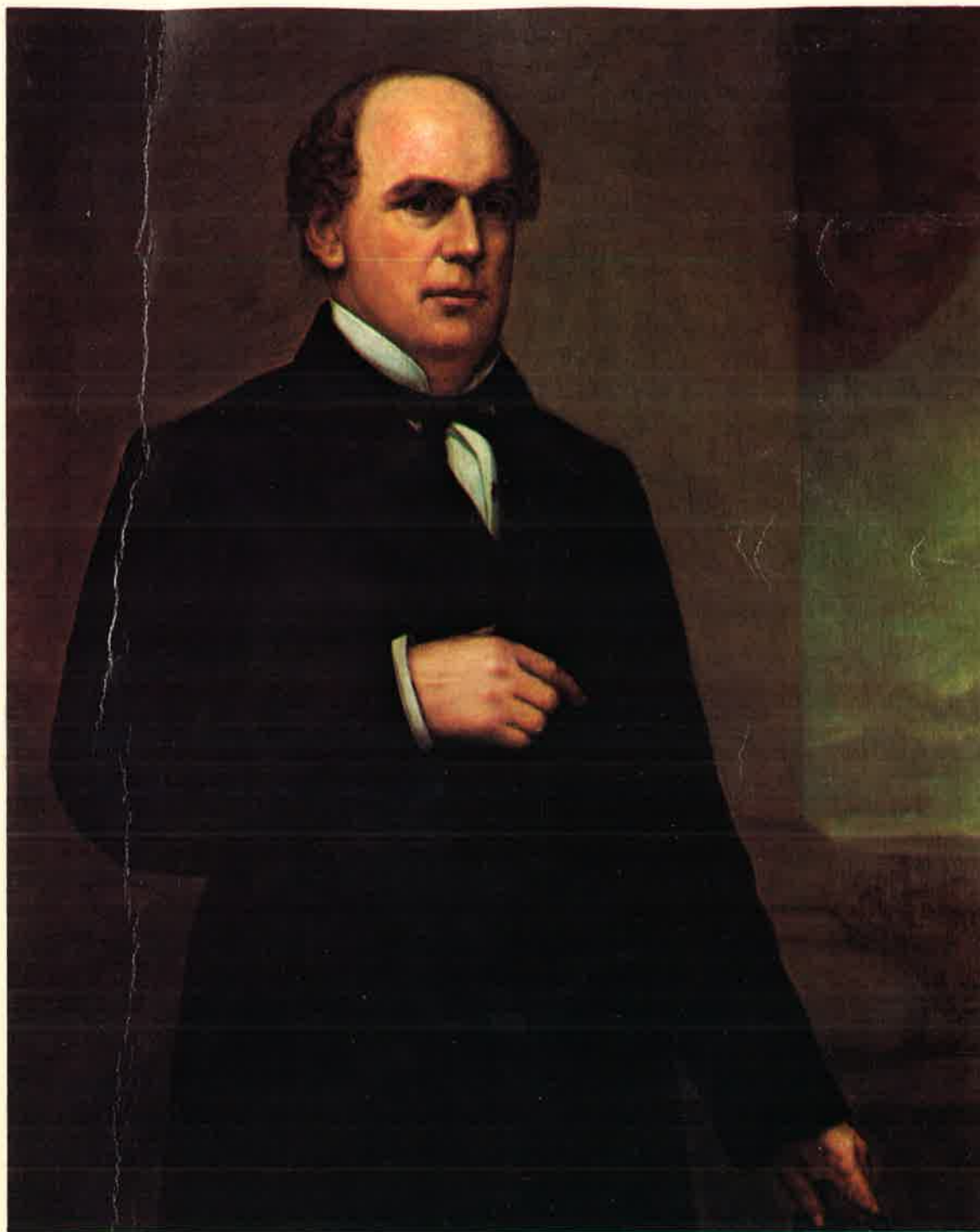


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SALMON P. CHASE
Sixth Chief Justice, 1864–1873

The Dorr War and Political Questions

GEORGE M. DENNISON

Promptly at 11:00 o'clock sharp on the morning of 22 January 1848, the Supreme Court of the United States opened as usual for business. A huge audience filled to overflowing the small, vaulted room located directly below the old Senate chamber in the basement of the Capitol Building. Those present had come to witness a stirring event in the affairs of the nation, as the highest tribunal in the land sat to hear what one correspondent described as the case "to settle or overthrow the whole doctrines of the Declaration of Independence."¹

The two cases before the Court on that day seem simple on the surface. *Martin Luther v. Luther M. Borden et al.* and *Rachel Luther v. Luther M. Borden et al.*, brought by a shoemaker and his mother against the same men, both involved alleged acts of trespass committed by state militiamen seeking to arrest a man accused of treason against the state of Rhode Island.² The militiamen claimed exemption from such suits because the legislature had proclaimed martial law over the entire state in the summer of 1842 in order to prevent revolution. Martin Luther responded that the proclamation of martial law had no validity because the government itself had been changed by a vote of the people some six months earlier in January 1842. Therefore, the militiamen had acted solely as individuals who took the law into their own hands, thereby violating the rights of property assured to all by the Constitution of the United States and the laws of Rhode Island derived from the English common law. Rachel Luther urged a much narrower view, that no government under the Constitution could deliberately suspend the civil institutions and allow military force to reign supreme. Thus, in either

case, the defendants should be required to pay damages.

However, surface impressions do not suffice to explain the significance of the Luther cases. Much more were at stake. Actually the Luthers and their supporters in and out of Rhode Island hoped to vindicate a particular theory of American government and constitutionalism by carrying these cases to the Supreme Court for judgment. At issue were the definitions of basic principles that many, even most, Americans traced to the founding of the republic.³ Those who favored the Luthers believed that American government rested firmly on the idea of popular sovereignty, that the majority of the people living under any government could change that government when and how they pleased. In Rhode Island in 1842, a political reform movement claiming the support of the majority of American citizens residing in the state had attempted to implement that specific idea. Their opponents, who controlled the state government, branded the reformers as revolutionaries and imposed martial law to suppress them. These actions produced the Luther cases.

I

Rhode Island had retained its colonial charter of 1663 in 1776 and after, when most other states adopted new, written constitutions.⁴ The reasons for doing so were clear enough, since the charter provided for representative government and allowed the majority in the General Assembly to decide all matters of law and policy. Once the connection with England was severed, most people apparently felt that the causes for change had been eliminated. They were happy enough with the political arrange-

ments within the new state, and remained so for a number of years.

But matters took a dramatic new turn during the two decades after 1820. A range of interrelated but disparate changes complicated the situation and figured importantly in the development of political insurgency in Rhode Island. Much like New England in general, Rhode Island experienced severe dislocations as the modernization process worked its transforming effect. Industry displaced agriculture and commerce as the dominant form of economic activity, and small towns burgeoned into metropolises integrated by industrial and related bonds. While cities grew, the way of life altered perceptibly, as did the very character of the population. Whereas most people during the earlier years had imbibed a common culture and tradition, new arrivals from Europe and other states—drawn by the bustle of activity and the apparent opportunity for gain—brought with them different ideas, cultures, and beliefs. To compound the problem, native Rhode Islanders left the state in great numbers, responding to the lure of greener pastures elsewhere. Predictably these movements of people exerted powerful pressures subversive of community cohesion and harmony. The country lifestyle fragmented as urban concentrations of strangers proliferated and a new kind of politics brought ethnic concerns to the center of public affairs.

The presence of so many “strangers” naturally exacerbated and raised the tensions within the state to disruptive levels. Most of the newcomers went to the growing industrial areas and worked as day laborers of one sort or another. The wages received barely assured subsistence and rarely if ever provided savings for the purchase of land. Thus, because of the requirement of the ownership of a \$134 freehold to vote, the new arrivals whether American citizens or not were disfranchised.⁵ In addition, those who were not “freemen,” that is, who did not own a freehold, could not sue in court without the sponsorship of freemen, and could not serve on juries.⁶ The number of

political eunuchs increased in Rhode Island, as immigration reached flood-tide proportions during the 1830s and 1840s. Moreover, these people already knew or quickly learned about more liberal arrangements in other states and sought to change the restrictive laws in Rhode Island.

