

---

## Commerce and Nationalization

---

**B**y the adoption of the Fourteenth Amendment the State governments were not only made definitely subordinate to that of the nation as a whole. They were also, North and South alike, defined as untrustworthy guardians of the rights of their own citizens. They were pilloried as well as subjected, insult being added to injury. Thus the stage seemed to be set for a complete centralization of power in the hands of the central government, the necessary prerequisite for establishment of real political democracy on a nation-wide basis.

But the strong foundations of federalism could not be destroyed. Radical Republicanism, which under Thaddeus Stevens had been dedicated to this end, began to crumble with the death of its brilliant leader. For this there were two major reasons, apart from the lack of any Radical lieutenant of equal competence. In the first place the element of passion, always necessary for a strong egalitarian movement, was subsiding. The war was over; the South

was crushed; the Negroes were free. Abolitionists could no longer rattle the chains of slavery. On the contrary, they were thrown on the defensive by the all too abundant evidence that the freedmen were morally and mentally unable immediately to associate with the whites on equal terms. Along with the unconcealable and all but inconceivable scandals of the carpetbagger period came realization that Emancipation had not solved, had merely posed, the problem of merging the two races peacefully in a common society.

Equally important, attention was focused and energies absorbed by the enormous material opportunities which were opening for the reunited country. For this economic development not more but less governmental intervention was wanted. With the election of President Grant the Republican leadership passed to men willing to bend a knee as well as an ear to the wishes of those industrial tycoons who now began to finance and direct that party. There is no doubt that this era of laissez-faire contributed enormously to the rapid growth and sharing of wealth. Unfortunately, unethical practices increasingly stained the amazing record of free enterprise. And the political consequences of this Gilded Age were much more in the long-range interest of socialism than of federalism.

Big business wanted freedom from all governmental controls—from those of the States as well as from that of Washington. Indeed, with the winning of the West and the rapid expansion of commerce across State lines, interference from local government could be more frustrating—

to railroads, for instance—than any controls now likely to be attempted by compliant Republicanism in Congress and the White House. This situation worked against centralization of power. But it also worked at least as vigorously against federal theory. The issue was no longer between federalism and democracy, because of the reaction against the extremes to which the latter had been carried. The issue now was between federalism and plutocracy again, sure to swing the pendulum towards democracy as the “Robber Barons” in their turn established monopoly power. “The will of the people” was temporarily out. This did not mean that “the public be damned” would remain in.

With this new phase the Supreme Court was placed in an extraordinarily difficult situation, not less so because it had temporarily bowed out as a determining factor by refusing to pass on the constitutionality of the Fourteenth Amendment. Soon or late, however, the Court would have to decide whether or not that first section, plus the final clause giving power “to enforce,” did or did not fundamentally alter the American form of government. Were the “privileges” and “immunities” of citizens matters with which the central government alone should henceforth concern itself, or did the States still have some say in a vital domain which prior to the Fourteenth Amendment had belonged to them exclusively? The political ambitions of Chief Justice Salmon P. Chase had helped to keep this knotty problem in an abeyance which ended with the foundering of his Presidential hopes.

In 1873, by the famous Slaughterhouse cases, the erosion of States' Rights was temporarily checked, though by an ominously close (5 to 4) decision. The Supreme Court then decided, rightly or wrongly, that the Fourteenth Amendment was not intended "to destroy the main features of the general system" of federal government. The "great source of power in this country," said Justice Samuel F. Miller for the Court, continues to vest in "the people of the States." For Congress to seize this power, in a manner violative of the original Constitution and the Bill of Rights, would be to "fetter and degrade" the States. "Undoubtedly," said Chief Justice Hughes years later, this decision "gave much less effect to the Fourteenth Amendment than some of the public men in framing it had intended, and disappointed many others."<sup>1</sup>

