CHAPTER *Three*

The Law of Enterprise

> Commerce is universally acknowledged to be both the parent and the offspring of liberty.
>
> —James Fenimore Cooper, 1828

While the rush of improvement raised hopes of material and moral betterment, it also placed novel demands and responsibilities upon local, state, and national governments, and posed new questions for judges, juries, and legislators. In their effort to fit old law and custom to new circumstance, Americans confronted some of the implications and dilemmas of progress for the first time.

Changing Rules of Commerce

Americans in the early nineteenth century did not need to invent rationalizations for public intervention in the occupations of the citizenry. Centuries of legal precedent and British and colonial practice had established the right and duty of government to supervise, restrain, and promote in order to protect the community's welfare and further the common good. Yet while the right stood unquestioned, the nature of the intervention, by the time of the Jubilee, was rapidly changing.

A central principle of English and American law was protection of the rights of property. In the colonial economy, land was the usual form of property, and agriculture its customary use. Early American law accordingly approached property as essentially static, something to be guarded and preserved rather than developed. When conflicts arose—for instance,

when a new mill dam on a stream flooded neighboring fields, damaged the fishing, or impaired the operation of other mills—courts intervened to protect the injured parties. Such rulings deterred innovation by sheltering prior claims on property against new, competing uses.

The colonial courts' treatment of contracts and business agreements likewise served to preserve an existing order instead of promoting change. In contract disputes judges and juries looked not only to the stated intentions of the agreeing parties, but to their own sense of what was customary and reasonable. Courts sometimes voided or adjusted agreements, not because they were improperly drawn or illegal, but because they departed from what seemed a fair exchange. These decisions guarded community welfare by protecting unwary citizens from sharp bargainers. But they also discouraged complex business transactions involving chance or contingency. The legal system valued security and predictability.

The law of indebtedness also deterred risky business ventures. People who borrowed money bore full responsibility to repay. There was no escape through bankruptcy, and delinquent debtors risked imprisonment.

In the half-century after independence, new laws and rulings traced a gradual shift from a static to a dynamic conception of the economy. Courts came to view property as active, not inert, and their emphasis shifted from protecting its old uses to promoting new ones. They adopted a flexible approach, which allowed scope to determine which of several conflicting claims on property was most conducive to community interest without deferring automatically to the one that came first. And more and more they assessed community interest—what Supreme Court Justice Joseph Story in 1827 called the "public convenience and general good"—in terms not of preservation but of development, reasoning frankly that the law should encourage new ventures in trade, manufacturing, and transportation. Courts came to see competition not as a danger to be suppressed or curtailed, but as a social boon, an arm of the improving spirit of the age; and they showed a willingness to bend old legal rules to foster it.

Lawmakers and jurists began to regard losers in competition, even injured bystanders, less as wronged victims deserving legal succor than as unavoidable casualties in the march of progress. As the New York Supreme Court put it in 1828, "every great public improvement must, almost of necessity, more or less affect individual convenience and property," and some private injuries must be "borne as part of the price to be paid for the advantages of the social condition." Placing the community's stake in economic development ahead of its interest in securing citizens from loss, Massachusetts passed legislation virtually inviting mill owners to flood their neighbors' fields. Courts rejected suits brought by farmers who suffered damage from the operations of nearby factories.

In New York in 1805, when a mill owner brought suit because a new dam impeded his stream flow, the court acknowledged the justice of his complaint under traditional common-law rules, then rejected it anyway because "the public, whose advantage is always to be regarded, would be deprived of the benefit which always attends competition and rivalry." When new businesses supplanted old ones—for instance, when canals and bridges appeared alongside toll roads and ferries, stealing their custom and destroying their value—courts denied recompense to the aggrieved proprietors.

Courts withdrew from mediating the fairness of business agreements, leaving the parties to negotiate for themselves and stepping in only to enforce the results. Justice Story pronounced in 1836 that the law should "act upon the ground, that every person . . . is entitled to dispose of his property in such manner and upon such terms, as he chooses; and whether his bargains are wise and discrete, or otherwise, profitable or unprofitable, are considerations, not for Courts of Justice, but for the party himself to deliberate upon." Or as New York legalist Gulian Verplanck put it in 1825, "justice permits" a contracting party to exploit his "peculiar advantages of skill, shrewdness, and experience." Implicitly jettisoning the notion that goods or services bore an intrinsic value, courts left the market itself to determine their worth. With the law no longer intruding to say what terms and prices were customary and fair, parties were free to contract as they wished.

The new legal approach encouraged enterprise by offering more freedom and less security. It freed entrepreneurs to strike their own bargains and left them to take the consequences. At the same time though, as an encouragement to business, lawmakers softened those consequences by reducing penalties for delinquent debtors and offering ways to resolve debt short of full repayment or jail. Once perceived as a moral failing, insolvency now appeared more as an impersonal misfortune, a chance one took when pursuing activities recognized as socially desirable yet freighted with risk.