Exclusion of large numbers of people from the polls and the courts only partially explained the anti-democratic character of Rhode Island, however. In addition, the apportionment system for the allocation of representatives to the legislature remained fixed as originally established in the seventeenth century by the charter. As a result, the static and declining communities of the south and west, with a minority of the population, controlled the government.⁷ The eastern expanding towns had 61,350 people in 1840, whereas the static towns had 28,719 and the declining towns only 18,761. The ratio of people per representative stood at 2,578:1 for the expanding towns; 1,115:1 for the static towns; and 781:1 for the declining towns. The state average was 1,512 people per representative. Rateable property in the expanding towns had an estimated value of \$48,072,000, but only \$14,724,000 in static towns and \$7,494,000 in declining towns. By any measure, the political arrangements made a mockery of democratic principles.

II

When Rhode Islanders responded to the urge for constitutional change, they invoked a set of ideas virtually self-evident to nearly all Americans. Numerous persons contributed to the development of a more or less coherent system of political concepts purporting to explain the American constitutional tradition. In Rhode Island, these ideas attained articulate form during the reform movement of the 1790s, although no one showed much interest in operationalizing them. On the other hand, no one bothered to refute them, and they gradually earned general acceptance or tolerance as reformers invoked them time and again over the years. Hardly original, these ideas nonetheless



The \$5 000 Reward

which *the* King had offered, rather too strongly, Dorr leapt the wall, (positively for the last time,) and once more escaped through the treachery of his coat tail!

Thomas W. Dorr's political ambivalence drew a satirical woodcut charging him with a disposition to go with whichever side served his interest.

sparked pride in the minds of Americans because of the apparent claim for the uniqueness of the American political and constitutional tradition.⁸

The first and perhaps most articulate spokesman for this particular constitutional ideology in Rhode Island after the founding period from 1776 to 1787 was George Burrill, who stated the theory succinctly in 1797:

The making of a constitution paramount is no act of government; it always exists; it is the immediate work of God, and a part of nature itself. . . . Neither can the legislature create a constitution; since the legislature itself is the creature of the written constitution, is posterior and subordinate to it. . . . Neither can the legislature judge of the necessity of forming a constitution, or dictate when or how it shall be formed. To the court is referred to pronounce judgment; to the legislature, the enacting of laws; and to the people, the forming of a constitution.⁹

Burrill relied on the concept of a higher law emanating from God and Nature which established immutable and self-evident principles and relationships in a decent society. His argument presumed the reality of popular or constituent sovereignty, that the people—or a majority of the people—have the inherent right to make and change government as seems to them most suitable to their needs. Of course, he also presumed that the people would never deliberately violate the immutable principles derived from God and Nature. "Rebellion, therefore, . . . is not to be imputed to those who maintain this supreme authority, although they act in opposition to a written constitution. . . ."

Burrill's formulation drew heavily from the speeches and writings of the leaders of the movement to establish a national constitution in 1787. Most noticeable was his reliance upon the thought of James Wilson of Pennsylvania, who argued that American government rested on a "revolution principle" the consequence of which was "that the people may change the constitutions, whenever and however they please."¹⁰ This idea served aptly the needs of those who sought to assure a governmental system dependent continuously on popular consent. Once announced in Rhode Island, the idea became common

currency. Thus, one reformer wrote in 1818 that the people had the inherent right to act directly to establish a constitution "should the Legislature, as heretofore, disappoint their wishes."¹¹

Regularly invoked and fully associated with the founding of the republic, the ideology of peaceable revolution and popular sovereignty served initially more to legitimate demands for governmental redress of grievances than to guide the conduct of those seeking change. However, as the socio-economic conditions altered, and as ever larger numbers of people felt excluded from civic participation, a tendency to operationalize the theory emerged. The Constitutional Movement of the 1830s vividly demonstrated the ideology's utility to a reform effort. While unsuccessful, the Constitutional Movement added fuel to the rising call for change and prepared the way for the future.

III

Artisans, shopkeepers, mechanics, barbers, carpenters, handcraftsmen, and a varied assortment of tradespeople dominated the Constitutional movement in its early stages, although some freemen participated from the outset.¹² Most of the early adherents were unquestionably newcomers, moved by the prospect of becoming full citizens. Initially a Workingmen's organization, not unlike those that sprang up all throughout the North Atlantic region of the United States during this period, it soon became an adjunct of Whiggery in Rhode Island, and then developed an independent existence. The ideas employed by the Constitutionalists sounded familiar themes. The support varied over time, but certainly come in large part from the disfranchised immigrants and laboring groups. In fact, problems plagued the Constitutionalists because of the rising nativism in the state. During the height of the movement, one supporter warned Thomas Wilson Dorr, Providence lawyer and scion of an old Rhode Island family who had assumed a leadership role, of the consequences of failure to explain that the reformers had no intention of destroying all suffrage requirements. The

supporter noted that "The greater portion hereabouts seem imbued with the belief that our object is to secure unrestricted, unqualified, universal suffrage, and are completely terrorstruck."¹¹ Unquestionably he wanted nothing to do with the enfranchisement of everyone, citizen and alien, literate and illiterate, independent and dependent alike. Fear of potential new voters and the threat to existing arrangements induced the landed interest to sabotage the movement.¹²

Actually the conservatism of the Constitutionalists proved their undoing. One spokesman for a more direct approach to governmental change called for peaceable and legal action, but demanded the achievement of reform objectives "peaceably if we can, forcibly if we must."¹³ The speaker, Seth Luther, reminded his listeners that under the American system of government the people have "a right to assemble in primary meetings, and appoint Delegates to a convention," which would then exercise the "right to form a Constitution and submit it" to the people for approval as "the law of the land." However, Dorr and other Constitutional leaders insisted that appropriate reform could only be secured through the "slow process of legislation."¹⁴ The result, predictable from the outset given the history of constitutional reform efforts in Rhode Island, was "a complete failure."¹⁵

Dorr and other leaders of the Constitutional movement turned their attention to new causes when the effort failed in 1838.¹⁶ Nonetheless, the ground had been prepared for further activity when the situation proved auspicious. The presidential election of 1840 provided the inspiration for a new movement much broader and far less conservative in its ideological orientation. Interestingly enough, the men who led the Suffrage movement of the 1840s had also involved themselves earlier in the Constitutional crusade.

IV

The Rhode Island Suffrage Association did not "spring" into action, by any means. Formed initially in early 1840, it remained inactive because of the conclusion of the

leaders that they must avoid partisanship.¹⁷ The Association charter outlined a plan of action through which the majority of American citizens residing permanently in Rhode Island would formulate and ratify a written constitution for the state implementing the principle of universal manhood suffrage and establishing the separation of powers as a juridical premise.¹⁸ If the General Assembly rejected petitions for a constitutional convention elected by all the male, adult, American citizens, rather than just the freemen, the Suffragists intended to appeal to Congress or the Supreme Court to interpret the meaning of the Republican Guarantee Clause in Article IV, Section 4 of the national Constitution.¹⁹ The charter concluded with the aphorism which became the motto of the Association: "WE KNOW OUR RIGHTS, AND KNOWING, DARE MAINTAIN THEM."

By February 1841, a petition had been addressed to the legislature requesting a constitutional convention to form a new constitution.²⁰ The petition also demanded the suspension of the suffrage restrictions for the selection of delegates and the ratification election. When the General Assembly agreed to call a convention, but insisted upon full respect for the suffrage laws, the Suffragists called an independent and unauthorized convention to draft a constitution. Delegates were elected in August, 1841, and the People's Convention met and prepared a model constitution in October. When the legal convention refused to consider the People's Constitution, but proceeded with its own investigation of whether to make any changes, the die was cast. The People's Convention re-convened and made a few changes in the original draft of the People's Constitution before submitting it to the people for approval or rejection in December 1841 and January 1842. Taking note of the approval by a majority of freemen as well as an absolute majority of male American citizens, the People's Convention resolved that the People's Constitution "ought to be, and is, the paramount law and Constitution of Rhode Island and Providence Plantations."²¹



Thomas Wilson Dorr of Rhode Island, titular leader in the "war" for a constitution to supplant the colonial charter.

