishing spectacle of a whole people deliberating calmly on what form of government will be most conducive to their happiness; and deciding with an unexpected degree of unanimity in favor of a system which they conceive calculated to answer the purpose."

The implication, of course, was that the American effort to erect a government of laws and not of men was replete with lessons for the old nations of Europe, to say nothing of the rest of mankind. This at least was the construction put on the event by Hamilton, who, in ringing words, recognized the challenge and accepted it. "It seems to have been reserved to the people of this country," he wrote in *Federalist No. 1*, "by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force. If there be any truth in the remark, the crisis at which we are arrived may with propriety be regarded as the era in which that decision is to be made; and a wrong election of the part we shall act may, in this view, deserve to be considered as the general misfortune of mankind."

There is truth in the remark, and 200 years of both American and world history have established that the answer to Hamilton's great question is yes.