That decision, again fragmenting the "general will" into State compartments, was indeed calculated to make both Thaddeus Stevens, and Rousseau before him, turn in their graves. But as expanding business found State legislatures inimical to its plans, the Court's interpretation shifted, though not at all in a manner calculated to assist political democracy, from either the State or national viewpoint. In this hostility to any local regulation of free enterprise the leading spirit on the Court was Justice Stephen J. Field, whose tenure there for almost thirty-five years was to exceed the record of even John Marshall, if only in regard to length. Field had been with the minority

---

<sup>1</sup> Charles E. Hughes, *The Supreme Court of the United States*, Columbia Univ. Press (New York 1928) p. 180.

in the Slaughterhouse decision, but it was well said that his early rejected dissents “gradually established themselves as the view of the Court.”<sup>2</sup>

During the decade following the adoption of the Fourteenth Amendment only three cases were decided by the Supreme Court under all its clauses. The numbers then rapidly increased. Following 1896, to quote Professor Edward S. Corwin, “the flood burst”:

Between that date and the end of the 1905 term of court, 297 cases were passed upon under the Amendment—substantially all under the “due process” and “equal protection” clauses. What was the cause of this inundation? In the main it is to be found in the Court’s ratification of the idea, following a period of vacillation, that the term *liberty* of the “due process” clause was intended to annex the principals of *laissez faire* capitalism to the Constitution and put them beyond reach of State legislative power.<sup>3</sup>

Corporation lawyers, in other words, had discovered that the Fourteenth Amendment could be as amenable to the safeguarding of commercial interests as its designers had expected it to be for the protection of individual, especially Negro, civil rights. And the frontal attack on the States had thereby been diverted into a more subtle undermining of their original authority. Here was the origin of the three-cornered ideological division which would in

---

<sup>2</sup> Carl B. Swisher, *Stephen J. Field, Craftsman of the Law*, Brookings Institution (Washington 1930) p. 424.

<sup>3</sup> Edward S. Corwin, *The Twilight of the Supreme Court*, 4th prtg., Yale Univ. Press (New Haven 1937) pp. 77–8,

time come to characterize American politics: (1) Southern Democrats regarding States' Rights as more important than civil rights; (2) Northern and Western Republicans giving their primary allegiance to laissez-faire capitalism; (3) socialistic dissenters from both camps making the promotion of civil rights by the central government their main objective. With the confusion produced by the Fourteenth Amendment each faction could claim constitutional sanction for its position.

The Fifth Amendment had stipulated that "no person" shall be deprived of property "without due process of law." The Fourteenth Amendment repeated this, but with the provision directed specifically against "any State." Now the ingeniously simple formula was to define a corporation as a "person," whose property under the Fourteenth Amendment was then not subject to deprivation by any State without due process of law. In practice this meant that any regulatory action by the States could be appealed to the Supreme Court, which thus gradually replaced them as guarantors of property rights. As described by Charles A. Beard: "before the end of the nineteenth century the once almost sovereign powers of the States over property and business within their borders were reduced to mere shadows of their former greatness."<sup>4</sup>

By a logical extension of the corporate person argument the railroads, again for instance, soon found it expedient to apply to national instead of State courts, under the in-

---

<sup>4</sup> Charles A. Beard, *Basic History of the United States*, New Home Library (New York 1944) p. 318.

terstate commerce clause. That procedure brought the granting of injunctions against strike action, the violation of which in turn resulted in summary imprisonment of labor leaders, without jury trial, for contempt of court. Thus the national development of industry on the one hand, and of trade unionism on the other, led through the channel of the Fourteenth Amendment to the nationalization of governmental power and the resumed weakening of federal structure. Business leadership, too "practical" to theorize on politics, welcomed this centralization of power as long as it seemed to favor laissez-faire at the expense of labor organization. There was all too little anticipation that, in the name of democracy, this favoritism would eventually be reversed.