The delegates pledged "in behalf of the People whom we represent" to "establish . . . sustain and defend" the new government "by all necessary means." The "new age" would begin in May, 1842.

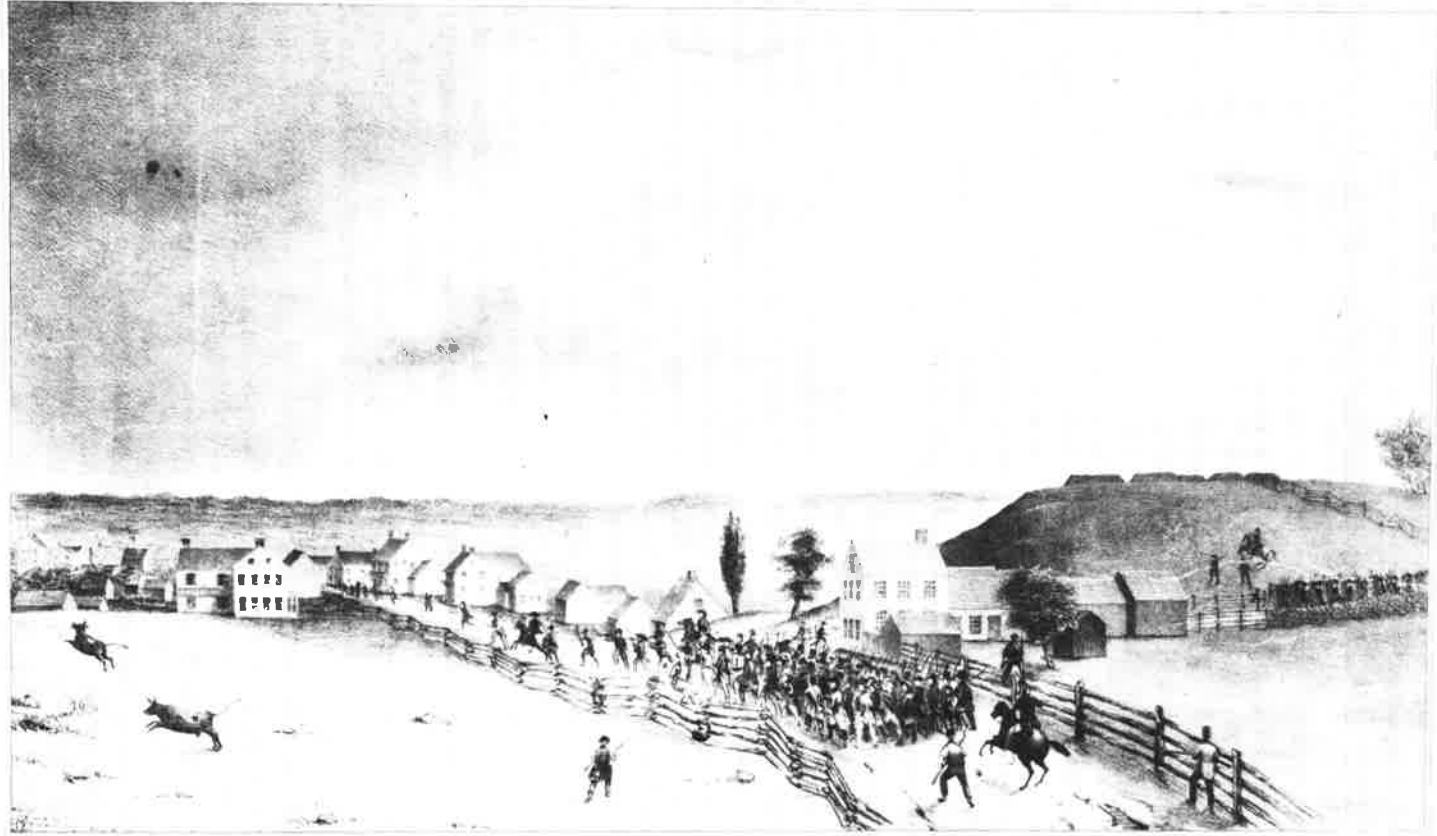
Efforts to reach an accommodation failed when the General Assembly refused to submit the People's Constitution for ratification in a legal election.²² Those in power agreed that the events thus far proved the need for reform, but they rejected all suggestions for acceptance of the Suffragists's creations. On the other hand, the Suffragists held firm to the legitimacy of the People's Constitution. By the theory of popular sovereignty and peaceable revolution, the government of the state had been changed because of the vote of the majority of the people. In addition, the Freeholders' Constitution, submitted for ratification in March 1842, retained the discrimination against naturalized citizens, thus raising the nativist hostilities to higher levels.²³ For both theoretical and practical reasons, then, the Suffragists joined incongruously with the hidebound opponents of any change to defeat the Freeholders' Constitution.²⁴ In doing so, they set the stage for a testing of the validity of the theory of popular sovereignty and peaceable revolution.

By this time, the Suffragists had corrected the lack of a firm theory. Thomas Wilson

Dorr, the former Constitutionalist who emerged as the preeminent leader, had outlined the Wilson-Burrill constitutionalism in such detail that few questions remained. As Dorr argued, the issue of the character of government in Rhode Island was "a People's question, properly to be decided at home."²⁵ Congress had nothing to do with the matter, and "God forbid that any democrat should be ready to concede to any *Court* in this country the final decision of the question, whether the people have the right to change their form of government, or not." The people had decided; a new constitution had been ratified. It was left to the designated leaders to fulfill that mandate.

Both sides held elections in April, and two full complements of elected officials assumed office in early May—one group meeting in Newport, the other in Providence.²⁶ Meanwhile, the General Assembly had adopted a new treason statute prohibiting anyone from having any dealings with the putative "People's Constitution and Government."²⁷ The People's Legislature called upon the displaced regime to surrender control of all state offices, properties, and functions to the new government. The charter government issued warrants for the arrest of all persons implicated in the little revolution, and forced those arrested to place peace bonds with the courts in a strategy to immobilize the opposition.²⁸ In addition, Governor Samuel Ward King appealed to President John Tyler for federal assistance in the effort to enforce the laws of the state.²⁹ Having been elected People's Governor, Dorr journeyed to Washington himself to discuss the situation and to convince Democratic leaders in Congress to restrain the President.³⁰ Little came of the appeal to Washington, although President Tyler repeated earlier assurances that he would act to protect the charter government in the event of overt hostilities.³¹

In mid-May, following his return from Washington, Governor Dorr marched his People's Militia against the Province Arsenal and demanded the surrender of weapons and military supplies to the "legitimate" government of Rhode Island.³² Of course, the officer



THE CAPTURE OF ADONIS BLOC AND THE MASSACRE OF THE VILLAGE OF WICKFORD
BY
BRAVE RHODE ISLAND ALGERINES. (The gallant Colonel Brown)
ON THE 28 JUNE 1842

In an engraving worthy of Currier and Ives, this so-called "engagement" in the course of the Dorr "war" climaxed the constitutional struggle in Rhode Island.

in command refused. Fortunately for all concerned, Dorr ordered a retreat rather than attack the heavily fortified Arsenal. The decision to march on the Arsenal in the first place caused such disagreement within the ranks of the reformers that Dorr had no choice but to depart the state and adopt a strategy of cautious waiting. He intended to keep up the forms of government until after the Congressional elections later in the year, thus allowing the People's Government to send Representatives and Senators to Washington. Congress would then have to decide the matter of governmental legitimacy by seating one or the other of the rival state delegations.