Much of this evolution in the law, some of it highly technical and accruing slowly over many years, was invisible to citizens and even to judges and legislators. Often they acted without knowing what peers elsewhere were doing, since the systematic compiling of statutes and reporting of judicial decisions had barely begun. Rather than setting out to overhaul legal rules,

authorities simply did what seemed just and reasonable as problems and cases arose. But whether purposely or reflexively, their notions of justice and reason subtly adapted toward those of a dynamic and commercial society rather than a static and agricultural one. In other words, changes in law both reflected and furthered Americans' emerging perception of competition and innovation as positive social values. As Justice Story explained in 1825, "the law must fashion itself to the wants, and in some sort to the spirit of the age. Its stubborn rules, if they are not broken down, must bend to the demands of society."

Emergence of the Corporation

One sign of legal adaptation was the emergence of the business corporation, a key organizational tool of the expanding American economy. Its predecessor, the chartered stock company, had existed for centuries. In England and colonial America, kings and proprietors used charters to grant special powers and privileges as inducement and reward for doing some useful service. Chartered stock companies planted colonies, opened trade routes, furnished transport, and provided credit. Company enterprise thus mingled private profit with public benefit, the two being often so intertwined as to be inseparable. Educational, eleemosynary, and religious institutions—colleges, charities, churches—operated under corporate charters, as did governments of cities and colonies. Charters were individualized instruments, drawn to serve particular ends, and the rights they conferred were often exclusive or monopolistic.

After the Revolution state legislatures assumed the granting of corporate charters. They continued to use them to foster enterprises that would yield service to the public as well as, in some cases, profit to the incorporators. Bridges, ferries, turnpikes, waterworks, banks, and insurance companies sought and received charter privileges.

By the 1820s ideas of public service and private gain were starting to diverge onto separate tracks. Governments now undertook some projects themselves instead of delegating power to companies. For years after the Revolution, scant resources and poor credit had ruled state enterprise out of the question. But growth in population and wealth now made it possible; indeed, for the largest works there seemed no choice. New York's success with the Erie Canal after the failure of a private company on the same route seemed to show that state action was not only feasible but necessary.

Still, no one thought that states or localities should assume all the obligations of education, charity, religion, and philanthropy, nor that government should supplant private initiative in fostering economic growth. For both purposes states continued to dispense charters. Between 1816 and 1826, the state of Ohio incorporated, by special acts of legislation, eighteen turnpikes, seven bridges, two harbors, a waterworks, seven banks, an insurance company, two manufactories (one iron, one wool), a mining company, four colleges and a medical college, a seminary, eleven academies, six school and literary societies, eight libraries, eight charitable, benevolent, and religious organizations, and a historical society. Reflecting the state's interest in development as well as its hope for revenue, some governments accompanied charters with purchase of company stock. By the mid-1820s the state of Pennsylvania owned more than $4 million of stock in fifty-six turnpikes, twenty-five bridges, three canals, and three banks. Virginia, North Carolina, South Carolina, and Georgia all coupled incorporation with state investment as a means of promoting internal improvement.

Incorporation in such cases still implied a public purpose and usually conferred some special benefit. Bank charters, for instance, included the right to print and issue notes. Ostensibly these were IOUs upon the bank, redeemable in coin from its capital reserves. In practice, once lent out into circulation, they functioned as a quasi-official paper currency. (The federal government did not then, as it does today, issue its own paper. Technically, the country's only real money was minted gold and silver.) Turnpike and canal charters gave companies the power of eminent domain to procure rights-of-way. Ferry operators got exclusive locations. A perceived advantage to the public underlay all these grants. Citizens rarely sought incorporation for strictly private business. Planters, farmers, and professionals did not need charter privileges. Merchants and mill owners preferred the simple, easily dissolved personal partnership.

The establishment of the Boston Manufacturing Company in 1813 can be taken to mark the advent of the true business corporation. A few manufacturers had been chartered previously, though no very successful ones. Massachusetts in 1809 and New York in 1811 had already established general rules for incorporation. Yet in requesting a charter, the Waltham entrepreneurs avowed familiar public-service motives. Factories, like colleges or charities or canals, fostered the general welfare. They furnished goods and employment and thus enhanced the wealth, convenience, and security of the commonwealth.

Still, under a traditional guise Francis Cabot Lowell and his coadjutors were really seeking something new. Their need for incorporation stemmed

not from the purported public purpose of their enterprise but from its scale. Much larger than any existing manufactory and more durable than any trading venture, the Boston Company needed an organizational structure that could pool a dozen men's capital under unified control and ensure continuity of the business if investors were to die or sell out.

A chartered stock company secured these features while lending the state's imprimatur to what was, at first, an uncertain venture. Significantly, the Boston group did not request, and the state did not bestow, any exclusive privilege. Unlike turnpikes or banks, manufacturers did not require monopoly rights or delegations of public power to operate profitably. All they needed was the legal and organizational security that a state charter provided.