Yet there were elements of totalitarian democracy in all this judicial interpretation. Whether it was coercing the States in behalf of individual or corporate persons, the Supreme Court was impelled by the Fourteenth Amendment to act in autocratic manner. Emotionally, however, sharp distinction was made between Court intervention in behalf of "human" and of "property" rights. The former was "democratic"; the latter "plutocratic." In the field of human rights the Court could be regarded as forwarding "the will of the people," even when it was striking down local democratic processes to do so. In the field of property rights, on the other hand, the Court could be accused of favoring capitalism at the expense of the proletariat, as Marxists said it would continue to do until the triumph of communism. Long before Lenin's day the flood of Eu-

ropean immigration, exhibiting on the whole far more sympathy for socialism than for the American form of government, was obscuring the issue of centralization versus federalism. To many this was displaced by the class-war concept, depicted as democracy versus plutocracy. Because it leads directly to their goal none preach democracy more ardently than do the socialists.

The position of the Supreme Court itself, called upon to determine cases under the first section of the Fourteenth Amendment, was, as it continues to be, unhappy. Even before this Amendment the Court had gone far to weaken the authority of State governments. Now powers, which to Hamilton and Marshall were only implied, had been specifically given to the central government as against the States. So the Court was compelled to fall in line, the more so because the social tide in the rapidly industrializing nation was setting in the direction of centralization anyway. It was not, however, necessary for the Court to go as far as it has gone in recent years in altering judicial review into a sociological interpretation of Rousseau's general will.<sup>5</sup> As we shall see, this served to revive "interposition" of the authority of a State, between its citizens and Court decree, as an effective defense of federal doctrine.

---

<sup>5</sup> Professor Gottfried Dietze is outspoken on this point: "The Supreme Court seems to have abdicated its former position as the guardian of the Constitution and free government with its capitulation before the American *volunté générale* in 1937 and through its reluctance to exercise judicial review in the following decades." *Virginia Law Review*, Vol. 44, No. 8, December 1958, p. 1260.



In any government, but especially in one with a structure as delicate as that of federalism, it is far easier to initiate a major reform than to conclude it. The box of troubles opened by the Civil War Amendments helps to explain why forty-three years elapsed between certification of the Fifteenth Amendment, in 1870, and of the Sixteenth, on February 25, 1913. It took some two-score years of judicial interpretation to confine the centralizing work of the Radical Republicans within bounds generally consistent with original constitutional intent.<sup>6</sup> And by then the forces of democracy had gathered sufficient strength to take what Professor Burgess called "a very long step towards governmental despotism and the extinction of the original constitutional immunity of the individual against governmental power in the realm not only of his property, but also of his culture."<sup>7</sup> The reference of this famous teacher of constitutional law was to the Sixteenth Amendment, the text of which is short as well as sweeping: "The Congress shall have power to lay and collect taxes on income, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

---

<sup>6</sup> The compromise reached, preserving the theory of dual sovereignty, was well defined by Justice Cardozo, in *Palko v. Connecticut*: "immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty and thus, through the Fourteenth Amendment, become valid as against the States."

<sup>7</sup> John W. Burgess, *Recent Changes in American Constitutional Theory*, Columbia Univ. Press (New York 1923) p. 54.

Passed by the Congress early in the Republican Administration of William Howard Taft, this momentous Amendment went into effect just before Woodrow Wilson's first inauguration. Its complete disregard of State lines showed how far the judicial interpretations of the Fourteenth Amendment had gone in weakening the federal system. Hailed as "a direct attack on concentrated wealth," the Income Tax Amendment was much more directly and effectively an attack on the remnants of State sovereignty. For it openly bypassed the entire structure of the States to bring the full coercive power of central government to bear continuously on their citizens. The Sixteenth Amendment has not only given the central government access to virtually unlimited funds, with all the power, prestige and extravagance resulting therefrom. It has also served to make the financing of State and local government more onerous, and therefore to encourage the acceptance of "federal" aid for all sorts of services which in both theory and practice were formerly regarded as the clear and full responsibility of local government. It is supremely ironical that this agency of centralization, invidious in every respect to the health of federalism, should nevertheless be known as the "federal" income tax.