Unfortunately this strategy also failed. The charter government declared martial law throughout the entire state in June, prevented the meeting of the "People's Legislature" in early July, and arrested all known Suffragists and supporters for trial and punishment. The deliberate act of suspending the civil institutions for the duration of an alleged crisis marked the first instance of "military sovereignty" in the history of the republic, as one Democratic editor charged.³³ At any rate, by August the crisis had passed, and the General Assembly had authorized a convention to provide a new constitution for the state. Since the Suffragists took no part in this process, because of forced exile and a purposeful policy decision, and since the General Assembly subsequently decreed that a majority of those voting in the election sufficed to ratify the proposed constitution, the effort succeeded and Rhode Island finally entered the modern era before the end of the year. At that point, the Suffragists decided to return to the field, hoping to win the first election under the new instrument. They lost again, however, and then sought to vindicate their political ideas and constitutional theory by appealing to the courts. That decision, as it happened, prepared the way for their final undoing, and it led directly to the initiation of the Luther cases in the federal courts.

V

In deciding to go to court, the Suffragists

risked more than they knew. They had founded the movement on the direct action theory of American constitutional politics which premised popular sovereignty and the right of peaceable revolution. In the early stages of political activity, Dorr had specifically repudiated any appeal outside the state, and had denied emphatically that any positive institution could challenge a vote of the people.³⁴ As the situation approached crisis potential just before the march on the Providence Arsenal, he discovered that courts could play a role in resolving such disputes. As he said in a letter to the Governor of another state friendly to the Suffragist cause, "modes of redress open to every citizen" were available in the courts to those who challenged popularly approved changes in government, "without the intervention of a dictator [sic] and without a resort to the sword."³⁵ Of course, the responsibility to make use of those "modes of redress" fell upon those who disputed the legitimacy of the people's choice, not those who enjoyed proven popular support. Dorr himself refused to submit the question of legitimacy to the courts, since the people alone had the power to decide whether to continue or to new-model an existing government.

The position taken by Dorr, White, and most Suffragists concerning a possible judicial settlement of the controversy rested on functional and theoretical considerations of great importance. Democratic theory required that the citizenry decide such matters, either directly or through their representatives, not a few men selected because of their knowledge of the law to sit as impartial arbiters for cases that came before them. In this early period of the history of American constitutionalism, few people anticipated a judiciary armed with the power to settle all questions that came up during the heat of political contests. Moreover, the courts had long since developed a neutral stance to protect them from the political pressures concerning such issues. The doctrine of political questions served to prevent the courts from becoming entangled in matters relating to the political arrangements within the society.

Chief Justice John Marshall had stated the rule with precision in 1803: "Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive [or legislature] can never be made in this Court."³⁶ Confident that the majority of Rhode Islanders supported them, and that physical superiority accompanied moral supremacy, the Suffragists discounted the appeal to the judiciary.

When they lost the political struggle, largely they believed because of the state's use of force and the President's commitment to support the charter government, the Suffragists took new thought about a judicial strategy. They still could not see immediately how to overcome the functional and theoretical obstacles. Ultimately they solved the conundrum by redefining the rights at issue. Article IV, Section 4 of the national Constitution stipulates that "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on the Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."³⁷ The Suffragists concluded that the rights guaranteed by this constitutional clause accrued to individuals fully as much as the rights to property and liberty, and therefore deserved judicial protection equally with all other individual rights. If basic political rights depended solely upon the willingness of political majorities to respect them, then democracy meant little more than the right to be abused. In their thinking concerning this difficult question, the Suffragists anticipated the future, for the Supreme Court ruled finally in the second half of the twentieth century that courts could and should protect political rights.³⁸ Of course, that decision built upon other developments during the intervening years, such as the ratification of an amendment to the Constitution restraining the states from depriving people of the equal protection of the laws.³⁹

In 1843, the Suffragists reached the original and innovative conclusion that courts had to enforce the mandates given by the people. In

doing so, they restructured the hierarchy of authority and imposed the courts between the people and their governments. They adopted the logic used by Chief Justice Marshall in his assertion in 1803 that "The question whether a right has been vested or not, is, in its nature, judicial, and must be tried by the judicial authority."⁴⁰ When courts decided whether or when individual rights had been abused, they were bound to consider that "The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative Acts, and, like other Acts, is alterable when the legislature shall please to alter it."⁴¹ Since all agreed on the paramount nature of the Constitution, and since the judges had the responsibility "to say what the law is," judges had to decide that the Constitution, not an ordinary act, would prevail in the event of conflict between the two. "This is the very essence of judicial duty."⁴² Armed with this conclusion, and with the newfound conviction that the judges had to respect popular choices, the Suffragists took their claims to court for final vindication.

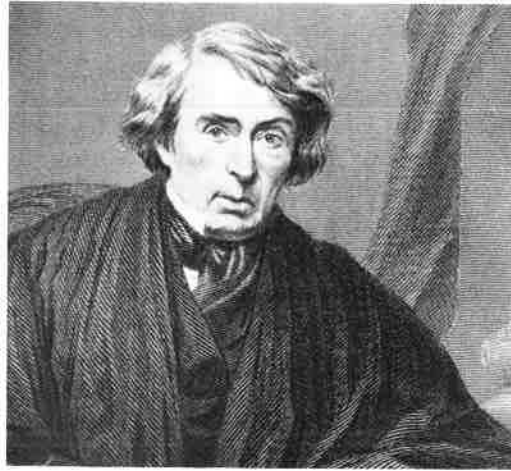
VI

Getting the cases to the Supreme Court proved difficult and time-consuming.⁴³ After six years of delay and jockeying for position, complicated by the search for counsel of sufficient standing and comprehension, the Suffragists finally had their day in Court. On that day in January 1848, they realized full well how much depended on the success of the effort. Politics had failed them utterly, first inside the state and then in Congress during a prolonged struggle to justify their constitutional theory. The reports issued by the Congressional committee which investigated the events of the summer of 1842 left matters just as confused and unsatisfying as before.⁴⁴ Benjamin F. Hallett had been well briefed, and his supply of appropriate authorities carefully collected.⁴⁵ Over the interim while they waited for a hearing, the Suffragists had also tried to convince the Democratic Party in its 1844 convention to come out in a ringing affirmation of popular sovereignty, but with-

out success.⁴⁶ Even as the Court listened to the arguments and then took the case under advisement, Dorr and his cohorts appealed to the Democrats once more.⁴⁷ All possible means were explored for their potential utility in bringing Americans to understand the vulnerability of liberty to tyranny.

Hallett opened the argument for the suffragists with the contention that "It is not the question what was the State of Rhode Island." For "The State is permanent and unchangeable. The constitution is the form of government, and may be changed in form, as well as a statute, if rightly done."⁴⁸ Justice Nelson asked how courts could possibly provide relief in cases such as this one, since courts merely applied known laws and here the law itself was in question.⁴⁸ Hallett replied that the courts had initially to determine what was the law before they could apply it, and they could not substitute form for substance in making that determination. The Republican Guarantee Clause of the national Constitution imposed the responsibility of ascertaining which constitution, or form, of government—in the event of controversy—assured a republican government. To reach a legitimate conclusion, the courts had to consult the will of the majority within the state, since republican government by definition required majority support or popular consent.

To explain what he had in mind, Hallett quoted extensively from the famous *Commentaries on the Constitution*, published initially in 1833 by former Associate Justice Joseph Story, that popular ratification of a constitution bound "the whole community PROPIO VIGORE."⁵⁰ Since the majority of the people of Rhode Island had ratified the People's Constitution in January 1842, the repudiated charter government had no more authority to resist the establishment of the new form than "the old Congress under the Confederation [in 1789] had . . . to hold over against the new Congress . . . under the Constitution." In neither instance, Hallett argued, had the existing government "given antecedent authority or consent" to its own displacement, yet no one had resisted in 1789. The Confederation Congress allowed the



Chief Justice Roger B. Taney, in the case of Luther v. Borden, held the Rhode Island question "political" and non-justiciable.

process of change to proceed as the majority willed, simply deferring all judgment on the issue to the people themselves in conventions assembled. Hallett insisted that the governmental stance in 1787-1789 had created a precedent binding on all other governments in the United States, and he called upon the Court to assure that the people controlled their governments rather than the reverse.