Once manufacturing companies proved successful, there was thus no reason not to multiply their numbers indefinitely and let competition decide which would survive. Lawmakers could not grant corporate status to some and deny it to others without inviting accusations of favoritism. So with the Boston Company inciting imitators, legislatures moved toward granting charters to all comers. Massachusetts incorporated 18 manufacturers before 1810, 133 in the next decade, and 146 in the 1820s. By 1830 the New England states alone had chartered nearly 600 manufacturing and mining concerns, along with twice that number of companies providing public service—transportation, finance, utilities—for private gain.

Shorn of its quasi-governmental character, the corporation now stood forth as merely a convenient form of business organization, a pure tool of investment and profit. As charters became routine, their provisions became more standard, and special rights and privileges disappeared. This trend spread to older types of enterprise along with manufactories. The first bank incorporated in Massachusetts, significantly named the Massachusetts Bank, enjoyed a monopoly when it was chartered in 1784. But by 1829 sixty-six banks operated in the state, and in that year the legislature imposed a uniform organization on all banks for the future. Massachusetts had already standardized insurance company charters in 1818, turnpikes in 1805.

The redefinition of finance and transportation companies, along with manufacturers, from instruments of state policy to profit-seeking ventures led lawmakers and jurists to develop rules distinguishing the new "private" business corporation from traditional "public" corporations such as municipalities and charities. In the course of defining the new entity, they also endowed it with a prized and controversial attribute—the limitation of stockholders' personal liability for the corporation's debts. First established through the courts, the principle of limited liability was clarified and cemented by statute in New York in 1813, Connecticut in 1817, Massachusetts in 1830.

The Growth of Banking

The adaptation of rules and policies to fit the needs of enterprise spurred expansion in commerce and manufacturing. But it also raised questions about how to reconcile the promotional role of government with the republican ideal of fair and equal treatment for all. Without doubt, laws designed to foster development would, even if only incidentally, advance some interests at the expense of others. Measures sponsored under the rubric of the public good also bestowed private benefit, often most unevenly. The cost of canals and other tax-supported public works was borne by all, yet not all gained by their operation. And the privilege of incorporation, traditionally conferred in the service of the common weal, could appear illegitimate once it began to serve mainly private ends. Why should some citizens, and not others, enjoy special protection from government?

Events following the War of 1812 brought the incipient changes in the American legal and economic environment into open view and exposed their implications to public scrutiny. Though it had threatened for a time to wreck the federal finances, the war also triggered a commercial and agricultural expansion that continued after the peace. White settlers poured onto rich western lands newly wrested from the Indians, bringing four new states—Indiana, Illinois, Alabama, and Mississippi—into the Union by 1819. Driven by foreign demand, cotton prices doubled in two years after 1814, luring southwestern fortune-seekers to make frenzied purchases of land and slaves. Seaport merchants, hit hard by the war, revived as exports rose and British goods, long blocked from entry, flooded back into the American market.

Headlong expansion created urgent demands for capital and credit. Before the war the United States had boasted few banks and only a handful of men who could be called professional bankers. Now state legislatures, eager to finance prosperity, rushed to charter new banks, raising the number in operation from 88 in 1811 to 208 in 1815 to 392 in 1818. This sudden growth reflected a shortage rather than a surfeit of sound credit. Americans' thirst for land, goods, and slaves outran their means. Well-connected men, more versed in politics than finance, procured bank charters for them-

selves and their friends, not because they wished to invest in banks but because they wished to borrow from them. New banks met the call by printing and lending notes backed by scant or even phantom reserves of gold and silver specie.

In 1816 Congress joined in by chartering the second Bank of the United States, with headquarters in Philadelphia and power to open branches throughout the states. Its predecessor, the first federal bank, created in 1791 at the urging of Alexander Hamilton, was widely unpopular and had been allowed to die at the expiration of its twenty-year charter. But financial near-disaster during the war and the disordered currency that followed convinced Congress and President James Madison to change their minds.

The new federal bank, like the old one and like many state banks, blended private and public objects. As the government's own banker, it would hold, transfer, and disburse its funds, manage the federal debt, and issue notes to circulate as the country's only national paper currency, good for all debts due the United States. These privileges were exclusive, Congress having promised to create no competitor in the twenty years of the new bank's charter. While vital to the government, the Bank's public functions were also profitable for the investors who owned four-fifths of its stock. The federal government itself owned the other fifth, and the President of the United States appointed five of the Bank's twenty-five directors.

Its official capacity, its huge $35 million capitalization, and its national reach gave the new Bank of the United States enormous leverage over the state-chartered banks. In the normal course of business many of their notes came into its hands. By presenting them for redemption in coin, it could force them to maintain adequate specie reserves, thus reining in their issue of notes and stabilizing the currency. This was Congress's intent. But at first the Bank made no effort at control. Like the state banks, it extended its lending to the limit of its resources. Instead of restraining credit, the Bank helped expand it. Easy money fueled speculation in western lands and sustained rising prices across the country.