The Fourteenth Amendment had rather subtly undermined federalism. The Sixteenth, in the name of democracy, made a much more frontal attack on the American system. The causes for this subversive development were complex, but certainly the peculiar vulnerability of federalism to modern war was one of the most influential.

And the Civil War, while the last of the chivalrous struggles in some aspects, was more outstandingly the first truly totalitarian combat. What it lacked in this respect because of relatively primitive governmental techniques, it gained from the fact that two national governments mobilized all available strength at the expense of a single federal creed. In a sense the advocates of federalism, whether uniformed in blue or gray, were on the losing side in every battle. In form the federal structure was, thanks largely to Lincoln, maintained intact. But the aftermath showed it substantially weakened in spirit.

Indeed, any war that requires centralized mobilization of power is necessarily helpful to the national and injurious to the federal principle. Consolidation of power is the essence of the national system, as diffusion of power is the essence of the federal. It follows that the more bitter and enduring the hostilities between governments, the stronger will be the nationalistic trend among all the belligerents—up to the point where the governmental structure of the defeated power collapses. If the victorious power demands the “unconditional surrender” of its adversary, the nationalistic emphasis will be the greater, for in that case the people of the defeated adversary will have to be governed, and to some extent supported, by proconsuls from the victorious capital.

A second political characteristic of modern war is the lip service that must be paid to democracy. Precisely because both civil and military operations in wartime are necessarily arbitrary, and affect everyone, it is vital to rally

the people with glittering assurances. Woodrow Wilson's slogan in 1917, a war "to make the world safe for democracy," is a classic example. And such propaganda does serve to advance, though not to consolidate, the cause of democracy. Veterans' organizations, to illustrate, employ democratic processes to give their members undemocratic advantages in return for the wartime sacrifices of their members.

Both in the enlargement of centralized power and in the encouragement to democratic theory, the Civil War had profound effects upon our form of government. For years the Southern States were ruled as conquered provinces. The silencing of their separatist viewpoint combined with Northern industrial expansion and the opening of the West to encourage a stimulus to national democracy well pictured in Walt Whitman's extravagant panegyrics. At the outset of his *Democratic Vistas* (1871) the "good gray poet" announced expansively that "I shall use the words America and democracy as convertible terms." They were beginning to become so.

Democratic action is always competent to tear down an established hierarchy, and therefore to open opportunities for those whose abilities are restricted by the rules and customs of a stratified society. But the more liquid the society becomes, and the greater the opportunity of the alert individual to act without restraint, the more certain it is that the shrewd, the dynamic and the ruthless will forge ahead of the mass. Having established economic, social and political preeminence, they will seek to confirm it.

Thus a new stratification sets in and we find that the characters in the drama have been altered, but not the lines they speak. The nobility created by Napoleon was very different from that of the *ancien régime*, but took its privileges just as seriously and arrogantly. The same was true of the Nazis in Hitler's Germany. The unvarying rule applies to the communist hierarchy in Soviet Russia. It applies to the privileged business leadership in the United States after the Civil War, as it applies to the privileged labor union leadership in the United States today. Society as a whole gains nothing—though it may lose much—when privilege is merely shifted from one group to another. The problem is the control of privilege as such.

This sociological truth, which weighed so heavily on Lincoln's overburdened mind, was all but forgotten by Americans following his assassination. Economic power passed quickly from agriculture to industry and finance, with the sharp political shift that always accompanies a change in the economic balance. The Republican Party, gradually accepting the role of puppet for the newly dominant elements, governed unbrokenly from 1861 to 1913, except for the two divided terms of that very moderate Democrat, Grover Cleveland.