Hallett argued that the Republican Guarantee Clause had to be interpreted in all its sections simultaneously, or the section concerning federal assistance in the event of "domestic Violence" controlled everything else.⁵¹ If Americans truly possessed the sovereignty, and could alter government at will, then the right of revolution had been transformed into a legal and constitutional right. Hallett believed that the "revolution principle" identified by James Wilson made American government distinctively different and substantially better than all other forms of government known to man. But the other side, even while conceding the sovereignty of the people and recognizing the great American right of revolution, nonetheless insisted that governments had to give prior consent before changes were legitimate. Thus, Hallett concluded, the "moment they have given us the right of revolution, they send the President, at the head of all the troops of the United States, to suppress it."⁵² The conse-

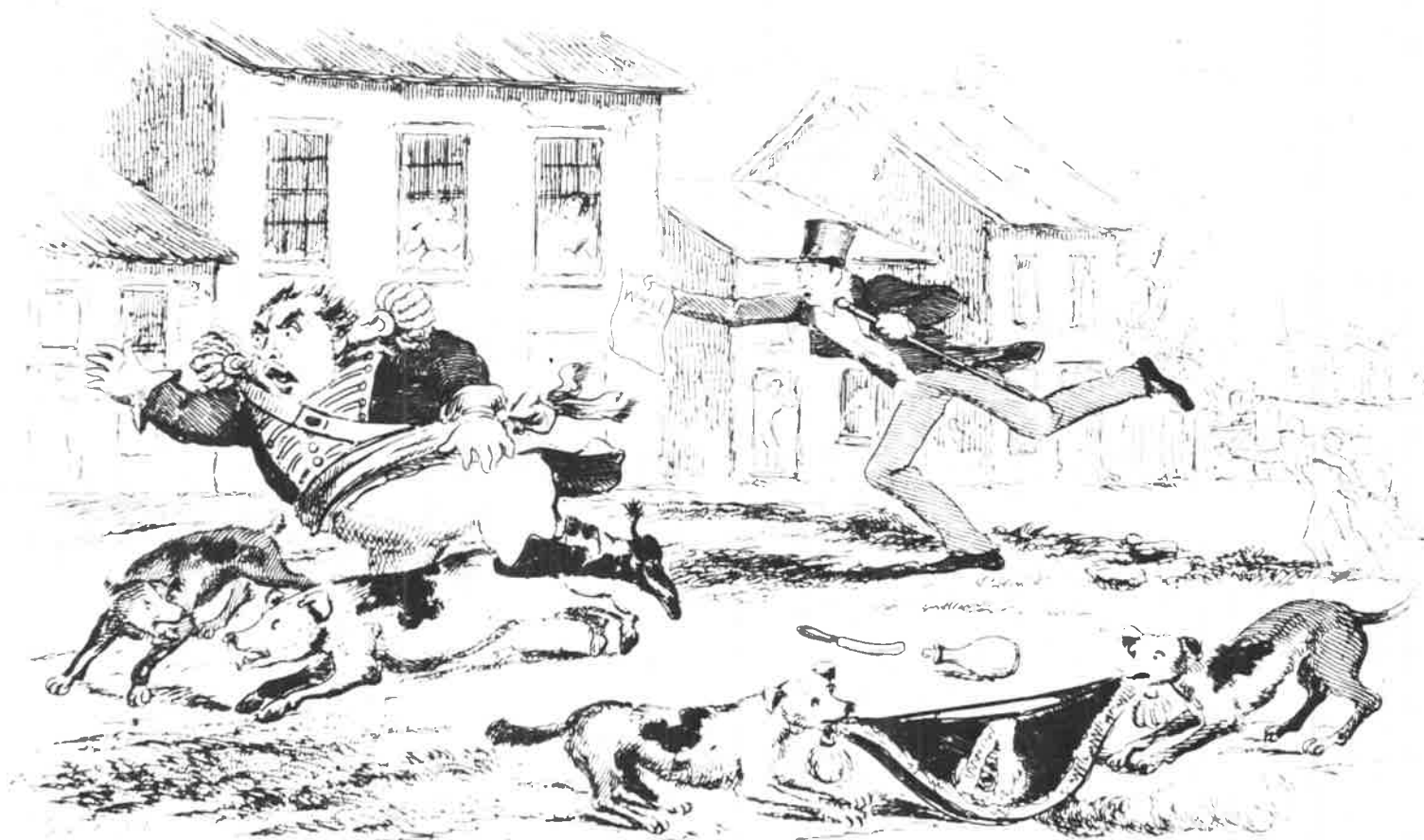
quence rendered "all State institutions subservient . . . to the military power of the President." Only by defeating the combined power of the state and the nation could Americans bring about desired changes if government resisted. Under this interpretation, only victory in war assured the redress of grievances when governments refused to act. Hallett thought this view grossly perverted the American system of popular government by destroying its essence. Moreover, he doubted that Americans would allow such a travesty to prevail. The right of forcible revolution—that is, the chance to succeed if sufficient force could be mustered—meant little to those who believed that they had the inherent and inalienable right to control their institutions. "It fails, and we fall back upon the great conservative right of the people; the American doctrine of popular government, . . . that peaceable changes in government are provided as the substitute of violence and bloodshed." As the final touch, Hallett quoted James Wilson's assertion that "the people possess over our constitutions control in act as well as in right."⁵³

Webster sought to exploit the opening provided by Justice Nelson's question about an effective remedy. He reminded the Court that the highest tribunal in Rhode Island had confirmed the legitimacy of the charter government by convicting Dorr and others of treason and by exonerating the militiamen who had attempted to arrest Martin Luther.⁵⁴ With those decisions, all questions about the applicable law had been settled "above all objection, and after all challenge." In making this argument, Webster ignored the point that Hallett has pressed, that state constitutions and statutes had to be judged against the standards found in the national Constitution. He obviously hoped to win the case by securing a dismissal on jurisdictional grounds, but he offered substantive reasons as well.

In response to Hallett's elaborate analysis of the principle of popular sovereignty and his lengthy explanation of the theory of peaceable revolution, Webster stated bluntly that "The Constitution does not proceed on the *ground* of revolution; it does not proceed

on any *right of* revolution;—but it goes on the idea that within and under the Constitution, no new Constitution can be established without the authority of the existing government."⁵⁵ He agreed that sovereignty was "with the people; but," he said, "they cannot exercise it in masses or *per capita*; they can only exercise it by their representatives." Under the American system of government, the suffrage franchise was "every man's part in the exercise of sovereign power; to have a voice in it, if he has the proper qualifications. . . . Suffrage is the delegation of the power of an individual to some agent." The right to delegate power could only be exercised in accordance with law so as to protect against fraud and to assure the representative character of the resultant government. The lawful exercise of prescribed rights formed the bedrock of American constitutional government. Webster denied any legitimacy to the direct action theory of American constitutional practice.