The Panic of 1819

For almost four years after the war Americans enjoyed a heady prosperity. Though some manufacturers suffered from renewed British competition, merchants and farmers and planters thrived on strong exports and loose credit. Chasing apparently limitless demand, cotton production doubled by 1819. But the pace could not be sustained. A reviving European

agriculture curbed the foreign market for American grain and meat. At the end of 1818 British prices for American cotton sagged abruptly. The effect reverberated through the vulnerable debt-laden economy, setting off a wave of business failures and contractions that became known as the Panic of 1819. Prices fell, land values plummeted, debtors defaulted, and bubbles burst. Shocked at the collapse, Americans took stock and assessed blame.

Controversy enveloped the banks as bankers turned upon one another to save themselves. Compelled to reverse its own easy policy, the Bank of the United States sought rescue by holding the state-chartered banks to account. They in turn relieved the pressure by calling in loans, forcing borrowers to liquidate assets at distress prices. Credit, once readily granted, was now as quickly refused. Unable to raise enough coin, some banks simply folded or refused to redeem their notes (an action known as suspending specie payment), leaving unlucky holders of their worthless or depreciated paper to fend for themselves.

The bewildering descent from prosperity to panic and the greed, incompetence, and downright dishonesty exposed in its wake inspired a revulsion against banks, bankers, and banknotes. Davy Crockett of Tennessee, like many others, concluded that "the whole Banking system" was nothing more than "a species of swindling on a large scale." Attacking the irresponsibility and impudence of chartered corporations, critics pointed to banks that, in plain defiance of legal requirements, continued to operate after suspending specie payment. (Unwilling to drive them out of business, state legislatures acquiesced.) Resentment flared against the corporate privilege that allowed bankers, unlike other people, to escape paying their debts. One editor half-jokingly suggested amending a bank charter so that the stockholders themselves, instead of a list of their names, should be "hung up" on display before the next election of directors.

State bankers denied guilt and blamed the Bank of the United States instead. Some politicians and voters agreed. They saw their local banks as victims, and the national bank as the villain. The fault lay not with state bankers who sustained the boom, but with the national bank for puncturing it. At any rate, they said, the cause of the crisis was now irrelevant. The immediate need after the panic was not to restrain credit but to restore it. So while some turned in disgust against all banks, others argued for new ones, and proposals to curtail banking competed with plans to expand it. In the West, where a chronic regional trade deficit and resulting specie scarcity made distress especially acute, some legislatures stepped in to create new banks or loan offices with paper backed only by the faith of the state.

The banking debate posed friends of an abundant (paper) currency against defenders of a sound (specie-based) one. Proponents of remedial action to expand the money supply vied with those who would let retrenchment run its course. Both inflationists and contractionists sought the same end of restoring prosperity. The question was how. To provide a useful medium of exchange, the currency had to be both ample in quantity and sure in value. Yet given the country's shortage of specie and the underdeveloped state of its wealth-producing resources, it could be only one or the other.

Interwoven with the banking controversy was a parallel argument over relief for debtors caught in the general distress. Borrowers who could not repay clamored for "stay laws" forestalling legal process against them, or minimum valuation laws to prevent seizure and sale of their property at collapsed prices. Though strongest in the cash-poor West, the agitation was national. Ten states adopted stay laws, including Maryland, Vermont, and Pennsylvania.

The relief question, like the banking one, was framed within the assumptions of a commercial economy. Arguments on both sides assumed the need to rebuild business confidence but differed over means. Stay laws bought borrowers time to restore their solvency but abrogated lenders' right of recovery, thus shaking their trust in the security of debts and perhaps deterring them from lending again. On the other hand, failure to provide relief would protect creditors only by ruining debtors.

These were hard choices. Farmers and tradesmen and rough-hewn politicians now grappled, many for the first time, with abstruse questions about the nature of money and the function of credit. Was debt good or evil, a tool of industry or a mark of improvidence? Was the entrepreneur with few means and expansive dreams a benefactor or a plague? Were banks and banknotes agents of progress, as they had so recently seemed, or engines of privilege and persecution? In posing these questions Americans sought the right road back to a substantial, enduring prosperity.

The vocabulary of discussion was as much moral as financial, as people applied familiar ethical maxims to a novel commercial crisis. Some traced the panic to failings in human character. Foes of currency expansion and debtor relief blamed plungers for their own distress and linked paper money and indebtedness with recklessness and dishonesty. A Cincinnati critic castigated "the theatre and the circus, brokers and shavers, speculation, luxury, extravagance, effeminacy in dress and manners, auctions and pawn brokers, lotteries and lottery offices, insurance, great and sudden changes in circumstance." All these iniquities were "productions of the paper system."