During this half-century, Republicanism was certainly not interested in the promotion of democracy, either social or political. Unfortunately, it was equally little interested in the maintenance of the federal system. Expanding industry was hampered by the often narrowly obstructionist and divergent attitudes of the State governments. The same irritations annoyed Wall Street, as the essential and always

faithful financial partner of Big Business. When the people of the agricultural States resisted the march of what was undoubtedly industrial progress, the “ploy” of the corporation lawyers was to influence—and even corrupt—the State legislatures. If that proved impossible, the Fourteenth Amendment, forcing a very rigorous exercise of “judicial review,” could be relied on to nullify State laws offensive to business interests. Thus the strength of federalism was steadily undermined. In the South it had been crushed by military defeat. In the rest of the country it was either seduced or overborn by the philosophy of “Get Rich Quick.” It was not a noble period, that Gilded Age of the “Robber Barons,” and the Republican Party still suffers from its memory.<sup>8</sup>

This lack of statesmanship in the Republican Party was certainly in part responsible for channeling the social democracy which is truly American into a swelling demand for that nationalized political democracy which conforms so poorly to the federal structure of our government. But

---

<sup>8</sup> Opinions on what has been called “plutocracy” in this period differ greatly. That of James Bryce was not merely contemporaneous, but certainly as well-informed and objective as any. In 1888 (*The American Commonwealth*, Vol. II, p. 591) he wrote: “It is not, however, only in the way of bribery at popular elections that the influence of wealth is felt. It taints the election of Federal senators by State legislatures. It induces officials who ought to guard the purity of the ballot box to tamper with returns. It procures legislation in the interests of commercial undertakings. It supplies the fund for maintaining party organizations and defraying the enormous costs of electoral campaigns, and demands in return sometimes a high administrative post, sometimes a foreign mission, sometimes favours for a railroad, sometimes a clause in a tariff bill, sometimes a lucrative contract. . . . One thing alone it can scarcely ever buy,—impunity for detected guilt.”

for several reasons this development was slow. Indeed, in spite of the stimulus from the Civil War, political democracy as a national objective did not become really potent in the United States until the rise of William Jennings Bryan.<sup>9</sup> Democratic leaders today, seeking to establish an authentic American tradition for their party, claim Andrew Jackson and even Thomas Jefferson as lineal political ancestors. But both of these men actually called themselves Republicans and neither was the accomplished demagogue—as Bryan certainly was—needed to head a Democratic Party appealing to a General Will which recognizes no State boundaries.

Why was Bryan, or somebody like him, so slow in coming to the fore? In the first place, the old Democratic Party was tainted with the stigmas of slavery and secession and could not be reformed and re-established overnight. In the post-war climate it was impossible to take political advantage of the contemptuous Republican attitude towards States' Rights. To raise that banner would have been tantamount to flying the Stars and Bars again. To quote Calhoun would have invited castigation for treason. So the South kept silent, biding its time.

In the second place, there was for at least a generation after the Civil War too much free land, too much oppor-

---

<sup>9</sup> The definitive biography of Bryan is not yet written. Helpful in regard to him, aside from personal acquaintance and periodical literature, have been Paxton Hibben's *The Peerless Leader* and M. R. Werner's *Bryan*, Harcourt, Brace (New York 1929). Mark Sullivan's *Our Times: The Turn of the Century* has also been utilized.

tunity for the industrious, and too much unassimilated immigration, to encourage effective opposition to well-entrenched Republicanism. The scandals of the Grant Administration, the very doubtful election of Rutherford Hayes, the colorless passivity of Chester A. Arthur—such political assets had to be reinforced by serious economic discontent before a rival party could hope for more than Congressional success. In the House of Representatives the Democratic Party, during these lean years, did well. But that was largely due to the representation from the Southern States, unreconstructed rather than socialistic Democrats, inclined to oppose rather than to support any Presidential candidate standing to the left of Grover Cleveland.