Both counsel added brief concluding comments concerning the use of martial law in Rhode Island. Hallett accepted word for word the arguments developed earlier by Dorr that "martial law is in fact a suspension of all law and a substitution, for a time, of the military *vis major*."⁵⁶ As such, martial law had no legal existence under the Constitution, looking instead to the establishment of a "military despotism." Under Hallett's interpretation, military officers could proclaim martial law during emergencies, but any such proclamation amounted simply to a recognition that the presence of armed forces in a theatre of war prevented the ordinary enforcement of the laws. When martial law existed, it applied only where and when armed forces fought for victory.⁵⁷ Thus, the deliberate suspension of the civil institutions in Rhode Island for the duration of the alleged crisis was unconstitutional, and had no legal effect. Hallett urged the Court to award damages to the Luthers at least on this ground, even if the Justices failed to find in their favor on the issue of governmental legitimacy. Americans should have the assurance of civil supremacy at all times, unless conditions of themselves suspended the civil law. Otherwise, as Dorr



Dorr's rather ignominious exit from public life with the collapse of his "peoples' government" is satirized in a contemporary woodcut.

had concluded, "the will of the people is dependent on the *military*; and . . . whatever government they set up under . . . [military] auspices, is valid and rightful; . . . [then] might is the criterion of right, the principle of the despotisms of the old world."⁵⁸

Webster contented himself with the assertion that martial law was "the law of the camp;" or "the law of war, a resort to military authority in cases where the civil law is not sufficient."⁵⁹ The only limit to this power, which accrued to all governments, "is to be found in the nature and character of the exigency." Webster's definition differed radically from traditional theory and practice in the United States, introducing instead the prerogative or preventive view of emergency powers of government.⁶⁰ In basic terms, he insisted that governments depended in the final analysis on the force they could muster to maintain themselves against challenge. More importantly, he left to the government the authority to decide when conditions required a resort to emergency powers. This line of argument flowed logically from his earlier contention that governments, once established, monopolized sovereign power. Popular consent to the establishment of a government meant that government must consent to all future changes.

These opposing arguments confronted the Court with a difficult and consequential choice. Each side contended for its own definition of the meaning of republican government, one insisting upon majoritarianism as the basic premise, the other holding that only lawful majorities counted under the American system. One side gloried in the revolutionary origins of the American experiment in government, and sought to revitalize the concept of direct popular involvement in governmental change; the other insisted on the idea of divested sovereignty and repudiated any other concept of revolution than the forcible power to prevail. The Court was called upon to decide whether right or might characterized American constitutional government. As Hallett reported to Dorr, "we got the question of the People's Constitution fairly before" the Court. "Now what the Court will do is surmise."⁶¹

VII

Although the Court held the case under advisement for a year before pronouncing judgment, Dorr and the Suffragists learned of the outcome in February and March 1848. Hallett wrote that the Court would probably hold that the Luther cases involved "a political & local question" not amenable to judicial resolution, particularly by a federal court.⁶² The judges would simply refuse to "go behind the existing Govt & the decision of the State Courts." In March, Dorr's close friend and political supporter, Edmund Burke of New Hampshire, learned from Justice Woodbury that the decision "will be adverse to the people."⁶³ Woodbury would dissent, but only concerning the issue of martial law. He "will take the ground that the US Government has no right to interfere in the political discussions [*sic*] of the people of a State, and that a State Government has no right to declare martial law." These predictions proved remarkably accurate.

On 3 January 1849, after the atmosphere had calmed from the presidential contest of 1848, the Chief Justice of the United States Supreme Court delivered the decision of the Court on the Luther cases.⁶⁴ After tersely summarizing the sequence of events which produced the cases, Taney dismissed them for want of jurisdiction. As he said, "Much of the argument on the part of the plaintiff turned upon political rights and political questions, upon which the Court has been urged to express an opinion. We decline doing so."⁶⁵ In a unanimous judgment, the Court ostensibly refused to provide the definitions that both sides had requested.

Taney's statement actually revealed very little about the significance of the cases or the impact of the decision. For in this instance, as Michael A. Conron has observed, "An abrogation of positive action had the effect of positive action."⁶⁶ Taney and his peers on the bench assumed the role of "American counterparts of the Italian *Podesta*, the French crown jurists, and English judges from the time of Henry II to that of Blackstone." The Supreme Court, by withholding its hand, confirmed the triumph of the Web-

sterian theory of American constitutional practice and thereby sanctioned the transformation of the old voluntary republic into a modern nation-state. An analysis of the two opinions delivered on that day in 1849 corroborates this thesis.

"No one, we believe," the Chief Justice intoned rhetorically, "has ever doubted the proposition, that, according to the institutions of this country, the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their pleasure."⁶⁷ But when and if the people of a state exercised that power remained for them to decide, not for courts. "It is the province of a court to expound the law, not to make it. And certainly it is no part of the judicial functions . . . to prescribe the qualifications of voters . . . nor has it the right to determine what political privileges the citizens of a State are entitled to, unless there is a constitution or law to govern its decisions." Such matters belonged legitimately to the people to decide, within the limits assigned by the national Constitution.

Article VI, Section 4 of the national Constitution, the Republican Guarantee Clause, prescribed the requirement of a republican form of government in every state. But the admission to and continuance of a state in the Union gave notice to all concerned of "the proper constitutional authority . . . of the government" of that state and its "republican character." A decision by Congress to seat the elected Congressmen from the state "is binding on every other department of government, and could not be questioned in a judicial tribunal." Taney agreed that "a military government, established as the permanent government of a State, would not be a republican government," and that "it would be the duty of Congress to overthrow" such an attempted establishment. However, he stopped short of explaining how the Court would know when such an attempt was in progress or how Congress might accomplish its constitutional duty to prevent it. The Court would act when the time came, but no such imperative existed in this case.

If Congress accepted either the form of a

state government, or the means used to change an existing government, the Republican Guarantee Clause had no further bearing on the matter. Taney refused to define the guarantee, except in terms of form and the governmental functions associated with it. As he concluded, "It rested with Congress . . . to determine upon the means proper to be adopted to fulfill the guarantee." Congress had done so by adopting the Enforcement Acts of 1792, 1795, and 1807, delegating discretionary authority to the President to act when any state requested assistance from the national government.⁶⁸ In the event of conflicts such as the one in Rhode Island, "the President must, of necessity, decide which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the acts of Congress." Taney ruled that the President's decision to recognize a government was "as effectual as if the militia had been assembled under his orders" to defend it. Nor could the courts question a Presidential decision, for then "the guarantee . . . is . . . of anarchy, and not of order." Courts could not intervene during actual conflicts over the sovereignty, since they lacked the power to quell the disturbances; hence they "cannot, when peace is restored, punish as offenses and crimes the acts which [they were] . . . bound to recognize, as lawful," when instituted. In the view expounded by the Chief Justice, the Republican Guarantee Clause armed the nation to defend existing state institutions against challenges from within and without the state. The conclusion was clear: Change could occur only if the existing government approved it, or if the President supported the new regime.

That the state government had declared martial law altered nothing, in Taney's view. After all, the power "to meet the peril . . . [of] armed resistance to . . . authority," a power "essential to the preservation of order and free institutions," accrued to "the States of this Union as to any other government." Nothing was clearer. "If the government of Rhode Island deemed armed resistance so formidable, and so ramified throughout the State, as to require use of its military force

and the declaration of martial law, we see no ground upon which this court can question its authority." Once the state government made that determination, "it was a state of war; and the established government resorted to the rights and usages of war to maintain itself, and to overcome unlawful opposition." Taney refused to entertain the suggestion that an existing government could or would engage in "unlawful opposition" to its citizens. By presuming the legitimacy of existing governments, he virtually dismissed all opposition as unlawful. Moreover, his ruling allowed existing governments to destroy political opposition by discovering a crisis and proclaiming martial law for the duration.

Nonetheless, the Chief Justice denied that martial law as used in Rhode Island had any similarity to that practiced by the absolute monarchs by Europe. In Rhode Island, the representative legislature had resorted to military defense of existing institutions; in Europe, absolute monarchs used military power to protect themselves from the people. In Taney's view, the difference was one of kind rather than degree, and he doubted that any government could maintain order and defend liberty without the right to resort to emergency powers. So long as unlawful resistance to government continued, the military commanders who acted under the authority given by the civil government had unlimited power to arrest and deal with persons suspected on "reasonable grounds" of being "engaged in the insurrection." However, the commanders would "undoubtedly be answerable" for "any injury wilfully done to person or property," or for actions taken "for the purposes of oppression." Courts could and would protect against such offences.

Taney's decision placed the national government in the position to defend state institutions against change. Moreover, his entire argument rested on the premise that sovereignty existed in the established institutions of government, and not in people acting directly to exercise it. He never deigned to discuss the right of revolution, since he presumed the legitimacy of existing governments. The Republican Guarantee Clause meant

simply that the states could never fall for want of support. Unquestionably, the Chief Justice saw no danger in a strong national guarantee, so long as the national government acted to support existing state institutions. He failed utterly to take into account, however, that the discretionary power to defend carried with it the equally discretionary power to change.⁶⁹ That is, a strengthened national government could intervene to change state institutions when the will to do so existed.