Hezekiah Niles attributed the panic to "unprincipled speculation and unblushing fraud." His cure was simple: forsake the "supremely-to-be-hated rag, or paper system," return to "profitable industry, and prudent economy," and make both men and banks "pay their debts, or shut up shop." Andrew Jackson of Tennessee agreed: "habits of extravagance, and of transacting business too much upon credit" had created crisis. A return "to our former habits of industry and simplicity" would end it. Kentucky newspaper editor Amos Kendall drew a lesson from the panic:

> Things will take their course in the moral as well as in the natural world. . . . *The people must pay their own debts at last.* This truth should be impressed upon them, their eyes should be turned from banks and the legislature to themselves,—their own power and resources. Few need despair. Industry never died with hunger. Economy never went without its reward.

A different view of the business principles appropriate to an enterprising people appeared in appeals for congressional relief from two groups of beleaguered debtors, merchants operating out of the Atlantic port cities and buyers of western public land. Overextended traders wanted a national bankruptcy statute to replace the confusion of state insolvency laws and establish a fair, uniform method of liquidating debts and distributing assets. Pioneers and speculators had bought millions of acres of government land on credit before the panic, incurring debts that were now due and unpayable. In Alabama, vast sales of prime cotton acreage at inflated prices had created a condition of "universal mortgage." Federal law required forfeiture as penalty for default. But buyers begged for additional time and for leave to subdivide their purchases and transfer payments from one tract to another.

Congress debated who was more worthy of relief—the merchants whose initiative energized the whole society, or that "most useful and virtuous class of citizens, the honest, industrious farmers, by whose labors life and vigor are imparted to every other." But both supplicants agreed on one thing: theirs was not a moral failing of malfeasance and irresponsibility, but a guiltless hazard inevitable in a country that was "young, enterprising, and comparatively deficient in capital." As merchant spokesman Joseph Hopkinson of Philadelphia argued, the risk of failure arose from the

> nature and extent of their business; the hazards to which they were exposed from the enormous credits they were obliged to give in the course of their business; from their distant connexions and agents, to whose fidelity and capacity they must

trust so much; from the dangers of all the elements; from the political change in their own and foreign countries; and, in short, from every quarter and source from which danger and ruin can come.

Foreign trade was vital to the nation's welfare, yet its risks were such that without legal shelter, entrepreneurs would fear to conduct it at all.

Both sound policy and "the obligations of humanity and justice," said Hopkinson, demanded bankruptcy protection for merchants. Not only were they men "of good principles and capacities for usefulness, whose offences are frequently nothing but inevitable misfortunes," but assisting them to get a new start would set loose "a mass of talent and industry." "Of what value is a distressed and harassed insolvent debtor to his country?"

Spokesmen for landed debtors reasoned identically. Confessedly they had been carried away by optimism and bought too much on credit. But if they had been imprudent, it was an imprudence that society as a whole (and particularly the federal government, which set the purchase terms) had sanctioned and encouraged. Why punish them for a miscalculation which all had shared?

A bill to relieve land debtors passed Congress and became law in 1821, though the bankruptcy bill failed. The debate over them and over the relief question in all its forms, both in Congress and the states, revealed the complexity and ambivalence of Americans' response to the novel demands of a commercial society. With no political parties to shape the alternatives, discussion was both heated and confused. Mixing arguments of morality and expediency, speakers on all sides sought somehow to capture the benefits of enterprise while avoiding its excesses. They wanted growth without extravagance, energy without recklessness. Still, amid charges of culpability and expostulations of innocence, few called for forsaking the chase and retiring to more sedate pursuits. Men like Niles, Jackson, and Kendall, innovative and successful in their own affairs, touted industry and economy as the slow but sure route to advance, not an alternative to it. Even farmer advocates spoke the language of improvement. Championing relief for land purchasers, Senator Richard M. Johnson of Kentucky praised the nation's husbandmen not just for their hardy toil, but for the "persevering enterprise" that had led them unwarily into debt.

Debates over banking, credit, and relief did not, in most states, draw clear or enduring political lines. Their urgency faded as prosperity returned. Nor did the unstructured dialogue reflect a discernable clash of classes. Debtors and creditors were not so much distinct constituencies as interests diffused throughout the community. Acute distress in the West lent the

crisis a regional coloring, but relief measures there reflected no rejection of commercial aspirations. Most westerners, like other Americans who worked the soil, sought profit as well as sustenance. It was not devotion to some pastoral ideal but pell-mell expansion, agricultural as well as commercial and industrial, that encouraged borrowing and thus exposed them to the panic's worst effects. Land dealers, merchants, and manufacturers in the new inland empire were trapped in the collapse along with farmers and planters and joined them in the clamor for relief.