The campaign of 1896 marked the first irreversible turn towards national democracy in American political thinking. There had been a portent four years earlier when the Populists polled sixteen percent of the total vote and captured four Western states. Then, during Cleveland's second Administration, several events combined to set the parched undergrowth ablaze. The march of "Coxey's army" dramatized the plight of the unemployed. Over the protest of Governor Altgeld, of Illinois, President Cleveland sent national troops to Chicago, threw Eugene V. Debs in jail and broke the Pullman strike. On May 20, 1895, the Supreme Court, in a five to four opinion, threw fuel on the flames by declaring the one remaining part of the contemporary income tax law unconstitutional. And agrarian unrest found the formula of free silver, to be coined in the ratio of 16 to 1, as its panacea.



At the Democratic Convention of 1896, in Chicago, William Jennings Bryan proved himself a highly effective demagogue—meaning that his fervent oratory was also politically shrewd. By straight emotional appeal he sought to accomplish that fusion of West and South, against the industrial East, which Calhoun had vainly attempted to achieve by reason alone. And Bryan hammed it so cleverly that he allied both agriculture and labor in his cause. The designing speech which brought him nomination is well worth study by all who are concerned with democratic theory. He saw the farmers “rearing their children near to nature’s heart, where they can mingle their voices with the voices of the birds.” And for the factory workers, deprived of such pastoral delights, he saved his thundering metrical climax:

You shall not press this crown of thorns  
On labor’s brow.  
You shall not crucify mankind  
Upon a cross of gold.

But the United States was not yet ready for political democracy. Even a section of the Democratic Party refused to accept Bryan’s socialistic leadership and in a rump convention nominated a rival “National Democratic” candidate. This forgotten man—John M. Palmer—asserted: “Every true Democrat . . . profoundly disbelieves in the ability of the government, through paternal legislation or supervision, to increase the happiness of the nation.”

That was not accurate then, is not so now and never will be. For the “true democrat”—as soon as his thinking

becomes national rather than parochial—is drawn inexorably towards paternalism. The majority of people can always be said to need assistance of some kind and there is no question that a powerful central government can for a time do much to furnish those needs. And since majority opinion—by democratic definition—is all that counts, it follows that it is proper as well as expedient to increase the power of the central government so that it can meet the real or fancied wants of the majority. The fact that such centralization must undermine the federal structure of this Republic is secondary to the fiction of the general will. So there is little doubt that William Jennings Bryan rather than John M. Palmer was both the “true” and the “national” democrat in 1896.

But Bryan did not win, and would not have won if he had obtained all of Palmer’s relative handful of votes. Nor did Bryan win in 1900, nor in his third and final effort in 1908. Whether he would have won had the tools of radio and television then been available is an interesting speculation. Bryan was unquestionably a silver-tongued orator, and his speeches, like those of Franklin D. Roosevelt after him, were much more impressive to hear and witness than to read.

It seems probable, however, that even with the aid of broadcasting Bryan would never have reached the White House. For in his day the country did not yet regard itself as a democracy. In spite of, and also partly because of, resentment against plutocracy, most Americans continued to believe in the separation rather than the concentration

of governmental powers. Prior to World War I the average American was not conditioned to the supremacy of Washington, as he is today. The federal faith still stood, and indeed grew stronger as the South regained its economic health. And with this Southern restoration the fissure between the States' Rights Democrats and the Socialist Democrats began to form.

The accomplishment of Bryan, however, is not to be minimized. His constant threat shook the Republicans to the marrow of their being and forced them to make concessions to democratic demands which came more easily because Republican political philosophy was on the whole so cynical, untheoretical and narrowly materialistic. It was largely due to the influence of "The Great Commoner" that both the Sixteenth and Seventeenth Amendments received the necessary Congressional majorities during the Taft Administration. It was William Jennings Bryan, much more clearly than Andrew Jackson before, or Woodrow Wilson after, who had the vision of the Service State.<sup>10</sup>

---

<sup>10</sup> I follow the lead of Dean Roscoe Pound in preferring "Service State" to the more familiar term "Welfare State" because, as he says, governments of every description "have always held that they were set up to promote and conserve public welfare."