Justice Woodbury concurred in the majority decision insofar as it related to the political issues in abeyance. As he said, "The adjustment of these questions belongs to the people and their political representatives, either in the State or general governments."⁷⁰ Groups struggling over these questions "succeed or are defeated by public policy alone, or mere naked power, rather than intrinsic right." He had no authority to discuss these matters, and he agreed that no court should seek to settle them. Therefore, he joined his colleagues in dismissing the arguments presented to the Court. Woodbury's reliance on the doctrine of political questions rang true with his own fervid commitment to the idea of popular sovereignty. He stated his view that Americans possessed the right of revolution if they chose to exercise it, but its successful use depended upon the power to prevail. There was no right of peaceable revolution.

Woodbury abruptly parted company with the other Justices on the question of martial law. In the New Hampshire jurist's view, martial law had no legitimacy under the Constitution. Distinguishing this concept from military law, he held that martial law could only be invoked when conditions were such that the civil institutions could not function at all. And when martial law prevailed, the military forces could only be used to aid and support the civil magistrates in the enforcement of the laws. Any other interpretation of martial law, Woodbury concluded, "would go in practice to render the whole country . . . into a *camp*, and the administration of government a campaign." He identified the usage in Rhode Island with practices in Latin

American dictatorships, and invoked precedents to demonstrate that such arbitrary power had been "forbidden for nearly two centuries" in "every country which makes any claim to political or civil liberty." By sanctioning its resurrection, the Court exposed every citizen "to be hung up by a military despot at the next lamp-post, under the sentence of some drumhead court-martial."

On the basis of these conclusions, Woodbury urged the Court to reconsider and remand the cases for further hearings at the circuit court level. Whether the plaintiffs could sustain their claims for damages he did not know. But he entertained no doubt that only the national government had the power to wage war. The government of Rhode Island had unconstitutionally usurped national authority in its attempted declaration of martial law, since it did not possess any "rights of war . . . which could justify so extreme a measure as martial law over the whole State as incident to them." Woodbury warned that failure to repudiate this egregious claim of power "will open the door in future domestic dissensions . . . to a series of butchery, rapine, confiscation, plunder, conflagration, and cruelty, unparalleled in the worst contests in history between mere dynastics for supreme power."

VIII

The Luther cases ended in ignominious dismissal for want of jurisdiction. After all the care and planning, the Suffragists found themselves back at the starting point in their search for vindication. However, they had suffered much and lost more in the struggle. For the Court's decision settled at least one question for all time: The right of revolution depended for its exercise upon the ability of those who resorted to it to prevail in a contest of might.⁷¹ In addition, the sanction given to the concept of prerogative or preventive martial law inaugurated the era of the modern nation-state in American history.⁷² Finally, the decision paved the way for judicial supremacy in the United States by enhancing the authority of the Court to settle questions concerning the allocation of powers under

the Constitution. As happened frequently in the history of the Supreme Court, an apparent abdication of power in actuality manifested an assertion and accession of power.

The theory espoused by the Suffragists never again attracted much attention among Americans. When the crisis of the Union erupted in 1860, Southerners relied on the concept of state sovereignty to justify their actions, a concept very different from that the Suffragists had invoked. That difference notwithstanding, the Luther decision provided the needed precedent sanctioning the suppression of the Southern challenge to existing national institutions.⁷³ As for the states, so for the nation, as Chief Justice Taney found to his chagrin. Ironically, he came to understand in 1861 that governments might indeed commit "treason" against the citizens.⁷⁴ But the realization came far too late to matter much.

Thomas Wilson Dorr spent the remainder of his life collecting evidence to prove the legitimacy of his actions and the exercise of peaceable revolution in Rhode Island.⁷⁵ His papers are filled with warnings and urgings to the American people about the serious damage done to republican government. He agreed with Aaron White, Jr., who wrote that the peaceable exercise of "the hitherto undenied Sovereignty of the People has resulted in a complete Revolution . . . & that Revolution has been effected in our case in precisely the same way in which Revolutions in all former Republics have been accomplished. That is to say by an usurpation of power on the part of those in whose hands power has been entrusted. Since the 25th of June 1842 R.I. has ceased to be a Republic."⁷⁶

But White learned from the experience, while Dorr did not. Whereas Dorr exhorted Americans to return to the principles of the past, White looked to the future and projected new departures. As he explained to Dorr in a prophetic letter, even if the details escaped him: "When President [James M.] Birney [the abolitionist] takes the throne, we will cram Emancipating Constitutions down the throats of the Southern nabobs by the same rule. For if President Tyler under pretence of

suppressing domestic violence can interfere in behalf of a minority of a minority to guarantee an Aristocratic Constitution, a fortiori, may President Birney interfere to guarantee a Republican Constitution, recognizing the equal Rights of all men."⁷⁷ In 1861-1870, the unintended legacy of the Suffragists was realized.

NOTES

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¹ As quoted in Charles Warren, *The Supreme Court in United States History*, rev. ed. (Boston & Toronto: Little, Brown, & Co., 1926), 2:187.

² *Martin Luther v. Luther M. Borden et al.*, 7 Howard (1849) 1ff.

³ George M. Dennison, "The Dorr War and the Triumph of Institutionalism," *Social Science Journal* 15, no. 2 (April 1978): 39-58.

⁴ George M. Dennison, *The Dorr War: Republicanism on Trial, 1831-1861* (Lexington: University Press of Kentucky, 1976), ch.1; Patrick T. Conley *Democracy in Decline: Rhode Island's Constitutional Development, 1776-1841* (Providence: Rhode Island Historical Society, 1977), ch. 2-5.

⁵ *Rhode Island Acts . . .* (various eds., Providence and Newport: By Order of the General Assembly, 1724-1800); and Chilton Williamson, *American Suffrage: From Property to Democracy, 1760-1860* (Princeton: University Press, 1960), pp. 58, 178-9, 243.

⁶ *Public Laws of the State of Rhode Island* (Providence: Order of the General Assembly, 1798), pp. 146-50, 180-8, with the provisions remaining unchanged until after 1842.

⁷ For tabular evidence, Conley, *Democracy in Decline*, pp. 145ff.

⁸ See citation in note 3 *supra*. See also George M. Dennison, "Congressional Attitudes Toward Popular Sovereignty in the Territories, 1787-1867," *Maryland Historian* 6, no. 1 (Spring 1975): 19-40.

⁹ See "Extracts from the Oration of George R. Burrill, delivered in Providence in 1797, in favor of a republican constitution," *House Reports*, 447, vol. 111, no. 546, pp. 271-4.

^{9a} See George M. Dennison, "The 'Revolution Principle': Ideology and Constitutionalism in the Thought of James Wilson," *Review of Politics* 39, no. 2 (April 1977): 157-91; and Robert G. McCloskey, ed. *Works of James Wilson* (Cambridge: Harvard University Press, 1967), esp. 1:77-9, 2:770-1.

^{9b} As quoted in Conley, *Democracy in Decline*, p. 186.

¹⁰ On the Constitutional movement, Conley, *Democracy in Decline*, ch. 10-11; Dennison, *Dorr War*, pp. 14-24; Marvin L. Gettleman

and Noel P. Conlon, eds., "Responses to the Rhode Island Workingmen's Reform Agitation of 1833," *Rhode Island History* 28, no. 4 (Oct. 1969): 75-94.

¹¹ Charles Peckham to Thomas W. Dorr, 11 March 1836, Dorr Correspondence, vol. 1, Special Collections, John Hay Library, Brown University (hereafter referred to as DC and vol.).

¹² Conley, *Democracy in Decline*, pp. 234-5, 285-9.

¹³ As quoted in *ibid.*, pp. 238-9.