Short-lived but severe, the depression furnished a jolting reminder of the perils of unchecked development. Americans hailed the spirit of improvement and enterprise, but recoiled when that spirit produced rampant speculation, excessive debt, and abuse of privilege. Never fully extinguished, popular distrust of the symbols of commercial excess—especially of banks—lingered as a potentially explosive sentiment.

Commerce and the Supreme Court

The Panic of 1819 raised the enduring political question of how enterprise could be simultaneously cherished and controlled, and how such indispensable instruments of commercial advance as banks and corporations could be made socially responsible. Debated in the states and in Congress, these issues also engaged the United States Supreme Court. In a trio of momentous decisions handed down in early 1819, the Court took its own stand on the means of nurturing the spirit of improvement.

Guided since 1801 by Chief Justice John Marshall of Virginia (appointed by President John Adams), the Supreme Court had wielded its judicial weight carefully but effectively to fortify two intertwined principles—the supremacy of the national government over the states, and the Court's own authority as final interpreter and arbiter of the United States Constitution. For Marshall and his most energetic associate, Joseph Story of Massachusetts (appointed to the Court, with fitting symmetry, by Virginian James Madison), the ascendancy of national over state power was good in itself, a fulfillment of Revolutionary promise. But it was also means to another great end—the opening of a broad forum for business enterprise. As Story explained in 1818, "the spirit of commerce, once excited, is not easily extinguished or controlled. It is a useful spirit, which imparts life and intelligence to the body politic, increases the comforts and enjoyments of every class of people, and gradually liberalizes and expands the mind, as well as fosters the best interests of humanity." As nationality encouraged commerce, so

commerce would cement union. Seeing enterprise as the carrier of progress, the Marshall Court set out to clear a field for its exertions.

The obstructions they found in its path were state laws. State legislators presumed the power to govern in their community interest. But in the Marshall Court's eyes, the community of trade transcended the states. The true scope of commerce knew no limits. It needed an open arena to work its improving magic. It needed stable, uniform rules throughout the country, and these only national authority could supply. In the constitutional grant of power to Congress to regulate commerce "among the several States" and the ban on state laws "impairing the Obligation of Contracts," the Court found the germ of that authority.

In the 1819 case of *Sturges v. Crowinshield*, the Supreme Court struck down a New York law relieving insolvent debtors. Richard Crowinshield was a New York merchant from a prominent Massachusetts family. Engaged in overseas trade at a time of international upheaval, he fell prey to embargo and war, declared himself insolvent in 1811 under the New York law, and obtained release from his debts. With this new start he returned to Massachusetts and prospered; but a New York creditor, Josiah Sturgis, sued him to recover an old loan.

Substantively the case raised the same issue with which Congress and the states were grappling—whether the aims of protecting property and promoting enterprise were best served by relieving debtors or holding them to their obligations. Overlaying this question of commercial utility were political and constitutional complications. Congress, which had power to impose "uniform Laws on the subject of Bankruptcies throughout the United States," had not done so. In the absence of federal law, the Court conceded that states might adopt rules on insolvency or bankruptcy (despite fine distinctions, the two words were nearly interchangeable). But the justices all agreed that by freeing Crowinshield from a legal debt, the New York law violated the "Obligation of Contracts" and was therefore unconstitutional.

Exactly how far this ruling restrained state power over debtor and creditor remained unclear. The New York statute under which Crowinshield took shelter had operated retroactively; it was passed after he had contracted his debt. Also, Sturgis had not sued in a New York court, but in federal court in Massachusetts. The Supreme Court did not say whether states could pass prospective laws affecting future contracts and governing their own courts. Congress could clarify everything and preempt state action by adopting a national bankruptcy system. In anticipation, Justice

Story drafted a bill himself. But Congress did not act, and the Court finally refined its edict. In *Ogden v. Saunders* in 1827, it sanctioned prospective state bankruptcy laws—a decision from which three of the seven justices, including Marshall and Story, dissented.

This unusual division among the justices (Marshall's dissent was his first on a major constitutional question in twenty-six years on the Court) mirrored the general uncertainty over the rules best suited to a commercial economy. Within the Court there was no dispute over ends. All agreed on protecting what Justice Robert Trimble called "the right of acquiring and possessing property." For Marshall, allowing state legislatures "the power of changing the relative situation of debtor and creditor, of interfering with contracts" would be "to break in upon the ordinary intercourse of society, and destroy all confidence between man and man." But the opposing majority saw relief laws as "useful, if not absolutely necessary, in a commercial community" and "vitally important to a people overwhelmed in debt, and urged to enterprise by the activity of mind that is generated by revolutions and free governments." So the Court straddled: states could not undo existing contracts, but they could set rules for future ones, including procedures for expunging debts.

On the rights of corporations the Supreme Court spoke with a clearer voice. It had already held, beginning with the 1810 case of *Fletcher v. Peck*, that a state law conveying land or other property was a "contract" in the constitutional sense of the word, which the state could not retract or modify at will. In 1819 the justices expanded that doctrine to cover corporate charters in the celebrated case of *Dartmouth College v. Woodward*.

Dartmouth, located in Hanover, New Hampshire, was incorporated by the colony's royal governor in 1769 and governed under its charter by a self-perpetuating board of trustees. Responding to a dispute between the trustees and the college president, the New Hampshire legislature in 1816 placed the school under state-appointed overseers, changed its name to Dartmouth University, and in effect converted it to a state institution. The trustees sued to get their college back.

The Supreme Court's ruling for the trustees fortified the rights of corporations against the governments that created them. Although Dartmouth served the community by educating young men, Marshall held that in the eyes of the law it was not, like a chartered city government, a public instrument, a mere arm of the state. Rather, it was a private entity, and as such it enjoyed the same property rights as an individual. Having vested these rights in the college administration, the state could not rescind them

at will. Once called into existence by a charter that constituted a "contract," corporate privileges were untouchable, even by the governments that granted them.

The case concerned, as Daniel Webster said in arguing it for the trustees, only a small college; and its impact was limited by Justice Story's suggestion, in a concurring opinion, that legislatures could reserve the right to alter a corporate charter simply by saying so in the charter itself. Still the implications of *Dartmouth College* were broad and, at least on the part of Story (who behind the scenes had helped to orchestrate the case), wholly intentional. In 1819 corporations were new and untried entities, still evolving from their origins as delegations of governmental authority for public purposes. Their legal status and rights were yet poorly defined. In sheltering them from legislative interference by circumscribing their public character and clothing them with the sanctity of private property, the Supreme Court gave a powerful push toward incorporation as the preferred form of business organization.

If states could not cancel their own corporate creations, still less could they tamper with those of the federal government. That was the import of the Court's third great case in 1819, concerning the Bank of the United States.

The Bank's performance following its creation in 1816 had brought it into quick disrepute. Instead of resisting the state banks' expansion, the Bank had joined it; and when it did change course, the reversal angered debtors and state banks. The post-panic reaction against banking thus fell doubly on the Bank of the United States. Those who resented its power over state banks and those who hated all banks united to attack it. It was damned for failing to restrain state banks and damned again for trying to restrain them. The Bank's reputation fell further with the exposure early in 1819 of incompetence and malfeasance at its Philadelphia headquarters and outright fraud at some of the eighteen branch offices.

Even before the panic, several state legislatures tried to block the Bank of the United States from interfering or competing with state-chartered institutions. Six states, including Maryland, laid prohibitive taxes on its in-state branches while two others banned them altogether. This action raised the dual question of Congress's right to create the Bank and the states' right to regulate it. In March 1819, as popular outcry mounted against the Bank, the Supreme Court took on these issues in *McCulloch v. Maryland*.

Addressing the first question, one that had repeatedly dogged both the

first and second federal banks, Chief Justice Marshall affirmed the constitutionality of the Bank of the United States. Though the Constitution did not in words authorize Congress to charter a corporation, it did empower it to collect taxes, borrow money, regulate commerce, and to "make all Laws which shall be necessary and proper" to effect these or other specific powers. According to Marshall and a unanimous Court, it was the right of Congress itself, not the courts, to decide what means were necessary and proper.

The Bank, therefore, though a privately owned and managed concern, was also in effect an arm of the federal government, and states could not touch it. If they could tax its branches into closure ("the power to tax involves the power to destroy"), they could frustrate Congress's aim in creating the Bank in the first place. "The states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government," Marshall intoned. Maryland's tax was unconstitutional.

To stunned critics the decision appeared to mean that the country must submit to "be prostrated at the feet of an overbearing stock-jobbing aristocracy." Pronounced in the midst of the panic, *McCulloch v. Maryland* evoked outraged opposition. The Court had cloaked a profit-seeking business corporation with the authority and immunity of the federal government itself. Timing and circumstance could hardly have been worse. James W. McCulloch was the cashier of the Baltimore branch of the Bank of the United States, whose refusal to pay Maryland's tax had triggered the case. But, as came to light just days after the decision, he was also an embezzler who used his position at the Bank to funnel huge sums to his business partners (including the president of the Baltimore branch) and to lend half a million dollars to himself. The Court in *McCulloch* thus threw its protection around a despised institution, embodied by a man who at that moment stood before the public as a symbol of flagrant corruption and corporate abuse.

In Ohio discontent spilled over into outright defiance. Just a month earlier, in February 1819, the legislature had levied a $50,000 tax on each of the state's two branches of the Bank of the United States. Undeterred by *McCulloch,* the state in September demanded payment. The Bank refused, state authorities seized the money by force, and federal authorities seized it back and jailed the state treasurer. The upshot of this comedy was another

lawsuit, *Osborn v. Bank of the United States*, which reached the Supreme Court in 1824. Again the Court affirmed the Bank's immunity from state control.