¹⁴ Thomas W. Dorr to William B. Adams, May 28, 1832, DC, vol. 1; and Chilton Williamson, "The Disenchantment of Thomas Wilson Dorr," *Rhode Island History* 17, no. 4 (Oct. 1958): 97-108, esp. 100-1.

¹⁵ J. A. Brown to Thomas W. Dorr, November 12, 1835, DC, vol. 1.

¹⁶ See Dennison, *Dorr War*, pp. 22-4.

¹⁷ See *ibid.*, ch. 2.

¹⁸ For quotations from the charter, see Mrs. F. H. (W.) Green (MacDougal) *Might and Right: By a Rhode Islander* (2nd ed.; Providence: A. H. Stillwell, 1844), pp. 70-5.

¹⁹ See *infra* for discussion.

²⁰ Dennison, *Dorr War*, pp. 37-8ff.

²¹ *New Age*, January 14, 1842. (available on microfilm from Rhode Island Historical Society).

²² Dennison, *Dorr War*, pp. 70-8.

²³ *Ibid.*, p. 62.

²⁴ *Ibid.*, pp. 62-9.

²⁵ Thomas W. Dorr to William Simons, October 18, 1842, DC, vol. 5; and Thomas W. Dorr to William Simons, accompanied by an address to the people to be published in Simons' *Republican Herald*, November 11-12, 1842, DC, vol. 5.

²⁶ Dennison, *Dorr War*, pp. 70-8.

²⁷ *New Age*, April 9, 1842; *Providence Daily Journal*, April 2 and 4, 1842; Green, *Might and Right*, pp. 177-80; and Dennison, *Dorr War*, pp. 69-70.

²⁸ Dennison, *Dorr War*, p. 77.

²⁹ *Ibid.*, pp. 71-2, 75.

³⁰ *Ibid.*, pp. 76-83.

³¹ *Ibid.*

³² *Ibid.*, pp. 85-7ff.

³³ *Washington Globe*, May 9, 1842.

³⁴ See citations in note 25 *supra*.

³⁵ Thomas W. Dorr to Governor John Fairfield of Maine, May 17, 1842, in *New Age*, June 4, 1842; and Thomas W. Dorr to Governor Chauncy F. Cleveland, of Connecticut, May 13, 1842, DC, vol. 4.

³⁶ *William Marbury v. James Madison, Secretary of State of the United States, v. Cranch* 137-190, at 170 (1803), for this important precedent. See also Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New York & Indianapolis: Bobbs-Merrill Co., Inc., 1962); Charles Gordon Post, Jr., *The Supreme Court and Political Questions*, Johns Hopkins Series in Historical and Political Science, vol. 54, no. 4 (Baltimore: Johns Hopkins Press, 1936), pp.

419-542; Melville Westin Fuller, "Political Questions," *Harvard Law Review* 38 no. 3 (January 1925): 296-333; and John J. Gibbons, "The Interdependency of Legitimacy: An Introduction to the Meaning of the Separation of Powers," *Seton Hall Law Review* 5, no. 3 (Spring 1974): 435-88.

³⁷ United States Constitution, Article IV, Section 4.

³⁸ See *Baker v. Carr*, 369 U.S. 186ff (1962).

³⁹ *Ibid.*

⁴⁰ *Marbury v. Madison*, at 167.

⁴¹ *Ibid.*, at 177.

⁴² *Ibid.*, at 177-8.

⁴³ On the initiation of the case, see George M. Dennison, "Thomas Wilson Dorr: Counsel of Record in *Luther v. Borden*," *Saint Louis University Law Journal* 15, no. 3 (Spring 1971): 398-428.

⁴⁴ *House Reports, 28th Congress-1st Session (1844-1845)*, Series no. 447, vol. III, Documents nos. 546 and 581. These reports, known as the Burke and Causin Reports, were prepared in response to a request for a Congressional investigation of events in Rhode Island. On the reports see Dennison, *Dorr War*, ch. 6.

⁴⁵ See Dennison, "Counsel of Record," pp. 398-428; and Dennison, *Dorr War*, ch. 7.

⁴⁶ Dennison, *Dorr War*, pp. 137-8.

⁴⁷ *Ibid.*

⁴⁸ Unless otherwise noted, all quotations from Benjamin F. Hallett, *The Right of the People to Establish Forms of Government. Mr. Hallett's Argument in the Rhode Island Causes, before the Supreme Court of the United States, January 1848. No. 14. Martin Luther vs. Luther M. Borden and Others. No. 77 Rachel Luther vs. The Same* (Boston: Beals & Greene, 1848), *passim*.

⁴⁹ See discussion in Dennison, *Dorr War*, pp. 156-7 and 122-4.

⁵⁰ Hallett quoted Joseph Story, *Commentaries on the Constitution of the United States: With a Preliminary Review of the Colonies and the States, before the Adoption of the Constitution*, 2nd ed. (Boston: Little and Brown, 1851), 1:336-7. This portion of the argument remained unchanged from the original 1833 edition.

⁵¹ The clause is quoted in full in the text, *supra*, at note 37.

⁵² Note 48, *supra*.

⁵³ For the quoted statement, McCloskey, *Works of Wilson*, 2:770.

⁵⁴ Unless otherwise noted, all quoted from Daniel Webster, "The Rhode Island Govern-

ment," *Works of Daniel Webster* (5th ed.; reprint ed.; Boston: Little, Brown and Co., 1853), 6:217-42.

⁵⁵ See esp. *ibid.*, 6:219-22, 223-7, 240.

⁵⁶ Thomas W. Dorr to Nathan Clifford, December 10, 1847, DC, vol. 11. See also Hallett, *Right of the People*, pp. 65-70.

⁵⁷ For background, George M. Dennison, "Martial Law: The Development of a Theory of Emergency Powers, 1776-1861," *American Journal of Legal History* 18, no. 1 (January 1974): 52-79.

⁵⁸ Thomas W. Dorr to Franklin Cooley, *et al.*, February 1, 1843, DC, vol. 6.

⁵⁹ Webster, "Rhode Island Government," pp. 240-1.

⁶⁰ See note 57 *supra*.

⁶¹ Benjamin F. Hallett to Thomas W. Dorr, February 11, 1848, and Thomas W. Dorr to Benjamin F. Hallett, February 8, 1848, DC, vol. 12.

⁶² Benjamin F. Hallett to Thomas W. Dorr, February 11, 1848, DC, vol. 12.

⁶³ Edmund Burke to Thomas W. Dorr, March 5, 1848, DC, vol. 12.

⁶⁴ See Dennison, *Dorr War*, ch. 8.

⁶⁵ All quotations, unless otherwise indicated, from Taney's opinion *Luther v. Borden*, 7 *Howard* 41-47.

⁶⁶ Michael A. Conron, "Law, Politics, and Chief Justice Taney: A Reconsideration of the *Luther v. Borden* Decision," *American Journal of Legal History* 11, no. 4 (October 1967): 380.

⁶⁷ See note 65, *supra*.

⁶⁸ See Dennison, *Dorr War*, pp. 177-8.

⁶⁹ For the contention that the decision came at an "unguarded moment," see Charles Fairman, *The Law of Martial Rule*, 2nd ed. (Chicago: Callaghan & Co., 1943), p. 118.

⁷⁰ All quotations, unless otherwise indicated, from Woodbury's opinion, *Luther v. Borden*, 7 *Howard* 51-8.

⁷¹ See Dennison, *Dorr War*, pp. 185-92.

⁷² See Dennison, "Martial Law," pp. 52-79.

⁷³ *Ibid.*; see also Dennison, *Dorr War*, pp. 197-205.

⁷⁴ See "Oddments," Roger Brook Taney Papers, Manuscripts Division, Library of Congress.

⁷⁵ See Dorr Correspondence and Dorr Manuscripts, Special Collections, John Hay Library, Brown University.

⁷⁶ Aaron White, Jr., to Thomas W. Dorr, September 1, 1842, DC, vol. 5.

⁷⁷ Aaron White, Jr., to Thomas W. Dorr, June 3, 1842, DC, vol. 4.