By this time returning prosperity had cooled tempers; and the Bank, under prudent management, was proving an asset rather than a threat to the commercial community. Ohio dropped the confrontation. Another landmark case of the same term allowed the Court to strike a further blow for federal supremacy in commercial regulation. Sixteen years earlier, in 1808, New York had granted a state monopoly on steam navigation to Robert Fulton and his partner Robert Livingston. Both were now dead, but their heirs still controlled all steamboat traffic into and out of New York. In *Gibbons v. Ogden*, the Court voided the grant as an infringement on Congress's authority to regulate commerce between the states. Again the Court struck down a state law, but circumstances made this decision as welcome as *McCulloch* was hated. In 1808, when steamboats were new and unproven, government favors were necessary to lure inventors and investors. The New York law had done just that. But by 1824, with hundreds of boats in operation, the grant had lost its purpose; its only effect was to maintain a franchise resented by competitors and customers alike. *Gibbons* broke the monopoly and invited steamboat operators to run where they would, free from the paralysis of conflicting state privileges and restraints.

Taken as a whole, the Marshall Court's jurisprudence laid a firm constitutional foundation for the "spirit of commerce." The Court did not stand simply for protecting property and encouraging enterprise. No simple stand was possible. Different kinds of property rights and productive strategies inevitably clashed. When the Supreme Court curtailed the powers of state governments, it narrowed their ability to protect property as well as destroy it, to foster improvement as well as inhibit it. What bound the Court's rulings was not their promotional outlook, which state authorities generally shared, but their national scope, their determination to secure a wider arena for commerce by clearing away local fluctuations and impediments. "In all commercial regulations," Marshall pronounced in an 1821 case, "we are one and the same people."

The spirit of improvement working everywhere after the War of 1812 had raised perplexing questions about relations of debtor and creditor, the rights of corporations, and the extent of regulatory power. From a nationalist viewpoint, exactly how these questions were answered was less important than that they be answered. As Daniel Webster put it to Joseph Story in 1824 concerning a pending revision of the tariff on imports (on

which he was feeling his own uncertainty), "it is a great object to settle the concerns of the community; so that one may know what to depend on." The "community" Webster meant was defined by livelihood, not residence—a brethren of traders, not a town or neighborhood. Businessmen wanted firm, clear rules that could be counted on and that were uniform throughout the country. These the Supreme Court endeavored to supply.

In doing so it placed its own authority at risk. The Supreme Court's claim to pronounce definitively on the meaning of the Constitution had never passed unchallenged. By 1825 the Court had struck down laws of nine states. Ominously, Congress in 1822 debated proposals to reconstitute the Court or narrow its jurisdiction. Perennially suspect as an undemocratic institution removed from popular control, and lacking direct means of enforcing its will, the Supreme Court's power rested ultimately on public acceptance. Rulings like *McCulloch* tested its limits.

Knowing this, the Marshall Court moved carefully. It overruled state authorities with a great show of reluctance. Carefully Marshall clothed his boldest pronouncements in the garb of judicial reticence. "Courts are the mere instruments of the law," he explained in the *Osborn* case in 1824, "and can will nothing." Justices tried to foster an image of the Court as an impartial oracle of constitutional truth. Usually they spoke as one, with no concurring opinions or dissents. Marshall and his fellows masked their differences by compromise or by simply putting off decision until consensus could be reached.

Behind the scenes, justices were anything but passive. Working with a coterie of attorneys (notably Daniel Webster) who specialized in Supreme Court litigation, they helped set up crucial test cases and contrived to get them quickly before the Court. Off the bench they acknowledged and welcomed the practical consequences of their decisions. "Let us extend the national authority over the whole extent of power given by the Constitution," exclaimed Joseph Story in 1815.

> Let us have . . . a national bank; a national system of bankruptcy; a great navigation act; a general survey of our ports, and appointments of port-wardens and pilots; Judicial Courts which shall embrace the whole constitutional powers; national notaries; public and national justices of the peace, for the commercial and national concerns of the United States.

Marshall's strategy of sheltering policy-making behind a veil of judicial circumspection helped deflect censure, but it could not silence it entirely. Broadly speaking, the Supreme Court's promotion of commerce as the

vehicle of American progress was at one with the spirit of the age. But in furthering national interests, the Court overrode local ones; in affirming federal authority, it challenged the traditional prerogative of state courts and legislatures to determine what rules best suited community interests. The question bruited by the Court's landmark rulings of 1819–1825 was not whether there should be banks and colleges and steamboats and corporations, but to whom they should be accountable—the federal government or the states, the people's own elected representatives or an unelected judiciary.

As it happened, this question of power, in part as old as the republic itself, was acquiring a new dimension at this moment. The Supreme Court's assertion of federal supremacy reawakened localist fears of central tyranny. It also aroused democratic hostility to a judicial "aristocracy." Around the country, a popular upheaval was brewing—one that would propound new definitions of progress and lay new claims to its control.

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for Claudia
the better angel of my nature